Submission on *Family Law Amendment (Family Violence & Other Measures) Bill 2011* to Senate Legal and Constitutional Committee

Ms Zoe Rathus AM
Senior Lecturer
Law School
Griffith University

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LIST OF RECOMMENDATIONS

Recommendation 1

That the ***presumption be repealed***.

Recommendation 2

If the presumption is not to be repealed, then the government should at least:

a) ***Introduce the balancing presumption*** which was recommended by the original committee - a presumption against shared parental responsibility where there is 'entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse'; or

b) ***Re-draft the presumption*** in the terms suggested in the Chisholm Family Courts Violence Review; or

c) ***Remove the word 'equal'***; or

d) ***Sever the connection to*** the ***time*** provisions.

Recommendation 3

That research and consultation be undertaken in relation to the development of ***legislative or other guidelines*** which will assist decision-makers and advisers in the family law system with ensuring that ***family violence is made relevant to parenting arrangements.***

Recommendation 4

That lawyers and judges receive training and information about the ***benefits and usefulness of family violence reports***.

Recommendation 5

That ***'exposure to family violence' be included as an example of family violence*** and that the examples of 'exposure to family violence' be expanded.

Recommendation 6

Any definition of 'exposed to' needs to make it clear that it is the ***perpetrator, not the victim, of abuse that has exposed the child*** to the abuse.

Recommendation 7

That ***s43(ca) be amended*** to read:

> the need to take into account any family violence or abuse which has been experienced or may be experienced by family members

Recommendation 8

That subsections ***60B(1)(a) and 60CC(2)(a) be repealed.***

Recommendation 9

a) There ***should not be two tiers of considerations***.

b) Section ***60CC(2A) should not be introduced***.

c) If s60CC(2A) is to be introduced, the words '***If there is any inconsistency in applying the considerations set out in subsection (2)' should be deleted*** so that it simply reads:

> ***the court is to give greater weight to the consideration set out in paragraph (2)(b).***

d) A new subsection along these lines should be introduced as a ***best interest factor***.

> ***Any family violence involving the child*** or a member of the child's family or household including a consideration of:
>
> i. the nature and seriousness of the violence
> ii. how frequently and recently it (last) occurred
> iii. any physical, psychological, sexual and emotional harm caused
> iv. the impact of such harm on the child and any member of the child's family or household

Recommendation 10

a) Paragraph **60CC(3)(c) and (ca) should not be introduced**.

b) The concept canvassed in ***para 35 of the EM is dangerous*** to whole reform process and must not proceed.

Recommendation 11

That research be undertaken into the advantages and disadvantages of a ***best interest factor that specifically refers to the pre-separation roles of each of the parents.***

Recommendation 12

a) ***s60D should not be enacted***. I also recommend that s63DA be repealed.

b) If some aspects of s60D are to go ahead, they should be amalgamated with s63DA. There should not be two sections with two different lists of mandatory statements required of advisers.

Recommendation 13

If there is to be any mention of specific time outcomes, then ***s65DAA should be re-drafted*** to become a provision which sets out the pre-requisites, or at least factors to have to regard to, before making an order for substantially shared care time.

INTRODUCTION

Firstly I congratulate the government on endeavouring to tackle the complex issue of family violence in family law matters. Finding ways to effectively deal with these cases is one of the most difficult challenges in family law and this legislative effort is commended for its upfront and overt approach.

However, for the reasons outlined below, I am concerned that the Bill as proposed will not assist to the extent hoped for by the legislature. In my view, a view shared by many practitioners and scholars, it is the presumption of equal shared parental responsibility that lies at the centre of this problem and any legislative amendment that leaves the presumption untouched is likely to leave many children unprotected.

Process Complaint

Secondly I have a process complaint. Despite making a submission on the Exposure Draft of the this Bill which was released for public comment last year, I was not directly informed of this Senate Reference and found out through other means. I would have thought that best practice would have involved notifying all those who had lodged submissions on the Draft. Further, the current materials provide no information on the nature or direction of those earlier submissions. There some (although not many) differences between the Bill and the Exposure Draft but we are not told whether they have been made as a result of the submissions received or some other process. This means that a chance to engage in a developing process of reform has been lost – or at least obscured. I hope that the members of the Committee will at least be provided with a summary of the key issues raised in those earlier submissions.

I think this is particularly important because, through my own contacts, I am aware that many groups raised the issue of the presumption but no mention of this is made in the documentation to which we must now respond.

Background to This Reform

It is clear from the number of research reports commissioned by governments and the amount of independent research undertaken in the relatively short time since the introduction of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) that there is an air of disquiet about the consequences of these amendments.[1] This has been publicly displayed in the media[2] and has been the subject of discussion in many academic articles and

[1] Many others will be citing these lists of reports and they are well known to government..

[2] A number of articles have been written by Caroline Overington for *The Australian*, including 'Fair share?' *The Weekend Australian Magazine*, 5-6 September, 2009; articles by Adele Horin in the *National Times* and *Sydney Moring Herald*, including respectively 'Next government must confront the dangers in family law reforms' 28 August, 2010 at <http://www.theage.com.au/opinion/politics/next-government-must-confront-the-dangers-in-family-law-reforms-20100827-13vx8.html> and 'Family

family law system conferences for lawyers, family dispute resolution practitioners, family consultants and researchers.[3]

It would seem that the disquiet is broader than the problems which have arisen in cases involving family violence and extends to a range of families who have implemented shared care (by agreement or order) where this has caused stress and distress to the children or one of the parents. Jennifer McIntosh is reported as saying about some of the children in shared care:

> Four years later, we are scaping those children off the walls ... Eighty percent of my recent referrals are from collapsed shared care arrangements.[4]

It is clear that some changes to the law and surrounding services are required to ensure that only appropriate/suitable families end up with shared care time.

What can be learnt from previous reform processes?

