FAMILY COURTS VIOLENCE REVIEW

A report by Professor Richard Chisholm

27 November 2009

EXECUTIVE SUMMARY

The challenge

There are few more difficult or more important challenges for the family law system than dealing with cases where family violence is an issue. Family violence happens throughout the community, and is especially likely to be present among families that separate and resort to the family law system. More than half the parenting cases that come to the courts involve allegations by one or both parties that the other has been violent, and violence issues often go together with other problems, for example those associated with substance abuse and mental ill-health. Violence is bad for everyone, and particularly dangerous for children, whether or not it is directed specifically at them.

These cases present the courts with truly daunting tasks: to provide a setting in which the parties feel safe and confident that they will be treated with respect; to deal with the cases with necessary efficiency but most importantly with justice and fairness; and to ensure as far as possible that arrangements made for children, whether as a result of the parties' consent or by the court's adjudication, are suitable for their needs, which will include being safe and having both parents contribute to their developmental needs.

The Review

This Review has required me to 'assess the appropriateness of the legislation, practices and procedures' that apply in these cases; and in particular to consider whether the practices and procedures of the courts encourage victims to disclose family violence and support 'best practice', whether appropriate support is provided for families who have experienced violence, and whether information disclosed by litigants is appropriately shared within the courts.

There has been limited time to do it – four months – but the task has been made possible through help I have received from many sources. They include the Family Court of Australia and the Federal Magistrates Court, the Attorney-General's Department, and the many people and organisations who have contributed to the Review by making submissions or meeting with me: details are set out in Appendix 1.

Some of this Report describes the law and how it works: apart from the discussions in the body of the Report, there are details in the appendices 2, 3 and 4 about the legislation and the procedures in each of the two family law courts. I hope that these parts will contribute to a wider understanding of the family law system, as well as an understanding of the recommendations and the reasons for them.

A theme

A theme that recurred during the Review was that family violence must be disclosed, understood, and acted upon. This theme seems helpful whether we are thinking of a lawyer interviewing a client, a dispute resolution practitioner dealing with a new case, the work of a counter clerk at a family court, or of a judicial officer. The family law system, and each component in it, needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding. This theme underpins many of the recommendations in this Report.

The courts' procedures (Part 2)

As the Terms of Reference suggest, there are two main areas to be considered.

The first is the practice and procedure in the two courts. At the time of writing, it is uncertain whether or in precisely what way the two courts are to be merged into one Australian family law court. Each of the two courts has a different history, and although they increasingly share resources, and apply essentially the same law, there are significant differences between the courts in the way they operate. Both courts understand the importance and difficulty of cases involving issues of violence, and there is much to be learned from the ways each court has addressed the problem.

It is not appropriate for this Review to recommend what detailed procedures should apply, both because of the limited time for the Review and because it will be appropriate for these issues to be resolved once the future of the courts is known.

The discussion in Part 2, however, reviews the present day role of the family court – which has moved a long way from the traditional limitations of the 'adversary system' - and attempts to identify the basic purposes of the courts' procedures. It draws attention to some initiatives developed by the Family Court that seem to have potential benefits for the

handling of cases involving issues of violence, in particular the 'less adversarial trial' and the 'child responsive' program, which deploys the services of family consultants to help parties focus on, and understand, their children's needs: by no means an easy task in the stress of family separation and reorganisation.

Whatever the structural future of the courts is to be, it is important that children's cases are dealt with by judicial officers and court staff who are experienced and expert in the area of family law. The discussion in Part 2 suggests that even if the more difficult and complex cases go to the superior court, or the superior tier of the one court, it is unlikely that it would be 'best practice' to continue as now, with each court having its own distinctive approach, rather than both courts having the same approach, which would however have the flexibility necessary to provide for the different demands of different cases.

A significant part of the discussion in Part 2 relates to a process introduced by the 2006 amendments whereby the court has particular duties to examine cases when a particular document is filed – the Notice of Abuse or Family Violence. Under the Rules of court, parties are obliged to file such a notice where allegations of violence or abuse have been made. Experience has shown that this system is not working. This Report suggests that because of this, and because issues of family violence and other risks factors are so common in parenting cases brought to the courts, it would be better to have a system of risk identification and assessment that applies to all parenting cases. This approach would reflect the best available thinking about these issues, and would reinforce a lot of measures that are already being taken by the courts to identify and deal with issues of violence as early as possible.

The legislation (Part 3)

The discussion of the legislation in Part 3 is somewhat complex, reflecting the complexity of the legislation and the difficulty in formulating legislation that both provides workable rules and guidelines for courts to apply and satisfies the desire of the legislature in recent times to state principles that will play an educational role. The discussion reviews the origins of the amendments of 2006, the original intention of the Committee from which they stemmed (the Hull Committee of 2003), and experience with the law since those important changes.

Three provisions to be amended

The first conclusion is that three particular provisions need to be amended in a way that respects their original purposes but avoids the risk that they might deter victims of violence from making appropriate disclosures. They are the 'friendly parent' provision, the provision directing family advisers on what information to provide, and a provision for the making of costs orders where there are knowingly false allegations or statements.

In essence, the recommendations are that the 'friendly parent' provision should be amended so it recognises that parents sometimes need to take action to protect children from risk; that the specific and separate costs provision (s 117AB) dealing with knowingly false allegations and statements should be replaced by a simple reference to the giving of knowingly false evidence in the provision that deals with costs (s 117); and that the information that advisers are required to provide should reflect not only the importance of parental involvement but also the importance of safety for children.

Other provisions to be reconsidered

The second conclusion is that it would be useful to reconsider the set of provisions dealing with parental responsibility and the guidelines for determining what is in the child's best interests. These recommendations are intended to retain the essential ideas of the Hull Committee in 2003, while removing difficulties and unintended consequences that appear to have occurred as a result of the way the original idea has been translated into legislation.

The Hull Committee, after careful consideration, rejected the idea that a solution to the problem would be to substitute a different arrangement, namely equal time with each parent, as a preferred model. It considered, however, that while it should of course protect children from violence and abuse, the law should do more to ensure the involvement of both parents in the majority of families. In particular, the law should help people move away from a previous tendency to assume that it was best for children to spend most of their time with one parent, usually the mother, and only alternate weekends and half the school holidays with the other parent, usually the father.

The discussion in Part 3 reviews the history of the Hull Committee's recommendations and the way they were (after various consultations, committees, and government decisions) implemented in the amendments of 2006. It suggests that with hindsight it can be seen that

some of the techniques used in those amendments have proved confusing and troublesome. In particular, many people seem to have wrongly assumed that the amendments created a presumption that children should spend equal time with each parent (except in cases of violence or abuse). This misunderstanding seems to have arisen in part because of the complexity of the 2006 amendments. For example, the presumption of equal parental *responsibility* has been wrongly taken to mean that there was also a presumption favouring children spending equal *time* with each parent. Again, the weight to be attached to particular circumstances is not now determined simply by their importance for the child in the circumstances of each case, but by whether each circumstance falls within the class of 'primary' consideration, or is merely an 'additional' consideration, a question which will often require the parties to work out whether particular events fall within the legislative definition of 'family violence'.

Working out what is best for children is hard enough without having to get involved in such technical distinctions. The tangle of legal technicality that resulted from the 2006 amendments may well have distracted parties and those advising them from focusing on what arrangements are likely to be best for the children in the circumstances of each case. It may also have led to the very opposite of what the Hull Committee intended, namely the parties thinking about their own entitlements, rather than what is best for their children.

This Report therefore suggests amendments that will preserve the valuable insights of the Hull Committee, but remove the unnecessary complexities of the present wording and bring the focus back to what is best for the children.

The proposals in Recommendations 3.3 and 3.4 make three main changes. Firstly, they more clearly separate the notion of parental responsibility, which has to do with decision-making about the child's life, from the question of what parenting arrangements should be made. Secondly, instead of suggesting that any particular outcome is likely to be best for children ('one size fits all'), the proposed changes would simply require the court to consider which of the available options in each case would be best for the child. Thirdly, the proposed guidelines would continue to emphasise the importance of parental involvement and safety for children, but would remove the artificial distinction created in the present Act between 'primary' and 'additional' considerations. The court would instead be encouraged to take all matters into account, and give them the weight that is appropriate in the circumstances of each case.

These proposed changes would mean that family violence would cease to be an artificial category that has special consequences in determining what is best for the child. Under the present wording of the Act, there seems to be a common view that the court is required to order that the children spend equal or near-equal time with each parent except where there is family violence (one of the two 'primary considerations'). While violence would of course continue to be taken into account, the focus would be on its potency and seriousness in each case, and it would be taken into account along with all other matters, not singled out as 'primary'. For this reason, debates about the definition of family violence would cease to be of such importance.

The removal of the idea of family violence being a 'primary' factor (competing with the other primary factor, parental involvement) may also help the parties focus on children's interests rather than their own entitlement, because the artificial prominence given to the two factors under the present law seems to reflect ideas about parental entitlements: it can be seen as reflecting the main arguments addressed to the parliamentary committees in the course of what has been called the 'gender wars', and may also reflect the idea that spending equal time with the child is the right of a parent, forfeited only if the parent has been violence or abusive. If so, the proposed change might help the parties, and the courts, engage in a calm and undistracted examination of all the matters that need to be assessed to work out what is best for each child.

This Report also proposes that if these recommendations are not adopted, and thus the Act continues to speak of two 'primary' considerations, the provisions on family violence would need to be strengthened. Finally, a technical review of Part VII is recommended so that the law can be clarified and simplified.

Other matters (Part 4)

Part 4 discusses a number of other matters, mainly arising in connection with support provided to families who have experienced violence, the sharing of information disclosed by litigants, and legal representation in cases with issues of family violence. Most of these issues require more extensive research and consideration, especially in relation to resources, than has been possible in this review. The discussion and recommendations deal particularly with safety at court, legal representation, and education and training.

Conclusion

Nothing about family violence is easy: it raises complex problems that will not be solved by simple solutions. There will no doubt be debate about the views and recommendations in this Report, and that is as it should be. However, just as a judge sometimes has to make the best decision possible on less than complete evidence, those seeking to improve the family law system typically have to make decisions where there are continuing debates, and uncertainties, about things they would ideally like to know.

The recommendations in the Report derive from the information and ideas I have been able to collect and digest during the time available, and I am grateful to all those who assisted by making submissions and in other ways.

Despite the difficulties, I leave this task with confidence that those interested in the area overwhelmingly have the interests of children and families at heart, and are prepared to tackle the issues by way of continuing dialogue in the context of what has nicely been called 'respectful relationships'. Children need respectful relationships, and so do all of us who are interested in improving the way the family law system responds to issues of family violence. I hope that this Report will be one contribution to a careful and measured consideration of how we can better provide justice and support for the families affected by violence, especially the children. They deserve no less.

RECOMMENDATIONS

PART 2 (PROCEDURES)

Recommendation 2.1

That whatever steps are taken in relation to the future of the Family Court of Australia and the Federal Magistrates Court, the Government should ensure that the federal court or courts administering family law have judicial officers with an understanding of family law and a desire to work in that field, and procedures and resources specifically adapted to the requirements of family law, and particularly to the requirements of cases involving issues of family violence.

Recommendation 2.2

That the family law courts conduct a thorough review of their procedures and practices in parenting cases, especially those involving issues of family violence, and that the Government provide the necessary resources to support such a review.

Recommendation 2.3

That the Government consider amending s 60K so that it provides that in each parenting case the court must conduct a risk identification and assessment, rather than providing for the filing of a document that will require the courts to take particular actions.

Recommendation 2.4

That the Government consider the most appropriate ways of conducting such a risk identification and assessment, having regard to the resources available to the courts, and to the possibility of arranging for the assessment of risk to be conducted in part or whole by an external agency.

Recommendation 2.5

That the Government consider amending provisions of the Act relating to the confidentiality of information held by agencies outside the court, including dispute

resolution agencies, so that information relevant to the assessment of the risks from violence or other causes could be more readily available to the courts.

Recommendation 2.6

That the Government consider providing the family courts with the additional resources necessary to ensure that adequate attention can be given to children's cases in interim proceedings, especially cases involving allegations of family violence.

PART 3 (LEGISLATION)

Recommendation 3.1

That if recommendations 3.3 and 3.4 are adopted, section 63DA be replaced by a simpler provision, in substance directing advisers to have regard to the principles stated in the Act about the best interests of children; and if recommendations 3.3 and 3.4 are not adopted, s 63DA be amended to emphasise the need to ensure the safety of children and family members.

Recommendation 3.2

That s 117AB be repealed, and consideration be given to amending s 117 to make specific reference to the giving of knowingly false evidence, for example by inserting a new paragraph in subsection (2A) to the following effect: '*Whether a party has knowingly given false evidence in the proceedings*'.

Recommendation 3.3

That the Government give consideration to retaining the present provisions relating to parental responsibility (ss 61B, 61C, and 61DA), but amending the Act so that the guidelines for determining arrangements for the care of children (s 60CC) are independent of the provisions dealing with parental responsibility, and amending s 61DA so that it creates a presumption in favour of each parent having "parental responsibility".

Recommendation 3.4

That the Government give consideration to amending s 60CC to provide, in substance, as follows:

(1) In considering what parenting orders to make, the court must not assume that any particular parenting arrangement is more likely than others to be in the child's best interests, but should seek to identify the arrangements that are most likely to advance the child's best interests in the circumstances of each case.

(2) In considering what parenting orders to make, the court must take into account the following matters, so far as they are relevant:

(a) any views expressed by the child concerning the child's relationship with each parent and with other persons, and about any other matters that are important to the child;

(b) the nature of the relationship of the child with each of the child's parents, and with other persons (including any grandparent or other relative of the child);

(c) the benefit the child has received, and is likely to receive, from a meaningful relationship with both of the child's parents;

(d) the capacity and willingness of each parent or other relevant person to provide for the child's safety, welfare and well-being, and the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent;

(e) any likely advantages to the child if each parent regularly spends time with the child on weekdays as well as weekends and holidays, and is involved in the child's daily routine and occasions and events that are of particular significance to the child;

(f) the likely effect of any changes in the child's circumstances, including any separation from either parent or any other child or adult with whom the child has been living;

(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

(h) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child; and

(i) any other fact or circumstance that the court thinks is relevant.

(3) In determining the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent (paragraph (d)), the court must consider, in particular, the extent to which each of the child's parents:

(a) has taken, or failed to take, the opportunity to participate in making decisions about major long-term issues in relation to the child; and to spend time and communicate with the child;

(b) has facilitated, or failed to facilitate, the other parent in making decisions about major long-term issues in relation to the child, and spending time and communicating with the child; and

(c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.

(4) If the child is an Aboriginal child or a Torres Strait Islander child, the court must also take into account the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share it), and the likely impact any proposed parenting order under this Part will have on that right.

For the purpose of this subsection, the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture;

(b) to have the support, opportunity and encouragement necessary to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

(c) to develop a positive appreciation of that culture.

Recommendation 3.5

That if Recommendation 3.4 is not adopted, s 60CC(3)(c) be amended to read:

(c) the capacity and willingness of each parent to provide for the developmental needs of the child in the circumstances of each case, taking into account, among other things, children's need for safety and the benefits of a close and continuing relationship with both parents.

Recommendation 3.6

That if Recommendation 3.4 is not adopted, the Government strengthen the provisions of the Act relating to family violence, including more detail about the nature and consequences of family violence, and that it consider in this connection adapting some of the provisions of Victorian or other state and territory legislation relating to family violence.

Recommendation 3.7

That the Government give consideration to revising s 60B(2).

Recommendation 3.8

That the Government undertake a technical revision of Part VII of the Family Law Act and related provisions, with a view to clarifying and simplifying the law.

PART 4 (OTHER MATTERS)

Recommendation 4.1

That the Government consider the desirability of providing additional funding in relation to the family law system, including funding that would support the work of contact centres, family dispute resolution agencies, legal aid, and family consultants in reducing the risk of family violence.

Recommendation 4.2

That the Government provide the necessary funding and other assistance so that the family law courts can review the adequacy of existing policies, facilities and arrangements for the safety of people in the courts, and address any deficiencies or difficulties revealed by that review.

Recommendation 4.3

That the Government, the family law courts, and other agencies and bodies forming part of the family law system consider ways in which those working in the family law system might be better educated in relation to issues of family violence.

Recommendation 4.4

That experience and knowledge of family violence be taken into account when considering the appointment of persons to significant positions in organisations forming part of the family law system.

Recommendation 4.5

That in the funding and administration of legal aid, careful consideration should be given to the serious implications of parties, and especially children, being legally unrepresented.

Recommendation 4.6

That organisations of lawyers and bodies responsible for legal education give due weight to the importance of including programs about issues relating to family violence, including its effects on children.

Recommendation 4.7

That consideration be given to amending s 118 to enable the court to entertain such an application of its own motion.

Recommendation 4.8

That the family law courts review the extent to which judicial officers in the Family Court of Australia and the Federal Magistrates Court use and benefit from the *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged*, and consider any measures that might lead to the Principles becoming more influential.

PART 1: PRELIMINARY

1.1 TERMS OF REFERENCE

Review of legislation, practice and procedures relating to family violence in the Family Courts

Aim

To assess the appropriateness of the legislation, practices and procedures in relation to matters before the federal family courts where issues of family violence arise and to recommend any improvements considered necessary.

Reviewer

Professor Richard Chisholm AM

Review

The objectives of the Review are to examine whether:

- *the practices and procedures in the family courts encourage appropriate disclosure of family violence*
- *appropriate support is provided within the court system for families who have experienced or are at risk of violence*
- *information disclosed to the courts by litigants or their representatives is appropriately shared or made available within the courts*
- *the legislation and procedures support best practice for handling family violence matters, and*
- *appropriate legal representation is provided in such cases.*

The Review will take into account the case involving Darcey Freeman in considering recommendations for changes to improve responses to cases involving family violence.

In carrying out the Review, Professor Chisholm will obtain expert input on the issue of family violence in the context of court processes and proceedings. He will also consult

interested stakeholders, including the Attorney-General's Department, the Family Court of Australia and the Federal Magistrates Court.

The Report of the Review will be provided to the Attorney-General, the Chief Justice of the Family Court and the Chief Federal Magistrate within 4 months of its commencement.

1.2 THE SCOPE OF THE REVIEW

The 'aim' of the Review, as stated in the Terms of Reference is

> To assess the appropriateness of the legislation, practices and procedures in relation to matters before the federal family courts where issues of family violence arise and to recommend any improvements considered necessary.

The relevant legislation is primarily the Family Law Act 1975 (Cth), but includes delegated legislation such as the Family Law Rules 2004, the Federal Magistrates Court Rules 2001, and any other relevant delegated legislation. The term 'practices and procedures' includes any relevant Practice Directions, or Court guidelines (as well as actual practices) dealing with matters before the 'federal family courts', a term that must refer to the Family Court of Australia and the Federal Magistrates Court (but not to the Family Court of Western Australia, which is a State Court).

The term 'family violence' is not defined in the Terms of Reference. It is an ordinary term, commonly understood, and it would not be right to limit the Review by adopting a narrow or technical definition. As will be seen, 'family violence' takes many forms, and there are, no doubt, some forms of behaviour that would be regarded by some people and not by others as falling within the term. It will be necessary to return to this problem.

Although family violence is often accompanied by child abuse, and although it can be seen as itself a form of child abuse, the Terms of Reference do not call for an examination of child abuse, as distinct from family violence. Thus specific provisions in the Act dealing with child abuse, and the Family Court of Australia's Magellan Program (which is a case management program for serious child abuse cases, involving collaboration with legal aid and child protection agencies) fall outside the scope of this Review.

The task is to assess the appropriateness of the legislation, practices and procedures 'in relation to matters before the federal family courts where issues of family violence arise'. The words 'before the federal family courts' indicate that the main focus of the Review is on cases actually commenced, rather than the appropriateness of the legislation, practices or procedures in relation to the pre-court family dispute resolution process, except to the extent that they relate to cases before the courts.

The Review is not confined to the small minority of matters that proceed to adjudication. It includes cases involving family violence issues that are settled between the parties after proceedings have been commenced in the family courts.

The first of the five 'objectives' of the Review is 'to examine whether the practices and procedures in the family courts encourage appropriate disclosure of family violence'. This objective requires consideration of whether the system discourages people who have been exposed to violence from making disclosures. The words 'appropriate disclosure' obviously exclude allegations that are knowingly false.

The second objective is 'to examine whether appropriate support is provided within the court system for families who have experienced or are at risk of violence'. The word 'support' would include court facilities, sources of advice and/or referral available in the courts, and the demeanour and approach of court personnel.

The third objective is 'to examine whether information disclosed to the courts by litigants or their representatives is appropriately shared or made available within the courts'. This objective refers to the sharing of information between the Family Court of Australia and the Federal Magistrates Court and within each court. The phrase 'within the courts', and the terms of reference of the ALRC Report announced by the Attorney-General, indicate that the Review does not include questions relating to the sharing of information between the federal courts and state and territory child protection or other bodies. Nor does it include the sharing of information between community-based counselling and dispute resolution services and the courts.

The fourth objective is 'to examine whether the legislation and procedures support best practice for handling family violence matters'. This appears to emphasise that the Review is intended to include all aspects of the courts' work in relation to family violence matters, and is intended to identify, if possible, the most desirable way of doing things.

The fifth objective is 'to examine whether appropriate legal representation is provided in such cases'. This includes the question of legal aid and the representation of children as well as adults. I take the word 'appropriate' also to refer to the effectiveness of legal representation.

The terms of reference also require me to 'take into account the case involving Darcey Freeman in considering recommendations for changes to improve responses to cases involving family violence'.

Some other matters relating to the scope of the Review require mention.

- The Australian Institute of Family Studies is conducting a major evaluation of the 2006 changes to the Family Law Act 1975.[1] This is a larger and very different exercise from the present Review. Although it will no doubt include consideration of family violence issues, it is a much wider evaluation, and is intended to provide detailed information about the operation of the system: while no doubt that material will be extremely relevant to law reform, the evaluation is not itself an exercise in law reform. The timing of the two exercises means that the AIFS evaluation and the present Review will probably be completed at about the same time.

- The Terms of Reference (reflecting the legislation) are in gender-neutral terms and thus the Review includes all types of family violence, including, for example, violence by women against men, and by a man or woman against any child in the household.[2]

- I do not believe the Review is intended to deal with the extent to which a party's violence should be taken into account in determining *financial* matters under the Family Law Act 1975.[3] Although that issue might be regarded as literally within the terms of reference, in my view the context, including the Attorney-General's speech and the reference to the Darcey Freeman case, as well as the limited time for the Review, indicate that it was not intended that I should examine this issue.

---

1 See www.aifs.gov.au.

2 In contrast, the terms of reference of the Australian Law Reform Commission limits its task to 'the safety of women and their children', reflecting the 2009 Report of the National Council to Reduce Violence against Women and their Children, *Time for Action*.

3 See Family Law Council, *Discussion Paper - Violence and the Family Law Act* (August 1998); *Kennon v Kennon* (1997) 22 Fam LR 1; (1994) FLC 92-443.

1.3 THE CONDUCT OF THE REVIEW

Upon the announcement of the Review by the Attorney-General,[4] I was contracted by the Department on 27 July 2009 to carry out the review. The completion date was 27 November 2009. The Department kindly provided me with an office and support for the Review. A senior legal officer was assigned to the Review on a near full-time basis, and I had the benefit of secretarial and administrative support. I also had the benefit of discussions with senior officers in the department.

I was also fortunate in having assistance from both the Family Court of Australia and the Federal Magistrates Court. Each court designated a person to assist by providing information and documents relating to the operation of the Court. I also had the chance to discuss issues relating to the Review with the Chief Justice and the Chief Federal Magistrate, with a number of Judges and Federal Magistrates, and with other members of the court personnel.

Individuals and organisations thought to have an interest in the Review were sent email invitations to make submissions, and I took whatever opportunities arose to make it clear through the media that all comments and submissions would be welcomed. No doubt many people learned of the Review though the media, and I hope that as many people as possible had an opportunity to contribute to it. In addition, although time was limited, a number of helpful discussions were conducted with individuals and organisations having special expertise in the area. Steps were taken to ascertain whether people wished their comments or submissions to be confidential. List of persons and organisations who made submissions or contributed in other ways are set out in Appendix 1. I am very grateful to them all for their assistance, which has been of great value in the preparation of this Report.

I have taken the Darcey Freeman case into account, as required by the Terms of Reference. It would not be appropriate to comment on the case in this Report, which the Attorney-General may wish to make public. Firstly, ordinary decency means that this Review should respect the privacy of family members. They have had to cope with a terrible tragedy, and I would not want this review to subject them to any avoidable distress or exposure. I extend my deepest sympathy to them. Secondly, s 121 of the Family Law Act 1975 restricts the publication of an account of any proceedings under the Act that identifies parties, witnesses,

---

[4] The Attorney-General's speech establishing the Review can be found at: [http://www.attorneygeneral.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2009_ThirdQuarter_24July2009-SpeechtotheAlbury-WodongaFamilyPathwaysNetworkEvent].

or others involved. This section would apply if the Attorney-General were to make this Report public. Thirdly, as Darcey's father has been committed to trial for murder, it would be inappropriate to make further comment about matters that might become relevant for the trial.

It is appropriate to say, however, that I have examined the court file relating to the case and in my view there is nothing in that file suggesting that the judicial officer or any other member of the court staff had any reason to fear for the safety of any of the children.

I accept sole responsibility for the contents of this report and the recommendations made in it.

The submissions

In preparing this Report, I had the benefit of over 100 submissions. I have carefully considered them all, and they have been very helpful. Many of the ideas in the submissions are reflected in this Report. I am very grateful to all those who went to the trouble of preparing a submission – in many cases, I know, they involved a great deal of work.

I hope that those who have provided submissions understand that the limited time for the conduct of the Review has made it impossible for me to engage in dialogue with those who contributed. It will not be possible, therefore, to provide a response to the authors of submissions individually, discussing the substance of the submission. In this section, however, I make some general comments on the submissions.

It is convenient to consider the submissions in three main categories: from individuals, from lobby groups, and from professionals. This categorisation is only approximate. An individual who has been involved in the family law system as a party might also have relevant professional qualifications. Some of the 'lobby groups' have considerable expertise in family law. And some professionals have a particular relationship with particular categories of participants in family law. For example, a women's legal service would be expected to bring to bear its professional expertise and knowledge, but might also be particularly attuned to the perspectives and interests of its clients. I have attempted to consider the context of all the submissions, but it nevertheless seems useful to say something about the three main categories.

Individual submissions

First, there are submissions from individuals. Typically, these individual submissions set out the individual's experience with the system, their views on that experience, and recommendations for change. As might be expected, most of these submissions were from individuals who felt that the system let them down. Many of them are full of pain and distress. Those submissions that set out the details of actual cases that have been before the courts, and those whose authors indicated that they wishes their comments to remain private, have been treated as confidential.

These submissions have been valuable, in particular for two reasons. First, they portray in vivid terms the experience of the writers, and present the writers' perspective on the system and how it operated in their case. It is of great value for any reviewer to be reminded of the impact of the system on individuals, and to be confronted with the wide range of experiences of people coming before the court. These stories help a reviewer to avoid simplistic statements of how the system operates: the reviewer is continually challenged to address the way the system will impact on each individual family member, in the almost infinite range of situations that come before the courts. Second, the submissions often contain suggestions for change which need to be given careful consideration.

Lobby groups and similar organisations

The second category consists of what might be called lobby groups. These are organisations that actively lobby for change in the family law system, and, in some cases, have been created at least partly for that purpose. To varying extents, they take up the cause of particular categories of family members (for example single fathers, or mothers affected by violence, or children). However in general they attempt to take into account the legitimate interests of other family members, and they typically present their recommendations as intended to improve the system for all family members, especially children.

These organisations often base their submissions or lobbying at least partly on the reported experiences of their members and others who come to them for support. They typically provide assistance and support to those who come to them, as well as drawing on their experiences when lobbying for change. In some cases, those involved in the organisations have considerable experience, having participated in family law changes on a number of occasions over the years.

Submissions from these organisations have also been valuable for this Review. They often provide interesting reasons for the recommendations, and often attach a number of case examples, presumably drawn from information provided from their members and those who have sought their help. Those case studies, although usually anonymous, can be valuable for the same reasons as the individual submissions, discussed above.

Professional individuals and organisations

The third main category is submissions from individuals or organisations professionally involved in family law. They include lawyers and social scientists, both practising and academic. I include in this category some of the obvious 'stakeholders' in the family law system, such as the family courts themselves, the relevant government departments, the Family Law Council, Family Law Section of the Law Council of Australia, and the various family dispute resolutions organisations, such as the Family Relationship Centres.

These submissions are valuable because those making them can base the submissions on their professional expertise and experience (and in some cases on relevant research evidence), and because the individuals and organisations do not purport to represent the views of any particular parties in family law.

Considering the submissions

The previous discussion mentions some of the valuable qualities of the various categories of submissions. It is also important to notice ways in which submissions need to be treated with some care.

To the extent that submissions draw on individual cases, it is necessary to be cautious about two aspects. The first is the accuracy of the account given of the case. As is well known, family law cases typically involve different versions of the facts. Whenever one party reports on his or her experience, whether directly to the Review or through another person or organisation, it is quite possible that the other party to the proceedings would give a very different account of the facts. This does not mean that either party is attempting to mislead: each may be telling the true story as they have experienced it. There can be genuine differences of recollections. And it is almost inevitable that the telling of the story will emphasise some aspects, and omit others, and will reflect what is emotionally important to the person telling the story, so that even when both parties are trying to be truthful, the two

stories are likely to be very different. In so far as each individual story describes the actions and attitudes of other people, it might be particularly liable to reflect the perspective of the teller. For example, a person whose evidence was not accepted by a judicial officer might, in telling the story, say that the judicial officer made a certain decision even though the facts were as the teller asserts, or that the judicial officer 'ignored' the teller's evidence. Unless more information is provided (for example a copy of the judgment) showing the reasons given for the decision, it is difficult for the reader to draw confident conclusions about the judicial officer's reasons.

Similarly, it is necessary to be cautious when the stories attribute particular motivations to other parties. For example, if the teller of the story says that the other party made up false allegations, the reader cannot know whether the other party's allegations, even if in error, stemmed from some misunderstanding or mistake or whether they were indeed fabricated. Again, if the teller says that the other party wanted to spend more time with the child only in order to pay less child support, the reader cannot know whether this was really the other party's motivation, even if the teller genuinely believes that it was.

The second aspect of individual cases that needs consideration is whether they are *representative*. The number of anecdotes is vastly smaller than the total number of cases, and the Reviewer often has no way of knowing whether the anecdotes provided are typical of cases dealt with by the system.

This is particularly important in the case of anecdotes provided by lobby groups or other organisations that have a public profile as representing particular categories of people, or having a particular position on family law issues. It is entirely likely, in my view, that individuals who approach such organisations will mainly be in the category serviced by the organisation, or have views similar to those of the organisation. Thus the sample of cases known to each organisation may well reflect the public profile of the organisation, and perhaps be quite unrepresentative of the experiences of most people in the family law system. More subtly, those who approach the organisations and tell their stories, and those who listen and record the stories, might be likely - in each case without any intention to misrepresent the facts - to emphasise features of the case that are consistent with the general position of the organisation.

For that reason, it is wise to be cautious about assuming that particular cases, or particular groups of cases, are typical of what happens in the family law system. One can be more confident if the cases have been randomly selected by an independent person or body, and the submission or piece of research includes a reasoned discussion of the extent to which the cases studies might be representative. It is for this reason, of course, that the forthcoming evaluation by the Australian Institute of Family Studies is likely to be of particular value, being based on careful research on sample cases that are likely to be at least reasonably representative of most cases that go through the system.

The victim's dilemma

Many submissions described, in different ways, what may conveniently be called 'the victim's dilemma.' It applies where the victim has experienced family violence and has well-founded fears for the safety of the children if they are to be in the care of the perpetrator. If the victim seeks orders that will protect the children from risk (such as orders for no contact or for only supervised contact), the victim will need to provide evidence of the risk, and this will normally be evidence of previous abuse or family violence. That evidence will often need to be detailed, so that the context and the significance of specific acts can be understood. The victim, in such cases, believes that seeking such orders is necessary for the safety of the child.

The dilemma is that the seeking of such orders, and spelling out the reasons for the fear of risk, may be seen as vindictive or punitive, dwelling on the past and old grievances, or as a way of alienating the children from the perpetrator. The victim might therefore be rightly concerned that if the court does not accept his or her evidence, or if it considers that the protective orders are not warranted, it might take an adverse view of the victim, and not only fail to make the orders sought by the victim, but make orders placing the children with the perpetrator for longer periods, to protect them from what it might see as a style of parenting by the victim that would harm the children by alienating them from the other parent. Such an outcome, the victim would believe, would place the children at *additional* risk of harm.

A number of circumstances contribute to the seriousness of the dilemma. First, it may be that there had been a pattern of violence over a period of time, and that in the early stages the victim did not complain of it to others, perhaps for shame, perhaps believing the perpetrator's apologies and hoping it would stop, or perhaps being afraid that making the complaint might

trigger further violence or abuse. In order to explain the basis for the fear, the victim will need to give the history. But it may be met with the criticism that if such things had happened, the victim would have complained: it will be argued that the victim's lack of action at the time is a sign that there really had been no such family violence, or that it was of a trivial nature.

Second, it may be that much of the violence occurred in the home and had no documented physical consequences, in which case it may be difficult for the victim to persuade the court to accept the allegation of violence, rather than the perpetrator's denial.

Third, if the victim has been traumatised by the violence, the combination of such trauma with the inevitable anxiety and stress of court proceedings (especially proceedings involving such intimate disclosures of the victim's family life), may lead to the victim being somewhat unorganised, anxious or depressed, and, for such reasons, an unimpressive witness.

A victim who is rightly focussed on protecting the child therefore faces an agonising choice: balancing the risk to the child from not taking protective action against the risk to the child of doing so unsuccessfully, with the consequence that the child spends more time with the perpetrator.

The 'victim's dilemma' applies at all stages of the proceedings, and before. It is relevant to whether the victim will claim exemption from compulsory dispute resolution, to what orders will be proposed, and, in particular, to whether to enter into particular proposals in a parenting plan or consent order.

A significant number of individual and organisational submissions argued that because of what I have called the 'victim's dilemma', victims often fail to disclose family violence.

The 'victim's dilemma' is also the court's dilemma. People do sometimes tell lies in court to obtain the outcome they want. The court will need to consider the reliability of the evidence given by each of the parties. The victim may well appear to the court in these cases as someone who did not complain of the alleged violence when it happened, but is now complaining about it and asking the court to keep the children away from the other parent, and whose evidence and presentation is unorganised, and perhaps contradictory or confused about some matters. By contrast, it may be possible for the perpetrator to present very

persuasively to the court, calmly denying the allegations or, perhaps conceding some incidents but presenting them as minor or mutually violent episodes.

This is a dilemma for the court because the features of the victim's case and presentation – no complaint at the time, unorganised and unimpressive evidence – *could* have resulted either from a genuine history of abuse or from a desire to fabricate evidence, perhaps with the objective of punishing the other party or alienating the other party from the children. In the absence of corroboration, or reliable expert evidence, or successful cross-examination of one or other party, it may be impossible for the court to know which is the truth. Thus, the court runs the risk of harming the children: by unnecessarily separating the children from a good parent (if the allegations are fabricated but it treats them as true), or placing the children at risk (if the allegations are true but it treats them as fabricated). The risk is greatest in interim proceedings, where the court usually lacks comprehensive evidence and usually has to manage without witnesses being cross-examined.

It is easy to see how this sort of situation can produce enormous distress for the parties (reflected in some of the submissions). If protective orders are made because the court accepts the victim's case, or considers that not doing so would involve an unacceptable risk to the child, but in fact the allegations were fabricated, the wronged parent would be likely to feel that the court was prejudiced against him or her, or against men, or women, as the case may be. Similarly, if the court wrongly disbelieves the victim, and makes orders that the child should spend a lot of time with the (perpetrator) parent, the victim may well feel that the court is indifferent to the need to protect children, or that it is biased in favour of men, or in favour of women.

Of course the situations can be more complex than this, as where both parties have been involved in violent or abusive behaviour. But this account of the 'victim's dilemma' has attempted to express what was a major theme in many of the submissions, especially the confidential ones. It highlights the importance and difficulty facing the courts in such cases: to discern as best it can where the truth lies, and to treat each party with respect. And it highlights how important it is that individuals working in the family law system, and the system as a whole (including the legislation), do not send messages to either party suggesting that they have pre-judged the issue, by assuming that one side or the other is more likely to be telling the truth. Achieving this is a challenge for the system that is considered in many areas covered in this Report.

Stereotypes and perceptions of bias

Finally, I should refer to a striking fact about some of the submissions, namely their strong concern to counter what they saw as unfair stereotyping of the people they represented. Thus some groups argued, sometimes in remarkable detail, about the relative numbers of mothers and father who kill their children, seeking to demonstrate that mothers could be as violent and dangerous as men. These statistics are of limited assistance in this Review, but such submissions indicate, I think, how strongly the authors object to what they see as adverse stereotypes suggesting that most men are violent. Similarly, other submissions argued equally strongly against stereotypes of mothers as liable to invent allegations of violence in order to keep their children away from good fathers. The main relevance of these submissions is to emphasise the importance of fairness, and the pain and anguish people can experience if they feel that they are being dealt with on the basis of prejudice. I have tried to keep this important lesson in mind in preparing this Report.

In my view the evidence generally suggests, as one would expect, that the majority of men are not violent and the majority of mothers support their children having a close relationship with their fathers, and do not often manufacture allegations of violence. No doubt there are some violent men, and some women who fabricate evidence; and some violent women and some men who fabricate evidence.

The material received during this Review indicates that there are some men and some women who believe that they have been badly treated and that the system is biased against men, or against women. Thus some submissions suggested that the courts routinely believed allegations of violence and too readily removed the children as a result. Others suggested that the system tended to discourage allegations of violence, and when they were made, tended to disbelieve or minimise their importance, exposing children to risk and adding to the abuse of the victims of violence. Whether they are correct in such a belief about their own cases would require a detailed investigation of each case, and even then the truth may or may not emerge.

Inevitably individual professionals in the family law system will have their own values and assumptions, and everybody makes mistakes at times. I am not aware of any reliable evidence to suggest that there is a systemic bias either against men or against women among those who practise family law. But what is most important is the common ground in these

submissions: that the system should be fair and free of bias of any kind. This objective underpins the discussions and recommendations in this Report.

To conclude, I believe that it is possible, and sensible, for all those who have an interest in this subject to work towards a system that responds as well as is humanly possible to the challenge of identifying family violence when it exists, understanding what it is and what it means, especially for the children, and responding in a way that is fair and creates the best possible environment for the children to develop, namely one in which they have a relationship with parents and other family members that enables them to be safe and to develop to their full potential.

1.3 FAMILY VIOLENCE

Defining 'family violence' for legal purposes

For the purpose of this Review, no difficulties arise with the word 'family' in the expression 'family violence'. It obviously includes parents, children, grandparents and other members of the extended family, as well as husbands and wives. It also includes intimate partners. For practical purposes, family violence can be taken to include any violence involving members of the households of parties to proceedings under the Act.

Defining the word 'violence' is a more complex matter. A range of different shades of meaning can be seen in dictionary definitions. The Macquarie Dictionary, for example, lists the following meanings of 'violence':[5]

> 1. rough force in action: *the violence of the wind.*
>
> 2. rough or injurious action or treatment: *to die by violence.*
>
> 3. any unjust or unwarranted exertion of force or power, as against rights, laws, etc.; injury; wrong; outrage.
>
> 4. a violent act or proceeding.
>
> 5. rough or immoderate vehemence, as of feeling or language; fury; intensity; severity.

[5] It adds another meaning irrelevant to this Review: 'a distortion of meaning or fact'.

For the adjective 'violent' it has

> 1. Acting with or characterised by strong, rough force: *a violent blow, explosion, tempest, etc*
>
> 2. Acting with, characterised, by or due to injurious or destructive force: *violent measures, a violent death.*
>
> 3. Intense in force, effect, etc; severe, extreme: *violent heat, pain contrast, etc*.
>
> 4. Roughly or immoderately vehement, ardent, or passionate: *violent feeling*.
>
> 5. Furious in impetuosity, energy etc: *violent haste*.

The World Health Organisation (WHO) has defined violence as:

> *the intentional use of physical force or power, threatened or actual … that either results in or has a high likelihood of resulting in injury, death, psychological harm, maldevelopment or deprivation.*[6]

The National Council to Reduce Violence Against Women and their Children uses the following words in its definition of 'domestic violence':

> *The term 'domestic violence' refers predominantly to abuse of a person… While there is no single definition, the central element of 'domestic violence' is an ongoing pattern of behaviour aimed at controlling one's partner through fear, for example by using behaviour which is violent and threatening. It occurs between people who have, or have had, an intimate relationship. In most cases, the violent behaviour is part of a range of tactics to exercise power and control…* [7]

The definition currently in the Family Law Act 1975 is as follows:

> *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*

---

6 Quoted in AIFS Family Violence Report.

7 The 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, pp. 186 – 188, <http://www.fahcsia.gov.au/sa/women/pubs/violence/np_time_for_action/Pages/default.aspx>. Some of the omitted words are consistent with the National Council's focus on violence against women, and are inappropriate for the present Review, which is not limited in this way.

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.

It can be seen at once that this definition is not identical to the dictionary definitions, nor as extensive as some definitions that apply in other contexts. For example, some actions that did not in fact cause a person to be fearful would seem to fall within the dictionary definitions of violence, but outside the definition in the Act. Similarly, 'rough' actions that caused a person to be fearful, but which would not have caused a 'reasonable person' to be fearful, would fall outside the definition in the Act, but would be included in some of the dictionary definitions. Conversely, the Act's definition is wider than the definition used by the National Council, in that it would probably include, for example, uncontrolled rage that caused reasonable fear but was not intended to control a partner through fear.

While the meaning of the word in the community is a matter of usage (which dictionaries attempt to reflect), the meaning of the word in the law is a matter of choice. If the word is to be used in the legislation, the meaning given to it will affect the operation of any rules or principles that use it. While no doubt the legislature would not want to define the word in a way that strays too far from its ordinary meaning, there are many choices that could be made. For example, under the present legislation a deliberate decision was made in 2006 to limit the previous definition by adding the concept that the fear had to be reasonably held.

In considering the appropriateness of a definition, it is important to consider the context – the particular rule or principle involved. For example, if the context is the safety of people attending the court premises, it might be sensible to define violence in a way that focuses on physical danger. By contrast, if the context is determining the best interests of children, it might be sensible to have a wider definition, one that would include things that might be harmful to children but would not necessarily put at risk people attending the court.

Although it would be quite possible for the Act to have different definitions of the word 'violence' for the purpose of different provisions, such an approach might be confusing. And, in fact, as presently drafted the Family Law Act 1975 contains one definition, which applies in a number of different contexts.

It follows that there is no inherently right or wrong legal definition of 'family violence'. If the expression is to be used in the Act, a policy choice will have to be made about how it is to be defined. In making this choice it will be necessary to consider the impact of the definition in relation to the different legal provisions in which it appears.

For example, the definition could be used to indicate a range of behaviour that would entitle a court to take some action, although whether the court would actually do so might depend on the particular circumstances, and the seriousness of what was done. Definitions of violence in state and territory domestic violence legislation are of this kind. By contrast, the definition might be used in a way that has immediate consequences, as where it identifies circumstances in which a person is exempted from attending mediation. It is arguable that a fairly wide definition is appropriate in the first situation, because to the extent that it catches less serious situations, the court might decide to take no action. In the second case, where the definition is used to achieve a particular result - the person is exempt from the requirement if the definition applies – it might be appropriate for it to be more limited.

The nature of family violence

Introduction

For the purpose of this discussion, 'family violence' will be used in its ordinary sense – imprecise though that is – rather than with the specific meaning given to it by s 4 of the Act.

There is a vast literature on this topic, and it is impossible to review it in this Report. I have benefited from many of the submissions made to this Review,[8] and from published papers by internationally respected authors.[9] Although I have read as widely as the limited time permitted, this discussion draws primarily on sources that seem current, well-informed and reputable.

---

8 In particular, the paper by Tom Altobelli FM, 'Family Violence and Parenting: Future Directions in Practice' forthcoming in the *Australian Journal of Family Law*, contains a helpful and insightful review of the literature and of its application to family law practice. It has been of considerable assistance in the preparation of this discussion.

9 There are a number of instructive papers in the Family Court Review, Special Issue on Domestic Violence (July 2008), notably Jaffe, PG, Johnston, JR et al, 'Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans' (2008) 46 *Family Court Review* 500 and Kelly, JB, Johnson, MP, 'Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions' (2008) 46 *Family Court Review* 476.

I should mention two in particular. The first is what is known as the Wingspread Conference. In 2007 two major family law organisations in the USA, the National Council of Juvenile and Family Court Judges, and the Association of Family and Conciliation Courts, assembled 37 experienced family violence practitioners and researchers to work on the topic, and the report of their conference is of great value.[10] The second is the recent report by the AIFS on family violence allegations in the family courts.[11] It contains information about violence allegations in the family courts and how they are handled. Although it draws on a sample of cases before the amendments of 2006, it is the only existing study of its kind in Australia, and contains much that is important. In addition, it has a valuable review of the literature.

The discussion here is an attempt to summarise what is most relevant for the purpose of this Review. I accept that there will be room for disagreement about the accuracy of this summary of those limited sources, and also about the reliability of those sources. No doubt some would wish to point to other research and argue for some different conclusions. However I have done the best I can to try to reflect what is said about the topic by the most informed and credible scholars.

Many forms

It is widely accepted that family violence takes many forms, and that understanding and responding to it requires attention to what is involved in each case. Each individual's experience of violence, and its meaning and consequences is necessarily unique.

Understanding family violence requires examination not only of physical actions but of the context and the meaning of the actions to those involved. This point was strongly made at the Wingspread Conference:[12]

> *There was consensus among conference participants that the impact of domestic violence depends in large part on the context in which it occurs. Identical violent acts may have different*

---

10 Ver Steegh, N, Dalton, C 'Report from the Wingspread Conference on Domestic Violence and Family Courts' (2008) 46 *Family Court Review* 454 ('the Wingspread Report').

11 Moloney, L, Smyth, B, Weston, R, Richardson, N, Qu, L and Gray, M, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings. A Pre-reform Exploratory Study*, 2007, Australian Institute of Family Studies, Melbourne ('the AIFS violence study').

12 The Wingspread Report, 456-7.

meanings depending on the impact on the victim and the intent of the perpetrator.[13] *Consider a situation where partner A slaps partner B. First imagine that when the incident takes place there is no prior history of physical violence or of other abusive behaviors between A and B. Then imagine that, although this incident is the first instance of physical violence, A has previously undermined B's efforts to seek employment, denigrated B's parenting in front of the children, and isolated B from her family and friends. Then imagine a situation where A broke B's nose the week before and A is threatening to kill B and harm their children. The act of slapping is the same in each situation but the impact and consequences are very different. As a result, judicial focus on a single violent incident without consideration of its larger context is misleading and dangerously incomplete.*

The variety of forms that family violence can take is emphasised in some legislation. For example, in New Zealand's *Domestic Violence Act 1995* 'domestic violence' is defined to include: physical abuse, sexual abuse, and psychological abuse, including, but not limited to intimidation, harassment, damage to property, and threats of physical abuse, sexual abuse, or psychological abuse. The definition goes on to note that a single act may amount to abuse. It also notes that as a number of acts that form part of a pattern of behaviour may amount to abuse for that purpose, even though some or all of those acts, when viewed in isolation, may appear to be minor or trivial.[14]

Similarly, the Victorian Law Reform Commission, in its 2006 report *Review of Family Violence Laws: Report* recommend that the definition of 'family violence' for the purposes of personal protection laws be defined to include non-physical forms of violence.[15.] The Commission's recommendations are reflected in the definition of 'family violence' in the *Family Violence Protection Act 2008* (Vic):

behaviour by a person towards a family member of that person that is physically or sexually abusive, emotionally or psychologically abusive, economically abusive, threatening, coercive, or in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of that family member or another person, or behaviour by a

---

13 Loretta Frederick & Julie Tilley, *Effective Interventions in Domestic Violence Cases: Context is Everything*, Battered Women's Justice Project, Minneapolis, MN, May 2001, http:// data.ipharos.com/bwjp/documents/effective_interventions.pdf. [Footnote from the Wingspread Report].

14 Section. 3, *Domestic Violence Act 1995*.

15 Victorian Law Reform Commission, Review of Family Violence Laws: Report, 1 March 2006, Chapter 4, p. 95, http://www.lawreform.vic.gov.au/wps/wcm/connect/Law+Reform/resources/file/eb9212475ed4473/family%20violence%20chapter%204.pdf.

person that causes a child to hear or witness, or otherwise be exposed to the effects of that behaviour.[16]

Like the definition of the National Council to Reduce Violence Against Women and their Children, quoted above, that definition appears to be narrower than the definition in the Family Law Act in that it requires the behaviour to be controlling or dominating.

Differentiation of categories of family violence

In recent times, researchers have found it helpful to distinguish between different forms of family violence, pointing out some common features and patterns. Different scholars have offered different analyses or typologies. Here is the version discussed at the Wingspread Conference:[17]

> ***Violence used by a perpetrator in the exercise of coercive control over the victim.*** *Sometimes referred to as "classic battering," this type of violence occurs when an abuser (usually male) uses force as one tactic in a larger escalating pattern aimed at intimidating and controlling the victim. Physical violence and sexual abuse are often accompanied by threats, psychological and emotional abuse, isolation of the victim, manipulation of children, and exercise of economic control.*
>
> ***Violent resistance or self-defence****. This type of violence occurs when a victim (typically female) uses violence to protect herself against a perpetrator who is using force as a part of a larger pattern of coercive control.*
>
> ***Violence driven by conflict.*** *This type of violence takes place when an unresolved disagreement spirals into a violent incident, but the violence is not part of a larger pattern of coercive control. It may be initiated by either the male or female partner. However, female victims are more likely to suffer negative consequences, including injury, than are men.*
>
> ***Separation-instigated violence.*** *With this type of violence, the first violent incident occurs at the time of separation as a response to the trauma of separation on the part of an individual with no history of coercive controlling behavior. Separation-instigated violence may alternatively be viewed as a subset of violence driven by conflict. However, under either approach, care must be taken to distinguish separation-instigated violence from the first violent manifestation of coercive control.*

---

16 Section 5, *Family Violence Protection Act 2008 (VIC).*

17 The Wingspread Report, 458-9 (citations omitted).

> ***Violence stemming from severe mental illness.*** *Some perpetrators of domestic violence evidence psychosis and paranoia, and their violence is driven by severe mental illness.*

It is not appropriate to engage here in a detailed discussion of the different typologies presented by different researchers.[18] The above list is sufficient to make the point that family violence takes many forms, and acknowledging the differences between them may help us to understand it.

Typologies like this have potential benefits and potential risks. The potential benefits include helping us move away from stereotypes and simple assumptions: reading such a list, we might realise that family violence might sometimes be rather different from what we may have assumed.[19] As Tom Altobelli puts it, differentiation 'seeks to understand family violence in context, and to then use this as a guide to crafting parenting arrangements'.[20]

The potential risk is that we might come to think that every instance of family violence will fit within one category or another, and we might tend to respond to situations of violence by focusing on the typical features of that *category*, rather than the particular case. Accordingly, participants at the Wingspread Conference warned against the inappropriate use of labels, which:

> *could potentially place families in danger, or steer them toward inappropriate interventions. In addition, to the extent that typologies draw bright lines differentiating one type of violence from another, their application is likely to oversimplify family situations which are complex and not so easily categorized in practice. Finally, without substantial expertise and experience on the part of those charged with applying the labels, they are vulnerable to manipulation and misidentification.*

---

18 For example, the first category on the above list, or something like it, has been variously categorised by different researchers as 'abusive controlling violence', 'coercive controlling violence', 'battering' and 'intimate terrorism'. Similarly, the second category has been called 'conflict instigated violence', 'situational violence' and 'common couple violence': see Tom Altobelli FM, 'Family Violence and Parenting: Future Directions in Practice' forthcoming in the *Australian Journal of Family Law*.

19 As it was put at the Wingspread Conference, 'viewing domestic violence through the lens of potential patterns provides an opportunity to re-examine fundamental assumptions and think about how different family situations could be effectively matched with selected interventions and outcomes based on risk level'.

20 Tom Altobelli FM, 'Family Violence and Parenting: Future Directions in Practice' forthcoming in the *Australian Journal of Family Law*.

In short, these typologies are good if they help us attend to and understand the nature of the violence in each particular case; and bad if they distract us from this essential task and lead us to over-simple reactions.

How are we to understand family violence in a particular case? Categories can help, as we have seen, though we must look deeper. But what are we to look for?

Again, the Wingspread Conference provides valuable guidance:

> *There was consensus among conference participants that each domestic violence situation must be closely examined to determine the potential for lethality, the risk of future violence, and the presence of other forms of intimidation. Critical variables identified by conference participants included: the frequency, intensity, and recency of the violence; the presence of sexual coercion or abuse; the existence of nonphysical coercive strategies including verbal abuse, threats, isolation, and financial control; the presence of an established history of violence, criminal activity, substance abuse, or mental health issues; the determination of "who is afraid of what"; the needs, interests and well-being of children; any history of child maltreatment; and the extent to which the violence is consistent with a recognized pattern with proven implications for ongoing risk or the utility or impact of particular interventions or determinations. Family strengths and protective factors should also be taken into account and supported.*[21]

A related point is the importance of considering the emotional meaning of what has happened:

> *The specific abuse complaints need to be examined in terms of their logical and emotional meaning for the complainant: Did the abuse involve deep shaming and humiliation? Was the victim made to feel responsible? Was the abuse normalized, that is, seen as justly deserved punishment or discipline? How an abusive incident is perceived needs to be understood in terms of the family and cultural context in which it is made. Particular behaviors may be deemed especially insulting and offensive in some minority ethnic families in ways that may not be understood by most others (e.g., slapping with shoes in an Islamic culture). Moreover, a victim might have multiple abusers (e.g., her spouse and mother-in-law in some Indian families); or the violence to which the children are exposed is between family members other than the parents (e.g., between father and mother's new boyfriend or involving older siblings).*[22]

---

21 *Ibid* p7.

22 *Ibid* p 507.