I have been involved in making written submissions to and giving evidence before family law inquiries since the late 1980s. Most of that time was through the Women's Legal Service in Brisbane or Committees of which I was a member.[5] It seems to me that Women's Legal Services and other advocates on the issue of violence of against women have a good 'track record' for accurately predicting the effects of legislative reform on their client group – particularly women experiencing violence in their relationships.[6] It is fair to say that these groups particularly cautioned against the 'friendly parent' (s60CC(3)(c)) provision, the costs on 'false allegations' section (s117AB) and the objective element in the family violence definition.[7] Now it is proposed that all of these provisions be repealed or amended.

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law changes to tighten child protection' 11 November, 2010 at <http://www.smh.com.au/national/family-law-changes-to-tighten-child-protection-20101110-17npe.html> (5 January, 2010) and Christine Jackman, 'Divided Lives: will proposed new laws fix the flaws of shared parenting – or simply add fuel to the ire?' *The Weekend Australian Magazine*, 27-28 November, 2010, p16.

[3] Without trying to list these they include state and national family law conferences, the Family Relationship Services Conferences, AIFS conferences and local Family Pathways Seminars and conferences.

[4] Christine Jackman, 'Divided Lives: will proposed new laws fix the flaws of shared parenting – or simply ass fuel to the ire?' *The Weekend Australian Magazine*, 27-28 November, 2010, at p 18.

[5] Eg. The Queensland Domestic Violence Council in 1991

[6] Some of the work of these groups is outlined in S Armstrong, '"We told you so . . .": Women's legal groups and the Family Law Reform Act 1995' (2001) 15 *Australian Journal of Family Law*, 1-26.

[7] See for example, comments by Women's Legal Services Australia about costs and false allegations in Senate Legal and Constitutional Legislation Committee, *Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill, 2005*, Commonwealth of Australia, March, 2006, p 35; comments by Dr Lesley Laing and SPARK Resource Centre about the objective test for family violence in 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', Canberra, 2005, p 26 and comments by the National Abuse Free Contact Group about the friendly parent provision in the same report at p 54.

I suggest that the ability of these groups to understand and predict the consequences of legislative change is something that this government needs to consider carefully when weighing the competing information and views that will be received during the consultation process on the Bill. In particular, Women's Legal Services Australia (WLSA) (and I imagine many other groups and individuals) will be advocating for the repeal of the presumption or a major re-structuring of the Act around the detail of the presumption and how it interacts with the time provision – s65DAA. This is because they understand how deeply these sections and the structure of Part VII affect the understanding, interpretation and implementation of this legislation both in the community generally and within the family law system. Prior to the introduction of the 2006 Act WLSA[8] and others were specifically noted as warning that the presumption 'will increase the risk of family violence and abuse occurring'.[9]

I will return to the issues with the presumption myself. Legislation works as package. The sum of the parts of the 2006 reforms is bigger than the apparent meanings of individual sections. Changing some of those sections now may not rectify what goes wrong in some families where there is violence.

WHAT ARE THE REAL ISSUES?

Although the repeal of the existing s60CC(3)(c), s117AB and the removal of the objective test from the definition of family violence are all to be commended, I have reservations about the extent to which many of the amendments will impact on the problem. In my opinion it is critical for the government to recognise that the problems with dealing with family violence in family law go much deeper than the obvious provisions. These include:

- A long history in family law where the idea of 'no fault' in divorce and family law proceedings seems to have silenced, or at least side-lined, the relevance of family violence in parenting cases (and other matters);[10]

- The 'radiating message' that has been created by the presumption, with its connection to time[11] and the unfortunate use of the word 'equal' in both the presumption and the time provisions;

[8] As it was formerly known – the National Network of Women's Legal Services
[9] 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', Canberra, 2005, p 26. The point was also made by SPARK Resource Centre and the National Council of Single Mothers and their Children.
[10] See H Rhoades, C Frew and S Swain, 'Recognition of violence in the Australian family law system: A long journey' (2010) 24 *Australian Journal of Family Law* 296.
[11] See: B Smyth, 'A 5-year retrospective of post-separation shared care research in Australia' (2009) 15 Journal of Family Studies, 36

- The reluctance of some victims of family violence to disclose what they have experienced;

- The failure of lawyers to comprehensively present these issues in their clients' cases;[12]

- The lack of expertise about family violence amongst the range of 'advisers'[13] and decision-makers now involved in family law;

- The lack of guidance as to how allegations, or even findings, about family violence should be made relevant to decision-making.

It is my contention that the Bill does not address these issues and failure to do so may mean that the reforms will fail to fulfil their purpose.

THE PROBLEMS WITH THE PRESUMPTION

The Presumption Should be Repealed

I have recently written at length about the problems caused by the presumption in the *Family Law Act* .[14] I attach a copy of the article and ask that it be considered part of my submission. That article arose when I endeavoured to write about how family violence was being dealt with in the family law system and found myself coming back to the presumption as the fundamental issue. The presumption and its role in the radiating message of shared parenting and shared care time also seems to contribute to problems in other families where there is no violence such as families with very young children and where there is high conflict. The language and structure of Part VII have arguably overwhelmed the intended exceptions and nuances and many 'unsuitable' families end up with shared care time arrangements.

Examples of the failure of the exceptions are set out in my article. Perhaps the most significant issue has been the failure of s61DA(2). In theory it should mean that presumption is not applied in cases where there is family violence. Although there will be some cases where family violence is alleged but found not to exist, it is still clear that the exception has failed when it is ordered in 75.8% of cases involving allegations of violence or abuse.[15] I have re-produced below the table prepared on this issue for the AIFs Evaluation.

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[12] This became apparent in the AIFS report prepared about the how the law dealt with family violence prior to the reforms. See: L Moloney, B Smyth, R Weston, N Richardson, L Qu and M Gray, *Allegations of family violence and child abuse in family law proceedings: A pre-reform study*, (2007) AIFS.

[13] For the purposes of s63DA an 'adviser' includes a legal practitioner, family counsellor, family dispute resolution practitioner, family consultant.

[14] Z Rathus 'Social Science or 'Lego-Science'? Presumptions, Politics, Parenting and the New Family Law' (2010) 10(2) *Queensland University of Technology Law and Justice Journal* 164

[15] R Kaspiew, M Gray, R Weston, L Moloney, K Hand and L Qu, *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, 2009, p 190

Table 8.7 Parental responsibility outcomes, by allegation of violence or child abuse, judicially determined and consent after proceedings cases, post–1 July 2006				
	Allegation of family violence or child abuse			No allegation
	Both family violence and child abuse	Family violence only	Child abuse only	
	%			%
Shared parental responsibility	75.8	79.6	71.9	89.8
Sole to mother	14.0	18.5	18.0	4.9
Sole to father	4.0	1.0	4.4	1.8
Other	6.3	0.9	5.6	3.4
Total	100.1	100.0	99.9	99.9
Number of children	140	152	129	395

Citing from the AIFS Evaluation I explain in my article:

> The report found that the presumption only seems to be rebutted where the violence is 'quite extreme in a factual sense, often involving high levels of violence, conflict, mental health issues or substance misuse'. This means that in many cases involving less extreme violence the presumption must have been applied. For reasons already outlined, it is suggested that it is partly the choice of a *presumption* as the device for embedding policy that causes this tendency.[16]

After my research into presumptions I concluded that they are inappropriate in family law.

Recommendation 1

That the presumption be repealed.

Other Steps if Not Repealed

If the presumption is not repealed there are at least some other steps the government could take to ameliorate some of its (perhaps sometimes unintended) consequences.

<u>Introduce the Counterbalancing Presumption</u>

The original House of Representatives Committee recommended that two presumptions be introduced – one similar to the present one PLUS a balancing presumption *against* shared parental responsibility where there is 'entrenched conflict, family violence, substance abuse or established child

[16] Z Rathus 'Social Science or 'Lego-Science'? Presumptions, Politics, Parenting and the New Family Law' (2010) 10(2) *Queensland University of Technology Law and Justice Journal* 164 at 182

abuse, including sexual abuse'.[17] Such presumptions are discussed in my article and are used in a range of states of the USA.[18]

Redraft the Presumption as Suggested by Professor Chisholm

Professor Chisholm has recommended that s61DA be re-drafted 'so that it creates a presumption in favour of each parent having "parental responsibility"'.

Remove the Word 'Equal'

As noted in my article the use of the word 'equal' in both the presumption and the time provision has clearly exacerbated public confusion about what the Act means and has allowed an easy conflation of the concepts of parental responsibility and parenting time. This creates public expectations about likely outcomes and, no doubt, influences private and informal negotiations between parents.

Sever the Connection to the Time Section

The presumption (or an amended version thereof) can stand alone and makes sense without being tied to the time provisions. The link back to the presumption is made in the time provision - s65DAA. Section 61DA (the presumption) does not refer to s65DAA. Section s65DAA could become the section that simply sets out the requirements or pre-requisites for making equal or substantial and significant time orders (although I consider that the mention of any particular time arrangements is a mistake).[19] Although some further consideration of the detail of the drafting would be required the section would just start with words like:

> If the Court is considering making an order for equal or substantial and significant time, then the court must: ...

Recommendation 2

If the presumption is not to be repealed, then the government should at least:

e) Introduce the balancing presumption which was recommended by the original committee - a presumption against shared parental responsibility where there is

[17] House of Representatives Standing Committee on Family and Community Affairs, Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of a Family Separation* (2003) rec 2, pp 41-2.
[18] A Levin and L Mills, 'Fighting for Child Custody When domestic Violence is at Issue: Survey of State Laws' (2003) 48(4) *Social Work* 463
[19] I will return to s65DAA later

'entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse';[20] or

f) Re-draft the presumption in the terms suggested in the Chisholm Family Courts Violence Review;[21] or

g) Remove the word 'equal'; or

h) Sever the connection to the time provisions.[22]

DISCLOSURE AND RELEVANCE OF FAMILY VIOLENCE

There is a need to develop an understanding of the relevance of past family violence to formulating future parenting arrangements. As will be seen below, one of my greatest concerns about how the system currently deals with family violence is the *prospective* approach that tends to be taken. There is a tendency to think about wanting to protect a child against similar violence in the future, but this is only part of the picture. When children have lived with violence in their home and have witnessed or been exposed to this violence, this deeply affects their 'inner' sense of safety – their emotional integrity and security. They will carry a psychological and emotional legacy – probably for life.[23] Spending time with the abusive parent will be very difficult and stressful for some children even if that parent does not engage directly in family violence against them. Some children will be fearful simply knowing what that parent is capable of.

It seems to me that the problems of dealing with family violence in family law will not be addressed by changes to the Act that are more cosmetic than structural. There are difficulties about disclosure, pleading and evidence in respect of family violence and there is a lack of understanding of its full impact. Further there is little practical guidance about how to make any findings or information relevant to advice and decision-making. In his Report Professor Chisholm suggested that:

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[20] House of Representatives Standing Committee on Family and Community Affairs, Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of a Family Separation* (2003) rec 2, pp 41-2.

[21] See R Chisholm, *Family Courts Violence Review*, Commonwealth of Australia**,** November, 2009, recommendation 3.3.

[22] Better still remove any mention of specific time outcomes from the Act.

[23] I do not intend to set out the undisputed literature on the short, medium and long term consequences of violence in the home for children but they can include problematic behaviour at school, negative impact on self-esteem and difficulties with personal relationships – as children and adults. Boys tend to externalise their problems – risk of violent or aggressive behaviour; whereas, girls tend to internalise – causing withdrawal, passivity and depression. (I have drawn here on slides presented by the Hon Justice Judy Ryan of the Family Court of Australia, *Family Violence as in Issue in Parenting Cases*, at a recent professional development event.)

> The family law system, and each component in it, needs to encourage and facilitate the *disclosure* of family violence, ensure this it is *understood*, and *act effectively* upon that understanding.[24]

Drawing from this I have created a longer list that I think captures many of the steps towards ensuring that family violence is both visible and rendered relevant to outcomes. I have focussed on how these issues apply to lawyers' practices and judicial decision-making – but many also apply to other 'advisers' in the system.