I would add that the emotional meaning for the perpetrators might also be important. Understanding and dealing with the situation might well be affected by whether the perpetrators see themselves as violent, whether they regret what they have done, or whether they see their own behaviour as normal, or justified.[23]

Implications for screening and triage[24]

The Wingspread Conference gave considerable attention to screening and triage, which is of obvious importance in the family courts. They face the challenge of sorting out, when cases first arrive, whether they involve issues of family violence, the nature of those issues, and the most appropriate way to handle each case. The Conference did not underestimate the difficulties involved:

> *The first-order task of identifying domestic violence falls on those who interact with the family as it enters the court system. Conference participants emphasized that, in many jurisdictions, no person or office is specifically charged with screening for domestic violence. Further, even when a screening process is in place, cases may go undetected because domestic violence can be difficult to discern and either or both of the adult parties, for different reasons, may downplay the abuse. There was consensus among conference participants that families entering the court system should be screened for domestic violence, but less consensus about how this should be accomplished. …*
>
> *There was consensus that, when cases of domestic violence are identified or when initial screening is insufficient to confirm or rule out the presence of domestic violence, families should be individually considered and referred to appropriate services and court processes. As a part of the screening and review process for each family, risk and protective factors should be identified and mitigated or supported, respectively.*

It was pointed out that such screening is no easy task. If, for example, the screening involves looking only at physical violence, 'a historic pattern of coercive control may be overlooked, and the ongoing risk to family members may not be addressed'. Accordingly the Conference discussed the use of screening tools. It is not necessary here to review the details of these tools, but they are highly relevant to Australia, when the family courts face the same

---

23 For a detailed discussion, see submission 33.

24 The word 'triage' comes from the French verb *trier*, meaning to separate, sort, sift or select. It refers to sorting or prioritizing (originally, in a medical context, when allocating benefits such as food or medicine to patients on the basis of need and likely benefit).

problems as they do elsewhere. However the Wingspread Conference agreed that there should be

> *a multi-method, multi-informant approach to family assessment featuring increasingly intense inquiry as higher levels of conflict and abuse are uncovered.*[25] *Indeed, effective screening may ultimately require use of a variety of screening tools, each developed for a specific purpose and for potential use at different stages of the proceeding. For example, while the initial focus of screening might concern lethality and safety, that initial inquiry might trigger a mental health or substance abuse assessment or a further screening to assess the appropriateness of participation in dispute resolution processes such as mediation.*

The extent of family violence

It is difficult to assess the extent of family violence in a community generally, or, for example, in cases coming to the family courts. This is partly because of the difficulty in determining what happened in any particular case (family violence may often happen behind closed doors, and there may be little corroborative evidence), and partly because of the wide range of behaviour that can be included as family violence: when one does find research evidence, different studies are often measuring different things.

It has not been possible to conduct a detailed review of the literature, but it seems useful to refer to some evidence that gives at least a general indication of what might be the extent of family violence in Australia.

Perhaps the most useful indicator is the ABS study of 2005, the *Personal Safety Survey*.[26]

In relation to violence generally (not just family violence), the survey found that an estimated 35% (5,275,400) of men and women had experienced physical assault since the age of 15. In the 12 months prior to the survey, there were an estimated 443,800 (5.8%) women who experienced an incident of violence compared to 808,300 (11%) men. People were three times more likely to experience violence by a man than by a woman.

---

[25] Jaffe et al., *supra* note 9, at 25-29 (specialized assessment needs are delineated for normal conflict, high conflict, and spousal violence cases). [Footnote from the Wingspread Report]

[26] Australian Bureau of Statistics (2005) *Personal Safety Survey*, Cat No. 49060 (Reissue), Canberra: Commonwealth of Australia.

The Survey also gives some insight into the amount and characteristics of family violence (though it does not use that term). Reviewing the experience of violence by participants in the previous 12 months, the Survey reported:

> *The overall experiences of physical assault for men and women, in the 12 month period prior to the survey were different.*
>
> - *Of those men who were physically assaulted, 65% (316,700) were physically assaulted by a male stranger compared to 15% (35,500) of women who were physically assaulted by a male stranger.*
>
> - *Of those women who were physically assaulted, 31% (73,800) were physically assaulted by a current and/or previous partner compared to 4.4% (21,200) of men who were physically assaulted by a current and/or previous partner . […]*

As to 'violence by current partners', the survey found:

> *Since the age of 15, 0.9% (68,100) of men and 2.1% (160,100) of women experienced current partner violence.*

As to sexual violence:

> *During the 12 months prior to the survey 1.6% (126,100) of women and 0.6% (46,700) of men experienced an incident of sexual violence. […]*
>
> *Since the age of 15, 5.5% (408,100) of men reported experiencing sexual violence compared to 19% (1,469,500) of women.*
>
> - *10% (16,100) of women who had experienced violence by their current partner had a violence order issued against their current partner as a result of the violence. Of those women who had violence orders issued, 20% (3,200) reported that violence still occurred*

Violence, parenting and children

Sadly, the research indicates that children are often exposed to family violence. The ABS Personal Safety Survey reports:

- *49% (111,700) of men and women who experienced violence by a current partner reported that they had children in their care at some time during the relationship. An estimated 27% (60,700) said that these children had witnessed the violence. […]*

- *59% (667,900) of women who experienced violence by a previous partner were pregnant at some time during the relationship; of these, 36% (239,800) reported that violence occurred during a pregnancy and 17% (112,000) experienced violence for the first time when they were pregnant*

- *61% (822,500) of persons who experienced violence by a previous partner reported that they had children in their care at some time during the relationship and 36% (489,400) said that these children had witnessed the violence*

The AIFS Report contains a valuable discussion of this matter, also finding that children are often involved. The discussion starts:

> *Of the 21,000 family-related incidents that were reported to Victorian police in a 12-month period in 1997/1998, children were recorded as present on more than half the occasions (Atmore, 2001). Bedi and Goddard (2007) have provided a brief review of the impacts on children of living alongside intimate partner violence. Although much of the research is again plagued with definitional problems, one is struck by the similarities between the reports of the symptoms and outcomes with respect to the children in this situation, and the symptoms and outcomes, noted above, that attach to more direct forms of child maltreatment.*[27]

The impact on children of exposure to family violence is another important topic, the subject of considerable recent research. In her submission, Dr Lesley Laing writes:

> *"Over the past 20 years, a substantial body of research has identified that exposure to domestic violence is associated with a range of emotional, behavioural and developmental problems in children and young people (Margolin, 2005; Wolfe, Crooks, Lee, McIntyre-Smith, & Jaffe, 2003) and with increased risk of other forms of child abuse and neglect (Edleson, 1999). Indeed, a meta-analysis of many studies found that exposure to domestic violence was associated with similar levels of harm to those experienced by children who experience direct physical child abuse (Sternberg, Baradaran, Abbott, Lamb, & Guterman, 2006)."*

While it is important to understand the nature of family violence from the point of view of the adults involved, it is of particular importance in family law to focus on what it means for the

---

[27] AIFS Violence Study, page 13.

children. For example, it is possible that some forms of 'couples violence' may be tolerable for the adults involved – though this is a controversial topic – but even if this is so, a child's exposure to persistent parental conflict may be seriously damaging for the child, even if both adults can cope with it.

It has become apparent in the course of this Review that the use of violence is, among other things, an unacceptable way to parent children. There are at least three ways in which it can be damaging to children.

First, children may be damaged by being exposed or subject to violence.

Second, violent behaviour by a parent is a poor example for children: they need to learn from their parents how to deal with people and to deal with problems, and if what they learn is to use violence, there is a risk that they will learn the lesson only too well and become violent adults. Good or adequate parenting involves being a good or at least reasonably good role-model.

Third, violent behaviour by one parent against another, especially if it is of a serious and controlling kind, can have a disabling impact on the parent who is subjected to it. This is likely to reduce that parent's capacity in many ways, including parenting.

Violence by one parent against the other can thus lead to inadequate parenting by *both* parents, and can therefore compromise the extent to which the child's needs can be met by those parents.

None of this is new or startling. The *Convention on the Rights of the Child* recognises that

> *'the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'.*

The United Nations' report *Ending violence against women: Study of the Secretary-General* notes that research indicates exposure to violence, whether directly or through witnessing the violence, can adversely affect a child's health, and education, noting that these children 'have been found to show more anxiety, depression, trauma symptoms and temperament problems than other children.' Similarly, the National Council to Reduce Violence against Women and their Children provides the following summary of the link between poor parenting and family violence:

Given children are dependent on adult caregivers to provide them with a safe environment and to share their sense of what is normal and right, any form of domestic and family violence harms children, whether they are directly or indirectly a target or victim of abuse'.[28]

Finally, the AIFS Report says:

From the perspective of healthy child development, continued high conflict seriously erodes parental attunement to the needs and experiences of their children…[29]

In summary, violent responses, whether directed at a child, or at or between adults on whom the child depends, are simply incompatible with caring for that child's needs. In this sense, violent responses, along with ongoing, unresolved adult-to-adult conflict, can both be understood as significant acts of neglect.[30]

To what extent is family violence a gender issue?

It is necessary to deal briefly with two issues that were the subject of much discussion in the submissions, namely the extent that family violence is a gendered issue, and the extent of 'false allegations'.

The literature reveals remarkably different findings about the extent to which family violence involves violence by men against women. Although the ABS figures, above, and the AIFS literature review[31] suggests that most family violence is committed by men against women, some studies suggest that women engage as often as men in at least some forms of violence. Opinions differ greatly about these matters, and about whether violence by women against men tends to be qualitatively different to violence by men against women. The issue was taken up in some detail in a number of submissions to the Review.[32]

---

28 Background paper, page 25.

29 AIFS Violence Study, page 19.

30 AIFS Violence Study, page 14.

31 The AIFS Violence Study states at p 9: 'Kimmel's conclusion that violence that is instrumental and aimed at maintaining control is overwhelmingly (over 90%) perpetrated by men, is broadly in accordance with almost all the literature that has examined this category of violence […] Gender is embedded in the social, the economic and the psychological. It is an important story, and there is no doubt that men perpetrate most of the serious violence-related damage both to themselves and to women. At the same time, gender is not the whole story.'

32 For example, submission 23 said that of the 90 men assisted by its *Men's and Children's Accommodation and Crisis Service* over the period 1999-2002, 40% reported 'that they had been seriously abused by their female partners (within the ACT Police's definition of "domestic violence")', and 20% reported that they 'had been victims of serious physical violence by their female partners'.

The answer to this question may well be of considerable importance for some purposes, for example the design and resourcing of support services for victims of violence, both male and female. It may be, too, that an understanding of the relevance of gender would help us deal sensitively with male as well as female victims of violence: it seems possible that their experiences might be somewhat different, and perhaps the most appropriate ways of interviewing and screening might be different when the person alleging violence is a male, just as the way of dealing with victims from different cultures or groups in the community might need to be tailored so it is appropriate for those people.

However it is not necessary for the purpose of this Review to express an opinion about the amount or characteristics of violence by men against women compared to violence by women against men. The Wingspread Conference dealt with the problem as follows:

> *Many conference participants felt strongly that domestic violence is not gender neutral, that gender inequality underlies the violence in many families, and that family court systems must be alert to issues of gender both in the cases coming before them and in their own processing of those cases. At the same time, there was a general recognition that not every case of domestic violence is male initiated and that the ultimate obligation of the court system is to address each case on its own merits*

The last sentence pin-points the task facing the courts, and explains why it is not necessary that this Report be based on any particular view about the connection between gender and family violence.

A number of submissions referred to the problem of violence by women against men.[33] My impression from conversations with and submissions from legal practitioners is that their cases involved issues by women against men, although much less commonly than the reverse. This was the unanimous view of a group of specialist family law firms in the ACT.[34] No doubt male victims of violence also face difficulties in family law proceedings. One legal firm commented:

> *"When representing male alleged victim of domestic violence it is often difficult to assure the client that their complaints and allegations will be taken seriously against a presumption or an assumption that because they are men…the man's complaint can't be 'real'" (Dobinson)*

---

[33] Submission 47, 48 and 61.

[34] Submission 2.

The family law system needs to respond appropriately to each particular case, and deal fairly with the allegations and evidence. It would be wrong for the system as a whole, or for individuals working in the system, to approach the problem with preconceptions about the matter. Even if family violence, and especially the more serious forms of family violence, involves men being violent to women more than women being violent to men, it would be a mistake to assume that women's violence against men does not exist, or cannot be a serious matter. Any individual who makes allegations, and any individual who defends them, requires a fair hearing and fair treatment, regardless of gender. And it is important that all litigants understand that the system makes no pre-judgment about whether violence has or has not happened in a particular case, or how serious it might be.

The issue of 'false allegations'

In a similar way, widely different views have been expressed, both in the literature and in the submissions to this Review, about the incidence of 'false allegations'.

I put the expression in quotation marks because it is ambiguous.[35] An allegation can be true or untrue. If untrue, the lack of truth might relate to the whole allegation or only to some detail. The untruth might reflect an honest error, a deliberate desire to fabricate evidence and deceive the court, or it might be in the nature of an exaggerated or unduly colourful account of an event. Again, an allegation might be corroborated by other evidence or be uncorroborated: but in either case, it could be true or false. Finally, it is quite possible that two people give very different accounts of an event, in each case with perfect honesty, but in each case their recollection is much affected by the emotions involved. In such cases each person may conclude, genuinely but wrongly, that the other party has intended to mislead the court. The expression 'false allegation', if undefined, could refer to any of these situations.

All this applies equally to *denials* of family violence.

In my view it is likely that in many cases of conflicting evidence, the reason for the conflict is something other than a deliberate desire by one party to fabricate evidence and mislead the court. Nevertheless, there will surely be some cases in which litigants do indeed fabricate evidence for their own advantage. Sometimes, that will become obvious at a hearing, but more commonly the judicial officer will have no way of knowing whether a person has

---

[35] On this topic, see also the discussion in the AIFS Violence Study at 21-23.

fabricated their evidence. That is why judges often limit themselves to saying that they prefer the evidence of one person to another. That is a sufficient basis to make a finding of fact and determine the case, and avoids the injustice and distress that would be entailed if the judge called someone a liar when that was not so.

The AIFS study referred to claims 'that separated mothers routinely make false accusations of family violence and/or child abuse for revenge or to gain a tactical advantage in child custody disputes, with the aim of reducing their former partner's involvement in their children's lives or of cutting them out altogether' and said they were 'now largely debunked by the research community'.[36] However it also found that such views seemed to be held by many in the community – both men and women – referring to a telephone survey of 2000 people in Victoria finding that 46% of respondents agreed with the statement that "women going through custody battles often make up claims of domestic violence to improve their case".

As in the case of the relevance of gender in family violence, it is not particularly important for the purpose of this Review to know the amount of fabricated evidence among those who allege family violence and those who deny it. It is obvious that the family law system has to be alert to the possibility that any party or witness might be inventing stories to gain advantage in the litigation. It is equally obvious that fairness means that the court should not approach a case by assuming it is likely that either the allegation or the denial will be fabricated. As in other respects, men and women, and those alleging violence and those denying it, must be able to approach the court believing, correctly, that they will get a fair hearing. For this reason, too, it is important that the legislation should not give the impression that the court will approach a case with some preconception about the likelihood of one or other party seeking to mislead the court.

I should add that although much opinion was expressed on the subject, I am not aware of any good evidence to suggest that allegations of violence are more or less likely to be untrue, or to be fabricated, than denials; or that any evidence about family violence is more or less likely to be unreliable than evidence about anything else.

---

[36] AIFS Violence Study, page 1.

1.4 A THEME FOR REFORM: DISCLOSURE, UNDERSTANDING, ACTION

A theme that recurred in the course of the discussions and reading during the Review was that family violence must be disclosed, understood, and acted upon. This seems true at every point in the family law system – whether we are thinking of a lawyer interviewing a client, a dispute resolution practitioner dealing with a new case, or the work of a counter clerk at a family court, or of a judicial officer. In each case a proper response requires that the violence be disclosed, understood and acted upon.

This simple analysis suggests a useful approach to reviewing the various components of the system, and the system overall: how adequately does each component foster disclosure and understanding of family violence, and contribute to an appropriate response? As will be seen, this seems a fruitful question to ask about the legislation, the various rules and procedures of the system, and the way individuals go about their work in family law.

Each of the three steps presents a challenge for the system. There are factors that tend to inhibit victims of violence from disclosing it at all. When it is disclosed, understanding what is involved may be no easy task – family violence takes many forms, and it is easy to miss, or misunderstand, what is going on. Most obviously, even when family violence is disclosed and understood, the task of responding appropriately to it can present very difficult choices.

The three step analysis is not, of course, the whole story. The family law system needs to focus on the child's interests, distinguish between true and false claims and denials, and provide affordable and expeditious justice. I hope these and other matters will be given appropriate consideration in the Report. Nevertheless, improving the family law system in this area requires that we work towards the goal of ensuring that when family violence occurs, it is disclosed, and understood, and that there is an appropriate response.

PART 2: PRACTICES AND PROCEDURES OF THE FEDERAL FAMILY COURTS IN CASES WITH FAMILY VIOLENCE ISSUES

2.1 PRELIMINARY

Introduction

This Part is primarily concerned with what the Terms of Reference refer to as the appropriateness of the practices and procedures relating to matters before the federal family courts where issues of family violence arise, and 'whether the legislation and procedures support best practice for handling family violence matters'.

It is a somewhat complex topic. The relevant rules and procedures are contained not only in the Family Law Act 1975 but also in the rules formulated for each of the two courts; and it will also be necessary to consider matters of policy and practice relating to both the Family Court of Australia and the Federal Magistrates Court. Although issues of family violence can arise in other cases before the family courts, the focus here will be on parenting proceedings – that is, proceedings under Part VII of the Act in which at least one party seeks a parenting order. Parenting orders may include various aspects relating to the care of a child, such as with whom the child is to live, spend time or communicate and the allocation of parental responsibility for the child. The orders may also include procedural matters including processes for resolving disputes about the effects of the order.[37] Orders can be made following adjudication, or - as the majority are - with the parties' consent.

It will be necessary to discuss the procedures that apply generally to parenting cases as well as the specific rules that apply to cases involving issues of family violence.

Because of the complexity of the topic, a detailed account of it is set out in Appendix 3 (Family Court) and Appendix 4 (Federal Magistrates Court). In this chapter it will be sufficient to discuss the main issues; readers who wish to know more detail may consult these appendices.

---

[37] Paragraph 64B(2)(h), *Family Law Act 1975*.

The Family Court of Australia and the Federal Magistrates Court

The 'federal family courts' referred to in the Terms of Reference are the Family Court of Australia and the Federal Magistrates Court, both of which exercise jurisdiction under the *Family Law Act 1975* to hear family law matters.[38] They are the main courts in which parents may seek judicial determination of the arrangements for the care of their children following family separation.[39]

The Family Law Act sets out in Part VII the legislative requirements applicable to parenting proceedings, including the principles to be applied and some matters relating to procedure. It applies whether the proceedings are in the Family Court or the Federal Magistrates Court.

More detailed aspects of procedure are dealt with in the Rules made under the authority of the legislation.[40] In the case of the Family Court, the Rules are the *Family Law Rules 2004*; in the case of the Federal Magistrates Court, they are the *Federal Magistrates Court Rules 2001*.

Because the Federal Magistrates Court is not a specialist family court (it also deals with other types of cases), its Rules deal with matters other than family law cases. There is however a part of the Rules that specifically deals with family law proceedings, and on some matters the Federal Magistrates Court Rules adopt some of the rules in the Family Law Rules 2004 (ie the Rules that apply in the Family Court). In addition, the Family Law Rules 2004 will apply to fill in any gap that might be left in the Federal Magistrates Court Rules.[41]

Although each court has jurisdiction to deal with parenting matters, in practice arrangements exist under which, broadly speaking, the more complex cases go to the Family Court (the legislation provides for cases in one court to be transferred to the other). Applicants are instructed not to file a parenting matter in the Family Court unless it is 'of a complex nature

---

38 Sections 31, 39, Part X, *Family Law Act 1975*, Section 10, *Federal Magistrates Act 1999*.

39 In Western Australia, effectively the same jurisdiction is exercised by the Family Court of Western Australia, a state court. Some limited jurisdiction under the Family Law Act is also exercised by the local or magistrates courts in the states and territories, but these too are state courts.

40 Section 123 of the *Family Law Act* provides, in substance, that a majority of judges of the Family Court can make rules of court 'providing for or in relation to the practice and procedure to be followed' in the Family Court, but not in the FMC: subsections (1) and (1A). Similarly, s 81 of the *Federal Magistrates Act 1999* provides for a majority of the Federal magistrates to make rules of court relating to practice and procedure in the FMC.

41 The *Federal Magistrates Act 1999* provides, in substance, that the Family Law Rules (ie the rules that apply to the Family Court of Australia) apply, with necessary modifications, to the extent that the Federal Magistrates Court Rules are insufficient.

requiring the determination of the Family Court of Australia'.[42] Although 'complex nature' is not defined, it probably refers to cases involving multiple parties, for example where child welfare agencies are involved, cases where there are the allegations of sexual abuse or serious physical abuse of a child, 'family violence and/or mental health issues', or cases where a party seeks orders preventing a parent from having any contact with a child, and cases where there are 'multiple expert witnesses, complex questions of law and/or special jurisdictional issues, international child abduction under the Hague Convention, special medical procedures and international relocation'.[43]

The Family Court of Australia (the Family Court) was established as a superior court of record in 1976 by the *Family Law Act 1975*. Appeals from a judge of the Family Court go to a Full Court of the Family Court, normally consisting of three judges;[44] there can be a further appeal to the High Court of Australia in the rare cases where the court grants special leave.

The Federal Magistrates Court was established under the *Federal Magistrates Act 1999*[45] and commenced operation on 23 June 2000. Appeals from family law decisions of Federal Magistrates go the Family Court, where they are heard either by a single judge or a bench of three. The 'objects' stated in the Federal Magistrates Act 1999[46] and in the Rules,[47] emphasise that the court is to be informal, fast and cheap, and is to encourage settlement.

---

42 Initiating Application Kit (do it yourself kit), Family Court of Australia website, <http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/forms_fees/All+Forms/D+to+M+forms/Initiating+Application+Kit+%28do+it+yourself+kit%29>, as viewed 14 September 2009.

43 Family Court of Australia – Annual Report 2007–2008, Part 2, pages 11-12.

44 The court is divided into two Divisions, the Appeal Division and the General Division: Section 21A, *Family Law Act 1975*.

45 Section 8, *Federal Magistrates Act 1999*.

46 Section 3, *Federal Magistrates Act 1999*,(to 'enable the Federal Magistrates Court to operate as informally as possible in the exercise of judicial power', to use streamlined procedures, and to 'encourage the use of a range of appropriate dispute resolution processes'). The section also states that the main object of the Act is 'is to create the Federal Magistrates Court under Chapter III of the Constitution'. Section 42, which provides that the Federal Magistrates Court 'must proceed without undue formality and must endeavour to ensure that the proceedings are not protracted', is in the same terms as s 97(3) of the *Family Law Act*.

47 Federal Magistrates Rules, r 1.03 (…'to assist the just, efficient and economical resolution of proceedings', …'to operate as informally as possible', to 'use streamlined processes', and 'to encourage the use of appropriate dispute resolution procedures'. The rule also provides that 'to assist the Court, the parties must 'avoid undue delay, expense and technicality and consider options for primary dispute resolution as early as possible'. It also says that 'if appropriate, the Court will help to implement primary dispute resolution'

These themes are echoed elsewhere.[48] There is no separate statement of objects in relation to family law matters.

The work of the Federal Magistrates Court is about 90% family law,[49] but it also hears applications relating to a broad range of federal laws including child support, bankruptcy, migration, administrative law, human rights, trade practices, and intellectual property. In practice, some Federal Magistrates specialise in family law while others hear matters across a range of federal law. The Federal Magistrates Court now deals with the majority of family law matters.[50]

As a result of cooperation between the two courts – which have had to share resources since the Federal Magistrates Court began – and in particular a recent development called the 'combined registry initiative', the two federal family law courts now operate a single registry, in which all proceedings before the two courts are commenced. The Initiating Application (Family Law) now provides for parties to elect into which court the application is filed. The federal family law courts have recently entered into a Memorandum of Understanding (MOU) about sharing administrative resources and the working relationship between the two courts.

At the time of writing this Report, the Federal Magistrates Court and the Family Court of Australia are separate courts. In May 2009 the Government announced that it accepted the recommendation of the Semple Committee that the two courts should be merged into one Family Court of Australia, which would have two tiers, the lower tier replacing the Federal Magistrates Court. This possible development does not need to be considered in any detail in this report, since the issues relating to family violence, and the questions relating to the most appropriate procedures, will remain the same whether there is to be one court with two

---

48 The Explanatory Memorandum to the Federal Magistrates Bill 1999 emphasised that the procedures the Federal Magistrates develop are to be streamlined and uphold the ethos of simplicity and efficiency: Federal Magistrates Bill 1999, Explanatory Memorandum, paragraph 66. Similarly, the MOU between the two courts of 2004 said that the purpose of the Federal Magistrates Court was to 'improve access and lower the costs of justice for less complex matters': *Memorandum of Understanding (MOU) Between the Family Court of Australia and the Federal Magistrates Court for the Provision of Services*, 1 July 2004, clause 1, <http://www.fmc.gov.au/html/moufca.html>.

49 For 2007-08, family law matters comprised 91.7 per cent of the matters before the Court: Federal Magistrates Court of Australia 2007–08 Annual Report, Part 3, page 28.

50 During 2007–08, over 79 per cent of first instance family law applications were filed in the Federal Magistrates Court.

divisions or two separate courts (although no doubt the implementation of any recommendations would require different mechanisms).

The incidence of family violence concerns in cases coming before the Family Law Courts

Many of the parenting cases coming to the family courts raise issues of violence (often combined with other issues, such as the impact of mental illness or substance abuse). In 2003 a study by AIFS of 300 cases found that more than half the cases coming before the family courts were found to involve issues of violence.[51]

As might be expected, the proportion of cases involving violence was higher among the cases that needed adjudication, and many of the cases involved what the researchers considered allegations of 'severe' violence. The frequency and severity of allegations lead the researchers to conclude that for cases litigated in the Family Court 'allegations of violence appeared to be "core business"'.[52] The incidence of violence issues in Federal Magistrates Court cases was somewhat lower (62 - 67%) than in the Family Court (79%), but was still well over half the cases requiring adjudication. Allegations of child abuse frequently accompanied allegations of family violence.[53]

The researchers noted that caution should be applied when drawing inferences across the family law system from a study of 300 cases,[54] but the research (consistently with the anecdotal evidence I received during this Review) indicates that issues of family violence (and often associated child abuse concerns) form a significant part of many parenting cases that come before both the federal family law courts.

The high number of cases involving violence issues is relevant to this Review. It means, in my view, that it would be unrealistic to treat issues of violence as if they were exceptional. The implications of this will be further examined elsewhere in this Report.

---

51 AIFS Violence Study p. 67.

52 AIFS Violence Study p. 110.

53 AIFS Violence Study p. 67.

54 AIFS Violence Study p. vii.

Differences in procedures between the Federal Magistrates Court and the Family Court of Australia

Although the Family Law Act applies to both courts, the rules applicable are not identical. Details are set out in Appendices 3 and 4. The more important differences appear to be the following.

Affidavits

In the Family Court when applying for final orders parties are not permitted to file an affidavit in support of the application. Instead they must complete a questionnaire. The filing of affidavits occurs at a later stage. Affidavits are filed, however, in relation to interim applications. By contrast, in the Federal Magistrates Court affidavits are normally filed together with the application.

Registrar management

In the Family Court, initial procedural matters are normally handled by registrars. In the Federal Magistrates Court, cases are initially allocated to a Federal Magistrate, who will then normally remain in charge of the case until it is completed.

The 'less adversarial trial'

Although Division 12A applies to proceedings in both courts, the particular practices known as the 'less adversarial trial' in the Family Court are not generally adopted in the Federal Magistrates Court. In the Federal Magistrates Court, each Federal Magistrate handles the case as he or she sees fit, without necessarily adopting any particular practice; although, of course, applying the provisions of Division 12A.

The Child Responsive Program

Similarly, there is no equivalent in the Federal Magistrates Court to the 'Child Responsive Program' that has been developed in the Family Court. In the Federal Magistrates Court, litigants are frequently referred out to dispute resolution, which is a confidential process. Under the Family Court of Australia's Child Responsive Program, the parties' interactions with the family consultant are not confidential, and reference can be made to them later if the Family Consultant gives evidence.

Consent orders

Different rules apply in relation to consent orders. In particular, r10.15A of the Family Law Rules 2004 (which requires parties to explain how orders attempt to deal with the issues in child abuse cases) does not apply in the Federal Magistrates Court.

Family consultants and other resource issues

It appears that the Federal Magistrates Court may have less access to family consultants. On this and other resource issues, it has not been possible to identify all the facts and issues. It does appear, however, that in practice the Federal Magistrates Court does not often have family consultants available to do the work that they do in the Family Court 'less adversarial trials', and it has to rely more on external sources for family reports.

2.2 THE ROLE OF THE FAMILY LAW COURTS AND THE PURPOSES OF THEIR RULES AND PROCEDURES

Introduction

Applying the Terms of Reference involves some assumptions about the nature of the family law courts. The answers to questions such as what is 'best practice', and whether the court provide appropriate support for families at risk of violence will depend in part of what is seen as the nature and role of the family courts. In this discussion I will suggest that an understanding of the purposes of procedures in the family law courts requires a model of the courts that goes beyond the traditional 'adversarial' view of what courts do.[55]

The traditional ('adversary') model

It has been customary to think of courts in our legal system as based on 'the adversary system'. In the adversary system, the initiation and control of the proceedings is largely in the hands of the parties. They essentially control what happens. Cases come before the court only when one person (the 'applicant') starts a case, seeking some remedy against another

[55] Limitations of time for this Review mean that this discussion cannot be detailed or thoroughly researched. There are many qualifications to be made to some of the propositions made. For example, the discussion of the adversary system does not examine the extent to which public interests play a part. Nor does the discussion attempt to deal with the vast recent literature on matters of civil procedure. However some general analysis at this level is necessary, and I hope that this discussion, for all its limitations, helps to identify the problems, and the possible solutions, to the questions posed in the Terms of Reference.

party (the ‘respondent’). It is for the applicant to decide what orders to seek, and what evidence and argument to put before the court. Similarly, it is for the respondent to decide whether to defend the proceedings, and what evidence and arguments to use.

Traditionally there is a single trial, or hearing, in which the evidence and arguments are presented, at the end of which the judge makes orders that dispose of the case and delivers a judgment that makes the necessary determinations of fact and applies the relevant rules of law, and thus contains the reasons for the orders.

Such proceedings are characterised as ‘adversarial’ because the conduct of the case is in the hands of the adversaries, the parties. It is sometimes said that the adversarial system is not really a search for the truth, only for the better of the two stories presented to the court. There is some substance in this. Because the judge does not conduct any independent inquiry or investigation, the court is indeed limited to hearing the stories the parties tell, and, while its task is to assess the plausibility of these stories, it has no way of knowing whether either is true: the court will never know whether there might have been other evidence, not called by either party, that would have led to a more accurate result. Thus if neither party presents the true facts, the judge might perform the task impeccably, judging the two cases presented to the court, and yet reach a result that does not reflect what is actually true.

The court needs to make arrangements for cases to come on for a hearing: ‘case management’. Under the adversary model, case management is directed to ensure the orderly disposition of cases, ensuring, for example, that parties are not taken by surprise, that cases are heard in appropriate sequence (urgent cases may be given priority) and that the court’s time is not wasted. To ensure the court’s time is not wasted, one finds systems of pleading or other measures to ensure that by the time the case come on for hearing it is clear what the issues are, and each party has had a chance to assemble their evidence and argument. Also, especially in recent times, the court encourages settlements, for example by supporting mediation and other dispute resolution techniques. Within the adversary model, a settlement represents an excellent outcome: it is what the parties want, and the case gives way to allow the court to deal with other cases that require adjudication. In recent times, there has been increasing emphasis on making efficient use of the court and its resources.

Based on this model, one might say that the objective of family courts, like that of other courts, is to 'facilitate the just, quick and cheap resolution of the real issues in the proceedings'.[56]

Features of the Family Law Courts that do not entirely fit with the adversary model

The adversary model just summarised does not entirely fit the role of the family courts in children's cases. There are at least four reasons for this: the 'paramount consideration' principle, the idea that the court process should not harm children or parties, the need to address the *process* of family separation and its consequences, and the role of the court as part of a *system* of support for families.

First, the principle that the child's best interests must be the paramount consideration means that the court has a commitment to the interests of a person, the child, who is not normally[57] a party to the proceedings. This contrasts with the adversary model, in which the main issues relate to the competing interests claimed by each of the parties. This principle has profound implications for the way the court handles the case. For example, it means that the court is not bound by the proposals advanced by the parties. It has an obligation to consider other possible outcomes, if it thinks some other outcome might be better for the child.[58] Similarly, whereas under the adversary model the court does not query applications for consent orders (because the court normally assumes that the parties are the ones to determine what is in their own), under the Family Law Act 1975 the court still has an obligation to treat the child's best interests as paramount, and may refuse to make a consent order that it considers would not be in the child's interests.[59]

Second, the emphasis on the child's interests also leads to the idea that the court *process* itself should benefit children, or at least should damage them as little as possible.[60] Consistently

---

56 Civil Procedure Act 2005 (NSW), s 56.

57 Although it is theoretically possible for children to be parties – s 65C(a) - in practice this is very rare.

58 *U v U* (2002) 29 Fam LR 74 (High Court of Australia)

59 *T & N* (2003) 31 Fam LR 257; (2003) FLC ¶93-172 [2003] FamCA 1129 (Moore J).

60 It is true that since the 1995 amendments the *Family Law Act 1975* has limited the application of the paramountcy principle, for example to the making of parenting orders, and, read technically, it may have a less pervasive application than it did previously. See See Family Law Council, *Letter of Advice on the 'Child Paramountcy Principle' in the Family Law Act 1975* (2006). However in practice it remains of fundamental and pervasive importance. Also, courts exercising jurisdiction under the Act are required by s 43 to have regard, among other things, to the need 'protect the rights of children and to promote their welfare'.

with this, there are restrictions on the extent to which parties can have children interviewed and examined for the purpose of litigation. Again, one of the purposes of the use of family consultants, and of the less adversarial proceedings, is to help the parties identify and focus on the interests of the children, rather than their own conflict. These processes often include a deliberately educative component, which may involve confronting the parents with information about the child's views and understanding of the situation, and may involve helping parties to understand more general facts about child development and children's needs.

The idea that the process itself should not harm the children implies also that the process should not harm the parties, since the children's interests will normally depend to a large extent on the parties' continuing capacity for good parenting. Thus the process itself should do whatever is possible to help reduce conflict between the parties and avoid damaging them.

Third, whereas on the traditional adversary model the court's essential task is ended by the court making a single final adjudication of the rights of the parties, family courts have to deal with a continuing process for the family. After the 'final orders', the parents and children normally remain involved with each other, and will have to continue to deal with difficulties and differences. A number of features of the present system illustrate this point. When the case first comes before the court, for example when it deals with interim matters, the purpose of the exercise is not simply to prepare for the final hearing: the child's best interests remain paramount, and the court has to consider what orders, dealing with the period leading up to the trial, will be best for the child. Similarly, sometimes in difficult cases the court will adjourn a case in order to review at a later time how particular arrangements have worked. The court may also order the parties to attend family counselling, family dispute resolution and other family services.[61] Indeed, the court may require the parties to attend post-order programs, designed to assist them in their continuing parenting when the court's orders are in operation.

Fourth, the family courts do not stand alone, but are increasingly thought of as part of the 'family law system'. Other parts of the 'system' include the community-based dispute resolution services, notably the Family Relationships Centres established and funded following the 2006 amendments, the state and territory child protection departments, various

---

[61] Section 13C, *Family Law Act.*

services for families and children such as the child contact centres, the Australian Federal Police and state and territory police, and so on. The work of the 'family pathways' groups in seeking to help those working in different parts of the system understand each other and work together is a manifestation of this way of thinking, which stems in part from the 'Pathways' Report of 2001.[62] As it was said in the Family Relationship Services Australia submission:

> *We recognise that the Family Courts are a central and significant component of the family law system but they do not operate in isolation.*
>
> *The capacity and performance of the broader service system has a significant impact on the outcomes for families and children who have contact with the court. This includes the range of services that collectively make up the 'Family Law System' encompassing the legal aid commissions, community legal centres, private practitioners, government-funded family relationship services and government agencies. Related service systems including law enforcement, child protection, mental health and drug and alcohol services also contribute to improving the safety and wellbeing of children and parents affected by family violence.*

The features that set the family courts apart from the adversary model are emphasised in Division 12A of the Family Law Act, which was inserted into the Act by the amendments of 2006. These provisions involve what is generally known as the 'less adversarial' approach.

The key section for present purposes is s 69ZN, which says that the court must give effect to certain principles when 'performing duties and exercising powers' and when 'making other decisions about the conduct of child-related proceedings'.[63] The principles are:

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'.

Principle 2: 'the court is to actively direct, control and manage the conduct of the proceedings'.

Principle 3: 'the proceedings are to be conducted in a way that will safeguard:

---

62 Out of the Maze: Pathways to the future for families experiencing separation: Report of the Family Law Pathways Advisory Group, July 2001.

63 Broadly speaking, the other provisions in Division 12A give the courts a range of powers that increase the ability of the court to control the proceedings. The application of the rules of evidence is also modified.

(a) the child concerned against family violence, child abuse and child neglect; and

(b) the parties to the proceedings against family violence'.

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.

Principle 5: 'the proceedings are to be conducted without undue delay and with as little formality, and legal technicality and form, as possible'.[64]

The family law courts' objectives

For these reasons, the traditional 'adversary' model does not give an adequate idea of what the family courts are and how they work. Having regard to the features indicated above, the basic objectives of the family courts in relation to children's cases could be usefully summarised as follows:

1. To facilitate the just, quick and cheap resolution of disputes about children; and

2. To provide authoritative support for children experiencing conflicted parenting.

The first of these objectives reflects the traditional role of the court, and picks up the language of the Civil Procedure Act 2005 (NSW).

The formulation of the second objective is intended to recognise the four elements described above. Some further discussion of this second objective is necessary.

The reference to providing support to children reflects the 'paramount consideration' under the Family Law Act 1975. This is also emphasised by Principle 1 and Principle 3 of Division 12A, quoted above. Providing support could consist of a single decision, or a series of decisions over a period of time, and is not confined to the adjudication of disputes. It would include, for example, an order requiring the parties to attend some external counselling or other service, or an order appointing an Independent Children's Lawyer. The idea that the court should actively manage the proceedings is a strong theme of Division 12A, stated clearly in Principle 2.

---

[64] The fifth principle repeats the language of s 97 of the Act.

The adjective '*authoritative'* indicates that what distinguishes the role of the court from that of other agencies is its power to make legally binding orders.

The term '*conflicted parenting*' emphasises that it is the conflict between the parents that has brought the matter to the court and may continue to be the problem. The adjudication of particular disputes may in some cases finalise the matter, and remains a vital part of the courts' role, but more often the court has to deal as best it can with the underlying problems, which can compromise the parents' ability to provide for the child's developmental needs.

The formulation does not expressly refer to the courts being part of a system, but it is intended to be implicit. It is obvious that authoritative support of children experiencing conflicted parenting will be more likely to contribute to children's interests if it is done as part of a system of support for families.

This analysis of the current role of the family courts will, I hope, assist in the identification of possible improvements to the present system.

Before leaving this topic, two observations should be made. First, it foreshadows the position adopted later in this Report, that there is no real difference in the roles of the two courts, and in principle there seems no reason why there should be different procedures in each. Second, it is a description of the existing role of the courts. It is a question of policy how far the courts should be expected to engage in authoritative support of children in conflicted parenting, and what resources and facilities this task might require.

The purposes of practices and procedures in the family law courts

It seems useful to identify the purposes of practices and procedures in the family courts. Seven purposes can be identified, the first three generally reflecting the first of the two objectives (the just, quick and cheap resolution of disputes) and the remainder having more to do with the second (the authoritative support of children).

1. Defining issues and identifying evidence

As in all civil justice courts, there are rules about the way proceedings are commenced and what each party needs to do thereafter. They provide for the applicant to file some document setting out the nature of the application, for that to be served on the respondent, and for the respondent then to file and serve a document setting out the respondent's position: thus each

party knows what orders the other seeks.[65] In addition, there are procedures for parties to file affidavit evidence: thus each party knows the nature of the evidence each party will use. There will also be opportunities for discovery, for documents to be subpoenaed, and for other measures taken to ensure that (to put it simply) each side puts their cards on the table.

Ideally, this process will lead to a situation in which there is no misunderstanding about what each party wants, and irrelevant and inadmissible material is eliminated. As lawyers say, 'issue is joined'. Ideally, this situation should maximise the possibilities of the parties reaching agreement, since as far as possible the parties know where they stand.

2. Setting a timetable

Second, there are procedures having to do with setting a timetable for the conduct of the case. This process includes identification of cases that have priority and aspects of cases that need urgent consideration (for example, an urgent application to prevent a party from taking a child overseas).

3. Facilitating settlement

Third, there will normally be processes that encourage the parties to reach agreement. In the family law system, there are measures encouraging parties to reach agreement even before they approach the court. In addition, in family law as in other areas there are mechanisms that encourage settlement at every stage as the case progresses, up to and including the final hearing.

4. Risk assessment

At present, the procedures do not specifically deal with risk assessment. However there are special procedures dealing with certain types of risk, namely the risk of family violence and child abuse that might flow from parenting arrangements. There are also measures in place to deal with risk to persons attending court.

As will be discussed, it is an important question of policy whether this objective should continue to be limited to these categories of risk or extended to a process of risk assessment generally.

---

[65] In some areas of law, but not family law, this process is assisted by the filing of pleadings.

5. Early intervention

Another objective of some of the existing procedures could be described as 'early intervention'. That is, the court takes some early initiative to attend to the best interests of the child, even if this is not necessarily applied for by one of the parties. An example would be notifying the state or territory child protection department where there are concerns about a child's safety.

Early intervention is different from merely facilitating a settlement, since the focus is on the child's best interests, not the reaching of agreement in itself. In many cases, of course, the two objectives coincide, since it is normally in the child's interests for the parties to agree on arrangements. A procedure whereby parties are referred to counselling could be seen as combining the two objectives: the counselling would be intended to help the parties understand and focus on their children's needs and interests, and, if possible reach an agreement that would benefit the child.

6. Evidence gathering

The traditional role of the courts is to *receive* evidence (from the parties), not gather it. But some of the rules and procedures of the family law courts go beyond this and can only be explained by reference to the court seeking to gather some evidence that is important for the child's interests, whether or not the parties seek to put it before the court. This objective underlies some of the powers of the judicial officer under Division 12A, and explains some of the provisions (and protocols) that bring to the court evidence from outside agencies, such as the state and territory child protection departments.

7. Referral and support

Finally, it is one of the objectives of the system that the court should provide appropriate referral and support for family members who come to the court. This objective is more evident in matters of practice than in the written rules of procedure.

2.3 DISCUSSION AND RECOMMENDATIONS

Seeking 'best practice' in cases with issues of family violence

Existing differences

As mentioned elsewhere, at the time of this Report the two courts are separate, but it is possible that they will be combined into one Family Court of Australia. In these circumstances - and because of the limited time available in this Review – it is not appropriate to make detailed recommendations about specific procedures. However on the basis of information received during the review some general comments might be useful.

An important issue will be the extent to which each of the courts, or each division of a future single court, will have different procedures.

The existing difference between the courts, noted above, seems to derive largely from the different histories and purposes of the two courts. The Family Court of Australia has always been a specialist family law court, whereas the Federal Magistrates Court has been a generalist court whose work happens to be mainly family law. The Act provides that a person must not be appointed as a judge in the Family Court of Australia unless he or she is 'by reason of training, experience and personality, the person is a suitable person to deal with matters of family law'.[66] There is no equivalent provision relating to Federal Magistrates. Although this is a complex issue and the situation changes from time to time, broadly speaking it seems that the resources available to the Federal Magistrates Court, especially resources relevant to the performance of the distinctive requirements of family law, have been more limited than those available to the Family Court. The legislation governing the Federal Magistrates Court contains objectives that perhaps fit more comfortably with the adversarial model than with the objectives of a family court discussed earlier.

The Family Court's 'less adversarial trial' and the child responsive program

Although this Report will not make specific recommendations about what procedure the courts should adopt, a brief comment on the Family Court's 'less adversarial trial' and the child responsive program might be helpful. These are both procedures that have been specifically developed in connection with children's cases, and can be seen as reflecting the

---

[66] Section 21(2), *Family Law Act 1975.*

two objectives of family courts previously identified, namely facilitating the just, quick and cheap resolution of disputes about children; and providing authoritative support for children experiencing conflicted parenting. No doubt these procedures have various advantages and disadvantages, and it is a matter for the courts to assess the evidence on whether they represent the best ways of handling the various types of cases that come before the courts.

In my opinion, however, these processes seem capable of helping the courts deal appropriately with cases involving issues of family violence. In different ways, they have the potential to confront the parents (or other parties) with the children's experiences, and help them understand and focus on their roles as parents and what each needs to do to support the children's developmental needs. This approach has the potential to reduce reliance on allegations that are unrelated to the children's interests, and assist the parties to understand and deal with the consequences that violence will have for the children, whatever the seriousness of the violence, and whether or not it can usefully be characterised as 'couples violence', controlling violence', or in some other way.

Further, the fact that under the Child Responsive Program the communications between the Family Consultant and the family members are not privileged and can be revealed in evidence may help to ensure that the court is informed about issues of family violence. It is an interesting and important question whether litigants generally engage freely in settlement negotiations in circumstances that are not privileged, as in the case of the Child Responsive Program. Information received during the Review suggested that many people seem to discuss the issues remarkably freely in this situation, although some tend to clam up. No doubt one factor is the advice they have received from their lawyers. This is a matter that could be usefully researched, since it relates to the important general issue of the extent to which different dispute resolution processes should be 'privileged' in the sense that evidence cannot be given of what is said there.

In thinking about the advantages and disadvantages of different procedures, this aspect should be given careful attention.

A specialist court

In my view the federal court or courts administering family law should specialise in family law. The persons appointed as judicial officers should ideally be persons who have an understanding of family law and a desire to work in that field. The procedures and resources

of the court (or courts) should be specifically tailored to the requirements of family law which, as suggested above, are not limited to the adjudication of family disputes but can be described as contributing to children's interests by authoritative support of children experiencing conflicted parenting. The procedures and resources of the court or courts should also be such that it can form an essential part of the family law system. In my view the capacity of the court to handle all aspects of family law, and particularly to deal with issues of family violence, will be enhanced if it is specially designed, and specially equipped, to deal with family law.

Recommendation 2.1

That whatever steps are taken in relation to the future of the Family Court of Australia and the Federal Magistrates Court, the Government should ensure that the federal court or courts administering family law have judicial officers with an understanding of family law and a desire to work in that field, and procedures and resources specifically adapted to the requirements of family law, and particularly to the requirements of cases involving issues of family violence.

Different processes for different categories of cases perhaps, but probably not different processes for each court

It is a fundamental challenge for any family law court to deal appropriately with the wide range of cases that come before it, and this may entail different processes being applied to different categories of case. The Magellan program in the Family Court, by which certain difficult children's cases are dealt with separately and with increased resources, is a striking example.

In parenting cases especially, categorising cases is no easy task. Sometimes it may seem clear that a case will be particularly complex, or likely to take a particularly long time, or will require additional resources, but often it will be difficult to categorise cases, since the complexities may only emerge as the case progresses. For example, there seem to be some cases where the conflict between the parties is so intractable that it is in the children's interests that the matter should go to trial and a determination should be made as soon as possible. Perhaps in some such cases the 'less adversarial' processes may delay the inevitable and constitute an inappropriate use of limited resources. In many others, no doubt,

the parties and the children will benefit from the educational process built into the Child Responsive Program.

If this is correct, it suggests that within each court a choice might be made for the disposition of each case. But it does not suggest that the type of procedure adopted should depend on which of the two family courts happens to be hearing the case. Even if, as intended, the most difficult and complex cases go to the Family Court of Australia (or to the higher tier if the courts are to be merged), it seems clear that few if any of the other cases will be simple or easy. They will also be often characterised by the sort of problems that led to the development of the less adversarial procedures, and the child responsive program, including issues of family violence. Precisely because the community-based dispute resolution processes seem to be working well, the cases that are not resolved in that way and require the courts' attention are generally characterised by serious problems that can put children at risk in a variety of ways.

Since there are obviously differences of views about the best way of handling these difficult cases, it seems important for the courts to engage in discussion, evaluation and research to try to identify what procedures are most appropriate. That will be no easy task, because it involves, among other things, balancing the need to process cases reasonably promptly – so that delays do not increase – with the need to deal with each case in a way that is most beneficial for the children involved. Nevertheless, in my view it is desirable for the courts to make a choice about procedures and practices. If 'best practice' can be identified, it should be followed in each court.

Turning to resources, since parenting cases are dealt with by each court, there is no obvious basis for different services being available to each court. The need for family reports, independent children's lawyers, and various support services varies from case to case, and it makes no sense for these resources to be more or less available depending on which court hears the matter.

It may well be, of course, that differences in the kinds of cases heard by each court will be reflected in different levels of need. For example, if the most difficult children's cases are being heard in the Family Court of Australia, as is intended, these cases might require, on average, more specialist reports, involvement by child protection agencies, and other services than the cases heard by the Federal Magistrates Court. But ideally this pattern would emerge

because the system correctly identifies the level of need in each case, not because of some arbitrary allocation of resources to each court.

For these reasons, in my view it would be appropriate, especially when the future of the two courts is known, that the procedures of the courts, especially for parenting cases involving issues of family violence, and the resources to be provided to each court, or each tier if there is one court, be thoroughly reviewed.

Such a review would not be an easy task, and would itself require resources. It is my strong impression from information received during the Review that both courts are very hard-pressed to deal adequately with their caseload with their existing resources, and it would be unrealistic to impose on them the major task of reviewing their procedures without providing whatever additional resources the task might require.

Recommendation 2.2

That the family law courts conduct a thorough review of their procedures and practices in parenting cases, especially those involving issues of family violence, and that the Government provide the necessary resources to support such a review.

The section 60K procedure and screening for family violence

The problem

Section 60K provides, in substance, that the family law courts have certain obligations when a specified document is filed in the course of parenting proceedings. The document, specified in the Family Law Rules, is a *Form 4 Notice of Abuse or Family Violence* ('Form 4'), and it alleges, as a consideration relevant to the orders the court should make, that there has been child abuse or family violence, or there is a risk of either. Under the Rules, a party making such allegations is required to file a Form 4. Upon the filing of a Form 4, s 60K requires the court in effect, to consider urgently what immediate order might need to be made. Details may be found in Appendix 2 and Appendix 3.

There is clear and consistent evidence that Form 4s are often not filed in circumstances where the law (by way of the Family Law Rules 2004) requires them to be. In the course of the Review anecdotal evidence was often given to this effect. In addition, the Federal Magistrates Court has indicated that although statistics are not kept, examination of the two lists in 2009 strongly supported the anecdotal evidence: in Albury there were three Form 4s filed in 204 matters, and in Parramatta there were five filed among 102 matters.[67] Since it is clear that over half the parenting cases involve allegations of family violence, whatever the true statistical picture throughout Australia it is obvious that in many cases Form 4s are not being filed as the law requires. The submission from the Family Law Section of the Law Council of Australia contains a detailed and instructive critique of section 60K and associated provisions.

Hartnett FM has provided a valuable insight into the problems associated with s 60K from the experience of the Federal Magistrates Court. Her Honour suggested, in effect, that since applicants file an initial affidavit in any event, putting the same allegations in a shortened form in the Form 4 involves costly duplication, and that in any case the allegations are considered, and appropriate measures taken, without the need for a Form 4. In her experience, there is rarely a need to grant an injunction under s 68B because 'for the most part State domestic violence orders providing for such injunctions, have already been obtained by one or other or both parties'. Also, s 69ZW orders can be made without the need for a Form 4 when the affidavits suggest that the state or territory child protection department

[67] Submission 16.

has been involved, and in those cases there are usually orders for the appointment of an Independent Children's Lawyer.[68] Her Honour concludes:

> *Thus the filing of a Form 4, which should trigger those considerations set out in section 60K, seems unnecessary. Matters are independently considered by a judicial officer who is confronted with allegations of family violence set out in an affidavit.*

Discussion

One possible response to the evident problem is to take steps to ensure that Form 4s are filed when they should be. Such measures could include education of the legal profession, and an insistence by judicial officers on compliance with the requirements relating to Form 4s. More drastic measures might be a legislative provision to the effect that costs should be awarded against a party, or arguably a party's lawyer, if Form 4s are not filed in a case where it is mandatory to do so. Such approaches, however, do not address the reasons that the s60K process is not currently working and seem unlikely to be effective. Another approach would be to narrow the operation of s 60K and Form 4. At present, Form 4s must be filed, and the process in s 60K thereby triggered, whenever there is an allegation of past violence, even when it is not alleged that there is any present risk. The legislation could be re-drafted to limit the s 60K response to cases where there is alleged to be a present risk. It seems unlikely, however, that this would involve a drastic change, since in the majority of cases where family violence is alleged, the party alleging it would be asserting or implying that there is a present risk.

A more fruitful approach, in my view, starts from reconsidering whether s 60K is an appropriate way of dealing with cases involving family violence.

There is, indeed, something odd about having a special procedure, presumably expected to apply in exceptional cases, that actually applies in well over half the parenting cases that come before the court. As was pointed out in one submission, there should be

> *safety first principles, policies and procedures that recognise Domestic Violence as a mainstream problem affecting a majority of cases going through the Court.*[69]

---

[68] The actual appointment of the independent children's lawyer will depend on the availability of legal aid funds.

[69] Submission 34.

As some commented in the course of the Review, it might make more sense to have an exception for the minority of cases that do *not* involve allegations of family violence. Although perhaps uttered as something of a wry jest, this idea seems fruitful, and leads to the idea of having a risk assessment approach to *all* parenting cases.

A proposal

There is a powerful argument in my view for a process of scrutiny and triage that applies to all cases, and seeks to identify any risk that requires urgent attention. There is no good reason why that process should be limited to family violence, however defined. Some cases where there are serious problems stemming from mental illness, or serious substance abuse, as well as those involving a proposed relocation, might also call for a swift response.

Such an approach is consistent with the view of the participants at the Wingspread Conference (footnotes omitted):

> *There was consensus among conference participants that families entering the court system should be screened for domestic violence, but less consensus about how this should be accomplished. The ideal recommended by experts is that more than one method of screening be undertaken. In current practice, screening protocols can include one or more of the following: the administration of a written questionnaire, the conduct of a screening interview, a check of court and public records, and continued watchfulness for evidence of domination and control.*
>
> *There was consensus that, when cases of domestic violence are identified or when initial screening is insufficient to confirm or rule out the presence of domestic violence, families should be individually considered and referred to appropriate services and court processes. As a part of the screening and review process for each family, risk and protective factors should be identified and mitigated or supported, respectively.*
>
> *Discussions of screening inevitably reproduced participants' concerns about the use of standardized differentiating characteristics, variables, and patterns in the screening process. If the focus of the analysis is on the identification of a serious incident or recurring incidents of physical violence, for example, a historic pattern of coercive control may be overlooked, and the ongoing risk to family members may not be addressed. To avoid such a circumstance, Jaffe, Crooks, and Bala recommend, and conference participants supported, a multimethod, multi-informant approach to family assessment featuring increasingly intense inquiry as higher levels of conflict and abuse are uncovered. Indeed, effective screening may ultimately require use of a variety of screening tools, each developed for a specific purpose and for potential use at*

different stages of the proceeding. For example, while the initial focus of screening might concern lethality and safety, that initial inquiry might trigger a mental health or substance abuse assessment or a further screening to assess the appropriateness of participation in dispute resolution processes such as mediation.

The Wingspread participants indicated that there were currently few screening instruments aimed at differentiating among domestic violence cases, but expressed enthusiasm for what is known as the DOVE instrument. The Report states that this instrument 'links violence prevention interventions with (a) level of risk; (b) the presence of specific types of predictors; and (c) types and levels of violence and abuse' and has been empirically validated by a two-year field study. There should be, in the courts,

screening protocols with the proven capacity to detect domestic violence, steer families toward appropriate services, and guide judicial decision making, conference participants identified three critical additional challenges related to screening and triage.

The Report stresses that screening procedures must be culturally (and socio-economically) sensitive. Cultural perspectives 'are relevant both to risk assessment and to the choice of intervention or of custody or access determination'.

The design of screening instruments poses a challenge. They must be 'sufficiently complex and nuanced to provide accurate information', yet 'simple enough to be administered by people with markedly different educational backgrounds and experience levels'.

The Report also suggests that screening protocols should include feedback loops and opportunities for both additional input by the parties and others and procedures for formal challenge.

The report indicates the importance of screening for family violence in the making of appropriate referrals. If family violence is unidentified, the family could be referred to processes that, 'while helpful to many families, are inappropriate and even dangerous in the particular family situation', and might not be directed to processes and services that could be both safe and helpful. The Report illustrates this point in the context of referrals to educational services (footnote omitted):

Referrals for parenting education were discussed as one example. In many jurisdictions, parents are routinely referred to parenting education courses that stress co-parenting, ongoing contact,

and reducing conflict levels. These messages are ill advised in situations where there has been either a history of violence or a pattern of coercive control. Such parents should be excused from the class or, in the alternative, each parent should be offered, separately, a special parenting skills class that would stress safety planning and parallel parenting and offer domestic violence information and referrals. However, referral to a standard parenting education class could be appropriate (especially if no special class exists) in a situation where a single incident took place at the time of separation and there is no other history of coercive control or abuse. Thus, each family situation must be considered in context and in light of what is helpful and safe for individual family members.

It is beyond the scope of this Report to spell out exactly how the courts should conduct a risk assessment process. While on the face of it a daunting challenge, a number of existing measures can be seen as forming part of an overall risk assessment process. To take a small but instructive example, in one registry an initiative was taken in relation to a particular kind of risk, namely the risk associated with the release of a family report to the parties in cases involving serious violence or child abuse issues. The risk is that release of the report (which may contain damaging findings and comments) could trigger violent actions. It seems that report writers do not always identify such risks. Accordingly, the Manager, Child Dispute Services assesses the risks associated with the release of such reports, and this can lead to the release of the report being carefully managed, a process which is thought to have reduced the risk of violent incidents, and further abuse to children, in some instances. In my view this is a valuable initiative, and an example of one of the many measures that are already being taken, and would form a part of the sort of risk identification and risk management process.

The need for a risk assessment process was suggested in a number of submissions. For example the Federal Magistrates Court submission, as well as making a number of other useful recommendations, referred to the need

To undertake specialist triage/assessment process at an early stage in proceedings where allegations are made of family violence, risk of abuse or harm to children.

Similarly, the National Abuse Free Contact Campaign wrote:

All cases entering the family law system should be screened for the presence of violence or abuse issues and where there is some indication that this is an issue, the case should proceed on a basis of managing and controlling for risks of exposure to further violence and abuse.

It appears to have become widely if not universally accepted that various agencies working in family law need to include screening for family violence as part of their ordinary operation. Legal Aid in Western Australia, for example, has a screening process which provides for a "Coordinator's assessment" on the suitability of the case for alternative dispute resolution. The form includes a list of matters that need to be identified: whether there is or is not a history of family violence, whether there have been safety issues, whether there are likely to be safety issues at a conference that need to be taken into account, as well as other matters such as whether the parties appear to be physically, psychologically and emotionally capable of participating in a conference. Information received from Family Dispute Resolution Centres and other agencies indicated that such processes are generally in operation. It would be consistent with that if the Family Court itself were to have a general process of screening all cases for family violence and other risk factors.

The development of any risk assessment process could draw on the experience of the Family Court of Australia in a pilot program described in the Court's Information Paper:

> *An integral part of the Court's Family Violence Strategy was the screening and risk assessment pilot which ran at the Brisbane Registry from September 2005 to April 2006 inclusive. The aim of the pilot was to ensure that family violence issues were identified as early as possible in the Court's process and, where appropriate, safety plans developed with the client to facilitate their safety at court events and maximise their capacity to participate in court events. The pilot was evaluated by Relationships Australia (South Australia) against the objectives of making the Court more responsive to the needs of clients with family violence issues; the development of procedures to revise operational procedures relating to family violence; and to make recommendations on the suitability of the program for roll-out across all court registries. In summary, the evaluation report found that the pilot generated 'everyday success' in improving clients' perceptions of safety at Court. Client feedback showed that the ability of clients to participate in Court events had been maximised by feeling safer before arriving at Court. The Court achieved this with existing staff capabilities through skills training and without significant extra resourcing.*

It will be advantageous to examine other work that has been done in different registries, and in different courts, in this area. For example a triage system in operation in the Newcastle Registry was mentioned as a valuable initiative. Again, information received about the operation of the Family Court of Western Australia, and a visit to that Court, indicated that some valuable lessons could be learned by studying the practices there. They included, for

example, the fact that an officer of the State child protection authority had an office in the Family Court building, which must have greatly assisted the sharing of information between that authority and the Family Court of Western Australia. A great deal of work has been done on risk assessment in Victoria, manifested in the Common Risk Assessment Framework.

There are already measures in place so that a 'Safety Plan' is created in cases where there is reason to fear violence. Such plans specify steps that should be taken in the case, such as ensuring that each party arrives and leaves the court separately, and that there are private and secure rooms for conferences. Information received during the Review suggested that such plans are not always acted upon, and in some cases are placed inside a file, rather than being displayed prominently, with the result that court staff may be unaware of the plan.

When proceedings are commenced, court staff necessarily attend to the documents that are filed. The initial steps, whether involving registrars, family consultants or judicial officers, could have the explicit function of identifying any risks that the case seemed to involve, whether risks from violence at the court or risks to the children from existing or contemplated parenting arrangements.

An important part of the process would be obtaining relevant information from sources outside the court. A great deal of relevant information will often be available, held by police, child protection departments, other agencies and, in particular, family relationships centres and other agencies providing dispute resolution services. If that information could be available at an early stage, the court would be better placed to assess any risk, and deal appropriate with it. One submission said:

> *In cases where violence or abuse is alleged, all evidence held by all state agencies pertaining to the family should be subpoenaed, collated and assessed. Section 69ZW reports should be routine in all cases where violence or abuse are alleged.*[70]

The matters to be taken into account in such a risk assessment would include a certificate under s 60I to the effect that the matter was not suitable for dispute resolution. Such a certificate should trigger inquiries by the member of the court staff conducting the assessment. If those inquiries revealed concerns about a person's safety, it would be

---

[70] Submission 27.

appropriate for consideration to be given to ensuring that any available documents are available, and any necessary evidence could be given, to enable the judicial officer to be aware of the issues. If the litigant or other person perceived to be at risk is unable or unwilling to give the evidence, consideration might be given to making an application to the court for the appointment of an independent children's representative.

As this initiative is developed, it may prove useful to reconsider the drafting of s 60I. This raises issues beyond the scope of this review, but I note the following suggestions from the Family Relationships Services Australia:

> *Currently Family Dispute Resolution practitioners have limited options for passing on information about risks identified to the Family Court where this would be appropriate. The Certificates prescribed in Section 60I of the Family Law Act allow for limited identification of reasons why Family Dispute Resolution is either inappropriate or unsuccessful.*

The importance of obtaining evidence from external sources – and the difficulties of doing so within the limited adversarial model – can also be seen from the following passage in the submission by the Federal Magistrates Court:

> *Evidence from external sources: the FMC seldom seeks section 69ZW etc orders, but relies on the parties being proactive: 'Courts continue to rely upon the parties to present the material in support of their case by way of presentation of subpoenaed material.' This becomes more problematic where clients are self represented, as subpoenas are rare in these cases. Therefore, obtaining evidence can require legal aid to be granted.*

The crucial importance of corroborative material in violence cases is well illustrated by a case summarised by Hartnett FM:

> *In this matter a Form 4 was filed alleging actual family violence perpetuated by the father upon the mother and a risk of family violence in that it was asserted the father would continue to physically and verbally abuse the mother including in the presence of the very young child. The Form 4 restated matters deposed to in the affidavit. The mother was legally aided. The mother was in a refuge and supported by a worker in the courtroom. There were cultural issues both parties being migrants.*
>
> *The father was legally represented. He initiated the proceedings as he was unaware of the location of the mother and child and required a location order to effect service. He also subpoenaed certain medical records and the State/Territory child protection department file.*

When both parties were before the court they gave a very different history of their marriage. They agreed however that their child should live with the mother, that each would attend a post separation parenting programme and that they would attend upon a mutually appointed psychiatrist for the preparation of a report to be produced to the Court.

The Court ordered an Independent Children's Lawyer, a family report and supervised time between father and child of three hours each week supervised by a private agency and in the father's house but with no other persons save the child, father and supervisor to be present. Contact centre involvement was not ordered because of the lengthy wait before 'time spent with' could commence, as one of the reasons.

In reaching that determination as to time spent, the Court had to consider very concerning evidence of the mother, denied by the father and of the father, denied by the mother. Both parties had been on anti-depressant medication.

The mother's evidence was that separation finally occurred as a result of an assault perpetrated upon her by the father. She said he hit her in the face with an open hand causing her to fall and her nose to bleed. She claimed he continued hitting her on the face and head, pulled her hair and screamed abuse about her mother. Family members pulled him off her, she rang the police and they attended the home, arranging for her and the child to obtain temporary crisis accommodation […].

The husband's case was that he had observed the mother to shake the child and that she had told him that she would kill herself and him and hurt the child. He said he had become so concerned that he had discussed the mother's behaviour with his general practitioner. As to the violent episode which commenced the separation, the husband's evidence was that:

> *"She had been angry with me for a few days. She came into the room and started pushing and punching me and punching herself. I tried to stop her but she kept punching herself. We fell onto a wardrobe. She punched herself in the head and her nose bled. This self-harming behaviour continued for about five minutes."*

The father claimed that he had the support of his Doctor – that it was very dangerous to leave the child with the mother – and that his Doctor had conveyed this view to the State/Territory child protection department.

The Court was told Counsel for both parties had inspected the subpoenaed material. The material was not introduced into evidence. There was a concession that the child should live with the mother and submissions that the subpoenaed material supported the mother's case.

> *Without that material which the father's Counsel subpoenaed on the first ex parte date, this case would have been extremely difficult to determine and the parties may well have reached no consensus. The police record of attendance on the evening of separation would have been of great assistance but had not been subpoenaed by either party…*

An obvious difficulty here is that some of these records, including the records of the dispute resolutions services, will be confidential, as a result of legislative provisions that both prevent the officers from disclosing the material, and prevent it from being admitted into evidence. The confidentiality of the process comes at a price, because it seems clear that the protection of children and other family members would in some cases be enhanced if the material were available.

The question whether the rules about confidentiality should be modified to allow the information to be available to the court is a large question that falls outside the reasonable scope of this Review, as does the relationship between the court and other parts of the family law system. For this reason I simply note that in my view the court's ability to conduct a risk assessment process, and its capacity to protect the children and families that come before it, would almost certainly be enhanced if it had access to relevant information held by external agencies, including dispute resolution agencies. It would be appropriate, in my view, for this issue to be separately considered.

Finally in this connection, a process of risk assessment in all parenting cases might well cast light on a vexed issue, the relationship between the functioning of the family law courts and family violence orders made by state and territory courts. A number of submissions dealt with this issue, although it is outside the Terms of Reference of this Review.[71] It seems clearly desirable that urgent matters of a family character should be able to be dealt with quickly and effectively by the specialist family court, rather than litigants routinely going first to a state or territory court. Such a system, ideally involving only one court, would have obvious advantages, including removing the problematical issue of the weight the family law courts should give to family violence orders made in other courts.

---

[71] Submission 49. Some of the issues are considered in an important study by Patrick Parkinson, Judith Cashmore, and Judi Single, *Post-Separation Conflict and the Use of Family Violence Orders.* Sydney Law School Research Paper No. 09/124. Available at SSRN: http://ssrn.com/abstract=1506683.

Recommendation 2.3

That the Government consider amending s 60K so that it provides that in each parenting case the court must conduct a risk identification and assessment, rather than providing for the filing of a document that will require the courts to take particular actions.

Recommendation 2.4

That the Government consider the most appropriate ways of conducting such a risk identification and assessment, having regard to the resources available to the courts, and to the possibility of arranging for the assessment of risk to be conducted in part or whole by an external agency.

Recommendation 2.5

That the Government consider amending provisions of the Act relating to the confidentiality of information held by agencies outside the court, including dispute resolution agencies, so that information relevant to the assessment of the risks from violence or other causes could be more readily available to the courts.

Interim hearings

One of the greatest practical problems in cases involving family violence issues is what to do in interim cases. In many cases, there will be serious allegations which, if accepted, might mean that contact with a parent or other person might expose the children to risks of violence, neglect or abuse. But these allegations are usually denied. At the interim stage, there will often be little in the way of corroborative evidence or detail, and, in any case, there will be no time to cross-examine witnesses. In these cases the judicial officer will often be unable to make a finding about the likely truth of the allegations, and thus unable to reach a confident view about what arrangements are likely to be best for the children in the period – which may well be many months – before the final hearing.

A valuable description of the everyday experience of violence cases in the Federal Magistrates Court is provided by Hartnett FM:

> *These lists often contain in the vicinity of 25 upward to 30 matters each day. This is a reduction from the earlier times in the history of this Court when 40 or more matters a day were listed.*

What proportion of the duty list matters involve solely parenting cases is dependent on the Registry. In the Federal Magistrates Court Dandenong Registry the percentage is higher than in the Melbourne Registry. In those cases something over 50% (with the percentage being much higher in Dandenong) involve allegations of family violence of the severe kind. Here is one example, taken from a duty list where approximately one third of the list contained affidavit material of not dissimilar content:

> *"He regularly hit us with a belt and punched us. He used to pour cold water on the children, saying that it was good for them. The husband would light matches and flick them at the children. He used to pull the child's hair. He would make the children sleep with no clothes on even when it was cold. The husband was very violent to us regularly"*

and later with reference to the children's school notifying the Department of Human Services. The children had:

> *"visible bruises and marks on them from the husband's assaults".*

Most of the allegations of family violence are made by women against men. It is usual for the party making the allegations to be represented. Generally speaking, where the other party is represented there is a denial of the allegations and sometimes counter-allegations. Where text messages are annexed to an affidavit there is often a defence of "put this in context" and wait until the Court sees the similarly abusive and threatening texts forwarded by the party putting the texts into evidence. Where severe family violence is alleged and no response is provided then that can often suggest that other probative evidence may be available to support the assertion, for example, hospital records or police involvement and thus admissions, although qualified, may be able to be obtained.

At a first hearing date, there is a lack of opportunity to test evidence save in a very rare case. Considerable time could be spent by each Federal Magistrate on each individual case. Perhaps telephone calls could be made to the Department of Human Services, to hospitals and to schools to ascertain the veracity of some of the claims made given the absence of subpoenaed material or other evidence of probative value. This on occasion does occur. Relevant medical histories could be explored including any attendance upon a psychiatrist but of course the other party has to know about that attendance in the face of non-disclosure by the attending party. Mental health issues loom large in family violence matters. But in a busy duty list, where consent, undefended and interim judicial determination orders are made and where litigants in person require particular assistance, there is limited time. So the opportunity to have an in-depth investigation is not present at these hearings.

Interim proceedings thus pose problems that are no less agonising because they are familiar. A decision to allow unsupervised contact might preserve the children's relationship with the other parent, but might (if the allegations are true) expose them to serious risk. On the other hand, making orders that protect the children from such risk will almost inevitably mean there will be very little contact between the children and the other parent, who may not, in fact, be a danger to the children. This problem will be most acute where there is to be a long period before the final hearing, especially if there are no places available, or if there are long delays for places, in child contact centres.

In practice, the decisions made in interim situations can sometimes create a situation for the children which will be difficult to change when the final hearing eventually comes on. The result will be that the interim decision, made on inadequate material, will in effect determine the final outcome. Partly for this reason, and partly because of the emphasis in the legislation, when both parties are seeking to have the child live with them most of the time, there is a temptation for the judicial officer to make orders that the children should spend equal time with each parent. Such orders may appear to have the advantage of being fair as between the parents, preserving the opportunity for each parent to argue at the final hearing that the child should mainly live with them. But such orders might impose an equal sharing arrangement on children where this is not in their interest. In some cases, it might be better for the children to be mainly with one parent, even perhaps with *either* parent, than to have their time equally divided. The problem is not with shared care as such – that might well be the right answer for some children. The problem is that this approach leads to decisions which have more to do with preserving the rights of the parents than doing what is best for the children. But how can this problem be avoided, since the limited, rushed hearing does not enable the judicial officer to identify what *would* be best for the children?

The problem will be avoided, at least for the courts, if the parties can settle the case. It is understandable that a judicial officer in such circumstances will do everything possible to persuade the parties to reach agreement. This is especially so if there are numerous cases listed for attention that day: a list of 30 cases is not uncommon in the Federal Magistrates Court. The pressure of such cases, and the difficulty of identifying the outcome that is likely to be best for the child, can easily lead judicial officers to be brisk and impatient with anything that seems inessential. It is not surprising that many of those who presented

individual stories in their submissions said that they felt they had been ignored, or that the judicial officer was 'not interested'.

In such circumstances – and these are *typical* circumstances of the duty lists of the family courts every week – it is impossible for the court to give to issues of violence the attention they require. Doing so in a particular case would be likely to mean that most of the cases listed for that day would have to be deferred to another day – and so the list of waiting cases, and the length of delays, would grow.

It is arguable that in some ways these problems are exacerbated by some features of the legislation as amended in 2006. But even if this is so, that is not the only or the main source of the problems. The dilemma facing courts in interim proceedings, the tension between protecting children from risk and maintaining the contact with both parents, was a familiar one before the amendments of 2006 (and before those of 1995) and remains a familiar problem in other jurisdictions that have different legislation.

One way of seeking to address this problem is to provide assistance to the judicial officers in handling these situation. The Family Court's Best Practice Principles include a helpful list of matters that will ordinarily need consideration in interim hearings. First, they refer to

> The likely risk of harm to the child, whether physical and/or emotional, if an interim application for a child to spend time with a parent against whom allegations have been made is granted or refused.

Second, they provide that if the Court decides that it is in the interests of the child to spend time or communicate with a parent against whom allegations have been made, it should consider what directions are required to give effect to such order(s), and in particular:

- whether time spent with the other parent should be supervised;
- if so, whether or not that supervision should occur at a child contact centre;
- if not, where the time spent should take place and who should supervise it;
- times for the visit and places of exchange;
- who should be permitted to attend the appointment with the parent;

- who will bear the costs of the supervision, and in particular;

- what other arrangements should be put in place (including an order under section 60CG(2)) to secure the safety of the child and the parent with whom the child is living before, during and after any time spent with the other parent.[72]

Finally, the Principles suggest that the court might usefully consider

> Whether a parent or parents seeking to spend time with a child should attend a post-separation parenting program pursuant to section 65LA or seek advice and/or treatment pursuant to section 13C(1)(c) as a precondition to such an order or as a means of assisting the Court in ascertaining the likely risk of harm to the child from that person at the final hearing.

These are valuable guidelines. This Report recommends training and education for judicial officers as well as others in the family law system, and I believe this will also assist the ability of the system to deal properly with cases involving issues of family violence.

This Review has underlined the critical importance of interim proceedings, and the problems posed, especially in cases involving allegations of violence. It is likely that some improvement will result from a systematic screening for family violence, and from improved educational opportunities for courts staff, lawyers and other professionals, and additional guidance such as is contained in the Best Practice Principles.

However on the material available to this Review, the problem is not primarily related to the performance of judicial officers. Additional judicial and other resources will be required if we wish to improve the family courts' ability to protect children, especially from the consequences of important decisions based on inadequate and untested evidence, that might

---

[72] Although this is a helpful list, in my view the drafting might usefully be reconsidered. As presently written, it suggests that the court is able to decide that it is in the interests of a child to spend time with the person without considering those matters; it then considers those matters in relation to what directions are required to give effect to the order. The difficulty is that it is only when the full proposed order is considered that the court can determine whether it is in the interests of a child to spend time with the parent. For example, in a situation requiring supervision, the court would not first determine that it was in the child's interests to spend time with the parent and then think about supervision. It would consider (in the light of all relevant evidence, including the availability of a suitable supervisor) whether the particular order including its provisions relating to supervision, would be in the child's best interests.

expose the children to risk of harm, whether by being exposed to the risk of violence or by being separated unnecessarily from a parent. Children would undoubtedly be much safer if through legal aid or otherwise the parties and the children were properly represented, and the number of judicial officers was such that each case could be given the attention it deserved, without causing unacceptable delays in the hearing of other cases.

Recommendation 2.6

That the Government consider providing the family courts with the additional resources necessary to ensure that adequate attention can be given to children's cases in interim proceedings, especially cases involving allegations of family violence.

Consent orders

Parties' agreement on parenting arrangements can take various forms. At the simplest, the parties might simply put the proposed arrangements in place, never having commenced legal proceedings. They might make a parenting agreement, which would not be legally binding and would not be reviewed by the court or any other third party. Alternatively they might seek consent orders. Consent orders can be made at any stage of proceedings. Often, they are sought when proceedings have been commenced but before any court hearing. Sometimes they are sought after interim orders have been made, or after a family report has been published. Sometimes they are sought after the final hearing has commenced and some evidence has been received. In these latter circumstances, the parties will normally invite the judicial officer who has handled the matter to make the consent orders. In such cases, the judicial officer may well have considerable knowledge of the case. Where the parties seek a consent order before any hearing has occurred, especially when few or no affidavits have been filed, there may be very little information before the court.

In the family courts as much as in other courts, the functioning of the system depends on most cases ending with consent orders rather than adjudicated outcomes. The courts' resources fall well short of what would be required if each case that was commenced proceeded to judgment.

But while agreed outcomes are always welcome because of their benefits for the family law system, whether those outcomes are necessarily in the children's interests is another matter. Where the agreed outcome represents a reasonable compromise of the dispute, and is based

on the best interests of the children, the outcomes will almost certainly benefit the children, especially by bringing the costs and stress of the litigation to an end. In many cases, it will matter most to the children whether they feel loved and cared for by both of their parents, whatever the details of the parenting arrangements happen to be.

On the other hand, an agreed outcome – a 'settled' case – may result from factors other than a reasonable and child-focused compromise. One or other party may feel that they have no alternative but to accept a proposed settlement for reasons that have nothing to do with the child's best interests. A parent may fear that unless he or she accepts the settlement, the child or other family members might be at risk of violence or abuse. A parent may abandon a case because he or she has run out of money, or legal aid has been withdrawn. A party might settle because he or she fears that the result of not settling might be even more disadvantageous than the proposed settlement. A party might be misled by advice to the effect that the court would not accept certain types of evidence because of prejudice. A party might be daunted, or misled, by remarks of a judicial officer anxious to ensure that the case settles. In the most serious cases, an agreed outcome could result in a child being in the care of a dangerous or abusive person.

It is clear that some children may be at risk as a result of the arrangements put in place in accordance with consent orders. What can be done to avoid or lessen this risk?

On the strict adversarial model, the merits of the arrangement for the children in an agreed outcome would not be an issue. But it is clear that the making of consent orders, as much as the making of other orders, must be based on the best interests of the child.

There are limits, however, on what the court can do when presented with proposed consent orders.[73] It can refuse to make the orders – but doing so would not prevent the parties simply going ahead and putting in place whatever arrangements they had asked the court to sanction. It can also refer the papers to the police, or a state or territory child protection department, and this may be appropriate where there are fears of risk to the child. The court, if concerned about the children's welfare, might also consider referring the parties to some agency for counselling or assistance: but since it had received no evidence, it might not be possible for it to make such an order. Finally, the court could consider saying to the parties that it would

---

[73] The position is helpfully explained and illustrated in *T & N* (2003) 31 Fam LR 257; (2003) FLC ¶93-172 [2003] FamCA 1129 (Moore J).

make the consent order only if they, or one of them, attended some counselling or other program. Here again, however, it could do nothing if the parties simply declined, and put the arrangements into place without the court's sanction.

The problem is addressed in the Family Court Best Practice Principles. They identify various matters that could be considered in cases where there is concern about violence: the seriousness of the allegations, indicators of pathological jealousy, stalking, and the like; whether it is clear that there has been real consent to the proposed orders; the attitude of Independent Children's Lawyer, and other significant matters. The Guidelines also indicate measures the court might take:

- Ordering the preparation of a Family Report.
- Ordering the appointment of an Independent Children's Lawyer.
- Requesting a Family Consultant to interview one or both of the child's parents and, where appropriate, the child or children and reporting back to the Court.
- Ordering a section 69ZW report.
- Hearing evidence to determine whether or not a parent has behaved violently or abusively towards the other parent and/or the child or children, or whether a parent with whom a child is to spend time presents an unacceptable risk.
- Referring one or both parents to an appropriate service and adjourning the proceedings.

The Principles also say that if the Court forms the view that it is in the best interests of the child to make the orders sought by consent and those orders provide for a child to spend time with a person against whom allegations of family violence have been made, the Court may wish to give consideration to delivering a short judgment explaining why the Court has agreed to make the orders sought.

In my view these provisions are appropriate. I have considered whether any of these elements should be placed in the Rules and made mandatory. On balance, on the material before me I would not recommend this. It is important, in my view, that the Principles be better known, and steps should be taken to achieve this. If this proved impossible, it might be

appropriate to reconsider whether the Rules should deal with the problem. However there are resource implications involved – for example, opinions might differ about whether the judicial time that would be put into preparing reasons in these consent cases might be more fruitfully employed by hearing other cases.[74]

Is it appropriate to consider also r 10.15A of the Family Law Rules 2004, which applies to allegations of child abuse, though not to family violence. Rule 10.15A applies in the Family Court of Australia but not in the Federal Magistrates Court. It provides, in substance, that if an application is made for consent orders during a hearing or trial each party, or the party's lawyer, must advise the court whether there have been allegations of child sexual or other physical abuse or risk of abuse; if there have been such allegations, the party or lawyer 'must explain to the court how the order attempts to deal with the allegations'.

This rule is perhaps awkwardly phrased - what the order needs to deal with is any risk to the child, not the allegations themselves. In some cases, presumably, the agreed outcome would be such as to protect the child from the risk that would exist if the allegations were true. In others, however, the parties might agree on an outcome that would entail risk for the child if the allegations were true. Such a situation might come about if the person making the allegations had accepted that they were mistaken; or if the person making the allegations had come to the view that although true, they would not be accepted by the court. If at the time the consent orders are made the parties remain at odds about the truth or seriousness of the allegations, presumably their respective lawyers would need to indicate this to the court. This might be desirable: the court would be aware of the problem, and could at least think about what measures to take. It might, for example, refer the matter to the state or territory child protection department.

In my view r 10.15A potentially serves the important function of drawing the court's attention to the problem where there are allegations of child abuse. However the Family Law Section submitted that many judicial officers are unaware of the rule, and recommended that it be deleted. By contrast, the National Legal Aid Submission, starting from the same finding

---

[74] Submission 16 contains an argument against any requirement to give reasons ('If the Court were required to provide reasons for every consent order in a duty list the current system would simply not cope and considerable extra judicial resources will be required. …. If a judgment is required then that will necessitate a considerably slower throughput of work for little obvious benefit including no obvious outcome of family violence prevention…').

that the section was not much used, urged that it be clarified and extended to include family violence.[75]

If the rule is valuable, I see no reason why it should not apply in both courts. On balance, however, I do not think that there is sufficient material before this Review to justify a recommendation that it should be extended to apply to allegations of family violence. Of course the courts may wish to reconsider this if more information comes to light.

---

75 '…it has been the experience of Legal Aid lawyers that judicial officers faced with consent orders do not insist on such an explanation. It is believed that the desirability of settlement has become more important than strict adherence to the Rule. The Rule should be clarified and extended to include allegations of family violence'.

PART 3: PROBLEMS AND POSSIBLE REMEDIES: THE LEGISLATION

3.1 PRELIMINARY

Introduction

The Terms of Reference require an assessment of 'the appropriateness of the legislation' in relation to matters where issues of family violence arise and to recommend any improvements considered necessary, and to examine whether 'the legislation and procedures support best practice for handling family violence matters'.

It is apparent that in the drafting of the Act, especially since the 2006 amendments, issues of family violence are closely related to other provisions about children, including provisions dealing with parental involvement. Many submissions raised concerns about the impact of these other provisions in relation to family violence issues. For example, some submissions suggested that the prominence of shared care in a number of provisions of the Act can lead to children being ordered to spend time with perpetrators of violence.[76]

The Victorian Law Institute, stressing the importance of community education, wrote:

> *The 2006 law introduced a presumption of equal shared parental responsibility. The emphasis in the media and from politicians on the word "equal" had people assuming this meant that parents would have equal shared time with the children. This of course was not what the legislation said, but it created great confusion in the community about the effect of the new legislation*

The National Legal Aid submission said:

> *The reported cases and the information provided from legal aid practitioners confirms the emphasis in parenting cases on shared parenting rather than protection from harm despite the 2006 Amendments, or perhaps more accurately, because of them.*

That submission also pointed to the importance of the legislation as a factor when parties attempt to negotiate in circumstances where there has been violence:

---

[76] For example, Submissions 10, 19, 27, 34, 44, 56 and 78.

… mediation where one party is unable to negotiate freely, as is often the case where there is or has been family violence, is sometimes unfair and potentially dangerous. This situation is compounded by a community assumption, as a result of the 2006 amendments, that parents have rights in relation to equal shared care of their children and the failure of section 63AD to counter this.

It is the experience of Legal Aid lawyers that that assumption is used by fathers in particular as a bargaining tool in negotiations. Where there has been family violence pre and/or post separation, that assumption further creates a power imbalance between the perpetrator of violence and the victim at mediation, and can compromise the safety of women and children.

It is impossible to assess the appropriateness of the legislation by looking only at provisions specifically dealing with family violence; the relevant provisions in Part VII must be seen as a whole. The provisions relating to children's cases are contained mainly in Part VII of the Act, which is entitled "Children".[77] Part VII was significantly changed by amendments in 1995,[78] and changed again by the amendments of 2006.[79] In its present form, Part VII is of considerable complexity. For that reason, after this Introduction this Part sets out a summary of the significant provisions and how they are to be read together. It then goes on to address three particular issues and recommends amendments: the 'friendly parent' provision: s 60CC(3)(c); obligations on advisers: s 63DA; and costs orders: s 117AB.

The discussion then turns to more complex matters, namely the provisions about shared parental responsibility and the way the court determines the child's best interests. The recommendations on these matters are expressed more tentatively, because of the complexity of the issues and the limited time available for this review, but I hope the discussion will prove useful.

An overview of the relevant provisions of Part VII of the Family Law Act

The 'paramount consideration' principle retained

The law on what we are conveniently calling parenting cases has long been governed by the principle that the child's best interests must be treated as the paramount consideration. This

---

77 Section 43 (which is not in Part VII) sets out 'Principles to be applied by courts'. They include 'the need to protect the rights of children and to promote their welfare', and 'the need to ensure safety from family violence': paragraphs (c) and (ca).

78 Family Law Reform Act 1995.

79 Family Law Amendment (Shared Parental Responsibility) Act 2006.

principle was originally developed by court decisions in the nineteenth and early twentieth centuries, and then incorporated into legislation. It remains in the Act, and its importance was repeatedly emphasised in the background papers to the amending Act of 2006. Section 60CA now provides:

> In deciding whether to make a particular parenting order in relation to a child, a court must regard the best interests of the child as the paramount consideration.

Language

The language used for children's cases has changed over time. Before 1995, this area of law was generally known as 'custody law', and the usual orders were known as 'custody', 'access', and 'guardianship' orders. The language was changed by the 1995 amending Act: the court could make various 'parenting orders', namely residence orders, contact orders, and specific issues orders; and the word 'guardianship' was replaced by 'parental responsibility'. The 2006 amendments changed the language again, dropping the names of the parenting orders, and just saying that the court could make parenting orders dealing with various topics, notably with whom the child should live and with whom the child should spend time or communicate. 'Parental responsibility' was retained. The current language probably reflects the idea that to describe orders as giving one parent 'custody' or even 'residence' might be taken to imply that the other parent is not important.

Shared parental responsibility

The 2006 amendments also introduced some rather complex new measures designed to reinforce cooperative parenting. The first was a presumption that children would benefit from equal shared parental responsibility. By s 61DA(1), with certain qualifications, when making a parenting order, the court 'must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child'.

There is an exception, namely cases where there are reasonable grounds to believe that a parent has engaged in child abuse or family violence.[80] In interim proceedings (where the evidence is often incomplete) the presumption applies 'unless the court considers that it

---

[80] More precisely, 'if there are reasonable ground to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in: (a) 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 (b) family violence': s 61D(2).

would not be appropriate in the circumstances'.[81] The presumption may be rebutted 'by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child'.[82]

Next, an order for shared parental responsibility creates obligations to share decision-making: s 65DAC. The obligation is imposed on persons who, under a parenting order, are to share parental responsibility for a child, and relates only to decisions 'about a major long-term issue in relation to the child'.

Interestingly, the legislation does not explicitly say that there is such an obligation to consult where there has been no such order. Although one might think from the emphasis the background papers gave to cooperative parenting, and perhaps from some of the language of s 60B,[83] that there would be such an obligation, careful attention to the words of the Act seems to indicate that there is no such obligation. The provision that 'each parent has' parental responsibility[84] remains unamended, and the express creation of the obligation in cases of court orders might be taken to imply that there is no such obligation where there is no court order.[85] While it is clear that parental cooperation is *encouraged* by the Act, and that failure to cooperate might be taken into account against a parent in relation to parenting orders,[86] it seems that there may be no enforceable legal obligation to consult except where there is an order for shared parental responsibility.

Parental decision-making separate from residence since 1996

The change of language in the 1995 Act introduced an important substantive change: the severance of the link between residence and decision-making. The 'residence' orders

---

81 Section 61D(3). For an authoritative and detailed explanation of the legislation, see *Goode v Goode* (2006) 36 Fam LR 422; (2006) FLC 93-286.

82 Section 61D(4).

83 Section 60B(1)(a) ('ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives'); (2)(c) ('parents jointly share duties and responsibilities concerning the care, welfare and development of their children'; and (2)(d) ('parents should agree about the future parenting of their children').

84 Section 61D.

85 This is partly because expressly including something at one place and not at another may suggest that it was deliberately excluded at the second place: see the discussion in DC Pearce and RS Geddes, *Statutory Interpretation in Australia* (6th ed 2006), at paragraph [4.28].

86 See s 60CC(4) (court to consider the extent to which each parent has taken the opportunity to participate in making decisions about major long-term issues in relation to the child, and has facilitated the other parent in doing so).

introduced in 1995 were different from the 'custody' orders they replaced, in that when they provided that the child should live with one parent (the 'residence parent'), they gave that parent no particular advantage in decision-making. Unless the court deliberately ordered otherwise, both parents retained the equal decision-making power they had by virtue of having parental responsibility.[87] The obvious intention was to encourage continued involvement by both parents in decision-making, even though the child might be living mainly with one parent, and even though one or both partners might have re-married.[88] This feature was retained in the 2006 amendments: an order for a child to 'live with' a person gives that person no additional decision-making power.

The court's obligations to consider the child spending equal time, or substantial and significant time, with each parent

Section 65DAA applies in cases where the court has made, or is about to make, an order for equal shared parental responsibility and is considering what other parenting orders to make. It says, essentially, that in making a parenting order the court 'must consider' making orders that the child spend equal time, or if not equal then substantial and significant time, with each parent. 'Substantial and significant time' is defined to mean, essentially, weekdays and weekends and holidays, times that allow the parent to be involved in the child's daily routine as well as occasions and events that are of particular significance to the child or the parent.[89]

The guidelines for determining the child's best interests: s 60B and s 60CC

The amendments of 2006 continued the pattern of increasingly elaborate legislative guidelines, particularly in relation to the critical task of determining the best interests of the child. The most significant sections are s 60B and s 60CC.

Section 60B sets out the 'objects' of Part VII, and the 'principles underlying it':[90]

---

87 Parental responsibility means 'all the duties, powers, responsibilities and authority which, by law, parents have in relation to children': s 61B. In the absence of a court order to the contrary, each parent 'has parental responsibility': s 61C.

88 See s 61C(2), providing that the parents' parental responsibility 'is not affected, for example, by the parents becoming separated or by either or both of them marrying or re-marrying'.

89 The court must consider whether equal time would be in the child's best interests; and whether it would be practicable; and, if it is, consider making an order for equal time: s 65DAA(1). If not, then the court must consider the same issues in relation to 'substantial and significant' time: s 65DAA(2).

90 Sub-section (3) further elaborates sub-section (2)(e) in relation to indigenous children.

(1) The objects of this Part are to ensure that the best interests of children are met by:

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

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

(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

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

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

Section 60CC(1) says that the court 'must consider the matters' in subsections (2) and (3). Subsection (2) says that 'the primary considerations are':

(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Subsection (3) says that 'additional considerations are…' and then sets out a list of matters. Although the amendments of 2006 added some new ideas and some new emphases, the list still features many of the considerations that were previously in the Act, and which, in turn, largely reflected the matters that courts had long taken into account in determining the best interests of children. The list includes, for example:

(a) any views expressed by the child…

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

(c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;

(d) the likely effect of any changes in the child's circumstances…

(f) the capacity of [parents and others] to provide for the needs of the child…

The overall direction of these provisions is clear enough. The legislature has retained the principle that the child's best interests must be regarded as the paramount consideration, and has not restricted the matters to be taken into account in determining what orders are most likely to benefit the child.[91] However, in providing guidance to the courts on how to determine those best interests, it has strongly emphasised two aspects: the benefit to the child of a meaningful relationship with both parents, and protection from violence and abuse. These are the two 'primary' considerations in s 60CC, and the first two of the objects of Part VII. The court also has to consider all the other matters relating to the best interests of the child - the 'additional considerations' in sub-section (3). The legislation does not indicate what significance is to be given to the word 'primary', or how the apparent conflict between the two 'primary' considerations is to be resolved in situations where providing for a 'meaningful relationship' with a parent might expose the child to the risk of violence.

---

[91] The last item on the list, paragraph (m), 'any other fact or circumstance that the court thinks is relevant'

Summary of guidelines and principles for parenting decisions

To summarise, the new provisions:

- continue the principle that the child's best interests must be regarded as the paramount consideration;
- require the courts, in determining the child's best interests, to consider as 'primary considerations' the benefit to the child of having a meaningful relationship with both parents, and the need to protect the child from physical or psychological harm from abuse, neglect or family violence, and also to consider a long list of 'additional considerations';
- emphasise that both parents should normally share decision-making following separation, even where one or both re-partner or remarry, and regardless of whether the children live mainly with one parent;
- encourage parents to cooperate in decision-making relating to the children, and create legal obligations to do so where the court has made an order for shared parental responsibility;
- where there is an order for equal shared parental responsibility, require the court to consider whether the child should spend equal time, or substantial and significant time, with each parent, except in cases of violence, or child abuse or neglect; and
- require advisers to have regard to these things.

The Full Court has summarised the gist of the provisions as follows:[92]

> *In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with the children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable.*

---

92 *Goode v Goode* (2006) 36 Fam LR 422; (2006) FLC 93-286, paragraph 72.

Parenting orders subject to later parenting plans

Section 64D, which makes parenting orders subject to later parenting plans, is subject to the qualification that a court may 'in exceptional circumstances, include in a parenting order a provision that the parenting order, or a specified provision of the parenting order, may only be varied by a subsequent order of the court (and not by a parenting plan)'. Such exceptional circumstances include the following:

(a) circumstances that give rise to a need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence;

(b) the existence of substantial evidence that one of the child's parents is likely to seek to use coercion or duress to gain the agreement of the other parent to a parenting plan.

Provisions relating to family violence

Definition of 'family violence'

A number of provisions deal with 'family violence'. The term is defined in s 4 as follows:

> ***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.

General requirements for counselling before parenting order made

By s 65F, except in cases of consent, a court must not make a parenting order in relation to a child unless the parties to the proceedings have attended family counselling to discuss the matter; or

> (b) the court is satisfied that there is an urgent need for the parenting order, or there is some other special circumstance (such as family violence), that makes it appropriate to

make the order even though the parties to the proceedings have not attended a conference as mentioned in paragraph (a); […]

Informing the court of relevant family violence orders

Section 60CF provides, in substance, that a party who is aware that a family violence order applies to the child or a member of the child's family must inform the court of the family violence order. Also, a person who is not a party who knows of such an order *may* inform the court of the family violence order.

It is obviously desirable that a court hearing a children's case should be aware of any family violence order then in force, if only to ensure that it does not inadvertently make a parenting order that is inconsistent with the family violence order (a matter referred to in s 60CG).

Court to consider risk of family violence

Section 60CG(1) provides:

> In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order:
>
> (a) is consistent with any family violence order; and
>
> (b) does not expose a person to an unacceptable risk of family violence.

Subsection (2) adds that for the purposes of paragraph (1)(b), the court 'may include in the order any safeguards that it considers necessary for the safety of those affected by the order'.

It is my impression that this section is not given much prominence. If so, this may have to do with matters of drafting. It deals with two very different matters: in paragraph (a), the obvious desirability of the court not making orders that clash with family violence orders, and in paragraph (b), the mandatory requirement not to expose a person to an unacceptable risk of family violence. In each aspect, it is separated from the other relevant provisions. Paragraph (a) is separate from the provisions that primarily deal with the relationship between family violence orders and parenting orders, which are contained in Division 11. And paragraph (b) is separate from the provisions that set out the principles (s 60B) and the matters to be considered in determining a child's best interests (s 60CC). These difficulties with s 60CG

are examples of matters that would be addressed if there is to be a technical review of Part VII, as proposed in Recommendation 3.8, and this section does not require further discussion in this report.

Court to take prompt action in relation to allegations of child abuse or family violence: s 60K

Section 60K is intended to ensure that in children's cases the courts 'take prompt action in relation to allegations of child abuse or family violence'. The measure involved is triggered by the filing of a particular document, known as a Notice of Abuse or Family Violence, or a Form 4. The operation of this section was considered in Part 2.

Court may obtain information from Commonwealth, State and Territory agencies about child abuse or family violence: ss67J – 67P, s 69ZW

Sections 67J – 67P provide for the making of 'information orders', which require certain Commonwealth departments to provide relevant information to the courts, such as information about a child's location. The provisions specifically require the officials to provide 'any information about actual or threatened violence to the child concerned, to a parent of the child, or to another person with whom the child lives' that is in the Department's records.[93]

Section 69ZW provides, in substance, that the court may make orders requiring certain State and Territory organisations to provide relevant information about child abuse and family violence from its inquiries.

State and territory family violence orders and orders under the Family Law Act (Division 11 'Family violence')

The provisions in this Division are intended to resolve inconsistencies between (state and territory) family violence orders and certain orders under the Act, notably those that 'provide for a child to spend time with a person or require or authorise a person to spend time with a child', and to ensure that certain court orders do not expose people to family violence; and also 'to achieve the objects and principles in s 60B'.

---

[93] Section 67N(8), *Family Law Act.*

These provisions, essentially concerned with the interaction between the Family Law Act and state and territory laws, fall outside the scope of the present Review.

3.2 THE 'FRIENDLY PARENT' PROVISION: s 60CC(3)(c)

The so-called 'friendly parent' provision is s 60CC(3)(c), which provides, in substance, that among the 'additional considerations' to be taken into account in determining the child's best interests is

> the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent.

It is obvious that in ordinary circumstances it is an important part of each parent's role to encourage their children to have a close and continuing relationship with the other. This is especially so when one parent is away from the children. Thus in intact families, when one parent is away for substantial periods, for example in military service, the parent left with the children should, for example, encourage the children to keep in contact with the absent parent by phone, email, or other means, help the children understand why the parent is away, assure them that the absent parent still loves them, and so on.

This is particularly important when parents separate. Children need to know that while the parents are separated from each other, they do not cease to love their children or cease to be their parents. But when the separation is not amicable, each parent will commonly feel anger and hurt towards the other, and it must sometimes be difficult in such situations for the parent with the children not to express that anger to the children, and not to denigrate the other parent. Similarly, it must often be difficult for parents to resist painting the other parent in a poor light, and encouraging children to take one parent's side. Parents have many difficult tasks when they separate, and sometimes one of the most difficult is to bite one's tongue when tempted to make a disparaging remark to the children about the other parent.

This point is generally accepted, and is frequently made - more eloquently than I have made it - in the literature designed to help separating parents. Similarly, the point is frequently made by judicial officers in their judgments and in discussions with the parties and their representatives.

It is therefore entirely understandable that the legislature might have thought it desirable to make this familiar and important point by specifically including it among the matters to be taken into account when deciding what is likely to be best for children.

Unfortunately, what is obviously desirable in most families can sometimes be problematical in families that are dysfunctional or have particular problems, including problems associated with violence and abuse. Sometimes, children can be attracted to parents who have abused them or who have been violent. In some circumstances, those parents might constitute a continuing risk for the children. Sometimes the violent parent will continue to provide the child with a role model for dealing with life's problems by using violence.

In such cases, it would be generally accepted that it is part of the non-violent parent's task to protect the children from harm. This might involve providing evidence to the court demonstrating why the other parent poses a risk for the children. And it might involve asking the court to make orders preventing the children from spending time with the violent parent, or, in some situations, seeing the other parent only in supervised circumstances.

While the message sent by the 'friendly parent' provision is perfectly appropriate in many situations, therefore, it needs to be qualified in some circumstances, such as cases involving some forms of violence and abuse. In such cases, the appropriate message might be that the parent needs first to make sure the children are safe. There may still be a need to try and preserve some benefit from the children's relationship with the other parent, but it should not compromise the children's safety.

This point is of course not confined to what is sometimes called 'controlling violence'. There may be other circumstances, for example where a parent's ability to care for the children is compromised by mental illness, the other parent will need to take protective action on behalf of the children. It is important in these cases that the legislation should not deter or discourage the parent from taking such protective action in such cases.

A number of submissions made to the Review expressed the view that the 'friendly parent' provision has had the unfortunate consequence of discouraging some parents from disclosing violence by the other parent (or, in some cases, by the other parent's partner). For example the National Legal Aid submission said:

> *Paradoxically, commonly parties to proceedings who allege significant levels of family violence still seek orders for the children to spend time with the alleged perpetrator. Clients who disclose family violence are mandatorily referred to the provisions of the legislation that highlight encouraging a meaningful relationship between a child and a parent. For example, S 63DA does not mention family violence but sets out the mandatory areas of advice to be given to a client by an advisor. With this dialogue occurring, it is more than possible and in NLA's experience most likely, that the need for a child to have a meaningful relationship with a parent becomes (in the minds of advisors and the parties) more important a consideration than the need to protect a child from harm. The reported cases and the information provided from legal aid practitioners confirms the emphasis in parenting cases on shared parenting rather than protection from harm despite the 2006 Amendments, or perhaps more accurately, because of them.*
>
> *[…] If a parent insists on making allegations of family violence prominent at an interim stage, she is usually considered to be an "unfriendly" parent, thus serving to further minimise the issue.*

On the material available, it seems likely that the friendly parent provision, s 60CC(3)(c), while it might have had a beneficial effect in many situations, has had the undesirable consequence in some cases of discouraging some parents affected by violence from disclosing that violence to the family court. It is appropriate, therefore, to consider whether some amendment would remove this undesirable consequence while retaining the value of the provision in encouraging parents in ordinary circumstances to facilitate the child's relationship with the other parent.

If the legislation seeks to spell out what is good parenting, it should do so in a way that is appropriate for all the cases that come to the family courts. If the legislation is to state the general desirability of facilitating children's relationship with the other parent, it should be done in such a way that it also recognises that there are circumstances in which parents need to take action to protect their children, and in some cases this means making serious allegations against the other parent. It is important in these cases that the understandable desire to emphasise the importance of parents supporting each other should not inadvertently lead to provisions that deter or discourage the parent from taking such protective action where this is necessary to protect the children.

The proposals in recommendations 3.3 and 3.4 below, seek to deal with this issue as well as others. However if those recommendations are not adopted, I recommend that paragraph (c) be amended so it refers to the capacity and willingness of each parent to provide for the developmental needs of the child in the circumstances of each case, taking into account, among other things, children's need for safety and the benefits of a close and continuing relationship with both parents: see below, Recommendation 3.5.

3.3 OBLIGATIONS ON ADVISERS: s 63DA

Introduction

Section 63DA provides that advisors must tell people various things. Issues arise about this provision, mainly because it omits all reference to the importance of ensuring the safety of children and other family members.

The provisions of s 63DA

Section 63DA provides in substance that advisers must inform people of various things when they are giving 'advice or assistance to people in relation to parental responsibility for a child following the breakdown of the relationship between those people'. 'Adviser' is defined as a legal practitioner; a family counsellor; a family dispute resolution practitioner; or a family consultant.

The adviser must inform them that they could consider entering into a parenting plan in relation to the child; and inform them about where they can get further assistance to develop a parenting plan and the content of the plan.[94]

Under subsection (2), if an adviser gives people advice about a parenting plan, the adviser must inform them that, if the child spending equal time with each of them is reasonably practicable and in the best interests of the child, they 'could consider the option of an arrangement of that kind' (paragraph (a)). The adviser must also inform them that, if the child spending equal time with each of them is not reasonably practicable or is not in the best interests of the child but the child spending substantial and significant time with each of them is reasonably practicable and in the best interests of the child, they 'could consider the option of an arrangement of that kind' (paragraph (b)).

---

[94] Subsection (1).

A note to the section says that paragraphs (a) and (b) 'only require the adviser to inform the people that they could consider the option of the child spending equal time, or substantial and significant time, with each of them. The adviser may, but is not obliged to, advise them as to whether that option would be appropriate in their particular circumstances'. Further, subsection (3) gives a detailed explanation of what is meant by 'substantial and significant time' in paragraph (b):

> (3) For the purposes of paragraph (2)(b), a child will be taken to spend ***substantial and significant time*** with a parent only if:
>
> (a) the time the child spends with the parent includes both:
>
> (i) days that fall on weekends and holidays; and
>
> (ii) days that do not fall on weekends or holidays; and
>
> (b) the time the child spends with the parent allows the parent to be involved in:
>
> (i) the child's daily routine; and
>
> (ii) occasions and events that are of particular significance to the child; and
>
> (c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

Yet further explanation is given of the obligations under paragraphs (a) and (b). Subsection (4) says that 'Subsection (3) does not limit the other matters to which regard may be had in determining whether the time a child spends with a parent would be substantial and significant.'

The adviser's obligations do not end with paragraphs (a) and (b) of sub-section (2). The adviser must also 'inform them that decisions made in developing parenting plans should be made in the best interests of the child'; and must 'inform them of the matters that may be dealt with in a parenting plan in accordance with subsection 63C(2)'. The adviser must also 'inform them that, if there is a parenting order in force in relation to the child, the order may

(because of section 64D) include a provision that the order is subject to a parenting plan they enter into'.

The adviser must also inform them about the desirability of including in the plan:

(i) if they are to share parental responsibility for the child under the plan—provisions of the kind referred to in paragraph 63C(2)(d) (which deals with the form of consultations between the parties to the plan) as a way of avoiding future conflicts over, or misunderstandings about, the matters covered by that paragraph; and

(ii) provisions of the kind referred to in paragraph 63C(2)(g) (which deals with the process for resolving disputes between the parties to the plan); and

(iii) provisions of the kind referred to in paragraph 63C(2)(h) (which deals with the process for changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan).

The adviser must also 'explain to them, in language they are likely to readily understand, the availability of programs to help people who experience difficulties in complying with a parenting plan'. The adviser must also 'inform them that s 65DAB requires the court to have regard to the terms of the most recent parenting plan in relation to the child when making a parenting order in relation to the child if it is in the best interests of the child to do so'.

Discussion

The Explanatory Memorandum explains the section as follows:

It sets out the obligations of advisors (ie. legal practitioners, family counsellors, family dispute resolution practitioners and family consultants) when giving advice to people in relation to parenting plans. It aims to assist people making parenting plans to understand what the plan may include, the effect of the plan and the availability of programs to assist people who experience difficulties with their agreements or who need to negotiate a change in an agreement. This is a key provision and ensures that people are well informed and supported towards making an agreement about post-separation parenting. It is intended that as part of the package of reforms to the family law system that brochures and information materials will be developed. These will present the information required to be provided in a simple and easily understood form. This will assist advisers in fulfilling their obligations under this provision.

The Explanatory Memorandum also says:

> *159. It is envisaged that the information relating to parenting plans that advisers are required to provide under this section could be provided in written form such as brochures.*

Conclusions and recommendations

In my view the drafting of the provision is less than satisfactory. It is unnecessarily lengthy, since much of it repeats what is in other provisions of the Act rather than telling advisers to refers to those sections.[95] Despite its length, it is curiously silent on whether advisers should give any advice about consent orders. If the intention was to instruct advisers in what to say, one might have expected the section to point out that agreements could be embodied in consent orders or parenting plans, or both. It seems however that the single focus of the section is, as the Family Law Section noted when it first appeared, on emphasising 'shared parenting'.[96]

This focus may be responsible for the most unsatisfactory aspect of the section. Despite its length and detail, it omits any reference to what is one of the two 'primary considerations' (and one of the 'objects' of the legislation under s 60B), namely 'the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence'.