1. Family violence must be raised by the client with their lawyer who must not inhibit the disclosure;

2. The lawyer must facilitate its disclosure in future out-of-court as well as litigious proceedings;

3. In court proceedings it must be presented in some detail and corroborative evidence should be obtained where available;

4. Family violence must be understood by the professionals who have to act on the information provided;

5. The family violence that has occurred must be made relevant to the parenting arrangements for the children.

I will briefly discuss each of the above.

1. It must be raised by the client with their lawyer

I suggest that training is required for lawyers and other 'advisers' about how to work with clients who have experienced violence. All family lawyers need to be ready for such a disclosure and know how to ensure they do not unwittingly block or inhibit it. Clients often drop unintended clues and a lawyer with the right understanding and skills can then guide the interview appropriately.

The *Best Practice Guidelines for lawyers doing family law work*[25] have just been updated and Part 9 provides practical information about how lawyers should work with these clients. But these guidelines need to be supplemented by other professional development activities. I know that some work is underway in this area but it is essential to ensure that on-going professional development is available.

2. Once raised, the lawyer must not discourage its disclosure in legal proceedings or other processes

[24] R Chisholm (2009), p 6 – my emphasis.
[25] Published by the Family Law Council and Family Law Section of the Law Council of Australia

We know that in providing legal advice to clients lawyers pass on to them their understanding of the legislation and the jurisprudence. Through this lens the lawyer and client construct the case to be presented.[26] If lawyers believe that it is strategically 'risky' to raise family violence they will advise against raising it in negotiations and dispute resolution and against including it in affidavits and other more formal material.

There seems to be no question that some of the provisions of the 2006 Act actively influence the advice some lawyers give to clients – discouraging making allegations of family violence.[27] The reasons seem to be partly the friendly parent and costs provisions – but also perhaps a pervading sense that it is risky to be seen to be at odds with the powerful message of shared parenting. Women who are reluctant to have to children spending time (or lots of time) with their fathers are at risk of being assessed as obstructive rather than protective. There has been a silencing of violence under the reforms.[28] But it would be a mistake to think that the repeal of the offending sections will fix the problem. Although the 2006 Act exacerbated the problem, this kind of advice has long been given to women by family lawyers - no doubt partly as a consequence of the entrenched 'no fault' philosophy. At Women's Legal Service Brisbane during the 1990s I would say that this kind of advice was reported to us more frequently after the *Family Law Reform Act 1995* (Cth) – but was always a concern.

The relevance of past family violence to parenting arrangement outcomes must be made crystal clear in the legislation if lawyers are to be encouraged to change their habits.[29]

3. In court proceedings it must be presented in some detail and corroborative evidence should be obtained where available.

I will not repeat what other submissions will tell you. It is clear from both the 2007 and 2009 AIFS Reports and Rae Kaspiew's earlier study that unless the family violence is quite serious, pleaded in some detail and corroborated where possible it will not be influential in the outcome.[30]

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[26] A Sarat and W Felstiner, *Divorce Lawyers and their Clients: Power and Meaning in the Legal Process,* Oxford University Press, 1995, chapter 4.

[27] See, for example: L Laing, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (June 2010) University of Sydney, NSW Health and Benevolent Society, pp 52 - 57 and R Chisholm, *Family Courts Violence Review*, Commonwealth of Australia**,** November, 2009.

[28] Something women's groups predicted in the consultation process and I wrote about early in the operation of the Act: Z Rathus, 'Shifting the Gaze: Will past violence be silenced by a further shift of the gaze to the future under the new family law system?' (2007) 21 *Australian Journal of Family Law* 87.

[29] See recommendation 6.

[30] L Moloney, B Smyth, R Weston, N Richardson, L Qu and M Gray, *Allegations of family violence and child abuse in family law proceedings: A pre-reform study,* (2007) AIFS; R Kaspiew, M Gray, R Weston, L Moloney, K Hand and L Qu, *Evaluation of the 2006 Family Law Reforms,* Australian

4. Family violence must be understood by the professionals who have to act on the information provided.

There are also some significant learnings about family violence that are important to remember when making decisions in family law.[31] Their importance derives partly from their relevance to the presentation of each of the parents at the time parenting matters are being prepared, negotiated or litigated.

- *Domestic violence affects the post separation conduct of women victims*

This was a key issue explored by the research of the Abuse Free Contact Group which examined family violence and the family law system after the introduction of the 1995 reforms. It demonstrated that mothers are often being assessed as potential 'primary resident' parents when they are still exhibiting behaviour conditioned by the years spent living with violence. They may be chaotic, angry, lack self-confidence, or may nurture the children poorly while they commence a healing process.[32]

- *Diminished parenting capacity often occurs with victims of domestic violence*[33]

Jaffe and others describe the impact of family violence on the victim's parenting:

> Preoccupation with the demands of their abuser (ACV), a conflict-ridden marriage (CIV), or a traumatic separation (SIV) may render parents physically and emotionally exhausted, inconsistently available, overly dependent upon, or unable to protect their children from the abuser.[34]

However, the mother's parenting ability may well to improve once she is safely away from the violence.[35]

- *Perpetrators can be charming and victims can be unattractive*

Institute of Family Studies, 2009 and R Kaspiew, 'Violence in contested children's cases: an empirical exploration' (2005) 19(2) *Australian Journal of Family Law*, 112.

[31] These ideas are explored more fully in T Altobelli, 'Family Violence and parenting: Future directions in practice' (2009) 23 *Australian Journal of Family Law* 194

[32] K Rendell, Z Rathus and A Lynch, *An Unacceptable Risk: A report on child contact arrangements where there is violence in the family*, Women's Legal Service, Brisbane, 2002.

[33] P Jaffe, J Johnston, C Crooks and N Bala, 'Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans' (2008) 46(3) *Family Court Review* 500 at 503

[34] Ibid., at 503

[35] Ibid., at 503

It must always be remembered that men who are abusive in their families may be charming outside. Johnston describes the 'thorny assessment' when 'dealing with allegations of mutual violence'. She explains that the victim tends to assume blame while the perpetrator is more likely to 'deny, minimise, obfuscate, and rationalise the abuse':

> … beware of differentiating the abuser from the victim based on who presents as the victim; who is more charming, charismatic, and likeable; who appears more organised, reasonable, and sensible; and who feels more entitled and morally outraged. Socio-paths, narcissists, and chauvinists (who use violence for interpersonal control) can make a very smooth presentation, whereas the victim can appear emotionally distraught and disorganised.[36]

There is a perfect example of these two types of presentations in *Calkin and Calkin*[37] as described by one of the experts who had interviewed the parties a year earlier as well:[38]

- Mr Calkin presented as much more positive, relaxed and resolved about his situation following marital separation … it seemed that Mr Calkin wants no more than to be a loving father.

- Ms Calkin appeared to be significantly anxious and tearful, although perhaps less so than her presentation 12 months ago. Her anger towards Mr Calkin … was palpable.[39]

- *Children's relationship with an abusive parent may well be ambivalent.*

It is also worth noting that children's feelings towards an abusive parent are sometimes ambivalent.[40] That parent may be a 'source of disappointment, bitterness and confusion' to them, but he may also be a 'source of entertainment and of relief from the tensions in their relationships with their mothers'. These contradictions can be fertile ground for 'traumatic bonding'.[41] It is well known that children will often desperately seek approbation from an emotionally or psychologically abusive or harsh parent. The significance of this learning is to understand that the fact that a child expresses a wish to spend time with a parent does not necessarily mean that the parent is not abusive. It does not even mean that the child is not frightened of them at times.

It is difficult to know what recommendation to develop from this theme. I am drawn to the idea suggested by the Family Law Council about the

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[36] J Johnston, 'A Child-Centered Approach to High-Conflict and Domestic-Violence Families: Differential Assessment and Intervention' (2006) 12(1) *Journal of Family Studies*, 15 at 19
[37] *Calkin and Calkin* [2009] FMCAfam 241
[38] I am not suggesting that the expert in this case did not understand the deeper meanings of these appearances.
[39] *Calkin and Calkin* [2009] FMCAfam 241 at para 24
[40] L Bancroft and J Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, Sage Publications, 2002, p 51
[41] Ibid.

development of a 'common knowledge base' of information about family violence for use by actors on the family law system.[42]

5. The family violence that has occurred must be made relevant to the parenting arrangements for the children.

This step is intended to incorporate relevance of both the emotional legacy that children may carry from past abuse as well as protecting them from future abuse. The 2007 AIFS study found that:

- where allegations were supported by evidence of strong probative weight this tended to influence outcome – otherwise 'allegations did not seem to be formally linked to outcomes';

- orders for overnight contact predominated no 'regardless of the apparent severity or probative weight of the evidence'.[43]

We need to find a legislative formula that provides judges with some real guidance as to relevance of family violence to decision-making. But this is difficult because there is no clear or determinative social science consensus around this issue and every case will turn on its own facts. I have set out below some information and ideas from the social sciences to show the kind of complexity confronting courts in these cases.

The Protective Parent

The literature suggests that when a spouse has been violent towards their partner but that partner is no longer present (ie when the parents have separated and the children now spend time with the abusive parent alone), 'the children may find that, through issues of contact arrangements, they move from the periphery to the centre of the conflict'.[44] One of the complex roles played by mothers with violent partners is ameliorating violence towards the children. Both the mother and children are acutely aware of her absence when the children are with the father. The Abuse Free Contact Group (mentioned earlier) developed a diagrammatic representation of the overlapping nature of spousal and child abuse, and pre- and post-separation abuse. I reproduce it here.[45]

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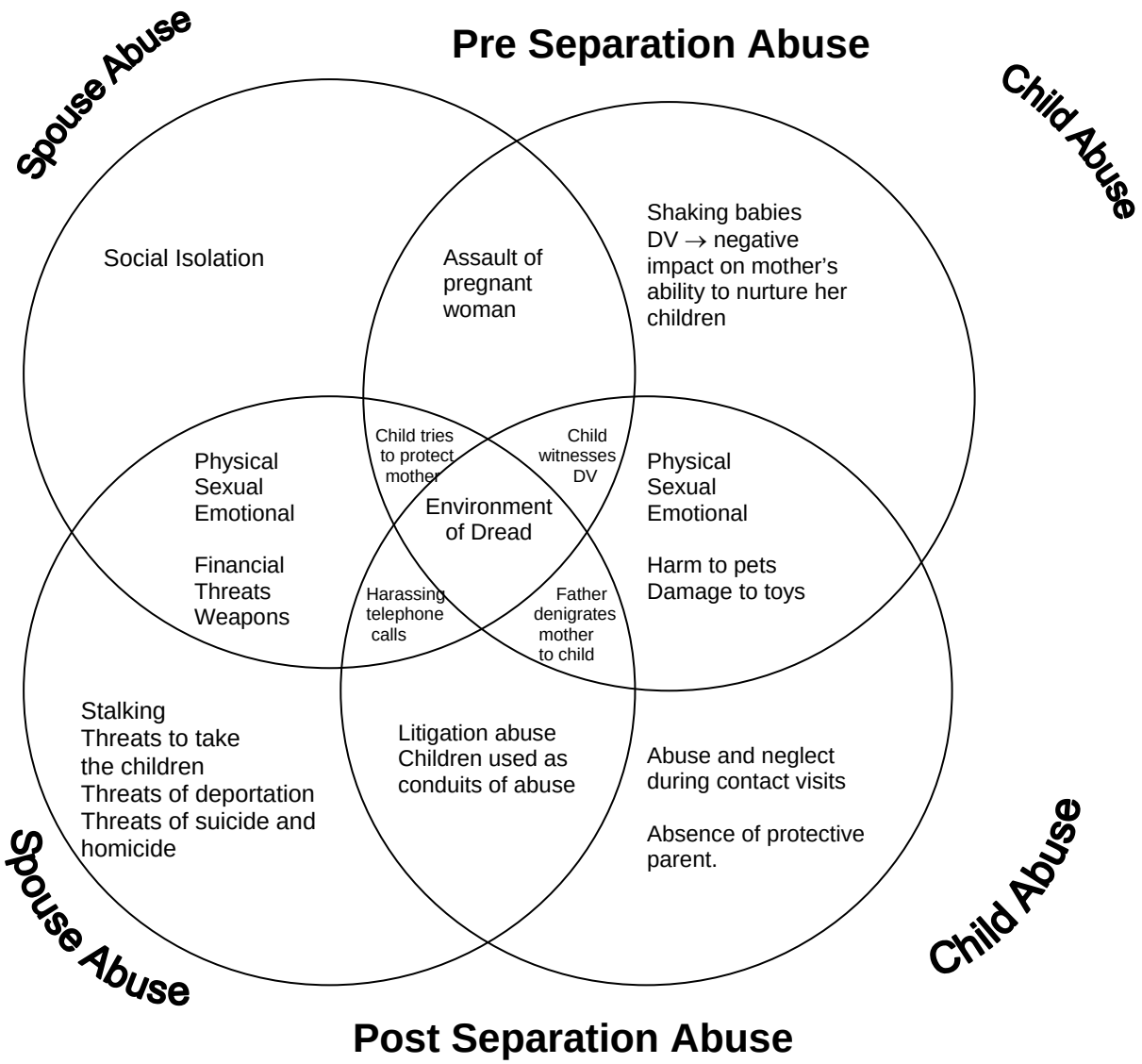
[42] Family Law Council, *Improving Responses to Family Violence in the Family law System: An advice on the intersection of family violence and family law issues*, Commonwealth of Australia, 2009.
[43] L Moloney, B Smyth, R Weston, N Richardson, L Qu and M Gray, *Allegations of family violence and child abuse in family law proceedings: A pre-reform study*, (2007) AIFS at pp vii - viii
[44] L Laing, 'Children, young people and domestic violence', *Issues Paper No 2*, Australian Domestic and Family Violence Clearinghouse, 2000, p 2.
[45] K Rendell, Z Rathus and A Lynch, *An Unacceptable Risk: A report on child contact arrangements where there is violence in the family*, Women's Legal Service, Brisbane, 2002, p 51. I have made some minor alterations to the diagram.