As the National Legal Aid submission observed:

> *Clients who disclose family violence are mandatorily referred to the provisions of the legislation that highlight encouraging a meaningful relationship between a child and a parent. For example, S 63DA does not mention family violence but sets out the mandatory areas of advice to be given to a client by an advisor. With this dialogue occurring, it is more than possible and in NLA's experience most likely, that the need for a child to have a meaningful relationship with a parent becomes (in the minds of advisors and the parties) more important a consideration than the need to protect a child from harm.*

In my view the present wording of s 63DA is inconsistent with one of the two major themes of the legislation. It effectively invites the professional to ignore issues of family violence

---

95 Further, if the intention was that the obligations would normally be discharged by way of written materials, it would have been easier to say so in the section itself.

96 Family Law Section of the Law Council of Australia, The New Family Law Parenting System, Handbook, National Seminar Series 2006, paragraph 5.2.

and safety, and focus only on the benefits of parental involvement. By doing so it seems likely to have exposed people to increased risks of violence, by contributing to the impression that the family law system is more interested in encouraging parents to be involved than in respecting the safety of children and adults.

Recommendation 3.1

That if recommendations 3.3 and 3.4 are adopted, section 63DA be replaced by a simpler provision, in substance directing advisers to have regard to the principles stated in the Act about the best interests of children; and if recommendations 3.3 and 3.4 are not adopted, s 63DA be amended to emphasise the need to ensure the safety of children and family members.

3.4 COSTS ORDERS: s 117AB

Introduction

Section 117AB provides as follows:

117AB Costs where false allegation or statement made

(1) This section applies if:

(a) proceedings under this Act are brought before a court; and

(b) the court is satisfied that a party to the proceedings knowingly made a false allegation or statement in the proceedings.

(2) The court must order that party to pay some or all of the costs of another party, or other parties, to the proceedings.

Section 117AB commenced on 1 July 2006, being among the amendments made to the *Family Law Act* by the *Family Law Amendment (Shared Parental Responsibility) Act 2006*. The Explanatory Memorandum explained that the section was designed to address 'concerns expressed, in particular that allegations of family violence and abuse can be easily made and may be taken into account in family law proceedings'.[97]

[97] Explanatory Memoranda, Family Law Amendment (Shared Parental Responsibility) Bill 2005, p. 41.

Background to s 117AB

The idea that the legislation should include a specific provision relating to costs was not part of the original Hull proposals of 2003, but was first suggested by the House of Representatives Standing Committee on Legal and Constitutional Affairs ('the LACA Committee') in its report on the bill in August 2005.

The LACA Committee

The LACA Committee's reasoning may be summarised as follows. First, after reviewing submissions about false allegations, it concluded that it was:[98]

> *unable to determine to what extent the allegations of family violence and abuse made in family law proceedings are actually false but accepts that these allegations do occur.*

The Committee referred to the objective test involved in the new definition of family violence, and the changes proposed in Schedule 3, but it did not consider that these measures were 'sufficient to address the concerns raised'. The Committee then said that a number of witnesses had supported the approach of deterring false allegations 'by ensuring appropriate penalties for the making of false allegations'. It discussed the offence of perjury, noting that there was a perception that perjury cases were rarely prosecuted, and noting the requirement to prove an intention to deceive beyond reasonable doubt. After agreeing with the Lone Fathers Association that sufficient funding should be provided for investigations into perjury, it concluded:

> *The Committee considers there is merit in an explicit provision in the Act for the imposition of cost penalties by the court dealing with the family law proceeding where false allegations are knowingly made.*
>
> *This approach avoids the need for separate criminal proceedings which may not be appropriate given that parents need to maintain an ongoing parenting relationship. It ensures that a penalty is imposed at the same time as the family court determination rather than relying on the possibility of protracted criminal proceedings at a later date. The Committee notes concerns about limitations on the courts power to investigate allegations of family violence and abuse.*
>
> *The Committee notes that the government discussion paper 'A new approach to the family law system' contained a proposal for a specific cost provision for false allegations that arose in the*

---

98 2.102.

context of the compulsory dispute resolution provision. The departmental submission stated that the government decided not to proceed with that measure because there were concerns that this would discourage people from relying on the exceptions where there were genuine family violence and abuse issues. Another consideration was that the measure did not satisfy other groups who did not consider this provision would be an effective deterrent.[99] *That issue is discussed further at paragraphs 3.50 -3.57 in Chapter 3.*

Conclusion

The Committee concludes that the Family Law Act 1975 should contain an explicit provision directing the courts to impose costs penalties where they are satisfied that false allegations have knowingly been made. Such a penalty would not prevent criminal prosecution in appropriate cases. A specific provision would make clear the intention that costs should be imposed in these circumstances.

The Committee's recommendation was[100]

that the Family Law Act 1975 should be amended to include an explicit provision that courts exercising family law jurisdiction should impose a cost order where the court is satisfied that there are reasonable grounds to believe that a false allegation has been knowingly made.

The Senate Committee

Such a clause was duly inserted into the bill, which was later considered by the Senate Legal and Constitutional Legislation Committee ('the Senate Committee') in its Report of March 2006. The provision in the bill was then to the effect that where the court is satisfied that a party to the proceedings knowingly made a false allegation *or statement* in the proceedings, the court must order that party to pay some or all of the costs of another (or other) parties. The Senate Committee, however, did not support the clause that was to become s 117AB. Like the LACA Committee, the Senate Committee found that evidence that there was a problem with false allegations in the family law system was inconclusive, and in these circumstances, it recommended that the provision

---

99 Attorney-General's Department, *Submission 46.1*, p.9.

100 Recommendation 10, House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*.

should be removed from the bill pending any relevant results of the Australian Institute of Family Studies research into the prevalence of false allegations of family violence in family law proceeding.[101]

The Government's response

The Government did not accept the recommendation to remove s 117AB. Its Response stated:[102]

The Government believes that, regardless of the frequency of false allegations and statements in family law proceedings, any occurrences should be penalised. The test is restricted to situations where the false statement has been 'knowingly made'. In such circumstances it is appropriate that costs be incurred and courts already routinely make such orders in these circumstances.

The reference to 'false allegations and statements' is significant. Although the early form of the section had referred only to allegations, it was deliberately changed to include statements (a term that would include false denials of abuse or violence). As the then Attorney-General said:

The Bill seeks to address concerns about false allegations and false denials by the inclusion of the new cost provision that applies where a person has knowingly made false allegations or a false statement and this clearly also covers false denials. This provision implements a committee recommendation. It is appropriate, given the high test that must be satisfied, a person must knowingly make the false statement. In such circumstances criminal penalties could also be applied.

This statement is of interest for two other reasons. First, the Government's support for s 117AB was not based on any view about the frequency of false allegations and statements: its view was that *any* occurrences should be penalised. Second, the Government believed that 'courts already routinely make costs orders in these circumstances'.

This passage thus indicates that the Government had no wish to change s 117 (the main provision dealing with costs), and raises the question why the Government thought s 117AB

---

101 The Senate, Legal and Constitutional Legislation Committee, Senate Report, Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005, March 2006, pp. 34 – 37.

102 Government response to recommendations of the Senate Legal and Constitutional Legislation Committee Report on the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (the Bill), tabled 11 May 2006, p 6.

was needed. Perhaps it saw s 117AB as a salutary reminder of the consequences of making a knowingly false allegation or statement.

The history summarised

To sum up, this review of the history of the provision indicates:

- The provision was inserted as a response to certain groups who expressed a concern about false allegations of violence.

- The initial recommendation addressed false allegations of violence. The inclusion of the reference to false *statements* in s 117AB resulted from a later decision to deal also with false denials.

- Although there were competing assertions about the frequency of false allegations of violence, and false denials, no relevant research evidence was put to any of the parliamentary committees, and the committees did not make any findings as to the prevalence of such claims.

- The Government's view seemed to be that s 117AB emphasised the likely consequence of the ordinary operation of s 117, namely that costs orders might be made if the court found that knowingly false evidence had been given. The Government made it clear that the case for s 117AB did not depend on the frequency of false allegations of statements. It did not comment on the danger that the section might discourage victims of violence to make disclosures.

The operation of the provision

Enquiries of legal practitioners and judicial officers made in connection with the review indicate that costs orders under s 117AB are in practice rarely sought and rarely made.[103] This is consistent with all other information received during the Review: it is clear that orders under s 117AB are rare in practice. *Maluka* provides an example of a case in which there was no costs order under s 117AB, although some of the findings could be seen as attracting

---

[103] The Federal Magistrates Court submission notes that of the 28 Federal Magistrates who responded to a question asked in connection with this Review, 26 had never been asked to make an order under 117AB and had never done so; the two other Federal Magistrates, both at the Parramatta registry, had made one each, in both cases on application by a party.

the section.[104] The language of the judgment also illustrates the way courts typically deal with evidence that they do not accept, and shows, in particular, that courts often do not expressly find that particular items of evidence were knowingly false. In that case, Benjamin J said:

> *43. The father denied that he has ever punched the mother but says on one occasion he slapped her once on the shoulder but this was in the context of a pushing and shoving between the parties. I do not regard his evidence on this point as reliable.*
>
> *44. The father denies the violence and abuse except to a very limited extent. In submissions his Counsel conceded that some of the father's denials could not stand scrutiny. When faced with overwhelming evidence the father minimises his culpability and/or blames others or events.*
>
> *45. The father is an unimpressive witness. He is not frank in his evidence; he is glib and at times evasive. He endeavours to offer explanations which at times are hollow. At other times his evidence is frankly unbelievable…*
>
> *46. The father's evidence is generally unreliable and I do not accept him to be a witness of truth. […]*
>
> *186. The father has consistently concealed and falsely denied the violence that he had inflicted upon the mother.*

Costs orders are not unknown, however, and some of the reported decisions on the section are considered below.

The case law on s 117AB

The section does not appear to have been the subject of an authoritative ruling by the Full Court, but there are some available decisions at first instance applying s 117AB.

It is clear that the section applies only to knowingly false evidence. Thus in *Charles*,[105] the application was brought by a wife, who argued that the husband had made false allegations that she was violent towards him. Cronin J dismissed the application for costs, holding that although he had preferred the evidence of the wife to that of the husband, this conclusion did not amount to a finding that the husband had given knowingly false evidence.

---

104 *Maluka & Maluka* [2009] FamCA 647.

105 *Charles & Charles* [2007] FamCA 276.

In *Sharma*, Ryan J found that some of the wife's allegations were 'fabrications'.[106] Her Honour reviewed all the matters relevant to costs, and concluded that the wife should pay 25% of the husband's final hearing costs, an amount of $3,195. Her Honour analysed the law as follows:

> *By s 117AB(2), where false allegations or statements are made, it is now mandatory that the Court order the offending party to pay some or all of the other party's costs. For this purpose the Court is also able to make an order in favour of an Independent Children's Lawyer. The only aspect of this issue which is discretionary is the quantum of costs payable by the offending party. […]*
>
> *There is no statutory guideline concerning the manner in which the Court determines the quantum of costs payable pursuant to s 117AB. The factors which ordinarily influence the Courts discretion about whether an order will be made at all (s 117(2A) purport to relate only to the exercise of that discretion and not to the separate issue of the quantum of a costs order which s 117AB mandates. Nonetheless s 117(2A) contains a useful structure of relevant considerations when determining the quantum of an s 117AB order.*

This passage indicates that in considering what costs order to make, the court considers the false evidence together with other matters relevant under s 117. Another example is *Claringbold*,[107] where the application was based on the wife's false denial that there had been violence by her present partner. Bennett J said:

> *34. … The section itself has the effect of focussing the mind on the costs implications of allegations of family violence and abuse which can be easily made but, when false, are still difficult and costly to refute. […]*
>
> *I give weight to the fact that the wife maintained her denial of certain events which were ultimately proved to the court to have occurred pretty much as the husband alleged and that she otherwise lied expressly or by omission and I have done so in my consideration of the conduct of the parties to the proceedings as well as pursuant to my obligation under s 117AB.*

The other available decisions are consistent with this approach.[108]

---

106 *Sharma & Sharma (No. 2)* [2007] FamCA 425.

107 *Claringbold & James (Costs)* [2008] FamCA 57.

108 Eg, *Conway & Clivery* [2007] FamCA 1306.

Submissions

Some submissions, including that of the Family Law Section of the Law Council of Australia, suggested the repeal of s 117AB, mainly arguing that it was unnecessary or that it discouraged the disclosure of family violence.[109] For example the NSW Law Society wrote that *'the very existence of the section provides a clear disincentive to parties making allegations'*. It was defended by Men's Rights Agency and at least one other submission.[110]

The importance of truthful evidence

It is well established that in property cases under the Family Law Act 1975 giving false evidence, especially about one's assets, can attract a costs order. Thus in *Penfold,* Murphy J said: *"Presentation of a false statement of financial circumstances, which puts the other party to the trouble and expense of disproving it, is a circumstance which justifies an order for costs."*[111] There are other decisions to similar effect.[112] There seem to be fewer reported decisions about these matters in children's cases than in financial cases, but this may reflect a mistaken view prior to about 1995 that costs should not ordinarily be awarded in children's cases as opposed to financial cases.[113] There is no doubt that as a matter of law the giving of knowingly false evidence about family violence as well as other things, especially where it leads to proceedings being protracted, can give rise to costs orders under s 117.

Truthful evidence is of at least equal importance in children's cases, and arguably of more importance. In relation to family violence, false or misleading evidence relating to violence can cause great distress, and lead to outcomes adverse to the interests of children. If it consists of false allegations, the adverse outcomes might be that the children spend less time than they should with the person wrongly accused of violence. If it consists of false denials, the adverse outcomes might be to put children or other family members at risk, or to prevent or discourage productive ways of dealing with the problem. The damage done by false

---

109 Submission 16 ('This section is unnecessary'); Submission 12 ('more likely to ferment dispute between the parties, distract from the real issue of the children's welfare by focusing on arguments about whether statements are, or are not, false and encourage parties to litigate rather than focus on resolving the dispute'*)*; and Submission 10.

110 Submission 88 and one of the firms contributing to submission 2, Farr Gessini and Dunn ('We do not believe that the system discourages victims from disclosing violence').

111 *Penfold and Penfold* (1980) 144 CLR 311; 5 Fam LR 579, 583; FLC 90–800.

112 For example *Oriolo v Oriolo* (1985) 10 Fam LR 665; FLC 91–653 (FC).

113 See *In the Marriage of I and I (No 2)* (1995) 22 Fam LR 557.

evidence can also relate to other matters, such as what wishes or views children have expressed.

For these reasons, there is much to be said for measures that might help to reduce the giving of false evidence.

Difficulties with the existing provision

As the reported cases have pointed out, the section does not specify what costs order is to be made, or provide any guidelines.[114] Costs orders range from orders to the effect that a party should pay the whole of the other party's costs of the proceedings, or some proportion of the costs, or some specific amount. The requirement that the court make a costs order could technically be satisfied by making some minimal costs orders.

In addition there is nothing in the section that would prevent the court from also making *other* costs orders in regard to the general provisions of s 117. Thus, as some of the decisions illustrate, consistently with the legislation, the court could make a costs order in favour of one party based on the making of a false statement and a costs order in favour of that party, for a different amount, based on other matters that arise under s 117.

Next, it should not be assumed that the court will ordinarily be in a position to find that a person *knowingly* gave false evidence. It is an everyday thing for the courts to prefer the evidence of one party to another, but they usually do so without finding that one party gave deliberately false evidence. It is generally thought that many differences of opinion about facts reflect genuine differences of recollection.[115] Also, in relation to many ambiguous and emotional events people come to believe a particular version of events and give evidence which, although shown to be inaccurate, represents their genuine beliefs. In many cases, I suspect, the differences of evidence do not reflect one or both parties deliberately fabricating evidence, although no doubt this happens in some cases.

Although actual costs orders under s 117AB are rare, it is possible that the *fear* of a costs order (whether well founded or not) may influence litigants in the way they present evidence.

---

114 The Explanatory Memorandum to the Bill contemplates that the level of costs could vary from order to order: Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005, p. 41.

115 Submission 16: ('No application has been made before me perhaps because litigants rarely "knowingly" make a false allegation. It is often a matter of perception').

There are a number of possibilities. Fear of a costs order might have the desirable effects of discouraging litigants from making knowingly false allegations of family violence, or making knowingly false denials of it. On the other hand, it could have the undesirable effects of discouraging litigants from making *truthful* allegations of family violence, or *truthful* denials of it. It could have all of these effects, affecting different cases in different ways.

Although s 117AB now speaks of false 'statements' as well as false allegations, it is well known that it stemmed from a concern about false allegations of family violence, made by women against men, and it seems to be understood in practice as having that purpose. Because of this association, in my view it is likely that it has the effect, in some cases, of discouraging victims of violence from making true allegations, for fear that if the court does not accept the allegation, they might have to pay costs. Further, it may give the impression that the legislature has accepted the view that women's evidence about men's violence is inherently unreliable. In my view there is no satisfactory evidence that this is so, or that allegations of violence are more likely to be knowingly false than denials of violence, or, indeed, more likely to be knowingly false than any other type of evidence.

It is sometimes said that allegations of violence or abuse are easy to make, but difficult to disprove.[116] The second part is often true: it can indeed be difficult to prove that one has not been violent, or that one has not misbehaved in other ways. But is it really easy to make allegations of violence or abuse?

In one sense it is, namely that it is a simple act to write down allegations and file an affidavit to that effect. However while the physical act of filing the affidavit may be easy, the evidence indicates, I think, that for many people who have been victims of violence or abuse, it is embarrassing and painful to make that experience public. The National Legal Aid submission says this:

> *… it is the experience of Legal Aid lawyers that there are a number of reasons why family violence is not disclosed and that non-disclosure does not necessarily mean there has been no family violence. Some reasons for non-disclosure are:*
>
> - *an attempt to reduce conflict;*

---

[116] See for example the Explanatory Memorandum to the 2005 bill (''concerns expressed, in particular that allegations of family violence and abuse can be easily made and may be taken into account in family law proceedings'), and Bennett J in *Claringbold*, quoted below ('allegations of family violence and abuse which can be easily made but, when false, are still difficult and costly to refute').

- *as a show of good will;*
- *insufficient legal advice;*
- *the misguided assumption that there is an obligation to mediate at all costs;*
- *an inability to define a partner's unacceptable behaviour as family violence; and*
- *a belief that reaching an agreement is preferable to going to court.*
- *fear of not being believed and being perceived as alienating/not friendly, with the feared consequences being more time to the other parent and the child/ren being at prolonged risk, and/or fear of other penalty.*

The cliché that violence is 'easy to allege' is in my opinion misleading. It fails to recognise the serious inhibitions people often have about publicly disclosing the fact that they have been in a violent or abusive relationship, and the variety of reasons why they might be reluctant to do so in family law proceedings.

Much of the literature relates to women victims of violence, but the experience may be at least as difficult, and perhaps in some ways more difficult, for men who have been exposed to violence. It is important that the family law system should not be seen to favour either men or women, or to favour either those who allege family violence or those who deny it. Indeed, as the former Government correctly noted, ultimately it is of limited relevance what proportion of people give false evidence about particular sorts of matters: the family law system must be ready to deal with each case on its merits, and determine as best it can where the truth lies in each case. Its capacity to do this will be greater if it is seen as fair and unbiased by all those who deal with it.

In short, the law should try to encourage people to tell the truth without making, or appearing to make, any pre-judgment. In my view this requires repealing s 117AB, which still carries with it the suggestion that the system is suspicious of those who allege violence, and which (as the former government recognised) does not significantly change the ordinary law of costs under s 117.

At the same time, there may well be merit in the idea that the law should make it clearer that giving knowingly false evidence can lead to costs orders. This might be achieved by an appropriate amendment to s 117.

Section 117(1) provides in substance that with some qualifications, 'each party to proceedings under this Act shall bear his or her own costs'. Subsection (2) provides that the court may make 'such order as to costs… as the court considers just' if it considers 'that there are circumstances that justify it in doing so'. Subsection (2A) then provides that in considering what order (if any) should be made, the court shall have regard to:

(a) the financial circumstances of each of the parties to the proceedings;

(b) whether any party to the proceedings is in receipt of assistance by way of legal aid and, if so, the terms of the grant of that assistance to that party;

(c) the conduct of the parties to the proceedings in relation to the proceedings including, without limiting the generality of the foregoing, the conduct of the parties in relation to pleadings, particulars, discovery, inspection, directions to answer questions, admissions of facts, production of documents and similar matters;

(d) whether the proceedings were necessitated by the failure of a party to the proceedings to comply with previous orders of the court;

(e) whether any party to the proceedings has been wholly unsuccessful in the proceedings;

(f) whether either party to the proceedings has made an offer in writing to the other party to the proceedings to settle the proceedings and the terms of any such offer; and

(g) such other matters as the court considers relevant.

If it be thought that the Act should do more to discourage people from giving knowingly false evidence, s 117 could be amended to provide expressly that the court could take into account, when considering making a costs order, that a person had given knowingly false evidence. This could be done, for example, by amending subsection (2A) by adding a new paragraph to the following effect: *'Whether a party has knowingly given false evidence in the proceedings'*.

A final decision on this question could involve a consideration of the whole of the sections relating to costs, which is beyond the scope of this review. The recommendation will therefore be that the possibility be considered.

Recommendation 3.2

That s 117AB be repealed, and consideration be given to amending s 117 to make specific reference to the giving of knowingly false evidence, for example by inserting a new paragraph in subsection (2A) to the following effect: '*Whether a party has knowingly given false evidence in the proceedings'*.

3.5 RECONSIDERATION OF THE PROVISIONS RELATING TO SHARED PARENTAL RESPONSIBILITY AND THE DETERMINATION OF THE CHILD'S BEST INTERESTS

Introduction

This is a large and controversial topic, since the amendments of 2006, like those of 1995, emerged from a detailed process of parliamentary review and public discussion; and there are a number of relevant publications about the meaning and the operation of the present Act. In addition, similar issues have been the subject of vigorous debate and review in other jurisdictions. Further, there is a great deal of research, and considerable controversy, about associated issues: the connection between child development and parenting arrangements, the impact of violence on children, the desirability of overnight stays for very young children, and much else. Finally, the operation of the 2006 amendments is the subject of the evaluation by AIFS, which has not been published at the time of this Report. It is impossible in this Report to deal fully with this vast amount of material and the many complex and controversial issues, so the following discussion concentrates on what, I believe, are the central issues.

Submissions

It is not possible to provide every detail of submissions on this topic, but some examples follow.

Max Wright, Senior Manager Practice Quality, Relationships Australia (Victoria)

> *Anecdotal evidence from our FDR practitioners indicates that, as a consequence of the 2006 amendments around (in particular) shared parental responsibility/shared care, and popular understandings thereof, practitioners have been under increased pressure to facilitate parenting plans which reflect shared care scenarios, whether or not they are in the best interests of the children. This particularly applies in high conflict cases, which, whilst they may contain elements of family violence, do not contain sufficient information to assess them as inappropriate for FDR, or to claim an exception from FDR.*

Anna Cody, Director, Kingsford Legal Service

> *The overall impression we have from the advice and casework we have engaged in is that both men and women now believe that on separation, the law requires children to spend equal time with both parents, regardless of any evidence or allegation of domestic violence. The media has been active in sending this message and women, who have experienced domestic violence frequently make statements to the effect of "I'm scared of him: he threatens me every time I handover the kids." And yet women believe that they are now required to continue with contact visits and do not seek legal help.*

Women's Legal Service Victoria

> *Parents having equal shared parental responsibility for the child has frequently been interpreted by some participants in the system as meaning that each parent has 50% rights over the child. The focus has been more on equalizing parental rights between the parties rather than safety or whether that arrangement is in the child's best interests. Allegations of family violence are frequently lost in this tussle and focus on the rights of the parents. This is in spite of the legislation stating that the presumption is rebutted if there is child abuse and/or family violence.*

Background: the 2006 amendments

The relevant provisions of the Family Law Act have been summarised above, and the significant provisions are reproduced in Appendix 2. To understand the present issues and the recommendations made in this Report, it is necessary to say something about the history of the Act and in particular the amendments of 2006.

The background to the amendments of 2006 featured continued pressure on the Government and politicians generally from groups seeking, in particular, to have the Act amended to provide for a rebuttable presumption that it is in children's best interests for their parents to

have them for equal periods. Broadly speaking, this campaign was opposed on the basis that such a presumption would be likely to expose children to a risk of violence or abuse. There were of course other arguments and issues, but these two themes loomed large in the debate.

The two decisive moments in the development of the 2006 amendments were, I believe, the publication of the Hull Committee Report in 2003 and the Government's response to that report, especially as set out in its Response of 2005.[117] The later process of drafting and parliamentary review affected the final legislation in some significant ways, but did not change the basic decisions.

Equal time: the debate

The great issue of the day was whether there should be a presumption favouring equal time.[118] It would not be appropriate to re-open this debate for the purpose of this Review.[119]

What is important is the conclusion that the Hull Committee reached. It did recommend a presumption in favour of *equal shared parental responsibility*, except in cases "where there is entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse". But the Committee did not recommend a presumption to the effect that children should spend equal *time* with each parent. Its reasons were set out as follows:

> *2.4 What has become apparent to the committee during its inquiry process is that many separated parents – mostly fathers but also mothers – feel excluded from their children's lives following separation. What parents want is to be more involved and for many the equal time argument has become the vehicle for pursuing the connection that their children are entitled to. This has turned the debate away from the benefits for children of a positive and caring relationship with both parents to all the arguments about why equal time will or will not work.*
>
> *2.5 The committee believes that the focus must be turned back to the primary issue of how to ensure both parents can, and will, remain involved in caring for their children after separation.*

---

117 A new family law system: Government Response to Every picture tells a story (June 2005).

118 The Committee's Terms of Reference commenced: "given that the best interests of the child are the paramount consideration:(i) what other factors should be taken into account in deciding the respective time each parent should spend with their children post separation, in particular whether there should be a presumption that children will spend equal time with each parent and, if so, in what circumstances such a presumption could be rebutted…"

119 Although a few submissions put the view that there should be an equal time presumption (eg submission 32), none of them provided any reasons for concluding that the Hull Committee erred in rejecting this proposal.

The resolution: no equal time presumption, but encouragement for parental involvement

Although the Hull Committee rejected the idea that there should be a presumption of equal time, it made recommendations intended to 'ensure both parents can, and will, remain involved in caring for their children after separation'.[120] This approach was accepted by the Government, and can be seen in the 2006 amendments.

In my view the rejection of the demand for equal time was clearly correct. It represents a focus on the interests of the child rather than parental rights, and is consistent with the bedrock principle that the child's best interests must be the paramount consideration.

There were also sound reasons for the Committee to consider that steps should be taken to ensure both parents remain involved in caring for their children after separation. The Committee clearly wanted to shift the family law system away from what it saw as the problem, namely that there was effectively a presumption, or default position, to the effect that children should be with one parent, normally the mother, for most of the time, and with the other parent, normally the father, for alternative weekends and half of the school holidays (the '80:20' outcome – because in this arrangement the child spends about 80% of the time with one parent, and 20% with the other).

Although the law had never prescribed the 80:20 outcome, and although good practitioners urged their clients to work out what was best for the child in each case, anecdotal evidence certainly suggests that before the amendments of 2006 there was a tendency for people to treat the 80:20 outcome as the normal result in ordinary cases. It may well be true that because of this perception, many people who reached the 80:20 arrangement by agreement, or asked the court to make orders to that effect, did so without necessarily exploring other options that might possibly have been better for the children.

Assuming this problem did exist, there is no reason to think that it derived from any prejudice against fathers. The traditional 80:20 division of time would have had obvious attractions for many parents. The parents having the child most of the time – mainly the mothers – may be unemployed or employed part-time, and have more time available for child care. The children would have stability and continuity during the week. Sharing weekends would mean that the children would spend some weekend time with the primary parent, and perhaps as

---

[120] Paragraph 2.5, quoted above.

much time with the other parent as work and other commitments allowed. It is true that this arrangement has disadvantages for the children – for young children, the periods between seeing the other parent may be distressingly long; some children might want to spend more time with the other parent; and the other parent may not be able to make as full a contribution to the child's life as if the children were with the other parent during parts of the week, and if the other parent was involved in helping with homework, preparation for school and the like. But it seems likely that the 80:20 arrangement was so popular because it was often convenient for the parents and often seemed to have benefits for both the children and the parents.

The essential problem was not that it was an inherently bad arrangement, but that people may have come to adopt it as a matter of routine, or because they assumed that is what a court would have decided, rather than because it represented the optimal arrangement for their children.

The Hull Committee presented a unanimous report that was based on a remarkably detailed examination and consultation. In my view its essential conclusion, with bipartisan support, was a sound one. That essential conclusion might be summarised by saying that the best interests of the child should continue to be the 'paramount consideration';[121] that the legislation should recognise that children need to be protected against violence and abuse; and that while there should not be a presumption of equal time, measures should be taken to 'ensure both parents can, and will, remain involved in caring for their children after separation'. That conclusion, expressing as it does a carefully considered and bipartisan position, should remain the starting point when considering reforms.

Although those principles were in my view correct, it can be seen, especially with the benefit of three years experience with the 2006 amendments, that there were technical difficulties about the way the legislation was formulated. The way forward is therefore to address those technical difficulties, while retaining the basic approach of the Hull Committee.

---

[121] See especially at paragraph 1.18 ("It is the opening statement to the inquiry terms of reference; it is the one irrefutable view held by most participants throughout the committee's inquiry…"

Difficulties with the provisions linking equal shared parental responsibility and time

Although the decision had been made not to have a presumption of equal time, in order to shift the system away from routinely encouraging 80:20 outcomes it was decided to provide that the court should 'consider' whether equal time, or near equal time ('substantial and significant') would be a good outcome for the children. But this legislative nudge towards equal time is linked in a complex way to provisions about parental decision-making ('*responsibility*'). There is a presumption that equal shared parental responsibility will benefit children; this will presumably make it more likely that the court will make an order to that effect; and when it does, or is about to do so, the court must 'consider' equal time, or substantial and significant time.

The origin of this link seems to have been in the Hull Committee's recommendation for a Families Tribunal, which was to take most of the cases, leaving the more difficult cases for the Family Court. There was to be a presumption *for* equal shared parental responsibility in these, what we might call 'ordinary' cases (which were to be determined by the Tribunal), and a presumption *against* it in cases of violence, abuse or entrenched conflict.[122] The cases where there would be equal shared parental responsibility would be cases where there was no violence, abuse or intractable conflict. The Tribunal proposal was not accepted, but the link between equal shared parental responsibility and the court's obligation to consider equal time remains a feature of the Act.

While one can see how it came about, the legislative link between equal shared parental responsibility and the time children are to spend with each parent is somewhat unexpected, and it is not surprising that some people have difficulty with it. Further, the word '*equal'* in the expression 'equal shared parental responsibility' seems to have led some people to think that the presumption is one favouring equal *time*, although when one studies the sections it becomes apparent that it only triggers the court's obligation to 'consider' equal time. The information available in the course of this Review suggests that many people continue to misunderstand the 2006 provisions as creating a right to equal time, or a presumption favouring equal time, and it seems likely that these intricate provisions, linking a rule about decision-making with a rule about time, have contributed to that misunderstanding.

---

[122] Recommendations 1 and 2.

The difficulty can be seen in the statement by the Full Court, already quoted (emphasis added):[123]

> *In our view, it can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children's lives, both as to parental responsibility and as to time spent with the children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable.*

As explained above, although the Act does contain a legal presumption in favour of equal shared parental responsibility (decision-making) it only says that the court must 'consider' equal time. Yet the Full Court's sentence, to the effect that the legislature favours substantial involvement of both parents, '*both as to parental responsibility and as to time spent with the children*' might lead the reader to think that the Act favours equal time in the same way that it favours equal decision-making, namely by creating a presumption. I do not, of course, suggest that the Full Court misunderstood the legislation. But this sentence shows the difficulty in giving a simple and clear explanation of what the 2006 amendments say, and in particular explaining the relationship between the provisions about parental responsibility and those that relate to arrangements for children.

The legislative technique adopted (to link time with decision-making) is surprising, because there is nothing to suggest that there was any real problem about parental responsibility. There is nothing in the Hull Report or later reports to suggest that the courts were unfairly making orders removing one parent's powers to make decisions about the child. Rather, the problem was that because of the common '80:20' outcomes, the parent with 20% of the child's time, usually the father, was *in practice* somewhat excluded from playing a major part in the child's life.[124]

This analysis suggests that the basic objectives of the Hull Committee might be achieved by provisions that more clearly addresses the need to consider the full range of options when considering what arrangements to put in place about the care of children, uncomplicated by any link with the allocation of parental responsibility.

---

123 *Goode v Goode* (2006) 36 Fam LR 422; (2006) FLC 93-286, paragraph 72.

124 A closely related idea was that to describe parenting orders as giving one parent 'custody' or even 'residence', and the other merely 'contact' or 'access', also tended to create the impression that one parent was to be the primary parent and the other parent was to play a more marginal role. Hence, the 2006 amendments removed such language from the description of court orders.

The 'twin pillars': legislative emphasis on parental involvement balanced by protection from violence and abuse

Another legislative technique adopted to express the conclusions of the Hull Committee's report and the subsequent decisions was the great prominence given to two matters, namely the benefits of parental involvement and the protection of children against violence and abuse. As Brown J put it:

> *The provisions in the Family Law Act 1975 (Cth) (the Act) relating to children rest on twin pillars. The first is the importance to children of having a meaningful relationship with both parents; the second is the need to protect children from physical and psychological harm.*[125]

These two themes can be seen articulated in s 60B and in s 60CC. The latter section contains a list of matters to be taken into account in determining the child's best interests. Such a list was already in the Act, but the 2006 amendments divided it into two categories, 'primary considerations', and 'additional considerations'. The 'primary considerations' were the benefits of parental involvement and the protection of children against violence and abuse. Taken together, they can be seen as saying, in effect: 'children will benefit from parental involvement, but not if it exposes them to violence or abuse.'

The attractions of this formula are obvious enough. It acknowledged the two main themes of the strong submissions that featured in the public and parliamentary debates. It seemed consistent with children's interests: children were seen as benefiting from parental involvement, but not, of course, where there was violence or abuse. Thirdly, although perhaps less obviously, it also fitted neatly with a common-sense notion of parental right or entitlement: parents are entitled to be involved in their children's lives, unless they forfeit their rights by being abusive or violent.

While it may well be appropriate to state these themes as part of the general principles or objects of the Act, the idea of building them into the list of matters to be considered, separating them from the others by calling them 'primary considerations' – a legislative technique not recommended by the Hull Committee – has proved troublesome. The 'twin pillars' formula is not an ideal guide to children's best interests. Good parenting can be compromised by other things in addition to violence and abuse. A parent may be disabled

---

125 *Mazorski v Albright* (2007) 37 Fam LR 518, at 526.

from responding properly to a child's needs by reason of adverse mental health,[126] or physical health. A parent may be indifferent to a child, and leave the child unattended for long periods; or seriously neglect the child. A parent may lack the necessary dedication and skills to respond to the special needs of a severely handicapped child. Parents may each be capable and willing parents in many ways, but the conflict between them might be such as to distress and damage the children. In these and many other situations, difficult issues may arise in determining what arrangements will be best for children, even though the problems might not fall within categories such as 'violence' or 'abuse'.

For these reasons it may not help in the identification of the child's best interests if the law appears to assume that there are two basic types of case, namely the ordinary case, and the case involving violence or abuse. While violence and abuse are serious matters, they are by no means the only serious problems that need to be considered in parenting cases. The formulation of such an approach, especially where it follows New Zealand in having a presumption or onus against contact by parents where there has been violence, creates a situation is which the litigation is likely to be focused on the legislative definition of violence and whether each case falls inside it or outside it, rather than on what is best for the child.

As Associate Professor Helen Rhoades has written:[127]

> *I am likewise not convinced of the protective benefits for women and children of a 'no contact' presumption, which would only apply in cases of proven family violence… Apart from the added stress involved for mothers and children, a no-contact presumption would reinforce the bifurcated pathway that has developed in Australian family law, in which the only candidates for an 'exemption' from shared parenting appear to be the victims of (serious) abuse. As Helen Reece has cautioned, we need to be careful of buying into a dichotomized 'family violence and everything else' view of post-separation families.[128] In light of this danger, what we need is law that is more broadly concerned with supporting children's healthy development and which recognises the wide range of risk factors, including as Susan Holmes has suggested, behaviours*

---

126 See B Rodgers, B Smyth and E Robinson, 'Mental Health and the Family Law System' (2004) 10 Journal of Family Studies 50-70.

127 H. Rhoades, 'Revising Australia's parenting laws: A plea for a relational approach to children's best interests' (2010) Child and Family Law Quarterly (forthcoming).

128 H. Reece, 'UK women's groups' child contact campaign: "so long as it is safe"' (2006) 18 Child and Family Law Quarterly 538 [Rhoades' footnote].

'such as obsession, stalking, depression, control, retaliation, inability to let go and attitudes of ownership of children', and not just 'the presence or absence of a past history of violence'.[129]

Of course the Family Law Act includes provisions under which these other problems can be considered, and for that reason it is possible for courts to take all circumstances into account. From that point of view, the existing provisions are workable. But any legislative focus on particular matters is likely to influence the many parents who look to the law to help them resolve their differences, and may deflect them from doing what is most important, namely working out what will be best for the children in the particular circumstances. In addition, notions of equal time, and even equal parental responsibility, may encourage parents to think about their own entitlements, rather than putting such feelings aside and focusing on what is important for the children.

The problem of parental conflict, which can be very damaging to children, provides a revealing example of the technical difficulty caused by the legislative link between parental responsibility and arrangements for the care of children. The Hull Committee had recommended that the presumption of equal shared parental responsibility would not apply in cases of *entrenched conflict*, as well as in cases of abuse and violence.[130] This was based on evidence before the Committee about the damage that such conflict can do to children exposed to it.[131]

The Government ultimately rejected this recommendation, however, not because it questioned the Committee's views about the impact of conflict on children, but because to do so would undermine the impact of the legislative formula by increasing the category of cases

---

129 http://www.frsa.org.au/UserFiles/Holmes%20Speech%20FLSC%2019%20Feb%20Final%20(1).pdf. [Rhoades' footnote].

130 Recommendation 2 was that there should be 'a clear presumption against shared parental responsibility with respect to cases where there is entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse'.

131 See paragraph 2.41. In its *Discussion Paper*, the Government agreed with this: 'Entrenched conflict can make it very difficult for equal shared parenting to work. It is also not likely to be in the best interests of the child where there is violence or child abuse. For these reasons, the presumption would be against equal shared parental responsibility where there is evidence of violence, child abuse or entrenched conflict.' However in mid-2005 it changed its mind: 'In relation to entrenched conflict, it could be argued that any case that reaches a final court hearing involves entrenched conflict. Making entrenched conflict a ground for applying a presumption against joint parental responsibility could mean the courts would rarely be able to apply the proposed new presumption in favour of joint parental responsibility…' : *A new family law system: Government Response to Every picture tells a story* (June 2005.

to which the presumption of equal shared parental responsibility would not apply.[132] This decision (which seems to reflect a desire to ensure that a large number of parents have the benefit of the presumption), illustrates the difficulties of the categorical approach adopted by the legislation.

A possible approach: strengthening the family violence provisions

Some submissions pointed out that the two principles can conflict with each other, and it has been suggested that 'many of the problematic orders made since [the 2006 amendments] have arisen because of this conflict'.[133]

A common theme among submissions critical of the current law was that while it deals with protection against violence and abuse as well as the value of parental involvement, it deals with the latter in more detail, and overall gives the impression that parental involvement is more important than protecting children and adults from violence and abuse. Those who took this view tended to urge that this imbalance be rectified by building into the Act a more specific and detailed treatment of family violence. A number suggested that some of the provisions of state legislation relating to family violence, in particular the Victorian legislation, should be incorporated into the Family Law Act 1975. Some were attracted by the New Zealand provisions, to the broad effect of creating a presumption against a person accused of violence having unsupervised contact with a child.

To continue Justice Brown's metaphor of the 'twin pillars', on this view the parental involvement pillar is taller than the protection against violence pillar, and the appropriate correction is to build up the second to make it as tall as the first. This is not the approach recommended in this Report, as will be seen. But some correction of this kind would be appropriate if the recommendations that follow are not adopted.

The recommended approach to legislative reform

Having regard to the previous discussion, in my view it would be desirable to revise the legislation in order to retain the benefits intended by the Hull Committee, while avoiding the difficulties that have arisen with the way the Hull approach was legislatively implemented.

---

132 *A new family law system: Government Response to Every picture tells a story* (June 2005) ('Making entrenched conflict a ground for applying a presumption against joint parental responsibility could mean the courts would rarely be able to apply the proposed new presumption in favour of joint parental responsibility').

133 Submission 10.

Such an approach would do two things. First, it would separate decisions about parental responsibility from provisions about living arrangements. Second, it would revise the formulation of the considerations relevant to determining the child's best interests so that they are more clearly based on promoting the child's interests rather than accommodating notions of parental rights. Instead of requiring the court to consider any particular arrangement (with the danger that it would become the de facto default position), the Act would say that there should be *no* default position or presumption.

This would be in the spirit of the recommendations of the Hull Committee. That Committee stressed the dangers of a 'one-size-fits-all' approach.[134] And although it recommended that the Act should require legal and other advisers to help the parties consider equal time,[135] in relation to the courts, the Hull Committee recommended that the Act should provide that they should be required 'to first consider *substantially shared parenting* time when making orders in cases where each parent wishes to be the primary carer'.[136] The present Act departs from that recommendation by requiring the courts to consider *equal* time.

A proper application of the 'paramount consideration' principle itself requires the court to consider equal time, as well as all other possibilities, in determining what is likely to be best for the child. The court is not limited to any particular arrangement, but must consider what arrangement will be best for the child in each particular case. The difficulty with the present formula is that the specific requirement that the court should consider one particular outcome, namely equal time (and if not, substantial and significant time) seems to have given many people the impression that there is a *presumption* in favour of equal time, in cases where parents have not forfeited their entitlements by reason of violence or abuse.

In my view there is likely to be a problem with any legislative provision that singles out a particular outcome for special mention, whether that outcome is equal time in non-violence cases, or – as in New Zealand – no contact in cases of violence. The experience of the 2006 amendments, and the information available to this Review, indicates that the objective of encouraging appropriate parental involvement is more likely to be achieved by provisions

---

134 For example in paragraph 2.39.

135 The recommendation was that they should be required 'to assist parents for whom the presumption of shared parenting responsibility is applicable, to first consider a starting point of equal time where practicable'.

136 Recommendation 5, last paragraph.

that emphasise the benefits to children of a close relationship with both parents, but encourage parents, advisers and courts to consider what arrangements will be best for the children in each case, rather than starting with the assumption that any particular outcome is likely to be best for any particular category of case.

The following recommendations are intended to implement this approach. They are followed by notes dealing with each recommendation in a little more detail.

Recommendations and notes

Recommendation 3.3

That the Government give consideration to retaining the present provisions relating to parental responsibility (ss 61B, 61C, and 61DA), but amending the Act so that the guidelines for determining arrangements for the care of children (s 60CC) are independent of the provisions dealing with parental responsibility, and amending s 61DA so that it creates a presumption in favour of each parent having "parental responsibility".

Recommendation 3.4

That the Government give consideration to amending s 60CC to provide, in substance, as follows:

(1) In considering what parenting orders to make, the court must not assume that any particular parenting arrangement is more likely than others to be in the child's best interests, but should seek to identify the arrangements that are most likely to advance the child's best interests in the circumstances of each case.

(2) In considering what parenting orders to make, the court must take into account the following matters, so far as they are relevant:

(a) any views expressed by the child concerning the child's relationship with each parent and with other persons, and about any other matters that are important to the child;

(b) the nature of the relationship of the child with each of the child's parents, and with other persons (including any grandparent or other relative of the child);

(c) the benefit the child has received, and is likely to receive, from a meaningful relationship with both of the child's parents;

(d) the capacity and willingness of each parent or other relevant person to provide for the child's safety, welfare and well-being, and the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent;

(e) any likely advantages to the child if each parent regularly spends time with the child on weekdays as well as weekends and holidays, and is involved in the child's daily routine and occasions and events that are of particular significance to the child;

(f) the likely effect of any changes in the child's circumstances, including any separation from either parent any other child or adult with whom the child has been living;

(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

(h) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(i) any other fact or circumstance that the court thinks is relevant.

(3) In determining the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent (paragraph (d)), the court must consider, in particular, the extent to which each of the child's parents:

(a) has taken, or failed to take, the opportunity to participate in making decisions about major long-term issues in relation to the child; and to spend time and communicate with the child;

(b) has facilitated, or failed to facilitate, the other parent in making decisions about major long-term issues in relation to the child, and spending time and communicating with the child; and

(c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.

(4) If the child is an Aboriginal child or a Torres Strait Islander child, the court must also take into account the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share it), and the likely impact any proposed parenting order under this Part will have on that right.

For the purpose of this subsection, the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture;

(b) to have the support, opportunity and encouragement necessary to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

(c) to develop a positive appreciation of that culture.

Recommendation 3.5

That if Recommendation 3.4 is not adopted, s 60CC(3)(c) be amended to read:

(c) the capacity and willingness of each parent to provide for the developmental needs of the child in the circumstances of each case, taking into account, among other things, children's need for safety and the benefits of a close and continuing relationship with both parents.

Recommendation 3.6

That if Recommendation 3.4 is not adopted, the Government strengthen the provisions of the Act relating to family violence, including more detail about the nature and consequences of family violence, and that it consider in this connection

adapting some of the provisions of Victorian or other state and territory legislation relating to family violence.

Recommendation 3.7

That the Government give consideration be given to revising s 60B(2).

Notes on recommendations 3.3 – 3.7

Parental responsibility and parenting arrangements separated

There is no need to change the substance of the existing provisions about parental responsibility. By s 61C each parent has parental responsibility. The principles and objects in s 60B make it clear that parents should cooperate in carrying out that responsibility. The court may make orders changing the allocation of parental responsibility. There is a presumption that children will benefit if the parents have equal shared parental responsibility,[137] and the court can make an order to that effect, which will have the consequence that the parties come under a legal obligation to consult each other about important decisions relating to the child.[138]

For the reasons given earlier it would be helpful, however, to deal separately with parental responsibility and the making of parenting orders dealing with such matters as with whom the child should live, and thus s 65DAA (which creates the link between parental responsibility and matters relating to the times the child should spend with each parent) should be repealed. It remains important that rather than suggesting that any particular outcome is likely to be best, the legislation should encourage parties and the courts to consider all options, including equal time and near-equal time, so that the best outcome can be arranged in each case. This is dealt with in the proposed amendments to s 60CC (see the notes below). Under the present recommendations, the valuable idea of spelling out what is meant by 'substantial and significant time', now contained in s 65DAA, has been incorporated in the proposed s 60CC(2)(e).

To make clearer the separation between parental responsibility and the arrangements for the care of children, it would be helpful if the presumption in s 61DA favouring both parents

---

137 Section 61DA.

138 Section 65DAC.

having parental responsibility were expressed as a presumption "*that each parent should have parental responsibility*". That wording avoids the risk that the concept of 'equal' shared parental responsibility might be confused with the idea that children should spend equal time with each parent.[139] It also avoids the problem that providing for 'joint' parental responsibility might have the unintended consequence that both parents' consent would be needed to authorise such things as medical attention, and school enrolment. While the law should encourage parents to co-operate (as s 60B rightly does), it would be impractical if, for example, a parent could not lawfully arrange for medical treatment for the child while the other parent was overseas or otherwise unavailable.

The proposed guidelines for determining what is in the best interests of the child: s 60CC

The proposed revision of s 60CC(1) would preserve the reform made by the 2006 amendments in discouraging what seems to have been a previous pattern of routinely assuming that children's interests would be served by spending alternate weekends and half school holidays with one parent. But instead of assuming that equal or near-equal time would normally be in the child's interests, it emphasises the need to consider all options. The new list of factors emphasises the importance of good parenting, and of the parent-child relationship.

Views of the child

Paragraph (a), like paragraph (a) of the existing list, refers to the views of the child, the importance of which was stressed in a number of submissions.[140] The proposed wording is slightly different from the existing provision. The suggested change is intended to reinforce the idea that influenced the previous change (from 'wishes' to 'views') by emphasising the importance of the court and the parties taking into account the way children experience the situation and feel about it, so that (among other things) the court might be helped to identify an outcome that will prove workable. As the earlier change from 'wishes' to 'views' suggests the focus should not be only on what outcome the children want. Understanding the views and perceptions of quite young children, for example, might be important for the adults

---

139 If some adjective is thought necessary, 'full' would be better than 'equal' or 'joint'.

140 Submissions: 8, 28, 31, 34, 38, 56, 63 and 95.

in deciding the best arrangements for the child, even though the child's point of view might not be based on an informed and mature consideration.

However the emphasis in the existing wording, emphasising the maturity of the child and referring to the 'weight' to be given to the child's views,[141] still suggests a narrow focus on what *outcome* the child desires. This is only one of the reasons the court may want to know about the child's views, and this narrow focus may suggest that only the more considered views of older children are of real importance.

The proposed wording is not a major change from the present wording, but is intended to encourage those in the family law system to approach the matter of the child's views so that the court will have a more complete understanding of the situation and a better ability to predict how different arrangements might work out. There are many valuable insights that can be gained from children without placing them in the position of expressing a choice between the parents.[142] The suggested wording is intended to lead to a more holistic approach to children's wishes, feelings and perceptions, and one that may help to protect them from the family conflict.

Nature of the child's relationships

Paragraph (b) requires the court to consider the nature of the relationships in the particular case, avoiding making assumptions that might or might not be true in the particular case.

Benefit of parental relationship

Paragraph (c) retains the language of the 2006 amendments referring to the benefit from the parental relationship, and emphasises the importance of parents by not referring to other persons. Its language is intended to focus, more clearly than the present wording, on the benefits to the child of the actual relationship in the particular case.

---

141 The present wording is "any views expressed by the child and any factors (such as the child's maturity or level of understanding) that the court thinks are relevant to the weight it should give to the child's views."

142 See the discussion in P. Parkinson and J Cashmore, *The Voice of a Child in Family Law Disputes* (OUP, 2008) pp. 200-205.

Parental capacity and performance

Paragraph (d) deals with parental capacity, but avoids the over-emphasis in the present wording on one aspect, namely facilitating the child's relationship with the other parent. That important aspect remains prominent (see proposed subsection (3)), but in addition the explicit reference to the child's safety emphasises that where necessary it is an important part of good parenting to take appropriate measures to ensure the child's safety.[143]

Paragraph (e) continues a helpful idea from the 2006 amendments, to the effect that good parenting normally involves being involved in all aspects of the child's life, so that, for example, a parent who sees the child only on weekends may be limited to entertainment activities and may find it hard to play more than a peripheral role in the child's life.

New paragraphs (f), (g), (h) and (i) are continued from the existing list in s 60CC.

Since the provisions about indigenous children - old paragraph (h) and sub-s (6) - apply only to a minority of cases, it seems more convenient to place them in a separate subsection. There they are at least as prominent, arguably more so.

The proposed list omits the following old paragraphs relating to family violence and family violence orders:

> (j) any family violence involving the child or a member of the child's family;
>
> (k) any family violence order that applies to the child or a member of the child's family, if:
>
> > (i) the order is a final order; or
> >
> > (ii) the making of the order was contested by a person;

This requires some comment.

---

[143] The words 'provide for the child's safety, welfare and well-being' are taken from The Children and Young Persons (Care and Protection) Act 1998 (NSW), section 8(a) and (c). The first of the two 'objects' stated in that section is 'to provide that children … receive *such care and protection as is necessary for their safety, welfare and well-being,* taking into account the rights, powers and duties of their parents or other persons responsible for them'. The third, which refers to appropriate assistance being rendered to parents and others responsible for children, refers to the 'the performance of their child-rearing responsibilities in order to promote *a safe and nurturing environment'*.

As to paragraph (j), although family violence is obviously relevant to any assessment of the child's safety and well-being, and there seems 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. In my view it is important to keep section 60CC as simple as possible, rather than seek to spell out particular reasons why a child might come to harm. In the 2006 amendments, as explained above, undue prominence is given to two matters, benefit from parental involvement and protection from violence and abuse: that emphasis, it has been argued, stemmed from the political compromise that resulted in the legislation, rather than from an analysis of children's interests.

Old paragraph (k) raises a number of issues. The court needs to know about any current family violence order so that it does not inadvertently make a parenting order that is contrary to it. Hence it is appropriate for the Act to provide, as it does in s 60CF, that the parties have an obligation to inform the court about such orders. The court should also know about information indicating any risk of violence (or other risk) to children. This topic is covered elsewhere in this Report, especially in the discussion of risk assessment. In this connection, what is important is the evidence or information relevant to the risk, rather than whether or not a different court has made a family violence order, or what evidence was before the court when it did make the family violence order.

The old paragraph (k), in my view, does not deal appropriately with this matter. By including family violence orders in this list of matters relevant to the assessment of children's interests, it might be taken as suggesting that the order itself is a factor that should be taken into account. It then partly retreats from that suggestion by excluding interim and non-contested orders.[144] The rationale is, obviously, that it may be wrong to infer from the making of such orders that there is a risk of violence. But is the implication that the court should infer that there is a risk of violence from the making of final and contested orders?

I doubt if that was the intention, and in my view the legislation should not give the impression that the court will infer from the order itself that a child is at risk. Such an impression, whether or not it reflects what the court will actually do, might well encourage

---

[144] Even this is not entirely satisfactory, since it might be thought that such orders, though not falling under that paragraph, could be considered under old paragraph (l)(any other fact or circumstance).

people to seek family violence orders in order to gain some advantage in family court cases.[145]

In my view the law should do everything possible to enable the court to know about current family violence orders, so it can avoid making orders that inadvertently clash with them. Otherwise, what is important is that the court should learn about the *factual circumstances* that might suggest a risk to the child or other person, regardless of what was the basis of a previous family violence order. As one legal submission pointed out, "It is the underlying allegations that are far more important to the Court in determining the case than the existence or otherwise of an order".[146]

To summarise, in my view on this topic the law should

- create a risk assessment process;
- make it clear that safety is an important aspect of children's interests, so that evidence will be presented on that topic; and
- ensure that the court knows about any current family violence order so that it does not inadvertently make a parenting order that is contrary to it;
- avoid creating an impression that the Family Court will draw adverse inferences from the family violence order itself, rather than on evidence put before the Family Court (which may or may not coincide with the evidence that was before the court that made the family violence order).

I believe that these objectives will be achieved by the recommendations made in this Report. Accordingly, if they are adopted there will be no need for the old paragraph (k).