The Abusive Parent

It is also clear from the literature that a person who has been violent to their spouse may well be a rigid and authoritarian parent – perhaps prone to disciplinarian conduct and inconsistent parenting driven by their own needs – rather than being a child-focussed parent. Bancroft and Silverman describe the 'stylistic problems' of abusive parents 'that may not rise to the level of abuse [but] can have profound consequences for children and for their development' including 'tendencies to authoritarianism, neglect, role reversal, and undermining the mother's parenting'.[46]

[46] L Bancroft and J Silverman, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics*, Sage Publications, 2002, p 52.

There is also the literature and jurisprudence on role-modelling. A key set of judgments were delivered in the mid 1990s where judges discussed this issue. The well-known statement of Baker J in *Patsalou* is an excellent example:

> The making of derogatory or denigrating remarks by one party to another and the inflicting of physical violence by one party on the other are, in my view, relevant matters to be taken into account in cases concerning the custody of and access to children. Any person who indulges in such behaviour, in my opinion, presents a poor role model indeed for children and his or her suitability as a custodial parent must be very much in doubt.[47]

We know that boys who have witnessed domestic violence are more likely to perpetrate it.[48] We also know that if the father re-partners there is a risk the children will witness violence in the new relationship.

Categorising Violence

One of the more controversial ideas in the research is that of differentiating types of family violence – creating categories. Some USA researchers use categories such as controlling coercive violence, violent resistance, situational common couple violence and separation instigated violence.[49] As Chisholm noted, although such categories may help us 'move away from stereotypes and simple assumptions', there is also the 'potential risk' 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'.[50]

There is a plethora of USA and Canadian literature which has started to develop ideas about appropriate parenting arrangements where there is violence and abuse – depending on the nature of the violence.[51] Altobelli argues that categories can be useful 'as a guide to crafting parenting arrangements' but recognises the risks:

> It needs to be recognised that there are inherent dangers in the differentiation process. Not only does accurate differentiation depend on the

[47] *Patsalou and Patsalou* [1995] FLC 92-580 at 81,752
[48] D Khachaturian, 'Domestic Violence and Shared Parental Responsibility: Dangerous Bedfellows', (1998-1999) 44 *Wayne Law Review*, 1745 at 1760.
[49] See for example, J Kelly and M Johnson, 'Differentiation among Types of Intimate Partner Violence: Research Update and Implications for Interventions', (2008) 46(3) *Family Court Review*, 476
[50] R Chisholm, *Family Courts Violence Review*, Commonwealth of Australia**,** November, 2009, p 39.
[51] P Jaffe, C Crooks and N Bala, *Making Appropriate Parenting Arrangements in Family Violence Cases: Applying the literature to identify promising practices*, Family, Children and Youth Section Research Report, Department of Justice, Canada, 2005 at p viii, accessed on 31 January, 2008 at <http://www.canada-justice.net/en/ps/pad/reports/2005-FCY-3/index.html> P Jaffe, J Johnston, C Crooks and N Bala, 'Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans' (2008) 46(3) *Family Court Review* 500, 'Emery's Alternative Parenting Plans (Child Custody Schedules)' accessed on 8 October, 2008 at http://www.emeryondivorce.com/parenting_plans.php

> existence of clear evidence but also on the skills and experience of the one undertaking the differentiation. The consequences of inaccurate differentiation are potentially serious. At one end of the spectrum there is the risk of endangering victims and their children. At the other end there is the danger of unnecessarily restricting parental contact with children.[52]

PPP Screening

Jaffe and others suggest that there three basic factors to be considered when determining how particular family violence may be relevant to a parenting arrangement; potency, pattern and primary perpetrator. '*Potency*' relates to the 'degree of severity, dangerousness, and potential risk of serious injury and lethality' – difficult matter to assess of course. The 'pattern' concerns whether the violence is 'part of *pattern* of coercive control and domination (rather than a relatively isolated incident)' – again complicated to decide, particularly if the evidence is thin or contradictory. The *primary perpetrator* issue is highlighted because some 'victims may tend to assume more blame, and abusers usually minimise or deny their conduct'. It is important for a decision-maker to ensure that they not lulled into believing or accepting a mutual fiction constructed by the parties.

Best Practice Principles

In March 2009 the Family Court of Australia promulgated the *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged* (BPP).[53] The BPP provide some guidance to judges in terms of procedures to follow, and the kinds of issues that might be covered in orders, but there is no guidance as to how to think about the family violence or make it relevant to the terms of the order. In fact it arguable that the best guidance given is in the suggested framework for orders to prepare a Family Report.[54]

Making Family Violence Relevant to Parenting Arrangements

I do not know what the best way forward is in this regard. The information which I have set out above demonstrates the complexity of this area of legal advice and decision-making which intersects so closely with the social sciences. It is a subject requiring more research and consultation in Australia. In my opinion, that should be done so that legislative or other guidance can be developed for use in the family law system in the future. However, it

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[52] T Altobelli, 'Family Violence and Parenting: Future directions in practice' (2009) 23 *Australian Journal of Family Law*, 194 at 206.
[53] Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes when Family Violence or Abuse is Alleged* (March 2009), <www.familycourt.gov.au/wps/wcm/resources/file/eb6f1303a17fe3c/FVBPPApril2009_V2.pdf> (accessed 17 February 2011).
[54] BPP, p 9

should not be assumed that the current Bill provides any answers to these problems.

Recommendation 3

That research and consultation be undertaken in relation to the development of legislative or other guidelines which will assist decision-makers and advisers in the family law system with ensuring that family violence is made relevant to parenting arrangements.

One important idea which has emerged is the use of specifically targeted family violence reports. These would be written by social scientists with a real expertise in the area and could be very helpful to decision-makers. However, it is a complex field of work – and not all experts will agree on the extent or relevance of violence in any family. Such reports may be particularly important in understanding the post-separation behaviour of the mother, analysing the impact of the violence on the children or its relevance to future parenting arrangements. The *Best Practice Principles* suggest that judges may consider 'whether an expert witness with expertise and clinical experience in family violence or abuse should be appointed to report on relevant matters'.[55]

Recommendation 4

That lawyers and judges receive training and information about the benefits and usefulness of family violence reports.

SPECIFIC PROVISIONS

Item 1 – definition of '*abuse*'

I am not sure that a new definition of 'abuse' was really required. Although there is always a lot of talk about definitions – and they are very important – it seems to me that it is not the definitions which hinder the courts in dealing with family violence. I note that s60CC(2)(b) already contained a reference to 'neglect' to which the definition section now gives a separate subsection – although it is now 'serious neglect'. I am not sure why this would assist the matter to be highlighted where it has been largely ignored in the past. I do, however, have a concern that naming 'neglect' like this may provide a handle for some fathers who will falsely allege or exaggerate circumstances of maternal neglect in response to allegations of violence.

[55] Accessed on 17th October, 2009 at http://www.familycourt.gov.au/wps/wcm/resources/file/ebf1380f96dab25/FVBPP_April2009.pdf

Item 8 – Definition of '*family violence*'

I think that the contextual paragraph that now forms the basis of the definition (s4BA(1)) is a much better provision than in the Exposure Draft. It is also better to have the list of concepts as a non-exhaustive list of examples rather than part of the definition itself.

However, 'exposure to family violence' should be seen as a form of family violence in itself. At present it only becomes relevant when applying the second primary consideration – the 'need to protect the child from ... being ... exposed to ... family violence'. This means that the set of examples used in s4AB(4) would become a set of examples within the set of examples of family violence. I think it could be said that the examples of being exposed to family violence seem to relate mainly to physical violence. Children are also exposed to family violence, for example, when they live with the more subtle effects of their mother's distress after verbal abuse. I think that the set of examples could be usefully expanded.

Recommendation 5

That 'exposure to family violence' be included as an example of family violence and that the examples of 'exposure to family violence' be expanded.

It is also essential to ensure that such 'exposure' can only committed by the perpetrator of the violence, to avoid the consequence of the mother / victim of the violence being blamed for her failure to protect as if that is somehow comparable to perpetrating the violence from which protection is needed. In case it is thought that such a misinterpretation could not occur in contemporary times it is instructive to consider the evidence given by the family report writer (the social scientist in the court room) in *Carlton and Carlton*.[56]

> … this assessment raises concerns about [Ms Carlton's] capacity in the past to protect her own children as well as Mr Carlton's older children from an abusive family environment. By exposing her children to on-going violence as well as denying the violence that was allegedly perpetrated on [one of the father's older sons] by his father, she appears to have been incapable of making discerning decisions that were child focused.[57]

As Altobelli FM said:

> Whilst I understand and accept the Family Consultant's concerns, the totality of the evidence paints a picture of the mother who has survived sustained family violence and who has moved on with her life with a dogged determination to focus on meeting the needs of the children. … it would be

[56] [2008] FMCAfam 440
[57] Para 104

> ironic indeed if the father, as the perpetrator of the family violence in respect of which the mother is being criticised for failing to protect her children, could in fact use this consideration in his favour in order to undermine the mother's capacity or attitude as regards parenting.[58]

Although the family report writer showed perception in relation to many matters relevant to the case, she almost blamed the mother for the violence of the father to which the children have been exposed. This exemplifies the need for increasing the use of family violence reports, as well as showing the need for care in how exposure to family violence is legislatively framed. The ALRC uses the language:

> ... Behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to [throughout the rest o the section][59]

Recommendation 6

Any definition of 'exposed to' needs to make it clear that it is the perpetrator, not the victim, of abuse that has exposed the child to the abuse.