Reconsideration of s 60B(2)

The provisions of s 60B(1), stating the "objects" of Part VII are in my view appropriate, giving weight to the importance of a meaningful relationship with parents, protecting children

---

145 For a recent study on family violence orders, see Parkinson, Patrick, Cashmore, Judith and Single, Judi P., Post-Separation Conflict and the Use of Family Violence Orders (November 15, 2009). Sydney Law School Research Paper No. 09/124. Available at SSRN: http://ssrn.com/abstract=1506683.

146 Farrer, Gesini & Dunn solicitors, (part of submission 2).

from harm, ensuring that children receive adequate and proper parenting, and parents fulfilling their duties.

However some issues arise in relation to the 'principles' in subsection (2). To some extent, they add little to the 'objects'. For example the idea that children 'have the right to know and be cared for by both their parents' - paragraph (a) - adds little to what is already in the 'objects' in subsection (1). To the extent that it implies that there is some enforceable right under Australian law, paragraph (a) is rather misleading: as a matter of law it seems that parents can lawfully arrange for others to look after their children. Similarly, the language of children having a 'right' to spend time with parents - paragraph (b) - is difficult to reconcile with the principle that the child's best interests are paramount, since in some sad cases it is necessary for the court to protect the child by limiting the extent to which the child is to be with the parent.[147] Paragraph (c) is also awkwardly phrased. It might be inadvertently misleading, because as a matter of law parents do not jointly share their responsibilities unless the court makes an order to that effect.[148] It is no doubt intended to encourage parental cooperation, but this is adequately covered by the 'objects' in subsection (1). Paragraph (d) adds little if anything to what is already in the 'objects'. Paragraph (e) (children's rights to enjoy their culture) is different: it is a separate and important matter, and might perhaps be considered for inclusion in sub-section (1) as an 'object'.

Section 60B was not the subject of detailed submissions, and is not central to this Review. However it is an important part of the Act. It is true that a small minority of parents may be unwilling or incapable of accepting their responsibilities. At the other extreme, some parents will proceed to make sensible and appropriate arrangements without needing any resort to the law. But there would also be quite a large number of parents, especially among those who attend the community-based dispute resolutions processes, who would be looking for direction from the law in resolving their differences about parenting arrangements, and the messages sent by the Act, no doubt usually filtered through the words of legal and other

---

147 The awkwardness of the drafting of s 60B(2) is underlined by the words in brackets "(except when it is or would be contrary to a child's best interests)" that introduce the list. This wording involves a puzzling idea, that a child can have a 'right' to something that in some circumstances is contrary to the child's interests.

148 As noted elsewhere, under s 61C 'each parent has' parental responsibility, and the legal obligation to consult arises only if the court makes an *order* for shared parental responsibility: s 65DAC.

advisers, are likely to be influential.[149] If the clear messages of s 60B (1) are being complicated and weakened by the difficulties with the wording of subsection (2), it might be useful to consider whether subsection (2) is really necessary, or whether it could be improved, and perhaps the substance of paragraph (e) removed into subsection (1).

The definition of family violence

The present definition of family violence in the Family Law Act is:

> ***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.*

Submissions about the definition of 'family violence' generally focused on two issues. The first was the merits and demerits of the amendment to the definition in the 2006 amendments, namely the narrowing of the definition to reasonable fear.[150]

The second was whether the definition should be clarified,[151] or elaborated,[152] so that it spells out what family violence might involve, on the model of some state and territory legislation, particularly the Family Violence Protection Act 2008 (Vic).

---

149 The Hull Committee was very aware of this, as can be seen from its emphasis on the majority of families in eg paragraph 2.6.

150 Submission 17 suggested an alternative approach, namely the inclusion into the definition of the following: ('a subjective perception that a person has been subject to family violence does not constitute Family Violence'). Submission 27: ('remove test of reasonableness').

151 Submission 17: ('It is submitted that the present drafting of the definition of Family Violence in section 4 is too vague. Decisions have been inconsistent with the plain wording. Given that both the presumptions of equal shared parental responsibility and the exceptions to participation in Family Dispute Resolution rely on this definition, it is submitted that the definition needs to be expanded and clarified. The re-wording of the definition, in a plain English fashion, will make it easier for both parties and the Court to identify what conduct does, or does not, constitute Family Violence').

152 Submission 28: ('amend definition so that it recognises that violence against a parent is violence against a child'); Submission 43: ('include 'psychological harm''); an opposed position included Submission 50: ('Family law courts should disregard allegations of emotional violence').

The National Legal Aid submission recommended that

> *An expanded and more prescriptive definition of family violence, similar to that contained in the Family Violence Protection Act 2008 (Vic), should be inserted into the Family Law Act 1975.*

Another example is the definition proposed by the NSW Women's Refuge Movement:

> *The current definitions for Family Violence and Child Abuse be removed, and that national definitions for Domestic Violence and Child Abuse be established that reflect:*
>
> - *violence and abuse are not only physical actions, but a range of other behaviours, that also impact on victims in a range of forms that may not be physically apparent and can be just as incapacitating as physical violence;*
> - *children witnessing violence or abuse of a parent, directly or indirectly, should also be recognised as a form trauma (sic) under Child Abuse;*
> - *Domestic Violence often goes unreported, and together with other forms of non-physical violence, results in a lack of undocumented evidence;*
> - *Domestic Violence and Child Abuse definitions that are applied at State/Territory levels.*

The Women's Legal Service Victoria submitted:

> *The understanding and definition of family violence should be as broad as possible to include the family dynamics and power imbalances that underlie the violence. An example could be similar to the preamble and definition of family violence in the Victorian Family Violence Protection Act 2008, which includes the context and nature of family violence.*

The Bundaberg Family Relationship Centre submission said:

> *The definition of "family violence" contained in Section 4 of the Family Law Act 1975 appears to be very limited and does not specifically include sexual abuse, psychological abuse, financial abuse, social abuse, harassment and intimidation. This vague and unclear definition means that many clients and their lawyers do not understand what family violence means and how it affects the children.*

The National Legal Aid submission said:

> *This definition of family violence under the Family Law Act while not as prescriptive as some definitions in state family violence legislation, for example the recent 'Family Violence Protection Act' 2008 (Vic), is nonetheless fairly broad. The fact that it does not emphasise physical violence over any other form is a positive thing, as much debilitating violence is psychological, emotional or financial. However, it is still the experience of lawyers that unless a litigant can show clear evidence of some physical violence, other forms of violence are often not considered in depth until final hearing, if at all. Definitions of 'family violence', 'neglect' and 'abuse' need to be carefully worded so that they act as a measure against which to assess allegations. A more comprehensive and specific definition, with a list of types of family violence, neglect and abuse would further assist in identifying such behaviours and in understanding the impact of such behaviours on the individuals, on their familial relationships and in the making of appropriate court orders.*

Some submissions commented that child abuse can accompany family violence,[153] and several made the related point that family violence can itself be seen as a form of child abuse.[154] Submissions emphasised the range of forms, and the importance of the element of control.[155] Some, however, thought that the existing definition recognised this:

> *The definition of family violence used by the Family Court of Australia is broad and captures the many different forms of violence and the diversity of family relationships in which it occurs.*[156]

The purposes of the definition

Any discussion of a definition must consider the purpose of the definition. The significance of the definition of family violence in the Family Law Act 1975 appears to be relevant especially in relation to:

1. s 60K;

2. exemptions from compulsory dispute resolution;

---

153 Submissions: 19 and 56.

154 Submissions: 28, 34, 95 and 100.

155 Submissions: 2, 31, 79 and 87.

156 Submission 14.

3. the connection between the operation of the Family Law Act 1975 and the operation of state and territory family violence laws;

4. the objects or principles in the Act (s 43, s 60B); and

5. the determination of the child's best interests.

The need for precision is not the same in relation to these different areas. For the purpose of stating objects, and perhaps for the purpose of a list of matters relevant to determining the child's best interests, it is not essential (although it may be desirable) that the term have a precise definition. On the other hand, for the first three listed purposes, the precise definition will be important, because legal consequences depend on whether behaviour falls inside or outside the definition. It is therefore helpful to consider the suitability of the definition for each of these various purposes.

In relation to s 60K

If other recommendations in this Report are accepted, this problem will not arise, because instead of a requirement to file a particular document in cases involving family violence, there will be a general process of risk assessment.

In relation to exemption from compulsory dispute resolution

It is arguable that the requirement of a reasonable fear is inappropriate for this purpose. Suppose one party had a *real but unreasonable* fear of the other, as, for example where the first party had a mental illness. That fear might well create a situation in which dispute resolution processes would be unworkable.

On the other hand, a definition based on a real but unreasonable fear might cause the other party (innocent of violence, in our hypothetical example of mental illness) to feel that a court-ordered exemption based on 'family violence' would unfairly stigmatise him or her.

Another relevant matter is that in the case of a real but unreasonable fear a dispute resolution practitioner would be likely to issue a certificate to the effect that dispute resolution would not be suitable. If so, in our example, the definition of family violence would not necessarily have the effect that the person having the fear would be forced to engage in dispute resolution.

This is a difficult issue, and I do not consider that the information available to me would justify amending the definition for this purpose. As with other matters, it would be appropriate for further consideration to be given to the question in the light of any relevant new information, for example from the AIFS evaluation.

In connection with the operation of state and territory family violence laws

The interaction between the Family Law Act and state and territory family violence laws is a complex topic that is outside the Terms of Reference for this Review.

In connection with objects or principles in the Act (s 43, s 60B)

As mentioned earlier, it is not critical that the definition be precise for these purposes. There is perhaps a stronger argument for the present definition in this context, however. It is appropriate for the principles to single out the most serious behaviour, and there seems no good reason to include situations in which a person has unreasonable fears.

In connection with the determination of the child's best interests

There has been no suggestion that the list of matters relevant to determining the child's best interests should be limited. Thus any reference to family violence in the list of relevant matters does not need to be precise: behaviour that fell outside the definition could also be taken into account, if nowhere else, under the provision referring to 'any other fact or circumstance that the court thinks is relevant'.

A greater need for precision arises from the distinction between the 'primary' and 'additional' considerations, which includes family violence as 'primary'. However if the recommendations of this Review are accepted this distinction will disappear.

Does the concept of 'reasonable' fear work in justice?

Some advocates for victims of violence have argued that the impact of the 'reasonable fear' requirement is unfair. It is often pointed out that behaviour may be frightening in ways that an outsider might not recognise. The example often given is where a violent partner uses a particular gesture which the victim knows from prior experience is a threat of a beating. An outsider not knowing the violent history or the significance of the gesture, might wrongly think that the other party could not reasonably be fearful.

In my view, however, the correct interpretation of the requirement of reasonableness would take the context into account, and ask whether a person in the victim's position, having experienced the history of violence and knowing the meaning of the gesture, would have a reasonable fear. The answer, in our example, would be yes.

Another criticism of the inclusion was made by the Domestic Violence Resource Centre (Victoria):

> *The word "reasonably" in this definition is problematic. Given the prevalence of community attitudes which blame the victim, and the lack of understanding of the reasons women may stay with violent men, the average person in the community may have a different idea of whether a woman's fear is "reasonable". This test places an additional burden on the woman alleging violence to provide documentary proof or third party evidence of that violence to the Court.*[157]

It is true that in such cases it would be necessary for the victim to give evidence of the context, so that the decision-maker would understand the basis of the fear. This is true of all situations in which the fear is reasonable because of the overall history and situation, rather than because of some obviously dangerous incident or threat of immediate harm. A problem of lack of understanding of the reasons women stay with violent men would remain a problem even if the word 'reasonable' were removed, and that problem should be reduced if, as recommended, there is to be increased training and education about family violence.

In my view, the inclusion of the concept of reasonableness has merit, and the question is whether it has in fact been interpreted in ways that is unfair to victims. The information available to the Review does not indicate that the definition has in fact malfunctioned in that way. Accordingly, it would not be appropriate to recommend the removal of the requirement. Again, however, further consideration should be given to this issue if more relevant information comes to light about the operation of the definition in practice.

Should the definition include a more detailed account of the nature of family violence?

As already mentioned, a number of submissions have urged that the Family Law Act 1975 should define family violence along the more elaborate lines of some state legislation. There is force in the argument that doing so would help educate people in the family law system understand the nuances and complexities of the topic.

---

157 Submission 10

The difficulty with this approach is that in contrast with the state and territory violence legislation, the Family Law Act 1975 is not an act about violence. Family law is an area where family violence is frequently an issue. But it is not obvious why the law should spell out great detail about family violence, and not about other topics relevant to family law and children, such as child development theory, good parenting, or the nature of mental illness. Consistently with this view, the state and territory child protection legislation,[158] while dealing explicitly with various kinds of harm from which children need protection, does not contain definitions of family violence or domestic violence.

The argument for a detailed legislative definition of family violence arises, perhaps, because of the central importance given to family violence in some of the provisions introduced in 2006. As mentioned earlier, it is possible to see children's law as dominated by the 'twin pillars' of parental involvement and protection from violence. In that context, it can be argued that since the Act spells out some desirable features of parental involvement, a proper balance requires that is should include equivalent detail about family violence. One can see the value, for example, in a definition that included words such as these, from the Victorian Act:

> *… the Parliament also recognises the following features of family violence… that children who are exposed to the effects of family violence are particularly vulnerable and exposure to family violence may have a serious impact on children's current and future physical, psychological and emotional wellbeing…*[159]

If the recommendations in this Report are accepted, the Family Law Act would emphasise the importance of all matters relevant to children's interests, and there would be no 'twin pillars'. In that different legislative environment, the argument for spelling out the nature of family violence would lose much of its force. In relation to family violence as well as many other matters relevant to children, the educational task would be linked to such matters as training and education for family law practitioners, and perhaps for litigants and the public. Amending the legislation to spell out the ingredients of various matters relevant to children's interests would be an unrealistic and potentially unending exercise.

---

158 Children, Youth and Families Act 2005 (Vic), Child Protection Act 1999 (Qld), Children and Community Services Act 2004(WA), Children's Protection Act 1993 (SA), Children, Young Persons and Their Families Act 1997 (Tas), Care and Protection of Children Act (NT), Children and Young Persons Act 2008 (ACT).

159 Family Violence Protection Act 2008 (Vic), Preamble.

If, however, the provisions in Part VII are not to be changed, so that the law continues to feature parental involvement competing with protection from violence, there would indeed be a good case, in my opinion, for the provisions relating to family violence to be more extensive, and the state and territory domestic violence laws might provide useful models: see Recommendation 3.6.

The clarification and simplification of the Family Law Act

In my view, especially having regard to the information received during this Review, there is a strong case for the Family Law Act 1975, especially the provisions relating to children in Part VII, to be clarified and simplified. I believe it is widely accepted in the family law community that the present provisions, which have been amended on numerous occasions, and virtually always by adding new material, are now poorly organised, repetitious, and unnecessarily complex. It is important that the law relating to children be readily understood, especially since it is intended to guide non-lawyers as well as lawyers (for example in the counselling and dispute resolution sectors) and since many litigants are unrepresented. It should be possible to have a clearer numbering system, and a structure that makes the ideas easier to follow – at present, for example, provisions about the care of children are interrupted by substantial body of provisions that deal with child maintenance, and these provisions should be relocated elsewhere in the Act. A thorough technical revision of Part VII and associated provisions could make the intention of Parliament much clearer, and help to achieve its objects. Such a review would not be intended to re-open issues of policy. While the clarification and simplification of the law without changing the underlying policies would require some care, in my view it is both feasible and desirable.

Recommendation 3.8

That the Government undertake a technical revision of Part VII of the Family Law Act and related provisions, with a view to clarifying and simplifying the law.

PART 4: PROBLEMS AND POSSIBLE REMEDIES – OTHER MATTERS

4.1 INTRODUCTION

This Part deals with matters not already covered in this Report, mainly falling within the provisions of the Terms of Reference dealing with:

- whether appropriate support is provided within the court system for families who have experienced or are at risk of violence;
- whether information disclosed to the courts by litigants or their representatives is appropriately shared or made available within the courts; and
- whether appropriate legal representation is provided in such cases.

These topics, especially the first, raise issues of fact, and issues about resources, that it has not been possible to resolve in the limited time for this Review. Accordingly, although a wide range of matters have been touched on in submissions and conversations, this part will be limited to those topics on which there is enough material to provide a basis for discussion and recommendations. I regret that it has not been possible to deal with a number of other important matters.

4.2 APPROPRIATE SUPPORT WITHIN THE COURT SYSTEM FOR FAMILIES WHO HAVE EXPERIENCED OR ARE AT RISK OF VIOLENCE

As previously indicated, while the support of litigants and other people in court may not be associated with the traditional adversary model of courts, it is a normal part of the functioning of the family law courts. An example is the work done by the family law courts on support for people suffering from mental health problems.[160]

While the circumstances of this Review did not permit a detailed or comprehensive survey, it is obvious that registries of the family law courts provide various types of assistance to litigants, including an array of pamphlets, referral service, assistance with filling out forms,

---

[160] See Integrated Client Service Delivery featuring Mental Health Support: *Final Report: a family law courts' skilling and client support program* (Family Law Courts and LIFE, January 2009).

and where possible provide a setting for the operation of other services such as lawyers working in duty solicitor schemes, support groups for victims of violence.[161] These services are of enormous importance, especially to people who have been exposed to family violence, and are consistent with the role of the court as part of today's family law system. In these areas, the information available to the Review has been positive, although the services are inevitably limited by resources, especially in the smaller and more remote registries.

A number of suggestions made in submissions are obviously desirable, but raise issues of resources. An example is the suggestion that

> *when a court changes residency, the children should be brought into the court, cared for by the counselling service and go home directly with the parent who is now going to have residency of the children. Alternatively, once a decision is handed down, a court officer/social worker should accompany the parent, who is to hand over the children to the other parent, to collect those children as soon as the decision is given.*[162]

The submissions identified a number of particular areas where resources were seen to be insufficient. They include some contact centres and some family dispute resolution centres, where delays are such as to put children at increased risk. For example, the Federal Magistrates Court submission emphasised the importance of contact centres and the particular value of evidence they could give the court about the behaviour of children and adult during contact. It noted that they provide supervised contact visits in a safe environment for children and a safe environment for changeover of children between parents in high conflict relationships, and that they are '*the best practical means to balance the right of a child to a relationship with a parent and the need to protect a child and/or parent from violence or threats of violence*' as well as protecting parents from unfounded allegations of violence. The submission pointed to current delays:

> *At present these centres which deal with the most difficult and intractable cases are starved of funds. In Parramatta, delays are 8 months for a spot to have supervised visit each alternate week for 2 hours. In Dandenong and regional Victoria it is a 12 month delay.*

---

161 Information received indicated that the work done by the Women's Family Law Support Service is of particular value to victims of family violence.

162 Submission 26.

The submission recommended:

> *Increased funding should be made available for the establishment and enhancement of services of Contact Centres. Centres should be funded on condition that they undertake reporting of conduct of clients at the Centres (and to that end their funding should accommodate the cost of the reporting).*

As to the second aspect (reporting conduct) this has obvious appeal, and is consistent with the importance for the court in having access to relevant information held by other agencies, a point made elsewhere in this report. However it raises issues that it has not been possible to examine during this Review.

Similarly, any significant delay in family dispute resolution agencies can be a major problem in families where there are violence issues. They may prolong a situation in which the child is likely to be disadvantaged by continuing uncertainty, and by any steps taken, whether by reason of being exposed to a risk of violence or by reason of being wrongly separated from a needed parent.[163] Again, funding for Family Consultants is of great importance. As the Federal Magistrates Court submission states:

> *Family Consultants are a key resource for the identification of family violence at an early stage in the proceedings and for the risk assessment for children. They can also greatly assist the Court in making recommendations for appropriate programmes for offenders and victims.*
>
> *Given that the Federal Magistrates Court is the front line for dealing with family violence there is a need for more appointments to relieve the already overburdened work load on existing Federal Magistrates.*

As well as maintaining existing services that support the courts' work, consideration also needs to be given to developing new or expanded services to meet new needs, or to reflect new understandings of the problems. For example, it might be useful to pay attention to the perspectives and feelings of parents who are violent, as well as to those who are victims of violence (of course, in many cases both parties will have committed and experienced violence). There are some programs that deal with men who have been violent,[164] including

---

163 Submission 26, expressing concern that delays in family dispute resolution can lead to men not seeing their children for as long as 6 months.

164 Those closer to the 'front line' will be better able than me to assess whether there should also be such programs for women who are violent.

anger management programs. Obviously the family law courts should contain appropriate pamphlets and make appropriate referrals when this appears to be possible.

It is also important that the system should as far as possible encourage those who have been violent to see it as a problem that can be addressed. Those working in the area, I believe, generally say that a significant number of violent people are capable of improvement with proper support and encouragement. It seems desirable that people working in the court in all situations should have an understanding of the point of view of violent people and what sorts of handling of the case might make it more likely that they will accept responsibility for their actions and take steps to address them. In this connection I mention, by way of example, what appeared to me to be a useful brochure.[165] It invites men to consider the role that violence has been playing in their lives, how they feel about it, and how their behaviour affects others. It is intended, as I understand it, to increase their insight into their situation and the impact of their behaviour. It also provides useful vignettes of men who have decided to do something about their violence, and contains referrals to appropriate agencies.

Unfortunately, it has not been possible to examine the situation of families from non-English speaking backgrounds, people with disabilities, indigenous Australians, and others who, for one reason or another, might need particular support. As the Wingspread Report and other authorities emphasise, family violence, like many other things, needs to be understood in context, and responding to the needs of these families will be difficult unless the context is understood.[166] So far as possible, it is desirable that those assisting should include representatives of the relevant community. The Family Court of Australia has in the past employed Indigenous officers for this reason, and such schemes, in my view, can be extremely valuable.

It would not be appropriate to make firm recommendations in this area. The limited circumstances of this Review do not enable detailed findings to be made about the extent of need for increased resources, or about the priorities for funding within the family law system. Nor, of course, is it possible to say anything about what funding should be directed to the family law system as distinct from other areas. However the material received does indicate

---

165 *How to deal with Domestic Violence: a self help book for men who want to change* (Department for Community Development in Western Australia, Men's Domestic Violence Helpline and Freedom from Fear).

166 Submission 1.

that there is reason for concern about issues of funding, and it is obvious that the level of risk for children and other family members, from violence and other causes, would be reduced if resources could be increased.

Recommendation 4.1

That the Government consider the desirability of providing additional funding in relation to the family law system, including funding that would support the work of contact centres, family dispute resolution agencies, legal aid, and family consultants in reducing the risk of family violence.

Safety at court

It is difficult to overstate the importance of safety in court, and the need for protective measures in the special circumstances of the family law courts. As the Law Council of Australia – Family Law Section said in its submission:

Litigants in this jurisdiction are often under enormous emotional and psychological stress. They may have a history of violent and unpredictable behaviour known to and feared by the other side. Practitioners need to be able to guarantee client safety and the court ought to be able to provide trained people who can do so. This unfortunately is not the case. The Newcastle, Parramatta and Dandenong Registries have had women murdered by their ex-partners outside of the court building.

Background: measures taken by the Family Court of Australia

It seems from information received during the Review that the sort of support that ought to be provided includes providing for the safety of litigants and other people in and about the courts, and appropriate referrals out. Attending court is typically stressful for families, and it is important that this is recognised in the way they are treated.

The Family Court of Australia has taken substantial measures relating to safety at Court. These measures, and some of the background, are conveniently summarised in the Information Paper provided by the Court:

A fundamental tenet of the Family Court's operation is that all who attend the Court and work on its premises should be safe. The Family Court's Safety at Court Protocol provides overarching direction for securing the safety of Court clients. Other allied materials, such as

the family violence policy for Child Dispute Services[167] *and the Family Violence Policy and Guidelines for Registrars*[168] *operate in conjunction with the Safety at Court Protocol.*

The Protocol contains a series of defined steps that must be followed where it is brought to the Court's attention that a client has safety concerns. In essence, this involves engaging the client and providing information about support options (including referrals to police and domestic violence agencies as appropriate), determining the level of need, checking for a family violence order or Notice of Child Abuse or Family Violence,[169] *and explaining the safety options available. These can include familiarisation visits, separate waiting areas, separate interviews, staggered arrivals and departures, telephone, video link or CCT attendance, security guard escort, police attendance and the presence of a support person at Court.*

Once options have been discussed with the client and an approach agreed upon, a safety plan is drawn up by a Client Services Officer. The plan is placed on the Court file and entered in Casetrack, the Court's electronic case management system, and is forwarded to the person conducting the next court event. A 'tips and scripts' resource has been developed and is available through the Family Court's intranet site to guide staff through client interactions.

Information about client safety is contained in the brochure 'Do You Have Fears for Your Safety When Attending Court?', available in hard copy format from family law court registries, the family law courts website and the websites of the Family Court and Federal Magistrates Court. Copies can be mailed to clients on request. Family Court brochures include standard information on personal safety, where clients who have any concerns about their safety while attending court are advised to contact the Court's National Enquiry Centre to discuss options for protecting their safety. This information is also included in relevant Court correspondence generated through Casetrack. Posters are displayed in all registries informing clients of the options available to them if they have concerns about their safety.

---

167 This detailed policy addresses screening for family violence, safety, power imbalances, situations where a restraining order is in place, cultural issues, training and supervision, case management and community liaison. The Court's policy in relation to the ordering and preparation of family reports also addresses family violence.

168 This detailed policy addresses definitions of family violence, the major provisions of the *Family Violence Strategy*, the obligations imposed on family courts by section 60K of the Family Law Act, the process of identifying cases involving family violence, a checklist for managing court events and suggested risk and screening assessment questions that can be asked by registrars prior to a court event.

169 The section 60K and Notice of Child Abuse or Family Violence process is discussed in Part 2, above.

Comments in submissions

A number of submissions referred to the issue of court safety. Broadly speaking, they acknowledged and valued the work the Court has done, while indicating areas where improvement is possible. In this context the views of legal organisations seem particularly relevant, because their members have day to day experience of the system. The following submissions deserve consideration:

Law Council of Australia – Family Law Section

> *Spaces need to be provided in which victims of family violence can be sure they are safe. Court buildings, especially on circuit or in regional centres, may not have such spaces or easy access to them. Out of hours access to a police station can also be problematic in regional centres. The Australian Federal Police no longer have a presence in Family Court buildings so if there is violence, threats or risk, there is no one to assist. Security staff screen people entering court buildings but do not otherwise protect litigants.*
>
> *The Australian Federal Police have withdrawn their services to the court and have not been replaced by trained security personnel. There have been instances of lawyers having to intervene to protect clients at their own peril. The existence of a "duress button" is of little comfort if practitioners and litigants do not know where these are located and upon it being pressed, there is no consistent or professional response…*
>
> *Family Reports are now often out-sourced to external Family Consultants. This is universally the case in the Federal Magistrates' Court in which most cases are heard. External Family Consultants who operate in private offices do not necessarily have any security at their premises. As single experts, all the correspondence such Consultants send or receive is read by both parties. The date, time and place of appointments is therefore known and can present a real security risk to victims of violence and to children.*

National Legal Aid

> *It is understood anecdotally that Family Court registries have measures in place for the protection of clients who have safety concerns. Legal practitioners are familiar with clients' attendance at hearings by telephone, video link or CCTV. Legal Aid duty lawyers in particular are exposed to measures such as security guard escorts, police attendances, separate waiting areas and secure rooms and help given from court support staff, although these facilities are usually confined to city registries, with such protection being much less likely to be available at*

rural and regional courts. In this regard, NLA notes it has been valuable to be able to raise security concerns direct with the Marshall of the Family Courts.

Law Society of NSW

Personal Security (at and around the Court)

Various members report being able to make arrangements for the safe movement of clients where there are issues of Family Violence. This includes being able to organise private entry and exit to and from the Court building other than, and away from, the usual public access points. These are however usually ad hoc and more a function of more experienced lawyers, familiar to and with the Court, being able to access relevant court officers &/or facilities. There is no obvious point of contact for the public, or less experienced practitioners.

There is no facility at an organisational or structural level for parties who have been victims of, or who fear, Family Violence. Some registries have specific facilities for such persons. For example at the Sydney Registry there is room staffed by volunteers from an outside agency. This is to be applauded and is obviously of great assistance. It is however an external facility and peculiar to that Registry. There may be other similar facilities in other Registries. In the event an episode of violence occurs within the Court, and there is a history of such, there is limited security or protection for other Registries.

In the event an episode of violence occurs within the Court, and there is a history of such, there is limited security or protection for victims. Contracted security personnel have limited capacity to protect victims. Federal Police no longer have a presence within the Court. (pp 1 – 2)

ACT Law Society

The solicitor may take steps to facilitate increased security for clients in certain circumstances (for example, ensuring that security guards are more visibly present nearby and remain vigilant). In a practical sense there are inadequate facilities at the Court premises to ensure that victims of domestic violence are able to remain in a separate conference room (there are not enough conference rooms). In addition, the waiting area outside certain of the Court rooms is inadequate and results in many parties and their supporters being in close proximity to each other, with little room for private discussions with their solicitors, in particular, the upstairs waiting area outside Court 7 at the Canberra Registry. In other Courts, a separate area, behind appropriate security, is made available for victims of domestic violence. That facility is not available in the Family Court at Canberra. It is noteworthy that the facilities at the ACT Magistrates Court are also inadequate. Many victims of domestic violence and their advisors

wait in the Legal Aid Office. Those facilities are often overcrowded and do not enable sufficient room for conferencing. [170]

The form 4s, the presence of Police in Court where necessary, the pervasive literature and signage in the Court are all very supportive. Judges and Magistrates are also very sensitive about the issue. Should it do more? Probably not.[171]

The practical support for victims of violence when the Court is pre-advised seems to work well, for example, the presence of security personnel and ensuring that victim is in a separate room. However, this tends to be used when the client is represented and arrangements are made by her lawyer. For unrepresented clients, the nature of the duty list, the number of people at court and the uncertainty about process means that a victim of violence is often in the same general area outside the courtroom as the perpetrator. It is unlikely that the Court would even be aware of the issue of family violence in matters where clients are self-represented and it is the first return date. We always advise women to take a support person with them to court.[172]

Women's Legal Services, Brisbane

We believe it is necessary to undertake an audit of the whole family law system, in accordance with International standards of best practice developed by Ellen Pence and others, to identify and address the systemic gaps that currently operate across the system and expose victims of violence and their children to a risk of harm. The audit should be a comprehensive audit of the family law system's response to family violence and be undertaken with a view to addressing safety and increasing consistency and accountability. The audit should include Family Relationship Centres, other Family Dispute Resolution Providers and the family law courts. This process would also help identify how the role of risk identification and assessment can be properly embedded in the family law system.

Meeting at Family Court Melbourne on 8 September 2009

A further insight into issues of court safety was provided by comments made at a meeting at the Melbourne Registry of the Family Court of Australia on 8 September with about 20 members of the Court and its staff.

---

170 Dobinson Davey Clifford Simpson, solicitors (part of Submission 2).

171 Watts McCray McGuinness Eley, solicitors (part of Submission 2)

172 Women's Legal Centre (part of Submission 2).

A number of issues arose relating to safety arrangements within the Court. Some related to the court building and its features. It was said that the public area on level 5 (which contains litigants in both the Family Court and the Federal Magistrates Court) did not have sufficient space and facilities for litigants and others involved to have private conferences in safe circumstances. There was only one secure room (on level 2 of the building). Similar problems were said to exist at the Dandenong Registry.

Others issues related to security personnel. It was noted that the Australian Federal Police formerly had a presence, but that currently they appeared only if the judicial officer made a formal request. It was also noted that the private security guards had not attended the Family Court's Integrated Client Service Training that was conducted in 2007-2008. It was noted that although registrars had received training in safety matters in about 2006, it was not ongoing, and new staff were not being trained.

Other issues discussed related to the measures taken in relation to 'Safety Plans', which are documents created in relation to particular cases where there is a risk of danger, setting out safety measures that should be taken in relation to the particular case. Where the general ideas of a Safety Plan seemed to be approved, it was said that in practice Safety Plans were 'event-specific' – that is, the safety plan document was displayed prominently on the file in relation to a particular court event, but was then relegated to the correspondence part of the file (where it would not normally come to attention). Thus at the next court event, unless something special had been done, those involved would have no notice of the danger.

It was also suggested by a family counsellor that Safety Plans may not always exist in cases where there are risks – the counsellor spoke of dealing with cases where the files contained a great deal of evidence of violence, yet there was no Safety Plan.

A further problem was said to be that the measures prescribed in Safety Plans were not always acted upon.

There was wide agreement that these were serious issues. It was pointed out that the majority of children's cases involve allegations of family violence, child abuse, mental health problems, and substance abuse, often in combination. Because most cases are settled outside court, those that do come to court tend to feature serious problems. A number of people said, in effect, that we should not have to wait for some terrible tragedy in the court before taking action.

I have no doubt that the meeting reflected widespread and reasonable concerns about safety by professionals whose work requires them to interact daily with people some of whom could well be highly dangerous, and who might pose a threat to all categories of court staff, other litigants, lawyers and witnesses, and any other members of the public who are in the court. Although to some extent the problem might be eased if people took more care to adhere to safety procedures, in practice when staff work hard to cope with a heavy workload, it is very difficult to set aside time to attend to these matters. In addition, some of the problems, such as the unavailability of the AFP and problems in the physical structure, cannot be addressed by court staff.

Conclusions and recommendations

In relation to safety at court as well as other aspects of dealing with family violence issues, measures need to be in place to ensure that risk is disclosed, and understood, and that necessary actions are then taken. In my view the Family Court has taken valuable steps to identify issues of danger and put in place measures that enhance safety at court. However the information received during the Review indicates that more needs to be done if the safety of those attending court is to be adequately protected. This review indicated some issues of concern, including the following:

- The absence of the Australian Federal Police in the courts, and the limited qualifications and resources for security staff in the courts.

- The current practice in relation to Safety Plans, in which, it seems, the approach of placing them prominently in the file only for individual court events, rather than for all events relating to each case for which a Safety Plan has been created, runs the risk that litigants and court staff may be unaware of the need to take specific safety measures;

- Physical resources and arrangements in some court locations that do not provide adequate secure and private facilities for litigants and their lawyers in cases involving risks of violence.

Some safety measures require particular equipment. Thus the Federal Magistrates Court submitted:

Electronic means should be available in all Courts including video link up equipment to balance the requirement of procedural fairness in allowing testing of the evidence when there maybe a victim of violence being cross-examined by an abusive partner.

Although the Family Court has developed valuable initiatives, it seems inevitable that attending to these and related issues will require some additional resources. As the Law Council of Australia – Family Law Section wrote in its submission:

…The language of the Act and its concerns is not reflected in the resources provided to the Courts to realistically deal with violence and its effects. From the basic issue of feeling and being safe at court, to the resources available to investigate allegations and risk, and access to services to support victims of violence, the system is under-funded. The issue cannot be addressed in a way which assists Australian families and children without proper and consistent funding.

No doubt it is impossible to create a situation in which there is no danger, but on the basis of my inquiries there is much that could be done to reduce it considerably and go some way towards a court environment that provides a high level of safety for all those involved.

Recommendation 4.2

That the Government provide the necessary funding and other assistance so that the family law courts can review the adequacy of existing policies, facilities and arrangements for the safety of people in the courts, and address any deficiencies or difficulties revealed by that review.

4.3 THE SHARING OF INFORMATION

The Terms of Reference refer to 'whether information disclosed to the courts by litigants or their representatives is appropriately shared or made available within the courts'. I take the words 'the courts' in this part of the Terms of Reference to mean the family law courts. I note in this connection that the Australian Law Reform Commission is considering issues between the state and territory courts and the family law courts.[173] That review, I assume, will consider issues of the transmission of information between the state and territory courts, for example in family violence proceedings, and the family law courts.

---

[173] The ALRC's inquiry is into 'the interaction in practice of State and Territory family/domestic violence and child protection laws with the Family Law Act and relevant Commonwealth, State and Territory criminal laws'.

Information may be disclosed to the court in different ways. Most obviously, it may be provided in affidavits filed in the proceedings. There appear to be no problems in this respect: affidavits are filed in court and come before the judicial officer if and when parties seek to rely on them in evidence. Similarly, when a case is transferred from one of the family law courts to the other, I am not aware of any difficulties in transferring the file, along with the affidavits.

Information will also be disclosed to the court if the litigants or their representatives provide information to a member of the court staff. For example, a litigant may tell a staff member that they are frightened of another litigant. In such cases, it might be appropriate for the staff member to share that information with other appropriate people, such as a security officer or a family counsellor, so that appropriate action can be taken. I am not aware of any difficulties in this regard. The sharing of information would form an essential part of the risk assessment process that I recommend should replace the present mechanism under s 60K. The information will come before a judicial officer, of course, only if it is contained in evidence presented to the court.

I have referred elsewhere to the important question whether information provided to external agencies might be made more available to the family law courts: this part of the Terms of Reference applies only to information provided to the (family law) courts by litigants and their representatives.

4.4 THE NEED FOR EDUCATION ON FAMILY VIOLENCE

The submissions

There was considerable support in the submissions for education and training.[174] A number specifically drew attention to the training and qualifications of expert witnesses.[175] A number of points were made in connection with expert witnesses, including the lack of peer review, and the need for more than one interview.[176] The Family Law Section of the Law Council of Australia supported legal education relating to family violence, and its submission contains details of steps taken by the Section in this regard.

Some comments critical of the handling of cases are relevant in this connection. Such comments (from lawyers) include:

> *More often than not the alleged family violence is considered incidental to the proceedings, an element of the separation process, and as such is not given appropriate weight in determining what is in the child's best interests. It appears that some judicial officers assume that family violence is the "product of the relationship" and relates to incidents between parents and that once separation has occurred, the violence either ceases or becomes less serious. It is conceded that family violence takes many forms. Some social science indicates that the impact of family violence on children varies depedent (sic) upon the form it has taken. There is a need for courts to have greater regard for social science research when determining the weight that it should be given. Family law practitioners and judicial officers would benefit from a central data base being maintained by the Family Courts containing significant research on children and families post separation.*[177]
>
> …
>
> *"In the Family Court victims are somewhat discouraged by disclosing violence because they are focusing on moving on; by separating from the other partner they have removed the likelihood of it occurring".*[178]
>
> …

---

174 Submission 43.

175 Submissions: 1, 28, 31, 34, 36, 38, 53, 55, 56, 58, 59, 62, 65, 67 and 99.

176 Submission 38 and 58.

177 Submission 30.

178 Phelps Reid (part of Submission 2).

'The language from the bench can reinforce the view that raising allegations of family violence risks being seen as a "trouble maker" and not looking to the future and/or the child's interests. Violence should not be characterised as merely heightened emotions at the time of separation.

As a case example, there was matter before the Federal Magistrates Court where there were allegations by the mother of a history of domestic violence and controlling behaviour. [....] The father had a criminal conviction for an offence where a weapon was used. At an interim hearing, the Federal Magistrate made a comment that the parties "knew how to push each other's buttons". The mother felt that this comment minimised and mutualised the history of family violence. The mother felt that the father's history was not given enough weight and there was instead a pressure to "look to the future" and simply forget what happened'.[179]

People who allege family violence they 'may be seen to be neurotic or liars depending on the judicial officer involved'.[180]

This definition of family violence under the Family Law Act while not as prescriptive as some definitions in state family violence legislation, for example the recent Family Violence Protection Act 2008 (Vic), is nonetheless fairly broad. The fact that it does not emphasise physical violence over any other form is a positive thing, as much debilitating violence is psychological, emotional or financial. However, it is still the experience of lawyers that unless a litigant can show clear evidence of some physical violence, other forms of violence are often not considered in depth until final hearing,[181]

It is inevitable that the outcome of cases will to some extent reflect the personal characteristics of the judicial officer, but training and education might help judicial officers to understand the various forms of violence and the behaviour of those who are involved in it, and, it may be hoped such understanding might reduce the extent to which the outcome will depend on the particular judicial officer who happens to hear the case.

A number of confidential submissions spoke, often in less measured terms, about the authors' experiences in court, and it is instructive to consider some of them.

One submission expressed concern that 'the focus on the future' in the Less Adversarial Trial process appeared to 'brush past violence under the carpet'. It is a matter of concern if this is

---

179 Women's Legal Centre (part of Submission 2).

180 Strong Law (part of Submission 2).

181 Submission 30.

true. While of course the purpose of the exercise is to determine the child's best interests in the future, this determination can only draw on past behaviour to predict the likely consequences of particular parenting arrangements. The system needs to discourage irrelevant criticisms, but pay attention to evidence of behaviour that might affect the child's best interests in the future. There seems no reason why the Less Adversarial Trial process should have the effect of brushing violence under the carpet – indeed in some ways it should provide a good opportunity for any violence to be disclosed and understood – but this comment underlines the fact that the more interventionist role envisaged for the judicial officer in Division 12A makes it especially important that the judicial officer should be well equipped to deal with family violence issues (as well as other frequently-occurring issues).

The author of another private submission spoke of advice that 'the Court doesn't like you airing your dirty washing' and understood that the message was 'to keep quiet about what has happened to you'. If the intended message was that the court does not want to hear *irrelevant* allegations, this could be a useful illustration of the need for lawyers to ensure that the client correctly understands what is being said.

One submission indicated that some victims of violence are unwilling to disclose incidents of violence, or full extent of the violence, due not only to fear of retribution from the perpetrator, but also from lack of support and understanding from the court. One judicial officer was described in a confidential submission as 'aloof', 'disinterested', and 'self-opinionated and impatient' and was said to have made comments to the effect that the case was 'cluttering up my Circuit schedule'. Another submission spoke of a judicial officer saying that if the author appeared again and 'wasted his time' he would 'just agree to everything in the Family Report'; the author considered the remarks demeaning and belittling.

It may be that courts' need to deal with cases briskly underlies such remarks, assuming that they were indeed made. The Women's Family Law Support Service referred to the emphasis the court places on the parties reaching a settlement, and said of one mother that she 'gathered the impression that the most important thing for the Court to do was to get the matter over and done with'.

It is impossible to know from the information available to the Review how justified such comments are in particular cases, or how representative they are. But they are useful in

drawing attention to areas that could usefully be addressed in education and training programs. For example, education might perhaps reveal to a judicial officer that remarks intended to do no more than keep the case on track can, in the fraught circumstances of family litigation, easily be understood in different ways. Similarly, any tendency for judicial officers to assume that violence necessarily ceases after separation might be usefully corrected by exposure to the research evidence on the occurrence, and re-occurrence, of violence following separation in some cases.

Finally, education or training would seem likely to assist if, as suggested in one submission,[182] the court sometimes inappropriately refers violence cases to family dispute resolution.

Discussion

Substantial improvement could be obtained, in my view, if there were improved education of all those who work in family law. Many practitioners, both legal and in the counselling and dispute resolution sectors, and certainly including judicial officers, emphasised the value of education and training in this field. Some of the submissions also indicated, by comments on particular cases, that there could be such benefits.

Careful consideration needs to be given to the form of educational opportunities that could be provided. There is a body of knowledge about family violence, and providing a guide to that literature would form an essential part.

But more will be required than a mere intellectual understanding. Those working in family law, in whatever capacity, will face day to day challenges. A member of the court staff might be faced with a litigant frightened of a threatening partner. Judicial officers will need to form a view about whether a person's failure to complain about previous alleged violence is an indication that the allegations are false, or might be explained by other factors, such as a desire to keep the family together or fear that a disclosure might provoke further violence. Family dispute resolution practitioners will need to consider, in virtually every case, whether clients can safely be seen together in the same room. Lawyers need to understand that some victims of family violence might be reluctant to disclose it, or disclose it in detail, unless the

[182] Submission 1 (the court 'seems to still refer violence cases to FDR although they have already been exempt').

demeanour of the lawyer is such as to give them confidence, or unless the lawyers asks specific questions.

Lawyers, and judicial officers, and perhaps others, might learn to become more sensitive to the impact of their manner, and way of speaking, on people who have been exposed to violence, especially those from non-mainstream communities. Judicial officers in a busy list - looking for cases to settle so that there will be time to deal with other cases, anxious to avoid time being wasted by irrelevancies - need to have, or to learn, the skills that will enable them to handle the work efficiently while at the same time ensuring that litigants are not afraid to put to the court their evidence and argument about what the child needs.

Similarly, lawyers and others involved in agreed outcomes, whether by parenting plans or consent orders, need to be careful to ensure, as best they can, that neither party is acting under false impressions of what the outcome of a contested case might be, or what the judge might be willing or unwilling to hear.

Because of the need for practitioners to put their knowledge into practical use, education and training on family violence may well require techniques beyond the provisions of reading material and lectures. It seems likely that the use of video, role playing and other such interactive methods will be of particular value. As with other aspects of the topic of family violence, it is useful to consider the three steps that constitute the theme of this Report: education and training should include consideration of the disclosure of family violence, its understanding, and the actions that should be taken.

Education can and should take many forms. Community education could be an important part of it. Apart from the potential of education to reduce the amount of community tolerance of violent conduct, it has the potential to empower victims. It should extend not only to family violence itself but to the functions of agencies and institutions that deal with it. In this connection, the following comment is relevant:

> *There has been some concern amongst stakeholder groups that women who have experienced violence are not well-informed of the exemptions in the Family Law Act related to family violence and may feel pressured to participate in family dispute resolution when it is not appropriate to do so.*[183]

---

[183] Submission 14.

The need for education is a continuing one, and in my view there is also merit in the suggestion that steps should be taken to ensure that the personnel of the key family law bodies include people with an understanding of family violence. [184]

Recommendation 4.3

That the Government, the family law courts, and other agencies and bodies forming part of the family law system consider ways in which those working in the family law system might be better educated in relation to issues of family violence.

Recommendation 4.4

That experience and knowledge of family violence be taken into account when considering the appointment of persons to significant positions in organisations forming part of the family law system.

4.5 APPROPRIATE LEGAL REPRESENTATION

The importance of appropriate legal representation can hardly be overstated in parenting cases, especially those that involve issues of family violence. Where one or both parties are unrepresented, even with the benefits of increased judicial involvement arising from Division 12A, it can be almost impossible for the court to receive the sort of evidence and argument that can lead it to make an informed decision about the child's best interests. Settled cases, too, are a worry when parties are unrepresented, because they may reach agreements in ignorance of the legal situation, or because they know they cannot properly put their case before the court.

It is universally agreed in the family law system that despite a lot of good work done to help unrepresented parties, such cases are the most likely to occupy the court's time unfruitfully, or, as sometimes happens, effectively collapse because one or both parties is unable to organise witnesses or present their case in a satisfactory way. One submission pointed out that in some circumstances, cross-examination of a victim by an unrepresented violent

[184] Submission 102.

partner can be experienced as a continuation of the violence.[185] In such cases children are at risk, because they do not have the protection of a well-informed judicial outcome.

The Family Law Section of the Law Council of Australia made the following comments in its submission to the Review:

> *42. A court may make an order for an Independent Children's Lawyer (ICL's) to be appointed under section 68L of the Act and find that such order is meaningless because the appointment will not be funded by legal aid. For example, in Victoria, particularly in the Federal Magistrates' Court, which is the court which deals with most children's matters, this is often the situation. NSW Legal Aid has also recently refused to fund ICL's despite the court ordering the appointment be made.*
>
> *43. Independent Children's Lawyers safeguard the interests of the children they represent. In cases in which violence is a risk, the ICL can and should collect information, ensure the child's voice is heard and provide an independent view of any proposed order. The lack of funding for ICL's in all cases, and particularly if violence is alleged, means the court is not properly assisted in assessing the risk of family violence or protecting children from such risk as it is obliged to do under section 60CG of the Act.*
>
> *44. The general under resourcing of legal aid has adverse effects on all parties and children when violence has occurred or is alleged. Competent representation in court ought not be a luxury only the well-off can afford. The court has in any event an overriding obligation to consider the best interests of children and can only properly do so if information is gathered and evidence properly presented.*
>
> *45. Self-represented litigants can be at a significant disadvantage. For victims of violence to present a case and argue it, including cross-examining the perpetrator, can be very difficult. If perpetrators are unrepresented this means they may be personally cross-examining the victim. These outcomes are increasingly frequent as legal assistance is under-funded and unable to assist many litigants who cannot otherwise afford representation.*
>
> *46. Legal aid generally also has a "merits test" and as a condition of assistance the case must be considered likely to succeed. If perpetrators of violence fail the merits test then legal assistance is denied which can impact not only on the perpetrator but also on the victim. Self-represented litigants can increase the costs of legal proceedings for the other side, delay the smooth running of the case and will then be personally cross-examining the victim.*

---

185 Submission 96.

47. Perpetrators who admit past violence and who then want to access programs and assistance also have great difficulty in finding such programs especially if unrepresented and also affording such programs or assistance.

In many cases involving family violence issues, lawyers will be involved only if legal aid is available. It is beyond the scope of this Review to make recommendations about legal aid funding or guidelines or how those guidelines should be applied. However it is clear, in my view, that in cases raising serious family violence issue children are especially likely to be at risk if parties are unrepresented.

I would stress, however, the importance of having children represented in these cases. Issues of family violence are one of the circumstances in which the Full Court held that children should ordinarily be represented.[186] Unfortunately, there is evidence that on occasions it is impossible to have children represented, even when a court so orders, because of lack of legal aid funding. In one reported example, it was alleged that the husband had broken into the home through the living room window, armed with an axe, and was later arrested by police, causing one of the children to commence bed wetting and another being teary at school; that on another occasions he had 'pulled a flick knife' at contact changeover; that he had made regular threats, including a threat to blow up the wife's car; and that he had on several occasions breached an intervention order. Although the court ordered the appointment of an Independent Children's Lawyer, no appointment was in fact made, because of lack of funding by Legal Aid.[187] This represents, in my opinion, a lamentable situation and one that puts children seriously at risk.

I have no evidence about the way legal aid deals with cases where applications are made for legal aid by one or both parties and there is also an order for the child to be represented. Drawing on my own experience and remarks from various judicial officers during the Review, I would urge that if there are insufficient funds to provide lawyers for the child as well as the parties, the priority should be to have the child represented. In my view although there are almost always difficulties when any party is unrepresented, it is generally better to have the child represented even if one or both of the parties are unrepresented rather than to have one party legal aided and the other party and the child unrepresented. I suspect that it

---

186 Re K (1994) 17 Fam LR 537.

187 *Lancet & Lancet* [2008] FMCAfam 525 (Reithmuller FM).

would generally be better to have the child alone represented than having both parties represented and the child unrepresented, but this may vary from case to case.

The beneficial impact of lawyers will be diluted, however, if they lack understanding of family violence in cases that raise that issue. It became clear during discussions with lawyers that there is a considerable amount of specialist knowledge associated with these types of cases. Interviewing clients, collecting evidence, negotiating settlements, making appropriate referrals to other agencies, will all be better done if the lawyer has a sound understanding of the various facets of family violence.

It might be arguable that at least in serious cases of family violence some formal steps should be taken in this regard, such as requiring or encouraging these cases to be handled by accredited family law specialists. However it was not possible in the circumstances of this Review to explore that possibility.

What is clear is the importance of continuing education for lawyers in aspects of family violence. Some good steps have already been taken in this regard: family violence is often a theme at legal conferences, and is discussed in the Law Council's publication on good standards for family law practice.

A greater knowledge of the Family Court of Australia's Best Practice Guidelines would in my view form a significant part of an effort to ensure that parties are appropriately represented in cases involving family violence issues.

There were some submissions about the inclusion of family violence in university and other educational courses. This would clearly be desirable but it would be wrong for me to make firm recommendations about how educational authorities should run their courses.

Finally, I understand that the Government is supporting initiatives involving education on family violence, and I wholeheartedly support that approach.

Recommendation 4.5

That in the funding and administration of legal aid, careful consideration should be given to the serious implications of parties, and especially children, being legally unrepresented.

Recommendation 4.6

That organisations of lawyers and bodies responsible for legal education give due weight to the importance of including programs about issues relating to family violence, including its effects on children.

4.6 OTHER MATTERS

Parenting plans

National Legal Aid suggested an amendment to the effect that where there is an existing family violence order, a parenting plan should need the approval of the court to be valid. Since parenting plans are not enforceable, the consequence of providing that they are not valid would appear to be that they could not have the effect of overriding inconsistent court orders. This is an interesting idea, but the relevant information available to this Review is too limited to provide a sound basis for a recommendation one way or the other. The argument for such an amendment would need to address, among other things, the question whether this would be an appropriate use of limited court resources.

The abuse of litigation and s 118

Some submissions referred to the use of litigation as a vehicle for harassment of the other party.[188] In some cases, no doubt, litigation which appears to one party as a vehicle for harassment will be considered by the other party to be reasonable and necessary, for example to enforce parenting orders where the other party is frequently in breach. However it is certainly possible for litigation to be abused. There appear to be two possible remedies: a costs order and an order under s 118.

Costs orders may however be ineffective where one or both parties are unrepresented, and also where the party against whom the order is made has minimal funds from which to pay them. Section 118 normally requires an application to be made and a case made out for the making of what is popularly called a 'vexatious litigant' order. In some circumstances, however, the party might be unable to make out such an application, especially when unrepresented. There might be an argument for amending s 118 to enable the court itself to

[188] Submission 34.

initiate such proceedings.[189] The material before the Review is not sufficient to justify a recommendation to that effect, but it is, I believe, a matter that deserves consideration, especially in the environment of legislation that encourages judicial officers to be more interventionist.

Recommendation 4.7

That consideration be given to amending s 118 to enable the court to entertain such an application of its own motion.

The Family Court's Publication "Best practice principles for use in parenting disputes when family violence or abuse is alleged"

In my view the publication of this document has been a valuable initiative. It draws on current understanding of family violence and contains a great deal of useful suggestions. Some of the contents of this publication have been referred to elsewhere in this Report. Such comments as were made about the Principles were favourable: some judicial officers clearly find it useful.[190]

On the other hand, it seemed that not all judicial officers are familiar with this document, and it does not seem to be as influential as it was obviously intended to be. Perhaps because of this, one submission suggested that the Principles be 'fully implemented'.[191] If this is the position, it might be useful for the Court to make some inquiries about this, and see if there are ways of encouraging judicial officers to make more use of it the Principles, perhaps by including it in training or education programs available to judicial officers, and to lawyers.

Information provided during the Review indicated that at least some Federal Magistrates used the Principles. However although the principles are obviously suitable for use in all parenting proceedings, it is not made explicit in the Principles that they are intended to apply to the Federal Magistrates Court. Such problems will presumably disappear once a decision is implemented about the future of the two courts, but as an interim measure it would be desirable for the Principles to indicate explicitly that they are intended for use in the Federal Magistrates Court as well as the Family Court of Australia (assuming that is the intention).

---

189 As suggested by Submission 34.

190 It is discussed in some detail by Benjamin J in *Maluka & Maluka* [2009] FamCA 647.

191 Submission 98.

There is much potential benefit in such a document as the Principles, although of course its actual value will depend on the extent to which it is known and used. I understand that the document was originally intended as an in-house guide for judicial officers, and only later became publicly available. Now that it is in the public arena, and having regard to its value, in my view it would be useful to examine whether the writing and presentation could be improved, and Appendix 5 contains some suggestions that the courts may wish to consider.

Recommendation 4.8

That the family law courts review the extent to which judicial officers in the Family Court of Australia and the Federal Magistrates Court use and benefit from the *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged*, and consider any measures that might lead to the Principles becoming more influential.

APPENDIX 1:
SUBMISSIONS AND CONSULTATIONS

SUBMISSIONS

List of submissions from organisations and individuals made to the

Family Courts Violence Review.

1. Aboriginal Family Violence Prevention & Legal Service Victoria
2. ACT Law Society
3. Dr Tom Altobelli
4. Australian Institute of Criminology
5. Australian Men's Congress
6. Background information paper from the Hon Diana Bryant, Chief Justice of the Family Court of Australia
7. Dr Juliet Behrens and Dr Bruce Smyth (In-Confidence)
8. Community Partnerships Against Domestic & Family Violence
9. Council of Single Mothers and their Children (Victoria)
10. Domestic Violence Resource Centre Victoria
11. Dr Patricia Easteal
12. Family Law Section, Law Council of Australia
13. Family Relationship Centre-Bundaberg
14. Family Relationship Services Australia
15. Federal Magistrates Court
16. Federal Magistrate Norah Hartnett
17. Journey Family Lawyers
18. Kingsford Legal Centre
19. Dr Lesley Laing (In-Confidence)
20. Law Institute of Victoria
21. The Law Society of New South Wales
22. Mr Paul Lodge
23. Lone Fathers Association (Australia)
24. Mark and Sands Lawyers
25. Mayumarri Healing Centre

26. Men’s Rights Agency
27. National Abuse Free Contact Campaign
28. National Council for Children Post-Separation
29. National Council of Single Mothers and their Children Inc.
30. National Legal Aid
31. National Peak Body for Safety and Protection of Parents and Children
32. Non-Custodial Parents Party (Equal Parenting)
33. No To Violence, Male Family Violence Prevention Association Inc.
34. NSW Women’s Refuge Movement Working Party Inc.
35. Nuance Exchange Network
36. Protective Mothers Alliance
37. Private Individual 1
38. Private Individual 2
39. Private Individual 3
40. Private Individual 4
41. Private Individual 5
42. Private Individual 6
43. Private Individual 7
44. Private Individual 8
45. Private Individual 9
46. Private Individual 10
47. Private Individual 11
48. Private Individual 12
49. Private Individual 13
50. Private Individual 14
51. Private Individual 15
52. Private Individual 16
53. Private Individual 17
54. Private Individual 18
55. Private Individual 19
56. Private Individual 20
57. Private Individual 21
58. Private Individual 22
59. Private Individual 23

60. Private Individual 24
61. Private Individual 25
62. Private Individual 26
63. Private Individual 27
64. Private Individual 28
65. Private Individual 29
66. Private Individual 30
67. Private Individual 31
68. Private Individual 32
69. Private Individual 33
70. Private Individual 34
71. Private Individual 35
72. Private Individual 36
73. Private Individual 37
74. Private Individual 38
75. Private Individual 39
76. Private Individual 40
77. Private Individual 41
78. Private Individual 42
79. Private Individual 43
80. Private Individual 44
81. Private Individual 45
82. Private Individual 46
83. Private Individual 47
84. Private Individual 48
85. Private Individual 49
86. Private Individual 50
87. Private Individual 51
88. Private Individual 52
89. Private Individual 53
90. Private Individual 54
91. Private Individual 55
92. Ms Zoe Rathus
93. Relationships Australia (Victoria)

94. Associate Professor Helen Rhoades
95. Safer Family Law Campaign
96. Sole Parents' Union
97. State Coroner Victoria
98. St George Domestic Violence Counselling Service
99. Victims of Crime Assistance League Inc. NSW
100. Women's Family Law Support Service
101. Women's Legal Services Australia
102. Women's Legal Service Brisbane
103. Women's Legal Service Victoria (In-Confidence)

List of meetings which Professor Chisholm conducted for the

Family Courts Violence Review

Australian Institute of Family Studies

Meeting 1: Canberra

- Attendees: Professor Alan Hayes (Director), and Dr Matthew Gray (Deputy Director, Research)
- Date: 18 August 2009

Meeting 2: Melbourne

- Attendees: Dr Matthew Gray (Deputy Director, Research), Dr Rae Kaspiew (Senior Research Fellow), Dr Lawrie Moloney, and Dr Ruth Weston (General Manager - Research and Principal Research Fellow)
- Date: 7 September 2009

Australian Law Reform Commission, Sydney

- Attendees included: Emeritus Professor David Weisbrot AM (President), and Professor Ros Croucher
- Date: 17 August 2009

Canberra Fathers and Children Service (CANFaCS), Canberra

- Attendee: Mr Anthony Rochester (Executive Officer)
- Date: 12 October 2009

Domestic Violence Resource Centre Victoria (DVRCV), Melbourne

- Attendees: Ms Virginia Geddes (DVRCV Coordinator), Ms Vida Luimaite (DVRCV Trainer), and Ms Libby Eltringham (DVRCV Community Legal Education Worker)
- Date: 8 September 2009

Family Court of Australia – Child Dispute Services

Meeting 1: Sydney

- Attendees: Mr Paul Lodge (Deputy Manager Child Dispute Services), and Ms Debra Fry (Regional Co-ordinator Child Dispute Services)
- Date: 31 August 2009

Meeting 2: Canberra

- Attendee: Ms Diane Gibson (Director, Child Dispute Services)
- Date: 13 October 2009

Family Court of Australia – Melbourne Registry

- Attendees included judicial officers of the Family Court of Australia, and other court staff
- Date: 8 September 2009

Family Court of Australia – Sydney Registry

- Attendees included judicial officers of the Family Court of Australia, and Federal Magistrate Kemp of the Federal Magistrates Court
- Date: 1 September 2009

Family Court of Western Australia

Meeting 1: Canberra

- Attendees: Magistrate David Monaghan, and Ms Kay Benham (Director, Court Counselling and Support Services)
- Date: 15 September 2009

Meeting 2: Perth

- Attendees included judicial officers of the Family Court of Western Australia, and other court staff
- Date: 22 September 2009

Family Law Section, Law Council of Australia, Canberra

- Attendees: Mr Geoff Sinclair (Chair), and Ms Maureen Schull (Director).
- Date: 16 September 2009

Family Law System Reference Group, Canberra

- Date: 15 September 2009

Family Relationship Centre - Perth City

- Attendees: Ms Mandy Flahavin (Senior Manager – Family Dispute Resolution Services), Ms Vivienne Wolff (Senior Family Dispute Resolution Provider), and Ms Noelene Iannello (Manager Family Violence Programs)
- Date: 23 September 2009

Family Relationship Centre- Sydney City

- Attendees: Ms Janet Carmichael (Manager), Ms Jenny Huxley (Community Liaison Officer), Ms Robyn Heath (Senior Family Adviser), and Ms Silvie Calder-Hickey (Senior Family Dispute Resolution Practitioner)
- Date: 1 September 2009

Family Transitions, Melbourne

- Attendee: Dr Jennifer McIntosh
- Date: 7 September 2009

Federal Magistrates Court – Brisbane Registry

- Attendees included: Federal Magistrate Susan Purdon-Sully, Federal Magistrate Leanne Spelleken, Federal Magistrate Stephen Coates, Federal Magistrate Keith Slack, and Ms Marie Adams (Senior Family Consultant)
- Date: 1 October 2009

Federal Magistrates Court - Melbourne Registry

- Attendees included: Federal Magistrate Michael Connolly (via telephone link), Federal Magistrate Norah Hartnett, Federal Magistrate Geoffrey Monahan, Federal Magistrate Daniel O'Dwyer, Federal Magistrate Maurice Phipps, Federal Magistrate Heather Riley, Federal Magistrate Grant Riethmuller, Federal Magistrate John Walters, and Ms Adele Byrne (Registrar)
- Date: 7 September 2009

Lawyers from the Australian Capital Territory

Meeting 1: Canberra

- Attendees: Ms Dianne Simpson (Director - Dobinson Davey Clifford Simpson Family Law Specialists), and Ms Julie Dobinson, (Director- Dobinson Davey Clifford Simpson Family Law Specialists)
- Date: 19 August 2009

Meeting 2: Canberra

- Attendees: Ms Michelle Bryant-Smith (Manager Family Dispute Resolution Legal Aid ACT), Ms Mary Burges (Manager/Principal solicitor Family Law Legal Aid ACT), Ms Brigitte Smithies, Mr Matthew Kamarul, and Mr Gregg Stagg (Family Law Solicitor Legal Aid ACT), Mr Geoff Mazengarb (Family Law Solicitor Private Practice "Mazengarb Baralet"), Ms Andrea Evans, Mr Stuart, Ms Lessli Strong, Mr Matthew Strong, and Mr Kevin Robinson (Family Law Solicitor Private Practice "Evans Yeend Family Lawyers"), Mr Ken Hubert and Mr David Nimmo (Family Law Solicitor Private Practice "Capon & Hubert")
- Date: 13 October 2009

Legal Aid Victoria, Melbourne

- Attendees: Ms Judy Small (Managing Lawyer, Family Law Service), and Ms Judith Sharples (Director, Family Youth & Children's Law Services)
- Date: 7 September 2009

Legal Aid Western Australia, Perth

- Attendees: Mr George Turnbull (Director of Legal Aid WA), Ms Bernadette Kasten (Director, Family Law Division), Ms Maureen Kavanagh (Director, Criminal Law Division), Ms Colleen Brown (Director, Client Services Division), Ms Julie Jackson (Solicitor in Charge, Family Court Services and Children's Court (Protection) Services), Mr Lee Mather (Solicitor), Mr Michael Hovane (Manager, Domestic Violence Legal Unit), and Ms Emma Walke (Solicitor)
- Date: 22 September 2009

Lone Fathers Association Australia, Canberra

- Attendees: Mr Barry Williams (President), and Mr Jim Carter (Policy Adviser)
- Date: 14 October 2009

Marks and Sands Lawyers, Perth

- Attendee: Ms Sonali De Alwis
- Date: 22 September 2009

National Legal Aid, Family Law Working Group, Brisbane

- Date: 30 September 2009

Sydney Law School, University of Sydney, Sydney

- Attendees: Professor Julie Stubbs, Professor Patrick Parkinson AM, Professor Hilary Astor, Dr Lesley Laing, and Associate Professor Judith Cashmore
- Date: 31 August 2009

Women's Legal Services Australia, Sydney

- Attendees: Ms Edwina MacDonald (Law Reform Coordinator, Women's Legal Services Australia and Law Reform and Policy Solicitor, Women's Legal Services NSW), Ms Dianne Hamey (Co-convenor, Women's Legal Services Australia and

Supervising Solicitor, Women's Legal Services NSW), Ms Natascha Rohr (A/ Supervising Solicitor, Women's Legal Services NSW), and Ms Carolyn Jones (Solicitor, Women's Legal Services NSW)

- Date: 31 August 2009

Women's Legal Services Brisbane, Brisbane

- Attendees: Ms Angela Lynch (Community Legal Education Solicitor), Ms Katrina Finn (Coordinator), and Ms Rachael Field (Service President)
- Date: 2 October 2009

Individuals-

Federal Magistrate Baumann, Brisbane

- Date: 2 October 2009

Magistrate Cathy Lamble, Melbourne

- Date: 8 September 2009

Chief Justice Diana Bryant, Chief Federal Magistrate John Pascoe, Mr Ian Govey (Deputy Secretary, Civil Justice and Legal Services Group), Ms Alison Playford (Acting First Assistant Secretary, Access to Justice Division), Ms Toni Pirani (Assistant Secretary, Family Law Branch, Access to Justice Division) and Ms Erin Smith (Senior Legal Officer, Access to Justice Division), Canberra

- Date: 22 October 2009

Teleconferences

- 21 September 2009, phone call with Chief Judge Peter Boshier (New Zealand)
- 29 September 2009, phone call with Mr David Hugall and Ms Deborah Fry, Regional Co-ordinators Child Dispute Services, Family Court of Australia, Mr Simon Kelso, Executive Advisor Client Services, Family Court of Australia,
  Ms Marianne Christmann, Regional Registry Manager, Family Law Courts NSW/ACT, Ms Wendy Bartlett, Registry and Judicial Services Manager, Sydney Registry, Family Court of Australia.

APPENDIX 2:

EXTRACTS FROM THE LEGISLATION

10D Confidentiality of communications in family counselling

(1) A family counsellor must not disclose a communication made to the counsellor while the counsellor is conducting family counselling, unless the disclosure is required or authorised by this section.

(2) A family counsellor must disclose a communication if the counsellor reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory.

(3) A family counsellor may disclose a communication if consent to the disclosure is given by:

(a) if the person who made the communication is 18 or over—that person; or

(b) if the person who made the communication is a child under 18:

(i) each person who has parental responsibility (within the meaning of Part VII) for the child; or

(ii) a court.

(4) A family counsellor may disclose a communication if the counsellor reasonably believes that the disclosure is necessary for the purpose of:

(a) protecting a child from the risk of harm (whether physical or psychological); or

(b) preventing or lessening a serious and imminent threat to the life or health of a person; or

(c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; or

(d) preventing or lessening a serious and imminent threat to the property of a person; or

(e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or

(f) if a lawyer independently represents a child's interests under an order under section 68L—assisting the lawyer to do so properly.

(5) A family counsellor may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the *Privacy Act 1988*) for research relevant to families.

(6) Evidence that would be inadmissible because of section 10E is not admissible merely because this section requires or authorises its disclosure.

Note: This means that the counsellor's evidence is inadmissible in court, even if subsection (2), (3), (4) or (5) allows the counsellor to disclose it in other circumstances.

(7) Nothing in this section prevents a family counsellor from disclosing information necessary for the counsellor to give a certificate of the kind mentioned in paragraph 16(2A)(a) of the *Marriage Act 1961*.

(8) In this section:

communication includes admission.

10H Confidentiality of communications in family dispute resolution

(1) A family dispute resolution practitioner must not disclose a communication made to the practitioner while the practitioner is conducting family dispute resolution, unless the disclosure is required or authorised by this section.

(2) A family dispute resolution practitioner must disclose a communication if the practitioner reasonably believes the disclosure is necessary for the purpose of complying with a law of the Commonwealth, a State or a Territory.

(3) A family dispute resolution practitioner may disclose a communication if consent to the disclosure is given by:

(a) if the person who made the communication is 18 or over—that person; or

(b) if the person who made the communication is a child under 18:

(i) each person who has parental responsibility (within the meaning of Part VII) for the child; or

(ii) a court.

(4) A family dispute resolution practitioner may disclose a communication if the practitioner reasonably believes that the disclosure is necessary for the purpose of:

(a) protecting a child from the risk of harm (whether physical or psychological); or

(b) preventing or lessening a serious and imminent threat to the life or health of a person; or

(c) reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person; or

(d) preventing or lessening a serious and imminent threat to the property of a person; or

(e) reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or

(f) if a lawyer independently represents a child's interests under an order under section 68L—assisting the lawyer to do so properly.

(5) A family dispute resolution practitioner may disclose a communication in order to provide information (other than personal information within the meaning of section 6 of the *Privacy Act 1988*) for research relevant to families.

(6) A family dispute resolution practitioner may disclose information necessary for the practitioner to give a certificate under subsection 60I(8).

(7) Evidence that would be inadmissible because of section 10J is not admissible merely because this section requires or authorises its disclosure.

Note: This means that the practitioner's evidence is inadmissible in court, even if subsection (2), (3), (4), (5) or (6) allows the practitioner to disclose it in other circumstances.

(8) In this section:

communication includes admission.

10E Admissibility of communications in family counselling and in referrals from family counselling

(1) Evidence of anything said, or any admission made, by or in the company of:

(a) a family counsellor conducting family counselling; or

(b) a person (the ***professional***) to whom a family counsellor refers a person for medical or other professional consultation, while the professional is carrying out professional services for the person;

is not admissible:

(c) in any court (whether or not exercising federal jurisdiction); or

(d) in any proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a State or a Territory, or by the consent of the parties).

(2) Subsection (1) does not apply to:

(a) an admission by an adult that indicates that a child under 18 has been abused or is at risk of abuse; or

(b) a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse;

unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.

(3) Nothing in this section prevents a family counsellor from disclosing information necessary for the counsellor to give a certificate of the kind mentioned in paragraph 16(2A)(a) of the *Marriage Act 1961*.

(4) A family counsellor who refers a person to a professional (within the meaning of paragraph (1)(b)) must inform the professional of the effect of this section.

60B Objects of Part and principles underlying it

(1) The objects of this Part are to ensure that the best interests of children are met by:

(a) ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and

(b) protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(c) ensuring that children receive adequate and proper parenting to help them achieve their full potential; and

(d) ensuring that parents fulfil their duties, and meet their responsibilities, concerning the care, welfare and development of their children.

(2) The principles underlying these objects are that (except when it is or would be contrary to a child's best interests):

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

(b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both their parents and other people significant to their care, welfare and development (such as grandparents and other relatives); and

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

(d) parents should agree about the future parenting of their children; and

(e) children have a right to enjoy their culture (including the right to enjoy that culture with other people who share that culture).

(3) For the purposes of subparagraph (2)(e), an Aboriginal child's or Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture; and

(b) to have the support, opportunity and encouragement necessary:

(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

(ii) to develop a positive appreciation of that culture.

60CC How a court determines what is in a child's best interests

Determining child's best interests

(1) Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).

Primary considerations

(2) The primary considerations are:

(a) the benefit to the child of having a meaningful relationship with both of the child's parents; and

(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

Note: Making these considerations the primary ones is consistent with the objects of this Part set out in paragraphs 60B(1)(a) and (b).

Additional considerations

(3) Additional considerations are:

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

(b) the nature of the relationship of the child with:

(i) each of the child's parents; and

(ii) other persons (including any grandparent or other relative of the child);

(c) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent;

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

(i) either of his or her parents; or

(ii) any other child, or other person (including any grandparent or other relative of the child), with whom he or she has been living;

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

(f) the capacity of:

(i) each of the child's parents; and

(ii) any other person (including any grandparent or other relative of the child);

to provide for the needs of the child, including emotional and intellectual needs;

(g) the maturity, sex, lifestyle and background (including lifestyle, culture and traditions) of the child and of either of the child's parents, and any other characteristics of the child that the court thinks are relevant;

(h) if the child is an Aboriginal child or a Torres Strait Islander child:

(i) the child's right to enjoy his or her Aboriginal or Torres Strait Islander culture (including the right to enjoy that culture with other people who share that culture); and

(ii) the likely impact any proposed parenting order under this Part will have on that right;

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

(j) any family violence involving the child or a member of the child's family;

(k) any family violence order that applies to the child or a member of the child's family, if:

(i) the order is a final order; or

(ii) the making of the order was contested by a person;

(l) whether it would be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child;

(m) any other fact or circumstance that the court thinks is relevant.

(4) Without limiting paragraphs (3)(c) and (i), the court must consider the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as a parent and, in particular, the extent to which each of the child's parents:

(a) has taken, or failed to take, the opportunity:

(i) to participate in making decisions about major long-term issues in relation to the child; and

(ii) to spend time with the child; and

(iii) to communicate with the child; and

(b) has facilitated, or failed to facilitate, the other parent:

(i) participating in making decisions about major long-term issues in relation to the child; and

(ii) spending time with the child; and

(iii) communicating with the child; and

(c) has fulfilled, or failed to fulfil, the parent's obligation to maintain the child.

(4A) If the child's parents have separated, the court must, in applying subsection (4), have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred.

Consent orders

(5) If the court is considering whether to make an order with the consent of all the parties to the proceedings, the court may, but is not required to, have regard to all or any of the matters set out in subsection (2) or (3).

Right to enjoy Aboriginal or Torres Strait Islander culture

(6) For the purposes of paragraph (3)(h), an Aboriginal child's or a Torres Strait Islander child's right to enjoy his or her Aboriginal or Torres Strait Islander culture includes the right:

(a) to maintain a connection with that culture; and

(b) to have the support, opportunity and encouragement necessary:

(i) to explore the full extent of that culture, consistent with the child's age and developmental level and the child's views; and

(ii) to develop a positive appreciation of that culture.

60CF Informing court of relevant family violence orders

(1) If a party to the proceedings is aware that a family violence order applies to the child, or a member of the child's family, that party must inform the court of the family violence order.

(2) If a person who is not a party to the proceedings is aware that a family violence order applies to the child, or a member of the child's family, that person may inform the court of the family violence order.

(3) Failure to inform the court of the family violence order does not affect the validity of any order made by the court.

60CG Court to consider risk of family violence

(1) In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order:

(a) is consistent with any family violence order; and

(b) does not expose a person to an unacceptable risk of family violence.

(2) For the purposes of paragraph (1)(b), the court may include in the order any safeguards that it considers necessary for the safety of those affected by the order.

60I Attending family dispute resolution before applying for Part VII order

Object of this section

(1) The object of this section is to ensure that all persons who have a dispute about matters that may be dealt with by an order under this Part (a ***Part VII order***) make a genuine effort to resolve that dispute by family dispute resolution before the Part VII order is applied for.

Phase 1 (from commencement to 30 June 2007)

(2) The dispute resolution provisions of the *Family Law Rules 2004* impose the requirements for dispute resolution that must be complied with before an application is made to the Family Court of Australia for a parenting order.

(3) By force of this subsection, the dispute resolution provisions of the *Family Law Rules 2004* also apply to an application to a court (other than the Family Court of Australia) for a parenting order. Those provisions apply to the application with such modifications as are necessary.

(4) Subsection (3) applies to an application for a parenting order if the application is made:

(a) on or after the commencement of this section; and

(b) before 1 July 2007.

Phase 2 (from 1 July 2007 to 30 June 2008)

(5) Subsections (7) to (12) apply to an application for a Part VII order in relation to a child if:

(a) the application is made on or after 1 July 2007 and before 1 July 2008; and

(b) none of the parties to the proceedings on the application has applied, before 1 July 2007, for a Part VII order in relation to the child.

Phase 3 (from 1 July 2008)

(6) Subsections (7) to (12) apply to all applications for a Part VII order in relation to a child that are made on or after 1 July 2008.

Requirement to attempt to resolve dispute by family dispute resolution before applying for a parenting order

(7) Subject to subsection (9), a court exercising jurisdiction under this Act must not hear an application for a Part VII order in relation to a child unless the applicant files in the court a certificate given to the applicant by a family dispute resolution practitioner under subsection (8). The certificate must be filed with the application for the Part VII order.

Certificate by family dispute resolution practitioner

(8) A family dispute resolution practitioner may give one of these kinds of certificates to a person:

(a) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but the person's failure to do so was due to the refusal, or the failure, of the other party or parties to the proceedings to attend;

(aa) a certificate to the effect that the person did not attend family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, because the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to conduct the proposed family dispute resolution;

(b) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, and that all attendees made a genuine effort to resolve the issue or issues;

(c) a certificate to the effect that the person attended family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the person, the other party or another of the parties did not make a genuine effort to resolve the issue or issues;

(d) a certificate to the effect that the person began attending family dispute resolution with the practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with, but that the practitioner considers, having regard to the matters prescribed by the regulations for the purposes of this paragraph, that it would not be appropriate to continue the family dispute resolution.

Note: When an applicant files one of these certificates under subsection (7), the court may take the kind of certificate into account in considering whether to make an order referring to parties to family dispute resolution (see section 13C) and in determining whether to award costs against a party (see section 117).

Exception

(9) Subsection (7) does not apply to an application for a Part VII order in relation to a child if:

(a) the applicant is applying for the order:

(i) to be made with the consent of all the parties to the proceedings; or

(ii) in response to an application that another party to the proceedings has made for a Part VII order; or

(b) the court is satisfied that there are reasonable grounds to believe that:

(i) there has been abuse of the child by one of the parties to the proceedings; or

(ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or

(iii) there has been family violence by one of the parties to the proceedings; or

(iv) there is a risk of family violence by one of the parties to the proceedings; or

(c) all the following conditions are satisfied:

(i) the application is made in relation to a particular issue;

(ii) a Part VII order has been made in relation to that issue within the period of 12 months before the application is made;

(iii) the application is made in relation to a contravention of the order by a person;

(iv) the court is satisfied that there are reasonable grounds to believe that the person has behaved in a way that shows a serious disregard for his or her obligations under the order; or

(d) the application is made in circumstances of urgency; or

(e) one or more of the parties to the proceedings is unable to participate effectively in family dispute resolution (whether because of an incapacity of some kind, physical remoteness from dispute resolution services or for some other reason); or

(f) other circumstances specified in the regulations are satisfied.

Referral to family dispute resolution when exception applies

(10) If:

(a) a person applies for a Part VII order; and

(b) the person does not, before applying for the order, attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to the issue or issues that the order would deal with; and

(c) subsection (7) does not apply to the application because of subsection (9);

the court must consider making an order that the person attend family dispute resolution with a family dispute resolution practitioner and the other party or parties to the proceedings in relation to that issue or those issues.

(11) The validity of:

(a) proceedings on an application for a Part VII order; or

(b) any order made in those proceedings;

is not affected by a failure to comply with subsection (7) in relation to those proceedings.

(12) In this section:

dispute resolution provisions of the *Family Law Rules 2004* means:

(a) Rule 1.05 of those Rules; and

(b) Part 2 of Schedule 1 to those Rules;

to the extent to which they deal with dispute resolution.

60J Family dispute resolution not attended because of child abuse or family violence

(1) If:

(a) subsections 60I(7) to (12) apply to an application for a Part VII order (see subsections 60I(5) and (6)); and

(b) subsection 60I(7) does not apply to the application because the court is satisfied that there are reasonable grounds to believe that:

(i) there has been abuse of the child by one of the parties to the proceedings; or

(ii) there has been family violence by one of the parties to the proceedings;

a court must not hear the application unless the applicant has indicated in writing that the applicant has received information from a family counsellor or family dispute resolution practitioner about the services and options (including alternatives to court action) available in circumstances of abuse or violence.

(2) Subsection (1) does not apply if the court is satisfied that there are reasonable grounds to believe that:

(a) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or

(b) there is a risk of family violence by one of the parties to the proceedings.

(3) The validity of:

(a) proceedings on an application for a Part VII order; or

(b) any order made in those proceedings;

is not affected by a failure to comply with subsection (1) in relation to those proceedings.

(4) If:

(a) the applicant indicates in writing that the applicant has not received information about the services and options (including alternatives to court action) available in circumstances of abuse or violence; and

(b) subsection (2) does not apply;

the principal executive officer of the court concerned must ensure that the applicant is referred to a family counsellor or family dispute resolution practitioner in order to obtain information about those matters.

60K Court to take prompt action in relation to allegations of child abuse or family violence

(1) This section applies if:

(a) an application is made to a court for a Part VII order in relation to a child; and

(b) a document is filed in the court, on or after the commencement of this section, in relation to the proceedings for the order; and

(c) the document alleges, as a consideration that is relevant to whether the court should grant or refuse the application, that:

(i) there has been abuse of the child by one of the parties to the proceedings; or

(ii) there would be a risk of abuse of the child if there were to be a delay in applying for the order; or

(iii) there has been family violence by one of the parties to the proceedings; or

(iv) there is a risk of family violence by one of the parties to the proceedings; and

(d) the document is a document of the kind prescribed by the applicable Rules of Court for the purposes of this paragraph.

(2) The court must:

(a) consider what interim or procedural orders (if any) should be made:

(i) to enable appropriate evidence about the allegation to be obtained as expeditiously as possible; and

(ii) to protect the child or any of the parties to the proceedings; and

(b) make such orders of that kind as the court considers appropriate; and

(c) deal with the issues raised by the allegation as expeditiously as possible.

(2A) The court must take the action required by paragraphs (2)(a) and (b):

(a) as soon as practicable after the document is filed; and

(b) if it is appropriate having regard to the circumstances of the case—within 8 weeks after the document is filed.

(3) Without limiting subparagraph (2)(a)(i), the court must consider whether orders should be made under section 69ZW to obtain reports from State and Territory agencies in relation to the allegations.

(4) Without limiting paragraph (2)(a)(ii), the court must consider whether orders should be made, or an injunction granted, under section 68B.

(5) A failure to comply with a provision of this section in relation to an application does not affect the validity of any order made in the proceedings in relation to the application.

61D Parenting orders and parental responsibility

(1) A parenting order confers parental responsibility for a child on a person, but only to the extent to which the order confers on the person duties, powers, responsibilities or authority in relation to the child.

(2) A parenting order in relation to a child does not take away or diminish any aspect of the parental responsibility of any person for the child except to the extent (if any):

(a) expressly provided for in the order; or

(b) necessary to give effect to the order.

61DA Presumption of equal shared parental responsibility when making parenting orders

(1) When making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

Note: The presumption provided for in this subsection is a presumption that relates solely to the allocation of parental responsibility for a child as defined in section 61B. It does not provide for a presumption about the amount of time the child spends with each of the parents (this issue is dealt with in section 65DAA).

(2) The presumption does not apply 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:

(a) 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

(b) family violence.

(3) When the court is making an interim order, the presumption applies unless the court considers that it would not be appropriate in the circumstances for the presumption to be applied when making that order.

(4) The presumption may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child for the child's parents to have equal shared parental responsibility for the child.

63DA Obligations of advisers

(1) If an adviser gives advice or assistance to people in relation to parental responsibility for a child following the breakdown of the relationship between those people, the adviser must:

(a) inform them that they could consider entering into a parenting plan in relation to the child; and

(b) inform them about where they can get further assistance to develop a parenting plan and the content of the plan.

(2) If an adviser gives advice to people in connection with the making by those people of a parenting plan in relation to a child, the adviser must:

(a) inform them that, if the child spending equal time with each of them is:

(i) reasonably practicable; and

(ii) in the best interests of the child;

they could consider the option of an arrangement of that kind; and

(b) inform them that, if the child spending equal time with each of them is not reasonably practicable or is not in the best interests of the child but the child spending substantial and significant time with each of them is:

(i) reasonably practicable; and

(ii) in the best interests of the child;

they could consider the option of an arrangement of that kind; and

(c) inform them that decisions made in developing parenting plans should be made in the best interests of the child; and

(d) inform them of the matters that may be dealt with in a parenting plan in accordance with subsection 63C(2); and

(e) inform them that, if there is a parenting order in force in relation to the child, the order may (because of section 64D) include a provision that the order is subject to a parenting plan they enter into; and

(f) inform them about the desirability of including in the plan:

(i) if they are to share parental responsibility for the child under the plan—provisions of the kind referred to in paragraph 63C(2)(d) (which deals with the form of consultations between the parties to the plan) as a way of avoiding future conflicts over, or misunderstandings about, the matters covered by that paragraph; and

(ii) provisions of the kind referred to in paragraph 63C(2)(g) (which deals with the process for resolving disputes between the parties to the plan); and

(iii) provisions of the kind referred to in paragraph 63C(2)(h) (which deals with the process for changing the plan to take account of the changing needs or circumstances of the child or the parties to the plan); and

(g) explain to them, in language they are likely to readily understand, the availability of programs to help people who experience difficulties in complying with a parenting plan; and

(h) inform them that section 65DAB requires the court to have regard to the terms of the most recent parenting plan in relation to the child when making a parenting order in relation to the child if it is in the best interests of the child to do so.

Note: Paragraphs (a) and (b) only require the adviser to inform the people that they could consider the option of the child spending equal time, or substantial and significant time, with each of them. The adviser may, but is not obliged to, advise them as to whether that option would be appropriate in their particular circumstances.

(3) For the purposes of paragraph (2)(b), a child will be taken to spend ***substantial and significant time*** with a parent only if:

(a) the time the child spends with the parent includes both:

(i) days that fall on weekends and holidays; and

(ii) days that do not fall on weekends or holidays; and

(b) the time the child spends with the parent allows the parent to be involved in:

(i) the child's daily routine; and

(ii) occasions and events that are of particular significance to the child; and

(c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

(4) Subsection (3) does not limit the other matters to which regard may be had in determining whether the time a child spends with a parent would be substantial and significant.

(5) In this section:

adviser means a person who is:

(a) a legal practitioner; or

(b) a family counsellor; or

(c) a family dispute resolution practitioner; or

(d) a family consultant.

64D Parenting orders subject to later parenting plans

(1) Subject to subsection (2), a parenting order in relation to a child is taken to include a provision that the order is subject to a parenting plan that is:

(a) entered into subsequently by the child's parents; and

(b) agreed to, in writing, by any other person (other than the child) to whom the parenting order applies.

(2) The court may, in exceptional circumstances, include in a parenting order a provision that the parenting order, or a specified provision of the parenting order, may only be varied by a subsequent order of the court (and not by a parenting plan).

(3) Without limiting subsection (2), exceptional circumstances for the purposes of that subsection include the following:

(a) circumstances that give rise to a need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence;

(b) the existence of substantial evidence that one of the child's parents is likely to seek to use coercion or duress to gain the agreement of the other parent to a parenting plan.

65DAA Court to consider child spending equal time or substantial and significant time with each parent in certain circumstances

Equal time

(1) If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child, the court must:

(a) consider whether the child spending equal time with each of the parents would be in the best interests of the child; and

(b) consider whether the child spending equal time with each of the parents is reasonably practicable; and

(c) if it is, consider making an order to provide (or including a provision in the order) for the child to spend equal time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend equal time with each of the

parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

Substantial and significant time

(2) If:

(a) a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child; and

(b) the court does not make an order (or include a provision in the order) for the child to spend equal time with each of the parents; and

the court must:

(c) consider whether the child spending substantial and significant time with each of the parents would be in the best interests of the child; and

(d) consider whether the child spending substantial and significant time with each of the parents is reasonably practicable; and

(e) if it is, consider making an order to provide (or including a provision in the order) for the child to spend substantial and significant time with each of the parents.

Note 1: The effect of section 60CA is that in deciding whether to go on to make a parenting order for the child to spend substantial time with each of the parents, the court will regard the best interests of the child as the paramount consideration.

Note 2: See subsection (5) for the factors the court takes into account in determining what is reasonably practicable.

(3) For the purposes of subsection (2), a child will be taken to spend ***substantial and significant time*** with a parent only if:

(a) the time the child spends with the parent includes both:

(i) days that fall on weekends and holidays; and

(ii) days that do not fall on weekends or holidays; and

(b) the time the child spends with the parent allows the parent to be involved in:

(i) the child's daily routine; and

(ii) occasions and events that are of particular significance to the child; and

(c) the time the child spends with the parent allows the child to be involved in occasions and events that are of special significance to the parent.

(4) Subsection (3) does not limit the other matters to which a court can have regard in determining whether the time a child spends with a parent would be substantial and significant.

Reasonable practicality

(5) In determining for the purposes of subsections (1) and (2) whether it is reasonably practicable for a child to spend equal time, or substantial and significant time, with each of the child's parents, the court must have regard to:

(a) how far apart the parents live from each other; and

(b) the parents' current and future capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; and

(c) the parents' current and future capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind; and

(d) the impact that an arrangement of that kind would have on the child; and

(e) such other matters as the court considers relevant.

Note 1: Behaviour of a parent that is relevant for paragraph (c) may also be taken into account in determining what parenting order the court should make in the best interests of the child. Subsection 60CC(3) provides for considerations that are taken into account in determining what is in the best interests of the child. These include:

(a) the willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent (paragraph 60CC(3)(c));

(b) the attitude to the child, and to the responsibilities of parenthood, demonstrated by each of the child's parents (paragraph 60CC(3)(i)).

Note 2: Paragraph (c) reference to future capacity—the court has power under section 13C to make orders for parties to attend family counselling or family dispute resolution or participate in courses, programs or services.

65DAC Effect of parenting order that provides for shared parental responsibility

(1) This section applies if, under a parenting order:

(a) 2 or more persons are to share parental responsibility for a child; and

(b) the exercise of that parental responsibility involves making a decision about a major long-term issue in relation to the child.

(2) The order is taken to require the decision to be made jointly by those persons.

Note: Subject to any court orders, decisions about issues that are not major long-term issues are made by the person with whom the child is spending time without a need to consult the other person (see section 65DAE).

(3) The order is taken to require each of those persons:

(a) to consult the other person in relation to the decision to be made about that issue; and

(b) to make a genuine effort to come to a joint decision about that issue.

(4) To avoid doubt, this section does not require any other person to establish, before acting on a decision about the child communicated by one of those persons, that the decision has been made jointly.

65F General requirements for counselling before parenting order made

(2) Subject to subsection (3), a court must not make a parenting order in relation to a child unless:

(a) the parties to the proceedings have attended family counselling to discuss the matter to which the proceedings relate; or

(b) the court is satisfied that there is an urgent need for the parenting order, or there is some other special circumstance (such as family violence), that makes it appropriate to make the order even though the parties to the proceedings have not attended a conference as mentioned in paragraph (a); or

(c) the court is satisfied that it is not practicable to require the parties to the proceedings to attend a conference as mentioned in paragraph (a).

(3) Subsection (2) does not apply to the making of a parenting order if:

(a) it is made with the consent of all the parties to the proceedings; or

(b) it is an order until further order.

(4) In this section:

proceedings for a parenting order includes:

(a) proceedings for the enforcement of a parenting order; and

(b) any other proceedings in which a contravention of a parenting order is alleged.

67N Provisions about Commonwealth information orders

(1) This section applies to Commonwealth information orders.

(2) Subject to section 67L, a court having jurisdiction under this Part or section 111CX, or exercising jurisdiction in proceedings arising under regulations made for the purposes of Part XIIIAA, may make a Commonwealth information order if it is satisfied that information about the child's location is likely to be contained in, or to come into, the records of the Department or Commonwealth instrumentality concerned.

(3) A court must not make a Commonwealth information order unless:

(a) a copy of the application for the order has been served in accordance with the applicable Rules of Court on the person to whom the order will apply (being the Secretary of the Department concerned or an appropriate authority of the Commonwealth instrumentality concerned); and

(b) if that Department or Commonwealth instrumentality is prescribed for the purposes of this paragraph—either:

(i) the period of 7 days after service of that copy of the application has expired; or

(ii) the court considers that there are special circumstances because of which the order should be made before the end of that period of 7 days.

(4) If an application for a Commonwealth information order relates to more than one Department or Commonwealth instrumentality, the court must not make the order in relation to more than one of them unless the court considers it should do so because of exceptional circumstances.

(5) A court may state that a Commonwealth information order only applies to records of a particular kind if the court considers that:

(a) the information sought by the order is only likely to be contained in records of that kind; and

(b) to apply the order to all records of the Department or Commonwealth instrumentality concerned would place an unreasonable burden on its resources.

(6) A Commonwealth information order stays in force for 12 months.

(7) While a Commonwealth information order is in force, the person to whom the order applies must, subject to subsection (9), provide the information sought by the order as soon as practicable, or as soon as practicable after it comes into the records of the Department or Commonwealth instrumentality concerned.

(8) If the person (the ***official***) to whom a Commonwealth information order applies provides another person (in accordance with the order) with information sought by the order, the official must, at the same time, provide the other person with any information about actual or threatened violence to the child concerned, to a parent of the child, or to another person with whom the child lives, that is in the records of the Department or Commonwealth instrumentality concerned.

(9) A Commonwealth information order does not require the records of the Department or Commonwealth instrumentality concerned to be searched for the information sought by the order more often than once every 3 months unless specifically so ordered by the court.

(10) The person to whom a Commonwealth information order applies must comply with the order in spite of anything in any other law.

67Z Where party to proceedings makes allegation of child abuse

(1) This section applies if a party to proceedings under this Act alleges that a child to whom the proceedings relate has been abused or is at risk of being abused.

(2) The 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.

(3) If a notice under subsection (2) is filed in a court, the Registry Manager must, as soon as practicable, notify a prescribed child welfare authority.

(4) In this section:

prescribed form means the form prescribed by the applicable Rules of Court.

Registry Manager means:

(a) in relation to the Family Court—the Registry Manager of the Registry of the Court; and

(b) in relation to the Family Court of Western Australia—the Principal Registrar, a Registrar or a Deputy Registrar, of the court; and

(c) in relation to any other court—the principal officer of that court.

69ZN Principles for conducting child-related proceedings

Application of the principles

(1) The court must give effect to the principles in this section:

(a) in performing duties and exercising powers (whether under this Division or otherwise) in relation to child-related proceedings; and

(b) in making other decisions about the conduct of child-related proceedings.

Failure to do so does not invalidate the proceedings or any order made in them.

(2) Regard is to be had to the principles in interpreting this Division.

Principle 1

(3) The first principle is that 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.

Principle 2

(4) The second principle is that the court is to actively direct, control and manage the conduct of the proceedings.

Principle 3

(5) The third principle is that 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.

Principle 4

(6) The fourth principle is that the proceedings are, as far as possible, to be conducted in a way that will promote cooperative and child-focused parenting by the parties.

Principle 5

(7) 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.

69ZW Evidence relating to child abuse or family violence

(1) The court may make an order in child-related proceedings requiring a prescribed State or Territory agency to provide the court with the documents or information specified in the order.

(2) The documents or information specified in the order must be documents recording, or information about, one or more of these:

(a) any notifications to the agency of suspected abuse of a child to whom the proceedings relate or of suspected family violence affecting the child;

(b) any assessments by the agency of investigations into a notification of that kind or the findings or outcomes of those investigations;

(c) any reports commissioned by the agency in the course of investigating a notification.

(3) Nothing in the order is to be taken to require the agency to provide the court with:

(a) documents or information not in the possession or control of the agency; or

(b) documents or information that include the identity of the person who made a notification.

(4) A law of a State or Territory has no effect to the extent that it would, apart from this subsection, hinder or prevent an agency complying with the order.

(5) The court must admit into evidence any documents or information, provided in response to the order, on which the court intends to rely.

(6) Despite subsection (5), the court must not disclose the identity of the person who made a notification, or information that could identify that person, unless:

(a) the person consents to the disclosure; or

(b) the court is satisfied that the identity or information is critically important to the proceedings and that failure to make the disclosure would prejudice the proper administration of justice.

(7) Before making a disclosure for the reasons in paragraph (6)(b), the court must ensure that the agency that provided the identity or information:

(a) is notified about the intended disclosure; and

(b) is given an opportunity to respond.

117AB Costs where false allegation or statement made

(1) This section applies if:

(a) proceedings under this Act are brought before a court; and

(b) the court is satisfied that a party to the proceedings knowingly made a false allegation or statement in the proceedings.

(2) The court must order that party to pay some or all of the costs of another party, or other parties, to the proceedings.

APPENDIX 3:
PRACTICE AND PROCEDURES OF THE FAMILY COURT OF AUSTRALIA IN PARENTING CASES RAISING ISSUES OF FAMILY VIOLENCE

The outline that follows focuses on the path through the Family Court available to families involved in parenting proceedings. The outline does not attempt to take into account the permutations that may arise where parenting proceedings are combined with other matters, such as property proceedings.

1. COMPULSORY PRE-FILING DISPUTE RESOLUTION

Family Dispute Resolution – threshold for accessing the federal family law courts

Family dispute resolution is a process by which a neutral, independent family dispute resolution practitioner assists people to resolve all or part of their disputes arising from separation or divorce.[192] The form that family dispute resolution (FDR) may take may vary, and can include mediation and conciliation.[193] From 1 July 2008, families wishing to apply to the federal family law courts for parenting orders must first obtain a certificate under section 60I of the *Family Law Act 1975* from an FDR practitioner, or come within the exceptions to doing so.[194]

The object of this restriction on access to the federal family law courts is to ensure that families make a genuine effort to resolve parenting disputes through FDR before applying for a parenting order.[195] Unless an exception to compulsory FDR applies, the courts cannot accept an application for parenting proceedings unless the application is accompanied by a section 60I certificate. However, the courts are not required to look behind this certificate to, for example, determine if dispute resolution occurred. The court is not directed to consider the certificate as a source of information about the families and their needs. For example, paragraphs b) and e) of the section 60I certificate note that in the practitioner's opinion

---

192 Section 10F, *Family Law Act 1975*.

193 Family Relationships Online, *Family Dispute Resolution*, <http://www.familyrelationships.gov.au/fdr>.

194 Subsection 60I(7), subsection 60I(9), *Family Law Act 1975*.

195 Subsection 60I(1), *Family Law Act 1975*.

family dispute resolution is not appropriate for the family, having regard to a number of factors including whether the ability of a party to negotiate freely is affected by a history of family violence.[196]

However, the Court is not required to give weight to the kind of certificate that was issued. The requirements of the Family Law Act are satisfied, and court proceedings may commence, merely if a section 60I certificate is filed with an application.

Families are not required to attempt FDR if the Court is satisfied that there are reasonable grounds to believe there has been child abuse, or there would be a risk of child abuse if parenting proceedings were delayed. Families are also not required to attempt FDR if the Court is satisfied that there are reasonable grounds to believe there has been, or there is a risk of family violence.[197] This is further discussed below. The other exceptions to compulsory FDR are:

- parenting orders sought with the consent of all the parties
- applications made in circumstances of urgency
- applications in response to an application by another party to the proceedings for an order under Part VII of the Family Law Act
- applications made in relation to a contravention of a Part VII order made within the period of 12 months before the application was made, and the court is satisfied that there are reasonable grounds to believe that the person behaved in a way that shows a serious disregard for his or her obligations under the order
- where one or more of the parties is unable to participate effectively in FDR (whether because of an incapacity of some kinds, physical remoteness from dispute resolution services or for some other reason), and
- other circumstances specified in the *Family Law Regulations 1984*.

FDR entails a further threshold to be satisfied before the Court may determine a parenting dispute. Where a section 60I certificate is not filed, and the party has been granted an

---

196 Schedule 1, Family Law (Family Dispute Resolution Practitioners) Regulations 2008.

197 Paragraph 60I(9)(b), *Family Law Act 1975*.

exemption to attending compulsory FDR on the basis that the Court is satisfied that there has been abuse of a child or has been family violence, the Court may not hear the parenting case until the Applicant provides the Court a written acknowledgement indicating that he or she has received from a family counsellor or FDR practitioner information about services and options available in circumstances of violence or abuse. As advised on the acknowledgement form available on the Family Law Courts website, where an acknowledgement is not filed, the case may be adjourned until the Applicant has obtained the information and lodged the written acknowledgment with the Court.[198]

The requirement to provide the written acknowledgement does not apply to parties who have been granted an exemption to attending compulsory FDR on grounds unrelated to violence or abuse, for example urgency alone. The requirement also does not apply where there is a risk of child abuse if proceedings before the Court are delayed or there is a risk of family violence by one of the parties.[199] This exception is to ensure that those matters involving high risk of immediate violence or abuse are heard by the court as soon as possible.[200]

The Act also contains additional restrictions on the Court making orders in a parenting matter. Under section 65F, the Court must not make a parenting order unless satisfied that the parties have attended family counselling to discuss the issues in dispute. This requirement does not apply where the matter is urgent, or where there are circumstances that make family counseling inappropriate, such as family violence.[201] The requirement also does not apply where parties are seeking orders by consent, or interim orders.[202]

Court ordered attendance at family dispute resolution or family counselling

The Family Law Act provides that the Court may refer parties to FDR or family counseling at any stage in the proceedings.[203] The Act does not require the Court to consider whether the referral is appropriate in the circumstances. However, before doing so, the Court must

---

198 Acknowledgment - Information from a Family Counsellor or Family Dispute Resolution Practitioner, <http://www.familycourt.gov.au>; subsection 60J(4), *Family Law Act 1975*.

199 Subsection 60J(2), *Family Law Act 1975*.

200 Family Law Amendment (Shared Parental Responsibility) Bill 2005, *Explanatory Memorandum*, paragraph 107.

201 Paragraph 65F(2)(b), *Family Law Act1975.*

202 Subsection 65F(3), *Family Law Act1975.*

203 Section 13C, *Family Law Act 1975*.

consider seeking the advice of a Family Consultant about the services appropriate to the family's needs.[204]

The Family Law Rules make specific provision for the Court to consider whether to refer families to FDR or family counseling, at specific stages along the court management pathway. This outline of the court events will flag these various stages.

Under the Family Law Act, communications made to an FDR practitioner or a family counsellor are confidential. Communications may be disclosed to uphold obligations under State and Territory law; to protect children from child abuse, to protect families from imminent harm; to report or prevent the commission of an offence, or with the consent of the relevant person.[205] There is no provision to allow disclosure of family violence concerns if the concerns do not meet the criteria of child abuse, imminent risk of harm, the commission, or likely commission, of an offence or with consent. The admissibility provisions in Family Law Act further limit the dissemination of information provided in family counselling or family dispute resolution session. Only admissions by an adult that indicate a child has been abused, or is at risk of abuse, or disclosure by a child that that child has been or is at risk of abuse, may be admitted into family law proceedings provided that in the opinion of the Court there is not sufficient evidence of the admission or disclosure available to the Court from other sources.[206]

There are further exceptions to the restrictions on confidentiality and admissibility of communications made, where the family's attendance at family counselling or FDR is court ordered. Where a party fails to attend the session, the FDR practitioner or family counsellor must report to the failure to the Court[207] However, the Family Law Act does not permit the FDR practitioner or family counsellor to provide additional information, or comment on the sessions were they to occur.

---

204 Section 11E, *Family Law Act 1975*.

205 Section 10D, section 10H, *Family Law Act 1975.*

206 Section 10E, section 10J, *Family Law Act 1975*.

207 Section 13D, *Family Law Act 1975*.

Pre-Action procedures

Prior to initiating parenting proceedings in the Family Court, parties are to comply with pre-action procedures under Schedule 1 of the *Family Law Rules 2004*.[208] The purpose of the pre-action procedures include providing parties an opportunity to settle all or part of the parenting dispute prior to commencing court litigation.[209] The pre-action procedures emphasise the use of dispute resolution services to reach settlement where possible. The objective of the pre-action procedures are to:

- encourage early and full disclosure through the exchange of information and documents about the prospective case
- assist people to resolve their differences quickly and fairly, and to avoid legal action where possible (thereby limiting costs and hopefully avoid the need to start a court case)
- help parties (where an agreement cannot be reached out of court) to identify the real issues in dispute (thereby helping to reduce the time involved and the cost of the case), and
- encourage parties to seek only those orders that are realistic and reasonable on the evidence.[210]

The pre-action procedures build on the requirements for parties to attempt FDR before initiating court proceedings. The first step in the pre-action procedures is to comply with the requirements of compulsory FDR.[211] The Court's brochure, *Before you file – pre-action procedures for parenting* cases, notes that if agreement is reached parties may enter into parenting plans or apply for consent orders. The brochure also contains advice to families that should agreement not be reached through FDR, parties may participate in other dispute resolution processes, such as family counseling, negotiation, conciliation, and arbitration, at any time before commencing court action.

---

208 Rule 1.05, Family Law Rules 2004.

209 Subclause 1(5), Part 2, Schedule 1, *Family Law Rules 2004*.

210 Family Court of Australia, *Before you file - pre-action procedure for parenting cases*, <http://www.familycourt.gov.au>.

211 Family Court of Australia, *Before you file - pre-action procedure for parenting cases*, <http://www.familycourt.gov.au>.

Before commencing court proceedings, a party must issue the other potential party to the parenting proceedings a notice of intention to claim.[212] The notice is to contain details of the matters in dispute, the proposed parenting orders, a genuine offer to resolve the parenting issues and a time, being not less than 14 days after the date of the letter, in which the other party is to respond.[213] Once a notice of intention to claim is issued, parties are required to explore options for settlement through exchange of correspondence.[214]

In exploring options for settlement, parties are to comply with the obligations of full and frank disclosure,[215] which requires parties to provide to each other party all information relevant to an issue in the case.[216]

The pre-action procedures aim to encourage child-focused negotiations. While not including children in the negotiation process, the Family Law Rules direct parties to consider at each stage of the pre-action procedures the best interests of the child and the effect of the negotiations, and of any litigation, on their child and the parent-child relationship. Parties are also directed to consider the benefit that the child may receive from parental cooperation.[217] However, while the Rules encourage parties to consider the needs of their children, the extent to which this occurs may vary between families.

Pre-action procedures in circumstances of family violence or child abuse

The pre-action procedures, and the emphasis on negotiation to reach settlement that the pre-action procedures entail, do not apply to cases involving allegations of child abuse or family violence, or the risk of child abuse or family violence.[218]

2. FILING

To commence parenting proceedings, applicants in the Family Court file an 'Initiating Application (Family Law)'[219] containing details the final orders, and any interim orders, that

---

212 Paragraph 1(1)(a), Part 2, Schedule 1, *Family Law Rules 2004*.

213 Subclause 3(5), Part 2, Schedule 1, *Family Law Rules 2004*.

214 Subclause 1(1), Part 2, Schedule 1, *Family Law Rules 2004*.

215 Paragraph 1(6)(i) and clause 4, Part 2, Schedule 1, and subrule 13.01(2) *Family Law Rules 2004*.

216 Chapter 13, *Family Law Rules 2004*; Family Court of Australia, *Duty of Disclosure (brochure)*, <http://www.familycourt.gov.au>.

217 Subclause 1(6), Part 2, Schedule 1, *Family Law Rules 2004*.

218 Paragraph 1.05(2)(a), *Family Law Rules 2004*.

the applicant is seeking.[220] Parties are not to file affidavits with an Initiating Application unless they seek interim orders in addition to final orders.[221] The Initiating Application must be served on other parties listed in the application through special service procedures,[222] which require the application to be personally received by the person served.[223] The Initiating Application is to be served with court prepared brochures containing information about reconciliation, non-court based family services and the court's processes and services.[224]

Parties responding to an Initiating Application must file a 'Response to an Initiating Application (Family Law)'.[225] A Response to an Initiating Application must be filed within seven days of the scheduled date for the procedural hearing.[226] The Response must note the facts in the Initiating Application with which the Respondent disagrees, state what the Respondent considers to be the facts, and give full details of the orders that the Respondent seeks. The Response may also include consent to an order that the Applicant seeks, ask that the Initiating Application be dismissed or ask for orders in another cause of action.[227] The same restrictions to filing an affidavit that apply to Applicants also apply to Respondents. An affidavit is not to be filed with a Response unless the Response seek interim, procedural, ancillary or other incidental orders or the Response is replying to such orders sought by the Applicant.[228]

FDR – assessment at filing

Compliance with the FDR requirements is assessed by registry staff when processing an Initiating Application. The application will not be accepted unless either an exemption to

---

219 Rule 2.01, *Family Law Rules 2004.*

220 Part A, *Initiating Application (Family Law)*, <http://www.familycourt.gov.au>, viewed 16 September 2009.

221 Rule 5.02, *Family Law Rules 2004*.

222 Rule 7.03, *Family Law Rules 2004*.

223 Rule 7.05, *Family Law Rules 2004*.

224 Rule 2.03, Family Law Rules; section 12F Family Law Act 1975; Family Court of Australia, Marriage, families and separation (Family Law Courts prescribed brochure), <http://www.familycourt.gov.au>.

225 Rule 9.01, *Family Law Rules 2004*.

226 Rule 9.07, *Family Law Rules 2004*.

227 Subrule 9.01(3*), Family Law Rules 2004*.

228 Rule 9.02, *Family Law Rules 2004*.

FDR is sought or a section 60I certificate is filed with the Initiating Application.[229] The onus is on Applicants not filing a section 60I certificate to establish that an exception to FDR applies. These Applicants must file an affidavit with the Initiating Application setting out the facts relied on to satisfy the Court that there are reasonable grounds to believe there has been child abuse or family violence, or there would be a risk of child abuse or family violence if parenting proceedings were delayed (or whatever the other exception claimed is).[230] The Family Court has provided a pro forma affidavit to assist parties claiming an exemption to compulsory FDR, titled 'Affidavit – Non-filing of Family Dispute Resolution Certificate'.[231] The pro forma contains tick boxes that reflect the exemptions under subsection 60I(9) of the Family Law Act. Under each exemption parties are provided space to include the facts that relate to the exemption. The pro forma advises applicants that they '**must** provide further information to support the statement. It is not sufficient to simply tick that particular sentence'.[232] Where the party is seeking interim orders in addition to final orders, the information may instead be included in any affidavit filed in support of an interim application. In this instance, parties are not required to use the pro forma.

The Family Court has advised that the affidavit is not assessed by registry staff, but by a Registrar. If the Registrar forms the opinion that on the basis of the affidavit it is not established that an exception applies, and the application cannot be filed, it is open to the applicant to file further material and request further consideration based on the additional material.

Pre-action procedures – assessment at filing

Compliance with the pre-action procedures is not considered by Family Court registry staff when processing an Initiating Application (Family Law). Compliance is first considered at the initial court event before the Registrar, who can take into account whether parties have fulfilled the pre-action procedures when making an order in relation to the procedural

---

229 Rule 2.02, *Family Law Rules 2004*.

230 Rule 2.02, *Family Law Rules 2004*.

231 Family Court of Australia, Affidavit – Non-filing of Family Dispute Resolution Certificate, <http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/forms_fees/All+Forms/List+of+all+forms/FCOA_form_Affidavit_NonFiling>.

232 Family Court of Australia, Affidavit – Non-filing of Family Dispute Resolution Certificate, Part C, <http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/forms_fees/All+Forms/List+of+all+forms/FCOA_form_Affidavit_NonFiling>.

requirements and any other matter contained in the Family Law Rules.[233] These orders can include orders for the parties to undertake steps required by the pre-action procedures, including undertaking family dispute resolution where appropriate. A judicial officer may also consider the pre-action procedures at an interim hearing, if an interim hearing occurs. There is also a financial incentive for parties to comply with the procedures, as the Court may take account of non-compliance when assessing applications for costs.[234]

Additional filing requirements where parties raise family violence concerns

Additional filing requirements apply where families raise concerns about family violence and/or child abuse.

Section 60J

As discussed above, where parties have filed an Initiating Application without a section 60I certificate and obtained an exemption on the basis of the court being satisfied that there are reasonable grounds to believe that there has been abuse of the child or family violence by one of the parties to the proceedings, the parties are required to satisfy the Court that they have received information from a family counsellor or FDR practitioner about the services and options available in circumstances of abuse and violence.[235] As previously noted, this filing requirement does not apply to parties who have been granted an exemption to attending compulsory FDR on grounds unrelated to violence or abuse, for example urgency alone or where there is a risk of child abuse if proceedings before the Court are delayed or there is a risk of family violence by one of the parties.[236]

The form is not filed with the Initiating Application, but is provided to a Judicial Officer hearing the case at the first Court event before the Judicial Officer.[237] As advised on the background information to the Court provided form *Acknowledgment - Information from a Family Counsellor or Family Dispute Resolution Practitioner*, failure to provide the form can

---

233 Rule 1.10, *Family Law Rules 2004*.

234 Paragraph 1.10(2)(d), Rule 11.03, *Family Law Rules 2004*.

235 Section 60J, *Family Law Act 1975*.

236 Subsection 60J(2), *Family Law Act 1975*.

237 Acknowledgment - Information from a Family Counsellor or Family Dispute Resolution Practitioner, <http://www.familycourt.gov.au>.

result in delays to the Court proceedings, as proceedings may be adjourned until the acknowledgement is filed.[238]

A Notice of Child Abuse or Family Violence (Form 4)

Further filing obligations apply to parties raising family violence or child abuse concerns. Section 67Z of the Family Law Act requires parties alleging that a child has been abused or is at risk of abuse to file a notice in the prescribed form, and serve this notice upon the person alleged to have abused the child or from whom the child is at risk of abuse.[239] The circumstances in which the obligation will arise are narrow. 'Abuse' is defined under the Family Law Act as being limited to sexual abuse and assault that is an offence under State and Territory law.[240] The mandatory filing requirement does not apply under the Family Law Act to families that only wish to raise family violence concerns. For these families, filing a notice is optional under the Family Law Act.[241]

Under the *Family Law Rules 2004*, the prescribed notice is *A Notice of Child Abuse or Family Violence (Form 4)*.[242] As the title of the prescribed notice suggests, the Family Law Rules extend the filing requirements imposed under the Family Law Act where parties raise allegations of child abuse or family violence. A party in the case, an independent children's lawyer and a person seeking to intervene in a case *must* file a Form 4 if alleging that:

- a child has been abused or that there is risk of a child being abused, and/or
- there has been family violence involving a child or a member of the child's family or that there is a risk of family violence involving a child or a member of the child's family.[243]

The Form 4 can be filed with an Initiating Application or at any subsequent time prior to final orders being made. The Form must be served on all parties to the proceedings,[244] in addition

---

238 Acknowledgment - Information from a Family Counsellor or Family Dispute Resolution Practitioner, <http://www.familycourt.gov.au>.

239 Section 67Z, Family Law Act 1975.

240 Subsection 4(1), *Family Law Act 1975*.

241 Section 60K, *Family Law Act 1975*.

242 Rule 2.04D, *Family Law Rules 2004*.

243 Rules 2.04, 2.04B, *Family Law Rules 2004*.

244 Rule 7.04, *Family Law Rules 2004*.

to any person who it is alleged has abused the child or from whom the child is at risk of abuse.[245]

Form 4s are one method by which the Family Court receives information about the alleged child abuse or family violence. Where a Form 4 is filed, the party alleging the violence or abuse, or the risk of same, must also file an affidavit setting out the evidence on which the Form 4 is filed[246]. The Form contains tick boxes for parties to indicate whether child abuse or family violence, or both, is being alleged. Parties are also asked to include on the form details of the alleged abuse, family violence or risk of same. Part 6 contains the following instructions.

> Describe any acts or omissions that you allege constitute abuse. Please include the identity of the alleged abuser(s), if known.

Similar instructions are provided where parties allege the risk of child abuse, family violence or the risk of family violence. The Forms can contain quite detailed information, and potential evidence, of abuse and family violence.

The Form also requires parties to establish a link between the alleged violence or child abuse and the parenting arrangements for the child. For example, question seven at Part E asks parties to note the application/response where the party sought orders relevant to the allegations.[247] Accordingly, allegations of family violence or child abuse cannot be made in isolation. Parties are required to establish a nexus between the allegations and the parenting orders, and in their application/response detail the orders the party asserts the Court should make in relation to the parenting arrangements for the child in circumstances of family violence or child abuse.[248]

---

245 Section 67Z, *Family Law Act 1975*.

246 The matters supporting the Form 4 may well have been addressed in the affidavit filed in support of the Application in a case, if so, no further affidavit needs to be filed.

247 Family Court of Australia, *A Notice of Child Abuse or Family Violence*, Part E, Question 7, p. 3, <http://www.familycourt.gov.au>.

248 Family Court of Australia, *A Notice of Child Abuse or Family Violence* questions 7, 11, 15 and 19.

Family violence orders

Parties to parenting proceedings are also required to file copies of any family violence orders affecting the child or a member of the child's family.[249] The Family Law Rules provide a process for parties to bring the orders to the Court's attention. The Rules recognise that parties may have concurrent proceedings before the Family Court and the relevant State or Territory Magistrates Court in which a family violence order may be obtained. The Rules require the parties to file the orders when the parenting proceedings start or, where this is not applicable, as soon as practicable after the order is made.[250] The Rule is consistent with section 60CF of the Family Law Act, which requires parties to proceedings to inform the court of any family violence order that applies to the child or members of the child's family.

The Family Law Rules also cover the scenario in which a copy of the family violence order is not available. In this instance, the party must file a written notice giving details of the order, including when and by which court the order was made. The parties are also to provide an undertaking to file the order within a specified time.[251]

Where a Form 4 is filed, the duty Registrar has discretion to list the matter in Court. This is further discussed below.

3. URGENT/ INTERIM HEARINGS

Urgent, or interim, hearings refer to hearings in which parenting orders may be made on an interim basis prior to hearings for final orders. There are three primary categories of circumstances in which parties may apply for interim parenting orders.

Application for interim orders by parties

The first is in response to parties' application for interim orders. A party may apply for interim orders where the party has made an application for final orders in the proceedings to which the interim orders relate, and in circumstances where final orders have not been made in the proceedings.[252] Unless an exception applies, the application must also not be filed unless the party seeking the orders has made a reasonable and genuine attempt to settle the

---

249 Section 60CF, *Family Law Act 1975*.

250 Rule 2.05, *Family Law Rules 2004*.

251 Subrule 2.05(2), *Family Law Rules 2004*.

252 Rule 5.01, *Family Law Rules 2004.*

issue to which the interim orders relate.[253] The exceptions include where the application for interim orders is necessary due to allegations of family violence or child abuse.

Where an interim order is sought when filing an Application for final orders an affidavit is required to be filed in support of the interim application only. The respondent would generally respond to the interim application as part of the Response and also file an affidavit.[254] Where an interim order is sought during proceedings at some time after filing of the Initiating Application, the applicant will file an Application in a case (with the required affidavit). This form may only be filed where there is an Initiating Application on foot. The respondent files a Response to an application in a case,[255] accompanied by an affidavit.[256] A Response must be filed and served no later than seven days before the interim hearing.[257] A reply to a Response must be filed and served as soon as possible after the Response is received.[258]

The affidavits form the evidence that the parties provide in support of, or in opposition to, the orders sought. There are limits on the number of affidavits that may be submitted, with the number of affidavits restricted to one per party and one per witness.[259] Where a Response is filed, the Applicant may also file a subsequent affidavit in reply to the Response.[260] All affidavits must be filed at least two days before the interim hearings.[261]

Without notice to the respondent

The second circumstance under which parties may apply for interim orders is one avenue through which the Family Court may give appropriate attention to family violence and child abuse concerns. A party may seek interim orders without notice to other parties to the proceedings.[262] The circumstances in which this may occur include where there are family

---

253 Rule 5.03, *Family Law Rules 2004*.

254 Rule 5.02, *Family Law Rules 2004*.

255 Rule 9.05, *Family Law Rules 2004*.

256 Rule 9.06, *Family Law Rules 2004*.

257 Subrule 9.08(1), *Family Law Rules 2004*.

258 Subrule 9.08(2), *Family Law Rules 2004*.

259 Rule 5.09, *Family Law Rules 2004*.

260 Rule 9.07, *Family Law Rules 2004*.

261 Subrule 9.08(3), *Family Law Rules 2004*.

262 Rule 5.12, *Family Law Rules 2004*.

violence and child abuse concerns. The ability to bring forward the application for interim orders gives due regard to the need to protect the safety of at risk children and their families. The party seeking the interim orders is to provide the court details of any family violence or child abuse concerns, and of the nature of the damage or harm that may result if the order is not made.[263] Where seeking an interim order without notice to the other party, the applicant must also inform the Court of:

- whether there has been a previous case between the parties and, if so, the nature of the case
- the particulars of any orders currently in force between the parties
- whether there has been a breach of a previous order by either party to the case
- whether the respondent or the respondent's lawyer has been told of the intention to make the application
- capacity of the applicant to give an undertaking as to damages
- why the order must be urgently made, and
- the last known address or address for service of the other party.

The party that may not receive notice of the application for interim orders is also considered by the Family Court. The applicant is required to inform the Court whether there is likely to be any hardship, danger or prejudice to the respondent, a child or a third party if the order is made.[264]

Where made without notice, the restricted operation of the interim orders is to be noted on the orders. The order must be expressed to apply only until a time specified in the order, or if the hearing of the application is adjourned, until the date of the hearing.[265]

---

263 Rule 5.12, *Family Law Rules 2004*.

264 Rule 5.12, *Family Law Rules 2004*.

265 Rule 5.13, *Family Law Rules 2004*.

Interim hearings and Form 4s

Third, an interim hearing may occur where a Form 4 has been filed even where no application for interim orders has been sought.[266] Where a Form 4 is filed with an Initiating Application (Family Law), the matter will be referred to a Registrar and if considered necessary may be listed by the Registrar before a Judge for an interim hearing. The Family Court's *Family Violence Best Practice Principles* direct that the interim hearing is to occur no later than six weeks from the date of the initial procedural hearing.[267] As also stated in the *Family Violence Best Practice Principles,* where a Form 4 is filed the matter will be promptly assessed by the duty Registrar, to determine if an interim hearing, or another form of hearing such as a procedural or directions hearing, is appropriate to make orders to enable evidence to be gathered about the allegation or for the protection of the parties.[268] This will occur even where parties have not applied for interim orders, and is consistent with the requirements of the Family Law Act where a Form 4 is filed.[269] In a practical sense where a party files a Form 4, the Registrar may list the application for interim order for hearing and direct the party to file the relevant form and affidavits in support.

Factors the Family Court considers when assessing applications for interim orders

Family violence concerns are central to the Family Court's response to interim orders, regardless of under which limb the application was made. The Family Law Rules direct that the Court may consider, in response to applications for interim orders, the best interests of the child as set out under section 60CC of the Family Law Act.[270] In addition, the Court may take into account whether the order(s) is necessary for reasons of hardship, family violence, and prejudice to the parties or the children.[271]

---

266 Rule 2.04C, *Family Law Rules 2004*.

267 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, op cit, p. 13.

268 Family Court of Australia, *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged*, op cit, p. 3.

269 Subsection 60K(2), *Family Law Act 1975*.

270 Subrule 5.08(a), *Family Law Rules 2004*.

271 Subrule 5.08(c), *Family Law Rules 2004*.

The Family Violence Best Practice Principles contain specific matters that the Family Court is to consider when determining whether to make interim orders in circumstances in which family violence or child abuse concerns have been raised. The matters are as follows.

> (i) The likely risk of harm to the child, whether physical and/or emotional, if an interim application for a child to spend time with a parent against whom allegations have been made is granted or refused.
>
> (ii) If the Court decides that it is in the interests of the child to spend time or communicate with a parent against whom allegations have been made, what directions are required to give effect to such order(s), and in particular:
>
> - whether time spent with the other parent should be supervised;
> - if so, whether or not that supervision should occur at a child contact centre;
> - if not, where the time spent should take place and who should supervise it;
> - times for the visit and places of exchange;
> - who should be permitted to attend the appointment with the parent;
> - who will bear the costs of the supervision, and in particular;
> - what other arrangements should be put in place (including an order under section 60CG(2)) to secure the safety of the child and the parent with whom the child is living before, during and after any time spent with the other parent.[272]

However, under the Rules there is only a limited time in which the Court may consider these factors. Interim hearings are not to exceed two hours in duration.[273] The nature of the evidence before the court is also limited, with the number of affidavits restricted to one affidavit per party, and one affidavit per witness provided the evidence is relevant and cannot

---

272 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, op cit, Part C, p. 7.

273 Subrule 5.10(1), *Family Law Rules 2004*.

by given by the party.[274] Cross-examination is not permitted except with the leave of Court.[275] However, it should be noted that under Rule 1.14 the Court may extend a time fixed under the Rules. Rule 1.12 also allows the Court to dispense with the Rules.

Interim hearings and evidence gathering

The Principles also direct the Court to give regard to other means of ascertaining the risk that a parent may pose to a child. In this regard, the Principles note that the Court may be assisted to ascertain the probable risk of harm from a proposed parenting order, by referring one or both of the parenting to a post-separation parenting program, or other appropriate courses, programs or services. The Principles infer that the information that this referral generates could then be used by the Court when assessing possible final orders.[276]

Interim hearings in the absence of the parties

Interim hearings may occur in the absence of the parties, in response to the applicant's request for same.[277] If the respondent objects to this request, the respondent must notify the court and the other party, in writing, of the objection no later than seven days prior to the date fixed for the hearing.[278] The notice is to comply with the formatting requirements for documents filed with the Family Court, under Rule 24.01 of the Family Law Rules. Where the respondent objects, both parties are to attend on the first court date for the application.[279] Even where both parties consent to the interim hearing occurring in their absence, the Court may determine that the parties are to be present at the interim hearing.[280]

Where the interim hearing occurs in the parties' absence, submissions are to be made on the papers, filed no later than two days before the date of the hearing.[281]

---

274 Rule 5.09, *Family Law Rules 2004*.

275 Subrule 5.10(2), *Family Law Rules 2004*.

276 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, op cit, Part C, p. 7.

277 Rule 5.14, *Family Law Rules 2004*.

278 Subrule 5.15(a), *Family Law Rules 2004*.

279 Subrule 5.15(b), *Family Law Rules 2004*.

280 Rule 5.16, *Family Law Rules 2004*.

281 Rule 5.17, *Family Law Rules 2004*.

Family Dispute Resolution – link to interim hearings

Applications for interim orders may also trigger the parties' referral out of the Family Court process. One matter the Family Court may consider when determining the application for interim orders is 'whether the parties would benefit from participating in one of the dispute resolution methods'.[282]

Abridgement of time for interim hearings

The Family Law Rules aim for interim hearings to occur as near as practicable to 28 days after the application for interim orders was filed.[283]

Under subrule 5.05(4), parties may apply for the hearing date to be brought forward on the grounds of urgency. 'Urgency' is not defined by this subrule or in Rule 5.05 as a whole, nor is it defined in the Dictionary to the Family Law Rules. However, paragraph 5.05(4)(a) indicates that the Court may consider the safety of the family when assessing whether a matter is urgent. Under paragraph 5.05(4)(a), an earlier date for an interim hearing may be fixed if the duty Registrar is satisfied that 'there is a harm that will be avoided, remedied or mitigated by hearing the application earlier.' Where an earlier date has been appointed to the interim hearing, procedural matters in relation to final orders must also be considered at this hearing.[284] If the Court considers that the listing for an urgent hearing is unreasonable, costs may be ordered against the party who sought the urgent hearing.

4. INITIAL PROCEDURAL HEARING

Where an urgent hearing is not held, following filing a parenting case is first listed before a Registrar for a procedural hearing attended by all parties.[285] The Registrar has a central role in the procedural hearing. Their function is to assess the case, make recommendations about the future conduct of the case, determine whether the case is suitable to remain in the Family Court or should be transferred to another court exercising jurisdiction under the Act, and enable the parties to attempt to resolve the case, or any part of the case, by agreement. The

---

282 Subrule 5.08(e), *Family Law Rules 2004*.

283 Rule 5.05, *Family Law Rules 2004*.

284 Rule 4.03, *Family Law Rules 2004*.

285 Rule 12.04, *Family Law Rules 2004*. The duty Registrar deals with the chambers considerations at filing eg s 60K and 60I and requests for urgent or without notice listings. Thereafter a Registrar conducts court events such as the initial procedural hearing.

functions of the Registrar indicate the objectives underlying the holding of procedural hearings. The Rules indicate that a purpose of the procedural hearings is to promote settlement. A second purpose is to provide the Family Court a structured time in which to determine whether to select the option to transfer the matter to the Federal Magistrates Court.

Where settlement is not reached, orders can be made at the procedural hearing about the future conduct of the case.[286] The orders may include referral of the parties to the Child Responsive Program.[287]

5. CHILD RESPONSIVE PROGRAM

The following description of the Child Responsive Program is based on information provided by Family Consultants with the Family Court, the Family Court's brochure *The Child Responsive Program*, Margaret Harrison's report *Finding A Better Way*, April 2007, and the Jennifer E. McIntosh and Caroline Long report *The Child Responsive Program, operating within the Less Adversarial Trial: A follow up study of parent and child outcomes, Report to the Family Court of Australia*, July 2007.

The Family Court has authority to refer parties to attend an appointment, or a series of appointments with social scientists or psychologists appointed under the Act[288], known as Family Consultants.[289] Under the Family Law Rules, this process has been extended into the 'Child Responsive Program'.

It is usual practice for parties to be ordered to attend the Child Responsive Program (the Program) prior to the Less Adversarial Trial. The Program is a four stage process of meetings between families and Family Consultants. The Program aims to direct parents to focus on the needs of their children when determining parenting arrangements.[290] One Family Consultant is assigned to a case for its duration.[291]

---

286 Subrule 12.04, *Family Law Rules 2004*.

287 Paragraph 12.04(2)(a), *Family Law Rules 2004*.

288 Section 11F, *Family Law Act 1975*.

289 Section 11B, section 38N *Family Law Act 1975*.

290 Family Court of Australia Brochure, *The Child Responsive Program*, <http://www.familycourt.gov.au>, p. 1.

291 McIntosh, Jennifer E., Long, Caroline, The Child Responsive Program, operating within the Less Adversarial Trial: A follow up study of parent and child outcomes, Report to the Family Court of Australia, July 2007, p. 5.

The Program starts with parents separately viewing a DVD such as 'Consider the Children' (sometimes the family has already seen a particular DVD). Following this, parents move into the Intake Assessment stage, in which the Family Consultant will meet separately with each parent to assess the current difficulties with parenting arrangements and determine the extent to which it is appropriate for the children to participate in the Program.

The Family Consultant will also screen for family violence. This can include reading particular documents in the court file as is directed prior to the initial meeting with the parents, to attempt to identify issues related to family violence. In addition, the Family Consultants go through a *questionnaire* that includes specific reference to family violence issues. When violence is identified, and there are concerns about on-going risk, other tools such as the Spousal Assault Risk Assessment Guide (SARA),[292] can be used by the Family Consultant. The SARA has been described as 'a quality control checklist that determines the extent to which [the professionals] have assessed risk factors of crucial predictive importance'.[293]

Where significant family violence concerns are identified, the Family Consultants will take the appropriate protective action for the kind of family violence that has been identified. This can include by-passing the second stage of the Program, to move directly to preparing the Children and Parents Issues Assessment.

Where the family violence relates to children, the Family Consultants will notify the relevant child welfare authorities. Where the family violence is against the spouse, the Family Consultants will prepare a security incident form and institute a safety plan to operate while the family attends court. However, other than arranging a safety plan, there are no formal protocols for the Family Consultants to follow to address the needs of alleged adult victims of violence.

Stage two of the process is known as 'Child and Family Meetings'. As the title indicates, it is at this stage of the process that the Family Consultant will, where appropriate, meet with the children to provide the children an opportunity to express their views about the family and parenting arrangements. The parents do not attend the children's meeting with the Family

---

[292] Developed by P. R. Kropp, Ph.D., S. D. Hart, Ph.D., C.D. Webster, Ph.D., & D. Eaves, M.B.

[293] Description drawn from MHS, http://downloads.mhs.com/saRA/SARA_TechBrochure.pdf, viewed October 2009.

Consultant. Where children disclose past family violence or child abuse, the disclosures can trigger the Family Consultants' mandatory reporting obligations to inform relevant child welfare authorities of any reasonable grounds for suspecting that a child has been abused or is at risk of being abused.[294]

Following this, the Family Consultant will provide feedback to the parents about the children's perspectives. The feedback can be provided to both parents jointly, or through individual meetings. To minimise the risk of harm to the child, feedback is focused on the child's overall experiences rather than their views of either parent.

For the third stage, the Family Consultant prepares the 'Children and Parents Issues Assessment'; a written report detailing the main issues affecting the family, the feedback provided to the parents and any outcomes of this. The Children and Parents Issues Assessment will be made available to the parents and their legal representatives. A copy will also be placed on the Court file, to be available to the Judicial Officer in the case. While a copy is placed on the Court file, it is not submitted as evidence in proceedings. However, evidence of anything said or any admissions made during the appointments with the Family Consultant are admissible in family law proceedings.[295]

The fourth and final stage of the Program is the Selective Settlement Meeting. The meeting is an optional conciliation session between the family, their legal representatives and the Family Consultant. As its title suggests, both parties, in consultation with the Family Consultant, must elect to participate in the meeting for it to occur. The meetings are directed towards reaching agreement about which parenting arrangements support the best outcomes for the children.[296] Agreements reached during the meeting can be formalised through consent orders.

6. Procedural hearing after Child Responsive Program

The Child Responsive Program is followed by a procedural hearing conducted by a Registrar (usually the docket Registrar).[297] The hearing is to occur 'as soon as practicable' after the

---

294 Section 67ZA, *Family Law Act 1975*.

295 Section 10P, *Family Law Act 1975*.

296 Family Court of Australia Brochure, *The Child Responsive Program*, <http://www.familycourt.gov.au>, p. 2.

297 Rule 12.09, *Family Law Rules 2009*.

conclusion of the Program,[298] and may be conducted by telephone or other means of electronic communication. The purpose of the hearings it to make consent orders to implement any agreements reached through the Child Responsive Program, or to manage the case if settlement was not reached.

There are a number of procedural orders which may be considered by the Registrar for case management. These may include diverting the parties from the Court hearing pathway through ordering the parties to attend FDR, family counseling or other family services where appropriate to the issues.

The parties' obligations of full and frank disclosure, which began during the pre-action procedures and continue throughout the proceedings, are also revisited at the procedural hearing. Parties are required to file an undertaking noting that the parties:

- are aware of their obligations to provide full and frank disclosure of all information relevant to the issues in the case, in a timely manner
- have, to the best of their knowledge and ability, complied with, and will continue to comply with, the duty of disclosure, and
- acknowledge that a breach of the undertaking may be contempt of court.[299]

The undertaking must be filed 28 days before the first day before the Judge.[300] A Registrar may make an order for this undertaking to be filed, at the procedural hearing.[301]

The Registrar may also allocate a date for the first day of the hearing,[302] order parties to pay a hearing fee,[303] and order parties to complete a parenting questionnaire.[304]

---

298 Rule 12.09, *Family Law Rules 2009*.

299 Rule 13.15, *Family Law Rules 2004*.

300 Rule 13.16, *Family Law Rules 2004*.

301 Paragraph 12.09(2)(e), *Family Law Rules 2004*.

302 Paragraph 12.09(2)(g), *Family Law Rules 2004*.

303 Paragraph 12.09(2)(c), *Family Law Rules 2004*.

304 Paragraph 12.09(2)(d), *Family Law Rules 2004*.

7. INDEPENDENT CHILDREN'S LAWYER

An Independent Children's Lawyer, previously known as a Separate Representative, may be appointed to independently represent the best interests of the children to the proceedings.[305] The role of the Independent Children's Lawyer (ICL) is to present to the Court what the ICL believes to be in the best interest of the children.[306] For this purpose, the ICL may apply to the Court for an order that the child be available for examination for the purpose of preparing a report about the child for the ICL's use.[307] The Family Violence Best Practice Principles direct the Court to consider whether to make this order, where A Notice of Child Abuse or Family Violence (Form 4) has been filed.[308]

The ICL is not a party to the case. However, parties to the proceedings are to treat the ICL as a party.[309] For example, parties are required to provide a copy of any documents filed and served on parties to the proceedings.[310]

An ICL may be appointed on application of the child or children to the proceedings, an organisation concerned with the welfare of the child or children or any other person including a party to the proceedings.[311] The Court may also appoint an Independent Children's Lawyer on its own initiative.[312] The Family Law Rules require parties seeking an Independent Children's Lawyer to be appointed to file an Application in a Case,[313] or apply for the appointment orally during proceedings before the Court.[314] The duty Judicial Officer may appoint the ICL. Alternatively, this power is also delegated under the Family Law Rules to Deputy Registrars.[315] The Rules relating to the procedural hearing following the Child

---

305 Section 68L, *Family Law Act 1975*.

306 Subsection 68LA, *Family Law Act 1975*.

307 Section 68M, *Family Law Act 1975*.

308 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, Part A, p. 2.

309 Rule 8.02, *Family Law Act 1975*.

310 Subrule 7.04(3), *Family Law Rules 2001*.

311 Paragraph 68l(4)(b), *Family Law Act 1975*.

312 Paragraph 68l(4)(a), *Family Law Act 1975*.

313 Subrule 8.02(1), *Family Law Rules 2001*.

314 Rule 11.01, *Family Law Rules 2001*.

315 Rule 18.06, *Family Law Rules 200 (noting*. the reference to 'Deputy Registrar' in Chapter 18 of the Rules is the same officer of the court referred to as 'Registrar').

Responsive Program provide that the person conducting the event may consider whether to order an ICL be appointed in the case.[316]

The Rules consider how the costs of the ICL are to be managed. Under the Rules, the Court may request that the costs of appointing an ICL be borne by the relevant Legal Aid Commission.[317] The Court may also order the ICL's costs to be met by a party to the proceedings.[318] Subrule 16.08(4) requires the ICL to provide parties a statement of the actual costs the ICL has occurred up to and including LAT, immediately prior to the first day of the final stage of the trial.

8. PARENTING QUESTIONNAIRE

All parties to parenting proceedings must complete a parenting questionnaire, and file a completed copy on the other parties to the proceedings, at least 28 days before the first date before the Judge.[319] The parenting questionnaire is available on the Family Court of Australia's website.[320]

The questionnaire is a means by which the Court obtains evidence of the family's background and current circumstances and can be admitted to evidence during a trial. The questions cover occupation, living arrangements, medical history, family violence and child abuse concerns, alcohol and drug relate issues, and the current parenting arrangements. The questions posed attempt to create a picture of the realities facing the parties, drilling down into details such as time taken to travel to work, the children's relationship with other relatives, living arrangements for the children, the means and the time taken for the children to travel to school, and the extent and means of communication between the parties to the proceedings.

9. COMPLIANCE CHECK

The compliance check occurs not less than 14 days before the first date of the hearing before the judicial officer. Its purpose is to:

---

316 Paragraph 12.09(2)(b), *Family Law Rules 2001*.

317 Paragraph 8.02(2)(a), *Family Law Rules 2001*

318 Paragraph 8.02(2)(b), *Family Law Rules 2001*.

319 Rule 15.77, *Family Law Rules 2004*.

320 Family Court of Australia, *Questionnaire – Parenting*, <http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/forms_fees/All+Forms/N+to+Z+forms/FCOA_form_Questionnaire_Parenting>.

- check that all procedural orders have been complied with, and

- consider any new issues that may have arisen since the last court event and their effect on the listing of the matter for the first day before the Judicial Officer.[321]

It is usual practice for the parties to attend this by electronic communication.[322]

10. APPLICATIONS TO ATTEND DAY ONE OF THE HEARING BEFORE THE JUDICIAL OFFICER BY ELECTRONIC COMMUNICATION

Parties are required to attend the first day of the hearing before the judicial officer in person.[323] If legally represented, parties must also ensure that their legal representatives attend in person.[324] The party that attends 'may seek the orders sought in that party's application by, if necessary, adducing evidence to establish an entitlement to those orders in a manner ordered by the court.'[325] Were neither party to attend in person the Court may dismiss the case.[326]

However, parties may apply to attend day one of the Less Adversarial Trial (LAT), and any other Court event that is judge managed, by electronic communication.[327] The application must be made at least 28 days before day one of LAT, although the Court has discretion to shorten or extend this time. Parties are to file with the application an affidavit containing details of the facts relied on in support of the application. These facts are to include information about the kind of electronic communication to be used, the place from which the party proposes to give or adduce the evidence, or make the submission, and the facilities at this place that will enable the Court to see or hear the party.[328] A party may also apply for a witness to attend by electronic communication.[329] The application will be listed before the Judicial Officer, for his or her determination.

---

321 Rule 16.02, *Family Law Rules 2004*.

322 Note, Rule 16.02, *Family Law Rules 2004*.

323 Rule 16.07, *Family Law Rules 2004*.

324 Subrule 16.07(1), *Family Law Rules 2004*.

325 Subrule 16.07(2), *Family Law Rules 2004*.

326 Subrule 16.07(3), *Family Law Rules 2004*.

327 Rule 16.05, *Family Law Rules 2004*. This Rule applies to all court events that are Judge managed.

328 Subrule 16.05(3), *Family Law Rules 2004*.

329 Rule 16.05, *Family Law Rules 2004*.

Parties are not required to indicate whether family violence or child abuse concerns are a factor in seeking to attend by electronic communicate. However, consultations with the Family Court noted that, as part of a safety plan, the Court may arrange for parties to appear separately or by electronic communication. This reflects advice given to parents on Family Court's webpage 'Family Court of Australia pathways', which advises parents as follows.

> If family violence is raised as an issue, steps will be taken to deal with it when it is raised as quickly as possible. If at the trial stage you are still concerned about family violence, it is important that this be raised again when you first appear before the judge. This allows the judge to decide how the case should proceed to keep parties safe and able to participate fully in the trial. This might involve a person being heard by video or teleconference.[330]

Such advice is also available in Family Court brochures, including the brochure *Less Adversarial Trial*.[331]

11. EXPEDITED HEARINGS

The Family Law Rules provide for parties to apply for an abridgement or extension of time, including dates for hearings.[332] In addition to this general rule, parties may apply for expedited hearings where family violence or child abuse concerns are raised.

Filing a Form 4 may add to the weight of safety concerns when applying for an expedited court date. According to the Family *Violence Best Practice Principles*, where an abridgement of time is granted and a Form 4 has been filed in the case, the Initial Procedural hearing is to occur no later than six weeks from the time the abridgement was granted.[333] The Principles do not direct the Court to consider timeframes for expedited final hearings.

---

330 Family Court of Australia, *Family Court of Australia pathways*, <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/About+Going+to+Court/Family+Court+of+Australia+pathways/#3>.

331 Family Court of Australia, *Less Adversarial Trial*, http://www.familycourt.gov.au/wps/wcm/resources/file/eba69f063453961/BRLessAdv_0609.pdf, pages 2 and 3.

332 Rule 1.14, *Family Law Rules 2004*.

333 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, op cit, Part H, p. 13.

However, Rule 12.10A sets out the factors the court may take into account when considering whether to expedite the date for the first day before the Judge. The factors include direct references to factors that can affect the safety of parties to the proceedings. These are:

- whether a party has been violent, harassing or intimidating to another party, a witness or any child the subject of, or affected by, the case[334]
- whether the continuation of interim orders is causing the applicant or a child hardship[335]
- whether the case involves allegations of child sexual or other abuse,[336] and
- whether an expedited trial would avoid serious emotional or psychological trauma to a party or child who is the subject of, or affected by, the case.[337]

12. DAY ONE OF THE LESS ADVERSARIAL TRIAL

Judicial Officers are required to be an active participant in hearings for parenting proceedings.[338] The Family Law Rules build on this requirement, to provide specific steps for the Judge conducting the first day of LAT.[339] The Family Law Rules assign a specific purpose to the first day. During day one the Judge must discuss and identify issues in dispute and the orders sought, with the parties and their legal representatives.[340] In doing so, the Judge has broad discretion to determine the nature of the evidence that may be adduced, the witnesses that may be called, the subpoenas that may be issued, and to determine the time that will be allocated to taking evidence in chief and to cross-examination.[341] This reflects the Court's general duties and powers under the Family Law Act to manage the presentation of evidence throughout the proceedings.[342]

---

334 Paragraph 12.10A(4)(b), *Family Law Rules 2004.*

335 Paragraph 12.10A(4)(d), *Family Law Rules 2004.*

336 Paragraph 12.10A(4)(f), *Family Law Rules 2004.*

337 Paragraph 12.10A(4)(g), *Family Law Rules 2004.*

338 Subsection 69ZN(4), *Family Law Act 1975*.

339 Rule 16.08, *Family Law Rules 2004*.

340 Paragraph 16.08(3)(a), *Family Law Rules 2004*.

341 Rule 16.04, *Family Law Rules 2004*. See also Rule 15.71, *Family Law Rules 2004*.

342 Section 69ZX, *Family Law Act 1975*.

The Judge is also in the ordinary course to hear and determine any outstanding interlocutory issues or interim applications or to make appropriate arrangements for the determination of those applications.[343]

The first day of the Less Adversarial Trial builds on the preparatory work conducted through the pre-trial case management events. The pre-trial events have established an evidence base from which the Judge can draw. For example, pursuant to the Family Law Act, the Court may incorporate Family Consultants into the trial.[344] The Family Law Rules establish a structure for this participation. Under the Rules, the Family Consultant may give evidence at the first day before the judge.[345] Unless the parties consent otherwise, Family Consultants provide the court sworn evidence.[346] The evidence that the Family Consultant provided will be based on the Children and Parents Issues Assessment.[347]

The first day also draws on the pre-trial process of completing the Parenting Questionnaire. As advised on the cover page to the parenting questionnaire, the facts contained in the parenting questionnaire are adopted as evidence on the first day before the Judge.[348]

It is at this point, and at any other day of the trial, that the family may also be referred out of the Family Court system. Under the Family Law Act, the Court has a general duty during the Less Adversarial Trial to encourage parties to use FDR or family counseling.[349] It should be noted that the legislation does not assign the Court the duty to refer parties to FDR or family counseling if the Courts thinks that FDR or family counseling is inappropriate.

First day before the Judge – family violence and child abuse allegations

The *Family Violence Best Practice Principles* (the Principles) also direct the Court to have particular regard to what evidence about family violence should be gathered, for cases in

---

343 Paragraph 16.08(3)(b), *Family Law Rules 2004*.

344 Section 69ZS, *Family Law Act 1975*.

345 Paragraph 16.08(3)(c), *Family Law Rules 2004*.

346 Section 69ZU, *Family Law Act 1975*.

347 Family Court of Australia Brochure, *The Child Responsive Program*, <http://www.familycourt.gov.au>, p. 3.

348 Family Court of Australia, *Questionnaire – Parenting*, <http://www.familycourt.gov.au/wps/wcm/connect/FCOA/home/forms_fees/All+Forms/N+to+Z+forms/FCOA_form_Questionnaire_Parenting>.

349 Paragraph 69ZQ(1)(f), *Family Law Act 1975.*

which a Form 4 has been filed. The Principles note that on the first day of hearing it would 'ordinarily be desirable' for the Family Court to consider 'whether or not it would be appropriate to hear the evidence about the disputed allegations of family violence or abuse or risk of family violence,[350] and whether to promptly consider the allegations by making a specific judgment about the allegations on the first day of hearing.[351]

13. FAMILY REPORT

At the first day of the hearing, the Judge may order a family report be prepared.[352]. Part A of the *Family Violence Best Practice Principles* (the Principles) includes a checklist for Registrars and Judicial Officers to consider in response to a Form 4 being filed. The checklist includes, at item xix, consideration of whether a Family Report should be ordered under section 62G of the Family Law Act.[353]

The family report is to address the matters that the Courts considers desirable.[354] The *Family Violence Best Practice Principles* contain a list of possible matters that the Court may wish to direct that the family report cover, in circumstances where a Form 4 has been filed.[355] In relation to family violence, the matters include:

- specifically addressing the issue of family violence or abuse or the risk of family violence or abuse.

- an assessment of the harm the children have suffered or are at risk of suffering if the orders sought are made or not made

---

350 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, op cit, Part D, p. 8.

351 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, op cit, Part D, p. 8.

352 Section 62G, *Family Law Act 1975*, Paragraph 16.04(1)(v), *Family Law Rules 2004*.

353 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, op cit, Part A, p. 3.

354 Subsection 62G(2), *Family Law Act 1975*.

355 Family Court of Australia, *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged*, op cit, Part B, p. 5 - 6. The Principles note that the factors that the Family Court may consider are drawn from the *Guidelines for Good Practice on Parental Contact in Cases where there is Domestic Violence*, Prepared by the Children Act Sub-Committee of the Lord Chancellor's Advisory Board on Family Law, April 2002.

- whether the safety of the child and the parent alleging the family violence or abuse can be secured before, during or after any time that the child spends with the parent, or another person, against whom the allegations are made, and

- the views of the child or children in light of the allegations of family violence or abuse or the risk of same.

The Principles also recommend the Court to consider making further directions about the content of the Family Report, in circumstances where the family violence or abuse has been acknowledged (presumably by the alleged perpetrator) or established. The order may request that the writer report on:

- the impact of the family violence or abuse

- whether or not the parent acknowledges the family violence or abuse has occurred

- whether or not the parent accepts some or all responsibility for the family violence or abuse

- whether and the extent to which the parent accepts that the family violence or abuse was inappropriate

- whether or not the parent has participated or is participating in any program, course or other

- activity to address the factors contributing towards his or her violent or abusive behaviour

- whether or not there is a need for the child and the other parent to receive counselling or other form of treatment as a result of the family violence or abuse

- whether the parent has expressed regret and shown some understanding of the impact of their behaviour on the other parent in the past and currently, and

- whether there are any indications that a parent who has behaved violently or abusively and who is seeking to spend time with the child can reliably sustain that arrangement.

The Principles also intersect with shared parenting. The Principles note that the Court may consider referring to the family report writer the issue of the impact for the child of spending time with the alleged perpetrator. The factors that the Principles note may be part of the family report in this regard are as follows.

- Whether or not it would be appropriate for the presumption of equal shared parental responsibility to apply.

- Whether or not there would be benefits, and the nature of those benefits, if the child spent time with the parent against whom the allegations are made.

- Where equal time or substantial and significant time is sought, assess whether the safety of the child can be secured during the time spent with the parent against whom the allegations are made.

- Where equal time or substantial and significant time is sought, assess whether the safety of the child can be secured during the time spent with the person against whom the allegations are made, where that person is not the child's parent.

Once prepared, the Court may determine to give a copy of the report to each party, or their legal representatives, and to any ICL appointed in the proceedings.[356] Alternatively, the Court may order that the report not be released to a person or that access to the report be restricted.[357]

The family report may be adduced as evidence in proceedings.[358] The Family Law Rules permit the Court to allow oral examination of the family report writer during proceedings.[359]

Family reports prepared by Family Consultants

The Family Court aims that the family report will be prepared by the Family Consultant who worked with the family through the Child Responsive Program.[360] This continuity assists

---

356 Rule 15.04, *Family Law Rules 2004*.

357 Rule 15.04, *Family Law Rules 2004*.

358 Subsection 62G(8), *Family Law Act 1975*; Rule 15.04(b), *Family Law Rules 2004*.

359 Rule 15.04, *Family Law Rules 2004*.

360 Family Court of Australia Brochure, *The Child Responsive Program*, <http://www.familycourt.gov.au>, p. 2.

with identifying the needs of the family, and any risks to the safety, such as family violence. From previous interactions with the family, the Family Consultant will be familiar with the needs and dynamics of the particular family. Preparing the family report provides the Family Consultant a subsequent opportunity to screen and assess the family, and through this identify risks.

The Family Court may 'direct a Family Consultant to give the court a report on such matters relevant to the proceedings as the court thinks desirable'.[361] Where the issues are limited, the family reports are known as 'Specific Issues Reports'. Alternatively, Family Consultants may be asked to prepare 'Family Assessment Reports', that is reports that address the family's relationship dynamics and the range of issues that have been identified as potentially affecting the family.[362]

The Family Law Act also authorises the Court to appoint a Family Consultant at any time during the proceedings.[363] In addition to preparing the family report, the Family Consultant may be appointed to exercise in the proceedings any of their other functions under the Family Law Act. The functions are:

- assisting and advising people involved in the proceedings
- assisting and advising courts, and giving evidence, in relation to the proceedings
- helping people involved in the proceedings to resolve disputes that are the subject of the proceedings, and
- advising the court about appropriate family counsellors, family dispute resolution practitioners and courses, programs and services to which the court can refer the parties to the proceedings. [364]

---

361 Subsection 62G(2), *Family Law Act 1975.*

362 Family Court of Australia Brochure, *The Child Responsive Program*, <http://www.familycourt.gov.au>, p. 3.

363 Section 69ZS, *Family Law Act 1975.*

364 Section 11A, *Family Law Act 1975*.

14. EXPERTS REPORT

The Family Law Act authorises the Family Court to appoint an expert to prepare evidence in relation to the family.[365] The Court may determine the manner in which the evidence is to be presented.[366] The Family Law Rules provide that where a single expert witness is appointed, the expert witness must prepare an expert's report.[367] Where the Court orders an expert's report be prepared, the completed report is to be delivered to the Registry Manager of the Family Court.[368]

The parties may have input into which person is appointed as the expert witness.[369] The Court may order the parties to confer to agree upon the person to be appointed.[370] In the absence of agreement, the parties are to provide the Court a list of possible experts that may be appointed.[371] The *Family Violence Best Practice Principles* (the Principles) give further directions to the Family Court when considering whether to order an experts report, where a Form 4 has been filed. The Principles direct the Court to give attention to the qualifications of the proposed expert, to 'satisfy itself that the expert witness has appropriate qualifications and experience to assess the impact and effects (both short and long term) of family violence or abuse, or being exposed to the risk of family violence or abuse, on the children and any party to the proceedings.'[372]

The matters that the expert is to consider are at the discretion of the Family Court.[373] The Principles also contain matters that the Court may wish to order be included in the expert's report. The matters are those that the Court may consider when ordering a family report be prepared.[374]

---

365 Paragraph 69ZX(1)(d), *Family Law Act 1975*.

366 Subparagraph 69ZX(1)(d)(iii), *Family Law Act 1975*.

367 Rule 15.48, *Family Law Rules 2004*.

368 Subrule 15.48(3), *Family Law Rules 2004*.

369 Rule 15.46, *Family Law Rules 2004*.

370 Subrule 15.46(a), *Family Law Rules 2004*.

371 Subrule15.46 (b), *Family Law Rules 2004*.

372 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, op cit, Part B, p. 5.

373 Subparagraph 69ZX(1)(d)(i), *Family Law Act 1975*.

374 Family Court of Australia, *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged*, op cit, Part B, p. 5 - 6.

Separate to a Court ordered expert report, parties to proceedings may arrange for an expert's report to be prepared. The Rules provide procedures where all parties to the proceedings agree to jointly appoint a single expert witness to prepare an expert's report.[375] The evidence that the single expert provides must be contained to a significant issue in dispute.[376] Where appointed by the parties, any report prepared by the expert must be delivered to the parties at the same time.[377] The report may be adduced as evidence without first obtaining the permission of the Court.[378]

A party may also seek to appoint an expert witness, or tender an expert witness report, in absence of agreement between the parties or a court order.[379] Where permission is granted, the party that ordered the report is required to disclose a copy of an expert's report at least two days prior to day one of the Less Adversarial Trial.[380]

15. CONTINUATION OF LESS ADVERSARIAL TRIAL

There may be delay between the first day of the Less Adversarial Trial and subsequent trial days. The Family Law Act does not specify the timeframes for the conduct of the Less Adversarial Trial. The second and subsequent days of the trial will occur on days allocated by the Family Court at its discretion.[381] The trial will be continued from the first day for the purposes of:

- further identifying issues for which evidence is required
- making any necessary procedural orders about filing and exchanging all remaining evidence
- allocating any other dates for the continuation of the trial, and

---

375 Rule 15.44, *Family Law Rules 2004*.

376 Rule 15.42, *Family Law Rules 2004*.

377 Subrule 15.48(2), *Family Law Rules 2004*.

378 Rule 15.44, *Family Law Rules 2004*.

379 Rule 15.52, *Family Law Rules 2004*.

380 Paragraph 15.55 (1) (a)), *Family Law Rules 2004*.

381 Rule 16.09, *Family Law Rules 2004*.

- allocating dates for the final stage of the trial.[382]

16. FINAL STAGE OF THE TRIAL

Under the Family Law Rules, the purpose of the final stage of the Less Adversarial Trial is to hear the remainder of the evidence, receive submissions and make a determination. The Family Law Rules are not prescriptive about the management of the later stages of the Less Adversarial Trial. This is in keeping with the principle that trials are to be run at the discretion of the individual Judge.

However, the Family Violence Best Practice Principles contain guidance for Judicial Officers when considering final orders in circumstance where a Form 4 has been filed. The Principles note that it may be of assistance to Judicial Officers to take into account the extent to which the allegations of family violence are consistent with the principle features of 'controlling family violence', including but not limited to that the violent party is alleged to have:

- used coercion and threats
- used intimidation
- used emotional abuse
- used tactics to isolate the other party
- minimised and/or denied the abuse
- blamed the other party for the violent behaviour
- used the children as tools, and
- denied the other party access to fiscal resources, and
- whether it is appropriate to make findings of fact as to the nature and degree of the family violence or abuse which is established on the balance of probabilities and its effect on the child and the parent with whom the child is living.[383]

---

382 Subrule 16.09(2), *Family Law Rules 2004*.

383 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, op cit, Part D, p. 8.

The Principles also contain matters that the Judicial Officer may wish to take into account where the Court has made findings of family violence or abuse, or an unacceptable risk of same.[384] The Principles also provide matters that the Judicial Officer may wish the consider where the Court is contemplating making orders for a child to spend time with a parent against whom findings have been made that allegations of family violence or abuse are proven, or against whom findings have been made that the parent presents an unacceptable risk of behaving violently or abusively.[385]

Follow up with the Family Consultant – section 65L

Where the court considers the order to be in the best interest of the child, the court may order that the Family Consultant continue with the family once an order has been made.[386] This order can only be made where the Court considers that the order is in the best interests of the child.[387] It is unclear how the Family Consultant is to carry out the function of supervising or assisting families to comply with the parenting orders. The length of time that the order may be operative is also not specified in the legislation, and would presumably be a matter to be included in the orders.

In addition, follow up with a Family Consultant may occur as part of the Child Responsive Program. As part of the Post-orders Review and Referral Meetings, the Family Consultant and the family may review the orders and determine strategies for implementing the orders. The Family Consultant may also refer the family to community services for additional assistance.[388]

---

384 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, op cit, Part E.

385 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, op cit, Part F.

386 Section 65L, *Family Law Act 1975*.

387 Section 65L, *Family Law Act 1975*.

388 Family Court of Australia Brochure, *The Child Responsive Program*, op cit, p. 3.

Post order programs

Where the court makes a parenting order, the Family Law Act requires the court to inform the parties of counselling services, family dispute resolution services and other courses or programs that can assist the family in adjusting to the terms of the order.[389]

Before informing the parties of the services, the Family Court is to confer with the Family Consultant about which services are appropriate to the family.[390] The appointment of one Family Consultant for the duration of the case would assist the Court to fulfil this requirement.

The Court's power to order families to attend a post-separation parenting program may be exercised prior to making final orders. For example, the *Family Violence Best Practice Principles* note that the Court may consider making orders for parties to attend the programs as part of interim orders.[391] Parties may be ordered to attend a post order program as part of making interim orders.

17. CONSENT ORDERS

Parties may apply for consent orders at various stages of the process through the Family Court. Consent orders may be made without the family initiating parenting proceedings. Alternatively, consent orders may be applied for at any stage once parenting proceedings have commenced.

Application for consent orders prior to commencing parenting proceedings.

Separate procedural requirements apply to parties who apply for parenting orders by consent without first commencing parenting proceedings. Such families are not required to attempt FDR.[392] The Family Law Rules also outline different procedural requirements for these matters.[393] Where proceedings have not commenced, parties may file an Application for

---

389 Section 62B, *Family Law Act 1975*.

390 Section 11E, *Family Law Act 1975*.

391 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, op cit, Part C, p. 7.

392 Subsection 60I(9), *Family Law Act 1975*.

393 Rule 10.15, *Family Law Rules 2004*

Consent Orders.[394] The Application must include draft consent orders that are clearly set out, note that they are made by consent of both parties, and are signed by each of the parties.[395] To assist with meeting the requirements in the Rules, the Family Court provides families the *Application for Consent Orders Kit* and a supplementary pro forma consent orders kit, which includes a sample cover sheet, a sample first page, the recommended format of the consent orders and a sample certification of consent orders.[396]

In practice, Registrars generally assess the Applications for Consent Orders.[397] The *Application for Consent Orders Kit* advises parents to consider the nature and effect of the proposed orders, including referring parties to the relevant legislative provisions in relation to parenting arrangements under the Family Law Act. The Kit also highlights to parents that the making of the proposed orders by the Court is not automatic, as the Court will determine whether the proposed orders are proper.[398] This reflects Rule 10.17 of the Family Law Rules, which notes that parties must satisfy the Court as to the reasons why the proposed orders should be made.

Family violence and child abuse concerns

Rule 10.15A and the *Family Violence Best Practice Principles* (discussed below) do not apply where parties apply for consent orders without having commenced proceedings. The parties are not obligated to satisfy the court that the orders do not impose a risk of abuse for the children. However if the proposed consent orders are inconsistent with a current family violence order, the *Application for Consent Orders Kit* advises that the Family Court cannot make the orders unless parenting proceedings are instituted.[399]

---

394 Paragraph 10.15(1)(b), *Family Law Rules 2004.*

395 Subrule10.15(1A), *Family Law Rules 2004*.

396 Family Court of Australia, *Application for Consent Orders kit – supplement*, <http://www.familycourt.gov.au/>.

397 Rule 18.06, *Family Law Rules 2004.*

398 Family Court of Australia, *Application for Consent Orders Kit*, Part A, <http://www.familycourt.gov.au/>

399 Family Court of Australia, *Application for Consent Orders Kit*, Part A, op cit.

Application for consent orders where parenting proceedings have commenced

Where proceedings have commenced, parties may apply for consent orders either orally, during a hearing or a trial, or by lodging a draft consent order.[400] In practice an oral application for consent orders is generally supported by a written draft consent order signed by the parties and/or their legal representatives. Where an Independent Children's Lawyer has been appointed to the case, the proposed orders will not be made unless the Independent Children's Lawyer has, in addition to the other parties, signed the proposed orders.[401]

Similar to applications for consent orders where proceedings have not been instigated, the Family Court is not required to make the proposed orders. The Family Law Rules authorise the Court to make an order in accordance with the orders sought, direct a party to provide additional information, or dismiss the application.[402] Under the Family Law Act, when determining whether to make the proposed orders, the Family Court may, but is not required to, consider whether the proposed orders are in the best interests of the child.[403]

Child Abuse and consent orders

Limitations for making consent orders exist where there are child abuse concerns.

Where consent orders are sought as part of parenting proceedings, the Family Law Rules increase the threshold that must be met before the Court is satisfied that the proposed consent orders are appropriate. The Rules require the parties to turn their minds to the intersection of the proposed orders with child abuse concerns.[404] This requirement applies regardless of whether child abuse allegations have been made during proceedings. For applications for consent orders made orally during hearing or trial in a case where child abuse allegations have been made, each party must explain to the Court how the orders attempt to address any child abuse allegations that have been made.[405] If child abuse allegations have not been made, the parties must advise the court that no allegations of child sexual or physical abuse,

---

400 Subrule 10.15(1), *Family Law Rules 2004.*

401 Subrule 8.02 (4)).

402 Rule 10.17, *Family Law Rules 2004.*

403 Subsection 60CC(5), *Family Law Act 1975.*

404 Rule 10.15A, *Family Law Rules 2004.*

405 Paragraph 10.15A(2)(b), *Family Law Rules 2004.*

or risk of same, have been made by either party.[406] This obligation is extended to also require the parties to advise the court that such allegations are not contained in any document filed or exhibited in the proceedings any report prepared for the proceedings and any document subpoenaed to the court in the proceedings.[407]

Different obligations apply where the application for consent orders is filed with the Court outside of a hearing or trial. In this circumstance, each party to the parenting proceedings must certify in an annexure to the proposed orders that no allegations of abuse have been made in any document filed or exhibited in the proceedings, any report prepared for the proceedings, or any document subpoenaed to the court in the proceedings.[408] The Rules do not require the parties to certify that no allegations have been made orally during a hearing or trial. Where allegations of abuse have been raised during the parenting proceedings, each party must, in the annexure to the proposed consent orders, identify each document containing the allegations and explain how the order attempts to deal with them.[409]

It is notable that Rule 10.15A does not require parties to satisfy the Court that either family violence allegations have not been made or that the orders are appropriate given any family violence allegations that have been made.

It is in the discretion of the judicial officer asked to consider approving the consent orders to consider the information provided and where necessary consider whether to seek further information including, for example a family report. In the case of *T & N* [2003] FamCA 1129; (2003) FLC ¶93-172 the Court declined to make parenting orders by consent where the court was not satisfied the proposed orders adequately addressed allegations of a history of family violence which had been made in the proceedings.

The *Family Violence Best Practice Principles* provide further guidance as to Court procedure where an application for consent orders has been made and a Form 4 has been filed in proceedings. The Principles provide guidance to the Court to consider the factors pointing to

---

406 Paragraph 10.15A(2)(a), *Family Law Rules 2004.*

407 Subparagraphs 10.15A(2)(a)(i)-(iii), *Family Law Rules 2004.*

408 Paragraph 10.15A(3)(a), *Family Law Rules 2004.*

409 Paragraph 10.15A(3)(b), *Family Law Rules 2004.*

the child's best interests in section 60CC of the Family Law Act.[410] These factors include as a primary consideration protecting the children from physical or physiological harm from being exposed to, or subjected to, family violence, abuse or neglect. In this regard, the Principles go beyond the Family Law Act, which does not require the Court to consider the child's best interests factors when assessing proposed consent orders.[411]

The Principles also contain a checklist of eight questions for the Court to consider, where the proposed consent orders provide for the child to spend time with a person against whom family violence allegations have been made. While not categorised in the Principles, the questions can be categorised under the following matters; seriousness of the alleged violence, control dynamics, threats to the children, views of the Independent Children's Lawyer, and mental health. The questions are:

- How serious are the allegations?
- Are there indicators of pathological jealousy, marked possessiveness or stalking?
- Is there any reason to believe that the parent seeking to spend time with a child or children is doing so as a way of continuing to control or maintain contact with the parent with whom the child lives?
- Is the driving motive for the parent in wanting to spend time with his or her child related more to his or her feelings about the parent with whom the child or children principally live than about the child or children?
- Is it clear that the parent with whom the child or children will principally live has agreed to the order without pressure from others and having had an open discussion with his or her lawyer about the arguments for and against the child spending time with a parent?
- Has there ever been involvement of the child or children (direct or indirect) in the family violence or a threat against the children?

---

410 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, Part G, p. 12.

411 Subsection 60CC(5), *Family Law Act 1975.*

- Where appointed, does the Independent Children's Lawyer support the consent orders and, if not, how should the concerns of the Independent Children's Lawyer be addressed?

- Are there any indicators of significant mental illness or suicidal ideation in the parent with whom a child or children would be spending time?

Where the Court has concerns about the proposed consent orders, the Principles recommend the Court consider taking the following steps:

- ordering the preparation of a Family Report

- ordering the appointment of an Independent Children's Lawyer (if not already appointed)

- requesting a Family Consultant to interview one or both of the child's parents and, where appropriate, the child or children and reporting back to the Court

- ordering a section 69ZW report

- hearing evidence to determine whether or not a parent has behaved violently or abusively towards the other parent and/or the child or children, or whether a parent with whom a child is to spend time presents an unacceptable risk, and

- referring one or both parents to an appropriate service and adjourning the proceedings.[412]

The Principles also recommend the Court to deliver a short judgment outlining the reasons why the Court is making the consent orders, if the orders provide for a child to spend time with a person against whom allegations of family violence have been made.[413]

---

412 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, Part G, p. 12.

413 Family Court of Australia, Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged, Part G, p. 12.

18. HEARING CONDUCTED WITH PARTY/IES ATTENDING BY ELECTRONIC COMMUNICATION

A party may also seek permission of the Family Court to attend court events by electronic communication. Attendance in this way can be part of response to managing safety or violence concerns (or a way to deal with practical difficulties with attendance). Using interim hearings as an example, the request must be in writing, and be made at least seven days before the interim hearing.[414] However, before the party can make the application, the party must ask the other parties to proceedings if they object to the proposal. When making an application to appear by electronic communication, the applicant must inform the Court of whether the other parties to the proceedings agree or object to the proposal. If the order is made, the applicant must immediately give written notice to the other parties.

Despite the requirement to consult with the other parties about the proposal, the Family Court is cognisant that attendance by electronic communication may be appropriate in circumstances of family violence or abuse. In assessing the application, the Family Law Rules direct the Family Court to take into account 'any concerns about security, including family violence and intimidation'. The other factors the Court may take into account are:

- the distance between the party's residence and the place where the court is to sit
- any difficulty the party has in attending because of illness or disability
- the expense associated with attending, and
- the expense to be incurred, or the savings to be made, by using the electronic communication.[415]

414 Rule 5.06, *Family Law Rules 2004.*

415 Subrule 5.06(5), *Family Law Rules 2004.*

APPENDIX 4:
PRACTICE AND PROCEDURES OF THE FEDERAL MAGISTRATES COURT IN PARENTING CASES RAISING ISSUES OF FAMILY VIOLENCE

Introduction

Like the Family Court (as to which see Appendix 3, above), the Federal Magistrates Court (FMC) operates a docket system in which the same Federal Magistrate is appointed to and remains with a case for its duration. A significant difference, however, is that while in the Family Court of Australia some work is done by registrars, in the Federal Magistrates Court nearly all tasks are undertaken by the Federal Magistrate.[416] The FMC *Practice Directions and Notices, Conducting Your Case, Family Law and Child Support*, advises that the Court aims to hear matters within six months of filing. According to the 2007-08 Annual Report, for this period '95.8 per cent of family law matters filed with the Court were finalised within 12 months and 85.9 per cent of were finalised within six months'.[417]

The FMC's ethos of operating without undue formality has influenced the Court's procedural rules. The Federal Magistrates Court Rules are to support the Court to operate as informally as possible, use streamlined processes and encourage the use of appropriate dispute resolution procedures.[418]

The following is an outline of the Court events. The outline is indicative only, as the Court has discretion to vary the Court path to suit the needs of the families party to proceedings. However, it has been attempted to incorporate the various permutations within the general outline.

1. Family Dispute Resolution

The requirements to obtain a certificate from a family dispute resolution (FDR) practitioner or come within the exceptions to FDR, apply to parenting proceedings in both the Family

---

416 The submission by Hartnett FM provides a picture of how the docket system works in the Federal Magistrates Court.

417 Federal Magistrates Court of Australia 2007–08 Annual Report, Part 2, page 14.

418 Subrule 1.03(2), *Federal Magistrates Court Rules 2001*.

Court and the FMC. For a full account of the implications of FDR as a gateway to accessing the federal family law courts, see Appendix 3.

Court ordered attendance at family dispute resolution or family counselling

Like the Family Court, the Federal Magistrates Court is empowered under the *Family Law Act 1975* to consider referring parties to family counselling and family dispute resolution.[419] It is an object of the Federal Magistrates Court Rules to promote 'primary dispute resolution', the term previously used to refer to out-of-court services such as family dispute resolution, where this is appropriate.[420] The Rules do not specify what the Court should take into account when determining if primary dispute resolution is appropriate. However, under Rule 23.02, a Federal Magistrate may delegate the assessment to an FDR practitioner or a Family Dispute Coordinator.

The restrictions in the Family Law Act on disseminating and admitting into evidence communications made in FDR or family counselling sessions that apply to family law proceedings before the FMC.[421] However, the Federal Magistrates Court Rules go beyond the exceptions in the Family Law Act to require the FDR practitioner to provide the Court feedback about the session with the family. The FDR practitioner is to provide the FMC a report containing details of:

- the number of family counselling and family dispute resolution sessions
- the outcome of the sessions, and
- the recommended future management of the matter.[422]

2. Pre-action procedures

The Court has not adopted the pre-action procedures required by the Family Court for parties to parenting proceedings. However, the Court's *Annual Report 2007-2008* states that "there is an expectation that all parties to proceedings filed in the Court will engage in pre-action

---

419 Section 13C, *Family Law Act 1975*.

420 Subrule 1.03(5), *Federal Magistrates Court Rules 2001*.

421 Section 10D, 10E, 10H, 10J and 13D, *Family Law Act 1975*

422 Rule 23.01, *Federal Magistrates Court Rules 2001*.

negotiations in a meaningful way."[423]. The Annual Report does not provide details of any steps required of parties to meaningfully engage in pre-action negotiations before initiating parenting proceedings in the FMC.

3. Filing

The Federal Magistrates Court Rules do not prescribe the forms that are to be filed for various stages of proceedings under Part VII of the Family Law Act 1975 (parenting proceedings). The Rules grant the Chief Federal Magistrate discretion to determine which forms are to be used for provisions under the Rules. [424] As of November 2009, seven forms have been prescribed, by the Chief Federal Magistrate for the purposes of parenting proceedings in the Federal Magistrates Court.[425] Of the seven, four are Family Court forms and one, the Initiating Application (family law) is a form jointly developed and piloted by the Family Court and the Federal Magistrates Court.[426]

The Rules also provide for further potential integration of Family Court forms into FMC family law proceedings. A form prescribed for a similar purpose in the Family Court may be used for proceedings in the FMC,[427] provided the form is headed 'Federal Magistrates Court of Australia'.[428] The forms that may be used for both the FMC and the Family Court facilitate this Rule, by including as a heading to the form tick boxes that allow parties to indicate into which Court the form will be filed.

The ethos of operating without undue formality is evident in the Federal Magistrates Court Rules regarding the parties completion of family law forms. Subrule 2.04 (1) removes the need for parties to strictly comply with the requirements of the form they are seeking to file.

---

423 Federal Magistrates Court, *Annual Report 2007-2008*, p. 52.

424 Subrule 2.04(1A), *Federal Magistrates Court Rules 2001*.

425 The following forms have been approved for use by the Chief Federal Magistrate for use in parenting proceedings before the Federal Magistrates Court: Initiating Application (family law), Response, Form 4: Notice of Child Abuse or Family Violence, Application - Contravention, Form 46: Enforcement summons, Affidavit - Non-Filing of Dispute Resolution Certificate, Acknowledgment - Information from a Family Counsellor or Family Dispute Resolution Practitioner. <http://www.fmc.gov.au/forms/html/family_law.html>.

426 Some of the forms used in the Federal Magistrates Court are designed for use in a range of areas other than family law. In this regard the Federal Magistrates Court needs to balance the competing benefits of uniformity between the two family law courts and with the desirability of using some forms for a range of matters in the Federal Magistrates Court.

427 Subrule 2.04(2), *Federal Magistrates Court Rules 2001*.

428 Subrule 2.04(3), *Federal Magistrates Court Rules 2001*.

Unless the Court otherwise orders, under this subrule substantial compliance is sufficient for the forms to be accepted and filed by the Court.

Initiating parenting proceedings – filing requirements

Persons seeking to initiate parenting proceedings in the FMC are to file the 'approved form'.[429] For applicants for parenting proceedings, the approved form is the same form as is used for to initiate parenting proceedings in the Family Court – the Initiating Application (Family Law).[430] However, unlike applicants in the Family Court, applicants for proceedings in the FMC are required to file with the Initiating Application an affidavit stating the facts on which their application relies.[431] The Initiating Application is also to include the final orders sought. The Initiating Application cannot include proposed interim or procedural orders, unless it also includes final orders.[432]

The applicant is to serve on the respondent(s) a copy of the Initiating Application filed and sealed by an FMC registry.[433] The Initiating Application is to be served by hand on the respondent, unless service is accepted by the respondent's legal representative.[434] Under the Rules, service must occur not less than seven days before the day fixed for the first court event.[435] The Rules prohibit the applicant from personally serving the respondent (which can be an important matter in cases with issues of violence).[436]

The Family Law Act requires the principle executive officer of the Court to ensure that a person who is considering instituting family law proceedings is provided documents about reconciliation, non-court based family services, and the Court's processes and services.[437] The FMC has adopted Rule 2.03 of the Family Law Rules 2004 that requires the Initiating

---

429 Subrule 4.01(1), *Federal Magistrates Court Rules 2001*.

430 Federal Magistrates Court of Australia, *Family Law Forms*, <http://www.fmc.gov.au/forms/html/family_law.html>.

431 Rule 4.05, *Federal Magistrates Court Rules 2001*.

432 Paragraph 4.01(3)(b), *Federal Magistrates Court Rules 2001*.

433 Rule 6.03, *Federal Magistrates Court Rules 2001*.

434 Rule 6.06, *Federal Magistrates Court Rules 2001*.

435 Rule 6.19, *Federal Magistrates Court Rules 2001*.

436 Rule 6.07, *Federal Magistrates Court Rules 2001*.

437 Section 12F, *Family Law Act 1975.*

Application to be served with court prepared brochures containing information about reconciliation, non-court based family services and the court's processes and services.[438]

Any response to the Initiating Application is to be filed using the form 'Response to Initiating Application (Family Law).[439] This form is also used by respondents to parenting proceedings in the Family Court.[440] Several options are available to the respondent in filing a 'Response to Initiating Application (Family Law)'. The respondent may indicate consent to any proposed orders contained in the Initiating Application, ask that the Court dismiss the Initiating Application, seek separate orders, or make a cross-claim against the applicant or another party.[441] If separate orders are sought, the proposed orders and the factual basis in support of the orders are to be included in the Response.[442] The Response is also to include an affidavit stating the facts on which the respondent relies.[443] A Response must be filed within 14 days of the date of service of the Initiating Application (and before the first Court event).[444]

The Response is to be served on the applicant, and any other parties to the proceedings. Where the respondent seeks orders, the applicant may file and serve a reply to the response.[445] The reply is to be made in accordance with the approved form, and is to be filed and served within 14 days of being served the response.[446]

Filing – compulsory family dispute resolution

An applicant's compliance with compulsory FDR is assessed when an Initiating Application (Family Law) is filed. Applicants must file with the Initiating Application a certificate under section 60I of the Family Law Act, unless an exemption from compulsory FDR applies.

---

438 Schedule 3, and Rule 1.05, *Federal Magistrates Court Rules 2001*.

439 Federal Magistrates Court of Australia, *Family Law Forms*, <http://www.fmc.gov.au/forms/html/family_law.html>.

440 The two family law courts have made progress in using some common forms, although some forms used by the Federal Magistrates Court for matters other than family law have no equivalent in the Family Court of Australia.

441 Subrule 4.04(1), *Federal Magistrates Court Rules 2001*.

442 Subrule 4.04(2), *Federal Magistrates Court Rules 2001*.

443 Subrule 4.05(1), *Federal Magistrates Court Rules 2001*.

444 Rule 4.03, *Federal Magistrates Court Rules 2001*.

445 Subrule 4.07(1), *Federal Magistrates Court Rules 2001*.

446 Rule 4.07, *Federal Magistrates Court Rules 2001*.

Applications for which an exemption to compulsory FDR does not apply and which are not accompanied by a section 60I certificate will not be accepted by the FMC.[447]

The Federal Magistrates Court Rules do not provide a process for filing a section 60I certificate or for claiming an exemption to compulsory FDR. These matters are covered by Practice Direction No. 2 of 2008, *Family Dispute Resolution – Applications for orders under Part VII of the* Family Law Act 1975.[448] The Practice Direction notes that a 'certificate pursuant to section 60I(8) from a registered family dispute resolution practitioner must be filed with an application for an order under Part VII of the *Family Law Act 1975* unless the applicant falls within one of the exceptions'. Applicants claiming an exemption from compulsory FDR are directed to file an affidavit stating which exemption under subsection 60I(9) of the Family Law Act is claimed, and outlining the factual basis on which it is asserted the exemption applies.

The Practice Directions presents two options as to the form that the affidavit may take. Applicants may file an affidavit pursuant to Rule 4.05 of the Federal Magistrates Court Rules or an affidavit provided by the Family Court under the *Family Law Rules* 2004. Rule 4.05 of the Federal Magistrates Rules does not prescribe any form that an affidavit filed pursuant to the Rule must take. The Family Court has prepared a pro forma affidavit which is structured so that applicants must clearly identify which exemption they consider relevant to their case, and provide information to establish whether the exemption applies.[449]

The Practice Direction further advises that the claim for an exemption to compulsory FDR will be assessed by a Registrar, usually the duty Registrar assigned to the case. Registrars are assigned this function under Rule 20.00A of the Federal Magistrates Court Rules, through amendments to the Rules that became operative on 1 March 2008. Where an application is assessed as not meeting the claimed exemption, the applicant may apply for a review of the

---

447 Practice Direction No. 2 of 2008, *Family Dispute Resolution – Applications for orders under Part VII of the* Family Law Act 1975, is available at <http://www.fmc.gov.au/practice/html/022008.html>, viewed October 2009.

448 Practice Direction No. 2 of 2008, *Family Dispute Resolution – Applications for orders under Part VII of the* Family Law Act 1975, is available at <http://www.fmc.gov.au/practice/html/022008.html>, viewed October 2009.

449 I understand that in practice the pro forma affidavit is a seen as a helpful checklist for litigants in person and is often used by the Federal Magistrates Court in Brisbane.

Registrar's decision.[450] An application for review must be made within seven days of the date of the Registrar's decision.[451] In practice such applications appear to be rare.

Additional filing requirements where parties raise family violence or child abuse concerns

Additional filing requirements apply where families raise concerns about family violence and/or child abuse.

Section 60J

Under the Family Law Act, parties who claim an exemption from compulsory FDR must satisfy the Court that they have received information from a family counsellor or family dispute resolution practitioner about the services and options available in circumstances of abuse and violence.[452] This requirement does not apply where the Court is satisfied that there are reasonable grounds to believe that there would be a risk of abuse of the child if there were to be a delay in applying for the order; or there is a risk of family violence by one of the parties to the proceedings.[453]

The Federal Magistrates Court Rules delegate to Registrars the process of determining whether parties are required to satisfy the Court that they have received this information.[454] However, the Rules do not prescribe the method by which parties are to demonstrate that they have met the requirements of section 60J. The process is provided by Practice Direction No. 2 of 2008, *Family Dispute Resolution - Applications for orders under Part VII of the* Family Law Act 1975. The Practice Direction requires parties to provide the court a written acknowledgement of receiving the information. The written acknowledgement may be contained in an affidavit filed according to the requirements of Rule 4.05 of the Federal Magistrates Court Rules. Alternatively, parties may file the Family Court form 'Acknowledgment - Information from a Family Counsellor or Family Dispute Resolution Practitioner'.

---

450 Section 104, *Federal Magistrates Act 1999.*

451 Rule 20.01, *Federal Magistrates Court Rules 2001*.

452 Section 60J, *Family Law Act 1975*.

453 Subsection 60J(2), *Family Law Act 1975.*

454 Item 13, Rule 20.00A, *Federal Magistrates Court Rules 2001*.

A Notice of Child Abuse or Family Violence (Form 4)

Additional filing obligations arise for parties who raise allegations of child abuse, family violence or risk of same. Section 67Z of the Family Law Act requires parties who raise allegations of child abuse, or risk of child abuse, to file a notice in the prescribed form. In addition, section 60K of the Family Law Act provides for, but does not require, parties to file a prescribed document when making allegations of family violence or child abuse, or risk of same.

The filing of the prescribed document, whether under section 67Z or section 60K, affects the procedures of the FMC. Under section 67Z, the filing of the prescribed form places an obligation on the Registry Manager to notify, as soon as practicable, a prescribed child welfare authority of the alleged abuse.[455] Under section 60K, where the prescribed document is filed, the Court must consider what interim or procedural orders should be made to facilitate obtaining appropriate evidence about the allegations, and to protect the child or parties to the proceedings from harm.[456] The assessment, and any resulting orders, must be made as soon as practicable after the document is filed, and if it is appropriate having regard to the circumstances of the case, within eight weeks of the document being filed.[457] Additionally, where the document is filed, the Court adopts an overarching obligation to ensure that the Court, and therefore the Court processes, address the issues raised by the allegation as expeditiously as possible.[458]

For the purposes of section 67Z, 'prescribed form' means the form prescribed by the applicable Rules of Court. Under section 60K, the 'prescribed document' means the document prescribed by the applicable Rules of Court. In both instances, for the proceedings before the FMC, the applicable rules are the Federal Magistrates Court Rules.[459] The Federal Magistrates Court Rules do not prescribe a document or a form for purposes of section 67Z and section 60K. However, the Federal Magistrates Court Rules provide that if the Federal Magistrates Court Rules are insufficient or inappropriate in a particular case, the Court may apply the *Family Law Rules 2004*, or the rules of the Federal Court, in whole or in part,

---

455 Subsection 67Z(3), *Family Law Act 1975.*

456 Subsection 60K(2), *Family Law Act 1975.*

457 Subsection 60K(2A), *Family Law Act 1975.*

458 Paragraph 60K(2)(c), *Family Law Act 1975.*

459 Subsection 4(1), *Family Law Act 1975.*

modified or dispensed with, as necessary.[460] In addition, in all family law cases certain provisions of the Family Law Rules apply.[461] The provisions of the Family Law Rules that apply in all family law courts before the FMC are listed in Schedule 3 of the Federal Magistrates Court Rules. The application of provisions of the Family Law Rules is in keeping with the provisions of the *Federal Magistrates Act 1999*, which permit the FMC to adopt rules of the Family Court or the Federal Court, with necessary modifications, where the Federal Magistrates Court Rules are insufficient.[462]

The list of applied Family Law Rules in Schedule 3 of the Federal Magistrates Court Rules includes the Family Law Rules made for the purposes of section 67Z and section 60K of the Family Law Act. Accordingly, to determine their obligations under sections 67Z and 60K of the Family Law Act, parties to parenting proceedings before the FMC must have regard to Part 2.3 of the Family Law Rules, and are required by those Rules to file a prescribed document when making allegations of family violence.[463] The prescribed form and the prescribed document is *A Notice of Child Abuse or Family Violence (Form 4)*.[464] [465]

Under the Federal Magistrates Court Rules, Registrars are given responsibility to make procedural orders for allegations of child abuse or family violence pursuant to section 60K.[466]

Family violence orders

The Family Law Act requires parties to parenting proceedings to file copies of any family violence orders affecting the child or a member of the child's family.[467] The Federal Magistrates Court Rules do not specifically address this process. However, the Court applies Rule 2.05 of the Family Law Rules which directly accommodate this procedure required by

---

460 Subrule 1.05(2), *Federal Magistrates Court Rules 2001*.

461 Subrule 1.05(3), *Federal Magistrates Court Rules 2001*

462 Section 43, *Federal Magistrates Act 1999*.

463 Rules 2.04, 2.04B, *Family Law Rules 2004*.

464 Rule 2.04D, *Family Law Rules 2004*.

465 This is noted on the FMC webpage *Family Law Forms*, which includes the Form 4 in the list of documents approved by the Chief Federal Magistrates for use in the Court, under subrule 2.04(1A) of the Federal Magistrates Court Rules: Federal Magistrates Court, *Family Law Forms*, <http://www.fmc.gov.au/forms/html/family_law.html>, viewed October 2009.

466 Rule 20.00A, *Federal Magistrates Court Rules 2001*.

467 Section 60CF, *Family Law Act 1975*.

the Family Law Act.[468] The initiating application provides for the litigants to notify the court of such orders. In practice, where this is done, copies of the orders are usually attached to the application.

4. First Court Date / Interim hearings

The date of the first appearance before the Court is assigned at filing.[469] The Family Law Courts webpage *Federal Magistrates Court: The Court Process – Family Law*, advises parties that the Federal Magistrate assigned to the case will preside over the fist court event.[470] The Federal Magistrates Court Rules make provision for the first Court event to be heard before a Registrar, but this is not current practice.[471] Various kinds of orders or directions regarding the conduct of the proceedings may be made at the first court date.[472] These can include directions or orders the will affect the evidence that is provided at final hearing, such as orders or directions regarding:

- defining of issues
- the filing and admissibility of affidavits
- the giving of evidence at hearing (including the use of statements of evidence and the taking of evidence by video link or telephone or other means)
- expert evidence and court experts, and
- admissions of fact or of documents.[473]

Other procedural orders or directions that the Court or Registrar may make can cover any matter that the Court or Registrar considers appropriate, including the following matters: the manner and sufficiency of service; amendment of documents, cross-claims; the joinder of

---

468 Rule 2.05, *Family Law Rules 2004.*

469 Family Law Courts, *Federal Magistrates Court: The Court Process – Family Law*, <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/About+Going+to+Court/Federal+Magistrates+Court+requirements/>, viewed October 2009.

470 Family Law Courts, *Federal Magistrates Court: The Court Process – Family Law*, <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/About+Going+to+Court/Federal+Magistrates+Court+requirements/>, viewed October 2009.

471 Rule 10.01, *Federal Magistrates Court Rules 2001*.

472 Subrule 10.01(1), *Federal Magistrates Court Rules 2001*.

473 Subrule 10.01(3), *Federal Magistrates Court Rules 2004*.

parties, discovery and inspection of documents, interrogatories, inspections of real or personal property, the giving of particulars, transfer of proceedings and costs.[474] The Federal Magistrate may also appoint the hearing date for the final hearing.[475]

Interim hearings

The Family Law Courts webpage Federal Magistrates Court: The Court Process – Family Law advises that applications for interim orders may also be heard at the first court date.[476] The *Information Notice, Conducting Your Case, Family Law and Child Support* advises that applications for interim orders may be heard at the first court date if the matter is urgent. The Information Notice further advise that where the Court does not hear the application at the first court date, a date for an interim hearing will be allocated.[477] The Rules do not provide specific directions about the conduct of interim hearings.

5. Urgent applications

Parties to parenting proceedings before the Court may apply for parenting orders without notice to the other party. This may occur where the applicant demonstrates that the case is urgent, and service on the respondent is not practicable.[478] The Federal Magistrates Court Rules direct applicants to provide the Court information about several matters, in order to assist the Court to determine whether to make the orders sought. The matters include the steps that have been taken to tell the respondent or the respondent's legal representative of the applicant's intention to make the application, or the reasons why no steps were taken.[479] Applicants must also address the Court about why the fixing of an early hearing date would not be more appropriate.[480]

Family violence or child abuse concerns are not among the factors listed in the Rules. However, a party could argue that any such concerns are relevant to the Court's

---

474 Subrule 10.01(3), Federal Magistrates Court Rules 2004.

475 Rule 10.03, Federal Magistrates Court Rules 2004.

476 Family Law Courts, *Federal Magistrates Court: The Court Process – Family Law*, <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/About+Going+to+Court/Federal+Magistrates+Court+requirements/>, viewed October 2009.

477 Federal Magistrates Court, Information Notices, Conducting Your Case, Family Law And Child Support, <http://www.fmc.gov.au/practice/html/conduct_fl.html>.

478 Rule 5.01, *Federal Magistrates Court Rules 2001*.

479 Paragraph 5.03(1)(d) *Federal Magistrates Court Rules 2001*.

480 Paragraph 5.03(1)(g), *Federal Magistrates Court Rules 2001*.

determination of whether to make orders on an urgent basis, without notice to the respondent. For example, applicants may bring before the Court evidence of existing family violence orders relating to the family, as applicants are required to inform the Court of orders or current proceedings in any court between the parties.[481] In addition, family violence and child abuse concerns could potentially be put before the Court if the applicant establishes that the concerns are relevant to any concerns about the damage or harm which may result if the orders are not made.[482] The Rules also direct applicants to inform the court of any other facts, matters and circumstances on which the applicants seeks to rely to demonstrate that the orders should be made.[483] This broad, catch all criteria, could provide parties the scope to put family violence and child abuse concerns before the Court.

Orders made without notice to the respondent may have limited application. The Rules provide for the Court to specify a time at which the orders will cease operation. Alternatively, the Court may make orders that remain in force until further parenting orders in the case are made.[484]

6. Referral to non-trial based dispute resolution

At the first court date the Court or Registrar may make orders or directions that divert the parties from the path of hearings before the Court to non-trial support services. The kinds of orders that the Court or Registrar can make are discussed below.

Family Dispute Resolution

Rule 10.01 of the Federal Magistrates Court Rules direct the Court or Registrar to consider whether to order parties to attend primary dispute resolution.[485] Primary dispute resolution is the term previously used for family dispute resolution. Where parties reach agreement through this process, the Rules provide for the parties to apply for consent orders on the basis of the agreement. The Court's approach to referring parties to family dispute resolution is discussed at Part One of this Appendix.

---

481 Paragraphs 5.03(1)(b)-(c), *Federal Magistrates Court Rules 2001*.

482 Paragraph 5.03(1)(e), *Federal Magistrates Court Rules 2001*.

483 Paragraph 5.03(1)(h), *Federal Magistrates Court Rules 2001*.

484 Rule 5.01, *Federal Magistrates Court Rules 2001*.

485 Subrule 10.001(3), *Federal Magistrates Court Rules 2001*.

Appointment with a Family Consultant/Child Dispute Conference

The Family Law Act provides for the Court to order parties meet with court appointed Family Consultants.[486] In the FMC, this may take the form of the 'Child Dispute Conference'. Under the Federal Magistrates Court Rules, this power is delegated to Registrars.[487] The Rules envisage that the meeting with the Family Consultant may take the form of a conciliation conference (discussed below).[488] However, the Rules do not provide further directions about the process of referral to the Family Consultants, or the form that the meetings may take.

In some FMC Registries, the referral to a Family Consultant may be formalised. For example, the Wollongong registry established a trial Child Dispute Conference program, under which an appointment with a Family Consultant is mandatory for all parties to parenting proceedings.[489]

Conciliation Conference

Section 26 of the *Federal Magistrates Act 1999* authorises the Court to order parties attend a conciliation conference. The Rules provide for a conciliation conference to be convened by a Federal Magistrate, a Registrar or another person appointed by the Court for the purpose and, if required by the order referring the proceeding, a family counsellor, family dispute resolution practitioner or family consultant.[490] The Rules provide some direction as to the form that the conciliation conference may take, through requiring that both parties attend the conference in person with their legal representatives. The Rules also place an onus on parties to make a genuine effort to resolve the issues in dispute, and provide for the Court to order costs where matters in dispute remain unresolved at the end of the conference.[491]

Information available on the Federal Magistrates Court's website indicates that conciliation conferences may have limited application for parenting proceedings. The website describes

---

486 Section 11F, *Family Law Act 1975.*

487 Rule 20.00A, *Federal Magistrates Court Rules 2001*.

488 Rule 10.05, *Federal Magistrates Court Rules 2001*.

489 Federal Magistrates Court Of Australia, Federal Magistrate Altobelli, Wollongong Registry, *Notice To The Profession Of Change In Procedure: Duty Lists*, effective as of 20 August 2008, <http://www.nswbar.asn.au/circulars/fmc_010408.pdf>, viewed October 2009.

490 Subrule 10.05(2), *Federal Magistrates Court Rules 2001*.

491 Rule 10.05, *Federal Magistrates Court Rules 2001*.

the conferences as a process by which an independent and impartial conciliator assists parties to resolve financial issues stemming out of separation or divorce.[492] However, as property matters may be intertwined with parenting matters, parties could potentially reach agreement on both issues at a conciliation conference.

7. Orders for legal assistance

Part 12 of the Federal Magistrates Court Rules provides for the Court to refer parties to lawyers on a pro bono panel, to obtain legal assistance with their proceedings before the Court.[493] The registries of the Court are required to maintain a list of participating lawyers for this purpose[494] In determining whether to make the referral, the Court make take into account the party's financial means, capacity to otherwise obtain legal assistance, the nature and complexity of the proceeding, and any other matter that the Court considers appropriate.[495]

The forms of assistance that may be provided may vary from party to party. The Court may request that one or more of the following kinds of assistance be provided: advice in relation to a proceeding, representation on first court date, interlocutory or final hearing or mediation, drafting or settling of documents to be filed or used in the proceeding, and representation generally in the conduct of the proceeding or part of the proceeding.[496]

In keeping with the pro bono nature of the Court-operated scheme, lawyers who accept referrals from the Court cannot seek or recover from the party fees for the legal assistance provided.[497] However, the lawyer can seek the cost of disbursements, and may recover costs where costs are made in favour of the party.[498]

---

492 Federal Magistrates Court, *Dispute Resolution in Family Law Proceedings*, http://www.fmc.gov.au/pdr/html/family.html#6, viewed October 2009.

493 Subrule 12.03(1), *Federal Magistrates Court Rules 2001*

494 Rules 12.02, 12.03, *Federal Magistrates Court Rules 2001*.

495 Subrule 12.03(2), *Federal Magistrates Court Rules 2001*.

496 Rule 12.04, *Federal Magistrates Court Rules 2001*.

497 Subrule 12.07(1), *Federal Magistrates Court Rules 2001*.

498 Subrules 12.07(2)-(3), *Federal Magistrates Court Rules 2001*.

8. Orders to appoint an Independent Children's Lawyer

An Independent Children's Lawyer, previously known as a Separate Representative, may be appointed to independently represent the best interests of the children to the proceedings.[499] The role of the Independent Children's Lawyer (ICL) is to present to the Court what the ICL believes to be in the best interest of the children.[500] For this purpose, the ICL may apply to the Court for an order that the child be available for examination for the purpose of preparing a report about the child for the ICL's use.[501] Under the Federal Magistrates Court Rules, Registrars are delegated the power to make orders appointing an Independent Children's Lawyer, although in practice only Federal Magistrates make these orders.[502]

The ICL is not a party to the case. However, parties to the proceedings are to treat the ICL as a party. For example, parties are required to provide a copy of any documents filed and served on parties to the proceedings.[503]

9. Attendance by audio or video link

The *Federal Magistrates Act 1999* provides for parties to proceedings before the FMC to appear by video or audio link.[504] Person may also give submissions or provide evidence by video or audio link.[505] This may occur either on the parties' application or the Court's initiative.[506]

The Act sets out criteria that must be met before the Court will permit a party to appear, make submissions or give evidence by video or audio link. The criteria are focused on practicalities of using the required information technology. The Court is to consider whether the proposed technology enables the remote person to be able to see and hear the eligible persons at the Court, and vice versa.[507] The Act delegates to the Federal Magistrates Court Rules the determination of any further practical requirements, such as the class of equipment

---

499 Section 68L, *Family Law Act 1975*.

500 Subsection 68LA, *Family Law Act 1975*.

501 Section 68M, *Family Law Act 1975*.

502 Item 18, Rule 20.00A, *Federal Magistrates Court Rules 2001*.

503 Rule 6.03, *Federal Magistrates Court Rules 2001*.

504 Section 67, *Federal Magistrates Act 1999*.

505 Section 66, section 68, *Federal Magistrates Act 1999*.

506 Paragraph 66(4)(b), paragraph 67(2)(b), paragraph 68(2)(b), *Federal Magistrates Act 1999*.

507 Section 69, *Federal Magistrates Act 1999*.

that may be used.[508] At the time of writing, the Federal Magistrates Court Rules did not specify requirements about such matters.

10. Final hearing

The Federal Magistrates Act directs the Court to make orders that finalise all matters in dispute between the parties. The Act places on the Court an obligation to grant to the parties all available remedies so that, as far as possible, all matters in dispute between the parties are completely and finally determined.[509] The Act also directs that the remedies, or orders, that the Court grants are to be framed to avoid re-litigation of the issues.[510] The purpose of the final hearing is to determine applications for final parenting orders, with a view to completing parenting proceedings between the parties. The Federal Magistrates Court Rules support this, by giving the Court power to make on the application of a party, any order even if the claim was not made in an originating process.[511]

The Federal Magistrates Court's website advises parties that final orders may not be made at the conclusion of the final hearing. Parties are informed that the Federal Magistrate may reserve the Federal Magistrate's decision and the final orders may be reserved to another day, usually within three months of the conclusion of the final hearing.[512]

Conduct of the final hearing

Under the Family Law Act, hearings in the FMC are to be managed according to principles for conducting child-related proceedings (parenting proceedings).[513] The principles direct the Court to adopt a less adversarial approach, in which the Court actively directs, controls and manages the conduct of the proceedings.[514]

---

508 Paragraph (1)(c), paragraph 69(3)(c), *Federal Magistrates Act 1999.*

509 Subsection 14(c), *Federal Magistrates Act 1999.*

510 Subsection 14(d), *Federal Magistrates Act 1999.*

511 Rule 16.01, *Federal Magistrates Act 1999.*

512 Family Law Courts, *Federal Magistrates Court: The Court Process – Family Law*, <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/About+Going+to+Court/Federal+Magistrates+Court+requirements/>, viewed October 2009.

513 Division 12A, Part VII, *Family Law Act 1975.*

514 Section 69ZN, *Family Law Act 1975.*

The Federal Magistrates Court's website contains an outline of the process of the final hearings.[515] Proceedings initiate with applicants, and any witnesses, providing evidence, and being cross-examined on the evidence provided. This is followed by the respondent presenting evidence and cross-examination of the respondent and any witnesses. If applicable, the process is then repeated by the Independent Children's Lawyer, and expert witnesses. To close, parties present final submissions to the Court.

The Federal Magistrates Act provides scope for the Federal Magistrates to interact with the parties. The Act authorises the Federal Magistrates to pose question to witnesses in proceedings, where the question is likely to assist with a matter in dispute or the expeditious and efficient conduct of the proceeding.[516]

The Rules specifically do not give directions as to the Federal Magistrate's role in the hearing, or the implementation of the principles under the Family Law Act relating to the less adversarial trial, in order to allow the Federal Magistrate to manage the proceedings flexibly as envisaged by Division 12A of the Family Law Act. However, under Schedule 3 of the Federal Magistrates Courts Rules, it is noted that Rule 16.10 of the Family Law Rules is applied to proceedings before the FMC, under the Rule 1.05 of the Federal Magistrates Courts Rules. Rule 16.10 of the Family Law Rules directs that the final stage of the trial will occur on the allocated dates. The Rule also requires the presiding judicial officer to hear the remainder of the evidence and receive submissions.

11. Family reports

Family Consultants may be appointed as officers of the Family Court,[517] officers of the FMC,[518] or as external personnel appointed under Regulation 7 of the *Family Law Regulations 1984*[519] by the Chief Executive Officer of the Family Court or the Chief Executive Officer of the FMC.[520] As of 30 June 2008, the FMC employed approximately

---

515 Family Law Courts, *Federal Magistrates Court: The Court Process – Family Law*, <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/About+Going+to+Court/Federal+Magistrates+Court+requirements/>, viewed October 2009.

516 Section 63, *Federal Magistrates Act 1999.*

517 Subsection 38N(1)(d), *Family Law Act 1975.*

518 Section 111A, *Federal Magistrates Act 1999*.

519 Subsection 11B(c), *Family Law Act 1975*.

520 Regulation 7, *Family Law Regulations 1984.*

11.8 Family Consultants.[521] Discussions with personnel of the FMC and the Family Court indicate that the FMC may also seek the services of Family Consultants employed by the Family Court.

The position of Family Consultant is established under the Family Law Act. Their role is potentially wide and multifaceted. Family Consultants may have a therapeutic role, through providing assistance and advice to families involved in family law proceedings,[522] and through advising the Courts about appropriate services and programs to which the Court may refer the families.[523] The Consultants can also be central to the dispute resolution process, with the Court having the authority to refer parties to Family Consultants to receive assistance to resolve their family law dispute.[524]

Family Consultants may also have an evidence gathering role, being delegated the function to assist and advise the courts, and give evidence, in relation to the proceedings.[525] The Family Law Act empowers the FMC to order a Family Consultant to prepare a Family Report for proceedings under the Act in which the care, welfare and development of a child is relevant.[526] In the FMC, anecdotal evidence suggests that the majority of Family Reports are written by external professionals appointed under Regulation 7 of the Family Law Regulations.

The Family Law Act does not specify at what point in proceedings a Family Report may be prepared, [527] and anecdotal information indicates that practice varies between registries. Under the Federal Magistrates Court Rules a party may only apply for a Family Report once he or she has applied for final orders.[528]

Under the Family Law Act, the threshold test for obtaining a Family Report is whether the care welfare and development of a child under 18 is relevant to the proceedings under the

---

521 Federal Magistrates Court, *Annual Report 2007-2008*, p. 52.

522 Subsection 11A(a), *Family Law Act 1975*.

523 Subsection 11A(e), *Family Law Act 1975*.

524 Subsection 11A(c), *Family Law Act 1975*.

525 Subsection 11A(b), *Family Law Act 1975*.

526 Section 62G, *Family Law Act 1975.*

527 Section 69ZS of the Family Law Act 1975 permits the Court to designate a Family Consultant as the Family consultant for the child-related proceedings at any time during the proceedings.

528 Subrule 23.01A(1), *Federal Magistrates Court Rules 2001*.

Act.[529] The Federal Magistrates Court Rules contain additional matters that the Court may consider when determining whether to order a Family Report be prepared. These matters include whether the matters in dispute:

- are complex or intractable
- concern the views of a child who is of sufficient maturity for his or her views to be taken into account, or
- about the existence or quality of the relationship between a parent, or other significant person, and a child.[530]

Family violence and child abuse concerns may also be a reason for a Family Report being ordered. Under the Rules, when determining whether to order a Family Report the FMC may take into account allegations of family violence or that a child is at risk of abuse.[531] The Court will also take into account whether there is any other relevant independent expert evidence available.[532]

In keeping with the evidence gathering role of Family Consultants, under the Family Law Act a Family Report may be received as evidence.[533] Once received as evidence, the Family Consultant, or report writer appointed under Regulation 7 of the Family Law Regulations, may be examined on the evidence contained in the report.[534] The Federal Magistrates Court Rules expand the role of the FMC in relation to completed Family Reports. For example, the Court may provide copies to the parties to the proceedings, including any appointed Independent Children's Lawyer, and/or restrict access to the report.[535]

---

529 Subsection 62G(1), *Family Law Act 1975*

530 Subrule 23.01A(2), *Federal Magistrates Court Rules 2001.*

531 Subparagraphs 23.01A(2)(a)(iv)-(v), *Federal Magistrates Court Rules 2001.*

532 Paragraph 23.01A(2)(b), *Federal Magistrates Court Rules 2001.*

533 Subsection 62G(8), *Family Law Act 1975.*

534 Paragraph 23.01A(5)(c), *Federal Magistrates Court Rules 2001.*

535 Subsection 23.01A(5), *Federal Magistrates Court Rules 2001.*

12. Experts reports

The Family Law Act authorises the FMC to appoint an expert to prepare evidence in relation to the family.[536] The Court may determine the manner in which the evidence is to be presented.[537]

Rules relating to the use of expert evidence are contained in Division 15.2 of the Federal Magistrates Court Rules. Division 15.2 is not limited to family law proceedings but applies to all proceedings before the FMC.

The Court may appoint an expert to inquire into and report on an issue arising in the proceedings, at its initiative or at the request of a party.[538] The rules direct that where possible the appointed court expert should be a person agreed upon between the parties.[539] Once completed, the court expert's report is provided to the Registrar, who is required to provide copies to each party to the proceedings.[540]

Where the Court permits, the expert's report may be received as evidence. The Court may also give directions as to the use of the report, and allow cross-examination of the court expert.[541]

Where a court expert's report has been prepared, a party provides additional expert evidence on the issues covered the report, with the leave of the Court.[542] Where two or more parties to a proceeding call expert witnesses to give opinion evidence about the same, or a similar, question, the Court may direct the expert witnesses to:

- direct both expert witnesses to prepare a joint statement of how their opinions on the question agree and differ
- provide an oral or written statement commenting on the other expert's evidence, and

---

536 Paragraph 69ZX(1)(d), *Family Law Act 1975*.

537 Subparagraph 69ZX(1)(d)(iii), *Family Law Act 1975*.

538 Rule 15.09, *Federal Magistrates Court Rules 2001*.

539 Rule 15.09, *Federal Magistrates Court Rules 2001*.

540 Rule 15.10, *Federal Magistrates Court Rules 2001*.

541 Subrule 15.10(3), *Federal Magistrates Court Rules 2001*.

542 Rule 15.12, *Federal Magistrates Court Rules 2001*.

- advise the court whether one or both expert witnesses wish to revise their expert evidence.

The Court may also direct the manner in which the evidence of both experts is to be given.[543]

13 Follow up with the Family Consultant – section 65L

Where the Court considers the order to be in the best interest of the child, the Court may order that the Family Consultant continue with the family once final orders have been made.[544] This order can only be made where the Court considers that the order is in the best interests of the child.[545]

14 Post order programs

Where the court makes a parenting order, the Family Law Act requires the court to inform the parties of counselling serves, family dispute resolution services and other courses or programs that can assist the family in adjusting to the terms of the order.[546]

Before informing the parties of the services, the FMC is to confer with the Family Consultant about which services are appropriate to the family.[547]

15 Consent orders

The Federal Magistrates Act contains directions about the use of consent orders in proceedings at the Federal Magistrates Court.[548] However, the directions are not operative for proceedings under the Family Law Act.

For family law proceedings, parties may apply for consent orders at various stages of the process through the FMC. Consent orders may be made without parenting proceedings being commenced, and therefore without the Court being involved with the case through parenting proceedings. Alternatively, consent orders may be applied for at any stage once parenting proceedings have commenced.

---

543 Rule 15.08, *Federal Magistrates Court Rules 2001*.

544 Section 65L, *Family Law Act 1975.*

545 Section 65L, *Family Law Act 1975.*

546 Section 62B, *Family Law Act 1975.*

547 Section 11E, *Family Law Act 1975*.

548 Section 32, *Federal Magistrates Act 1999.*

Directions for applying for consent orders are contained in Division 13.2 of the Federal Magistrates Court Rules. The Federal Magistrates Court Rules do not distinguish between consent orders sought prior to families initiating proceedings in the Court, and ones sought once proceedings are on foot: for example, affidavits are required in both instances. Anecdotal evidence indicates that it is practice to direct parties to apply for consent orders in the Family Court where families are seeking consent orders without instituting parenting proceedings.

The Rules contain limited directions about the form that the consent orders must take. The Rules only require that the proposed orders be signed by all parties, and state that the draft orders are made by consent.[549] However it is not uncommon for a Federal Magistrate to require the parties to appear in order to explain why the proposed orders are in the best interests of the child.

The Court has broad discretion to make such orders as the Court considers appropriate in the circumstances of the case.[550] While the Court may request further information from the parties,[551] the Rules provide no direction as to what orders may be appropriate in what circumstances. The parties are not required to satisfy the Court of any particular, save that the orders are made with the consent of all parties.

---

549 Rule 13.04, *Federal Magistrates Court Rules 2001*.

550 Subrule 13.04(3), *Federal Magistrates Court Rules 2001*.

551 Rule 13.05, *Federal Magistrates Court Rules 2001*.

APPENDIX 5:
PARTICULAR COMMENTS ON 'BEST PRACTICE PRINCIPLES FOR USE IN PARENTING DISPUTES WHEN FAMILY VIOLENCE OF ABUSE IS ALLEGED' (FAMILY COURT OF AUSTRALIA, 2009)

Preamble and 'Key legislative provisions'

In my view the document's authorship should be stated. It might also be desirable to indicate, if it is the case, that the document was prepared as a result of some committee's work or some person's particular effort. Since (as I understand it) the document has no legal binding force, its authorship and history may assist readers to understand its likely value for them.

The first paragraph of the Preamble indicates that the Principles apply only in cases where a Notice alleging violence etc has been filed, but this should obviously be changed, because we now know that such notices are often not filed in cases involving family violence. It seems better to say that the Principles apply to any case in which there are allegations that there has been family violence, or that there is a risk of family violence.

Footnote 2 could usefully spell out the other jurisdictions referred to. Again, it might add to the value of this document if its readers know that similar documents are used in a number of family law jurisdictions.

The preamble refers to "decision makers". It is not entirely clear, I think, whether this refers to judicial officers only - and if so to which judicial officers - or to everybody in the court who has to make some kind of decision. Assuming that it is intended for judicial officers only, this could be stated. Indeed it might be desirable to spell out specifically those to whom it applies namely, I assume, judges, judicial registrars and registrars.

The word "devastating" in the second paragraph seems too strong. Presumably not every act of family violence has devastating consequences. It might be better to say something to the effect that family violence can often be devastating.

In the list of matters mentioned in the second paragraph, I would put the legislation in the first place.

In the section “key legislative provisions” I suggest that there be no particular focus on amendments of 2006. Instead, the legislation should be read as a whole. Thus while the reference to sections 60B is appropriate, there is no particular need to say that it has been amended to insert a new object.

Headings and structure of the document

Reviewing the main headings, I suggest that they should be rephrased to focus on particular situations. This is true of only some of the existing headings.

For example Heading B refers to the situation of making orders directing the preparation of a family report or appointing a court expert. By contrast, Heading A does not seem to refer to any particular situation. The substance of the material under heading A, however, indicates that it deals with initial steps in proceeding. This could be indicated in the heading itself.

The structure of the material under heading A could perhaps be improved. The first subheading seems to indicate that it will deal with a number of statutory provisions which impose specific obligations on the court. However this is true only of some of the sections mentioned. It would be sensible to have a separate section which indicated the specific requirements of the Act and then a second section spelling out a list of matters that should be considered. However the language used could be more appropriate.

The checklist on pages 2-4

The material following the second subheading on page 2 (‘In every application the decision maker may’) is in my view a very helpful checklist of matters to be considered and the heading should indicate this (eg ‘Check list of matters often requiring consideration’) should be in such terms. I would avoid Roman numbering.

Paragraph (vii) seems to repeat paragraph (ii) in the first subheading. Similarly, paragraph (viii) repeats paragraph (x) in the first section.

As to paragraph (xi), the reader may not necessarily know what is referred to by ‘safety plan’ and this term could be explained. I do not think it is helpful to repeat section 60B in this connection.

Paragraph (xii) could usefully include words indicating that this applies only to children’s matters.

In paragraph (xiii), in my view, the word 'obtain' should be replaced by the words "apply for" since of course a party cannot of themselves obtain such a certificate: it must be granted by the court. More substantially, I am a little concerned that this paragraph might be read as indicating that the issue of a certificate under section 128 is a matter of course. It is, however, a judicial decision and questions of bias might possibly be raised if a judicial officer invited a party to apply for a certificate. I suggest that the wording of this paragraph be reconsidered.

Para (xxi) should be put into the active voice so that the decision maker thinks about who is required to make this happen. For example it could say 'whether one or more parties should be directed to make the child available for a psychological or psychiatric evaluation'.

Matters under Heading B (pages 5-6)

The first paragraph should be put into the active voice so that it specifies who it is that should provide the material to the family consultant of court expert.

Paragraph (iii) would be more accurate if it read "…appropriate for the parent or other parties to have equal shared parental responsibility". The question whether the presumption applies is different from the ultimate decision whether there should be equal shared parental responsibility.

Paragraph (iv) refers only to the *benefits* from time with the parent. However in some circumstances, time with a parent may have disadvantages for the child, and it might be important for these to be considered. I think if it would be better for this paragraph to refer to possible advantages and disadvantages.

In paragraph (x) in the second dot point should probably read "...parent or other person..."

In relation to the reference at the end of this section it is not clear whether the whole material in paragraph B is a direct quote from the document referred to. In my view it would be better for this section to be written in a way that is appropriate for the Family Court of Australia. The fact that it draws substantively on the document cited could be appropriately indicated elsewhere, for example in the introduction or preliminary part of the document.

Heading C

Although this is a helpful list, in my view the drafting might usefully be reconsidered. As presently written, this second matter suggests that the court is able to decide that it is in the interests of a child to spend time with the person without considering those matters; it then considers those matters in relation to what directions are required to give effect to the order. The difficulty is, in my view, that it is only when the full proposed order is considered that the court can determine whether it is in the interests of a child to spend time with the parent. For example, in a situation requiring supervision, the court would not first determine that it was in the child's interests to spend time with the parent and then think about supervision. It would consider (in the light of all relevant evidence, including the availability of a suitable supervisor) whether the particular order including its provisions relating to supervision, would be in the child's best interests.

Heading D

The wording of paragraph (iii) is awkward, and 'principle' is misspelled. I am not sure that this paragraph, dealing with a final hearing, should refer to 'allegations' at all. If I understand it correctly, the meaning would be better expressed 'Consider the nature and extent of any family violence, including whether it is in the nature of 'controlling family violence [insert here a reference to the literature], and in this connection whether the evidence indicates that the violent party… etc.

Heading E

The material under this heading is essentially a summary of the Sturge and Glasser report. This is now 10 years old, and the document should explain why it is singled out for special attention. Consideration might useful be given to whether later material, such as the Wingspread Report, could usefully be mentioned. It would be desirable to include some words indicating that it is always important for the court to rely on good quality and up to date social science. The fact that a particular report has been relied on by courts, whether in Australian or elsewhere, is no substitute.

Heading F

This heading needs revision. The subsequent material deals with matters that need attention when the court is *considering what parenting orders to make*, not when it *orders* a child to spend time with a parent. The second sentence is misleading: the question is whether the

proposed orders would subject the child to an unacceptable risk. The heading as a whole is seriously misleading in that it does not refer to the possibility that the child's best interests may be served by an order providing for no face to face contact.

In my view the material under this heading should be revised in one of two ways. The heading and the text could be revised to take account of the cases where there should be no contact. Alternatively, there could be an additional separate section dealing with the circumstances in which the court might make orders for no contact.