Item 11 – s43

In respect of the amendment to s43, my first comment is that this section is almost never referred to – by anyone! It is, of course, important symbolically because of its theoretical overarching nature, however, in practice it has never been much used. That said – again my problem is with the prospective nature of the wording – the original and the new. I think that a better relevant principle would be:

> (ca) the need to take into account any family violence or abuse which has been experienced or may be experienced by family members

Recommendation 7

That s43(ca) be amended to read:

> ***the need to take into account any family violence or abuse which has been experienced or may be experienced by family members***

Item 17 – s60CC

[58] Para 105

[59] Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response*, Final Report, Sydney, 2010, p 280.

The list of lest interest factors is probably the most important issue under consideration in the proposed Bill from my perspective. Along with many others I consider the two tiers of best interests factors to be problematic and confusing and believe that the law would be much easier for everyone to understand if there were simply one list of factors as was the case under s68F(2). Also, for the reasons outlined in my presumption article, I consider that subsection s60CC(2)(a), together with s61DA and S60B(1)(a) become a package that diverts attention away from the importance and relevance of family violence. This is exacerbated by the link to the time provision created by reference back to the presumption in s65DAA. As I will explain, the introduction of s60CC(2A) will not assist with the problems.

I recommend the repeal of sections s60CC(2)(a) and s60B(1)(a). Although I doubt the government will take this step at this time, it is a reform that needs to be considered in the future. Certainly the fact that those sub-sections contain a clear philosophy about the importance or benefit of on-going relationships between children and both of their parents is part of the reason why the relevance of violence and abuse to decision-making has been obscured.

Recommendation 8

That subsections 60B(1)(a) and 60CC(2)(a) be repealed.

As I have already commented, this is compounded by the prospective nature of s60CC(2)(b). Although judicial officers do consider past violence and some discuss it at length in terms of considering the benefit to the child of a meaningful relationship with the abusive parent, the drafting makes the consideration of these issues complex and inconsistent.

For example in *Pilcher & Schneider* [2007] FMCAfam 1163[60] the judgment of the federal magistrate graphically illustrates a prospective interpretation of s60CC(2)(b) and how a decision can be reached not to rebut the presumption on the basis of family violence. The children were 2 and 4 years of age and both parents were professionals. The mother alleged that the father had been violent towards her and had a 'domineering personality'.[61] Her allegations included social isolation, controlling behaviour, denigration of her housekeeping and parenting and physical violence including pushing and having things thrown at her. The father denied the allegations. The federal magistrate stated that, in the circumstances of the hearing he could not make a finding either way.[62] He then identified that this could be a case for the use of s61DA(3):

[60] It must be acknowledged that this was a fairly early case. It must also be noted that this is a judgment from an interim hearing where Brown FM had heard no oral evidence and did not have any expert report before him.
[61] *Pilcher & Schneider* [2007] FMCAfam 1163 at [26].
[62] At [67].

69. It seems that it is for reasons of that kind that section 61DA(3) was inserted into the legislation, and it is likely to be pivotal in cases such as this one. However, for the reasons I have already provided, it seems clear to me that the discretion that is provided by the subsection is to be used within the broad thrust of the legislature's intention regarding the ***desirability of shared parental arrangements*** for the care of children.

70. ***Clearly I think considerations of family violence are prospective.*** They are intended to protect children from harm in the future***.*** As a result, I think, in this particular case, it is significant that the mother does not allege that she has been subjected to any violent behaviour since the parties separated, now in excess of 12 months ago. ...

72. For those reasons, I have come to the conclusion that ***the presumption in this matter is not rebutted*** at this stage. I do not think it would be appropriate in all the circumstances of this case for it to not to apply. ...

Having applied the presumption Brown FM then said he had to consider s60CC and s65DAA.

75. Turning to those considerations now, in terms of the potential for the children to be exposed to physical or psychological harm from being subjected to or exposed to abuse, neglect or family violence, in this case I do not think that either party would willingly neglect or abuse either child. ***Although it is possible that the parties had an unhappy relationship during their married life, I think the likelihood of the children being exposed to family violence in the future is much reduced. The parties now live in separate households.***

76. Accordingly, in this case I think the other primary consideration that the court is required to consider, the benefit of the children having a meaningful relationship with both of their parents, assumes some paramountcy.[63]

The shows the problem with the wording of s60CC(2A) which is only triggered if the judicial officer considers that there is an 'inconsistency in applying' both of the primary considerations. There will be cases in which some judicial officers see no inconsistency between these considerations despite a history of family violence which is likely to be relevant to formulating safe and appropriate parenting orders.

In *McCall and Clark*[64] the Full Court of the Family Court considered how to interpret the other primary consideration – the benefit of a meaningful relationship with both parents. It declared that there were three possible interpretations of s60CC(2)(a) – the 'present relationship approach', the 'presumption approach' and the 'prospective approach'.[65] The last approach involves framing orders 'to ensure the particular child has a meaningful relationship with both parents' [implicitly in the future].[66] The Court

[63] *Pilcher & Schneider* [2007] FMCAfam 1163 – my emphsis
[64] *McCall and Clark* [2009] FamCAFC 92
[65] At [118].
[66] ibid

concluded that the 'prospective approach' was to be preferred.[67] Therefore both primary considerations have taken on a prospective hue and it is this kind of structural outcome that leads me to suggest that past violence can easily be rendered invisible or irrelevant when interpreting Part VII.

As I have stated, in this legislation the sum of the parts runs deeper than may be apparent from the individual sections. The prospective interpretations that are applied by some judicial officers in respect of the primary considerations allow family violence to be rendered irrelevant if the evidence suggests that it is no longer occurring. Its emotional legacy – its on-going psychological impact - is simply invisible. I suggest that the inclusion of the new s60CC(2A) will not assist with the problems. This is because it relies on a finding of inconsistency between future meaningful relationships and protection from violence. Many judicial officers will see no inconsistency if the violence has apparently stopped now that the parents have separated.

The considerations relating to family violence and abuse need to be about taking past violence into account as well as about protecting children from future harm. They must in some way acknowledge of the emotional legacy of past violence on children in terms of future parenting arrangements.

S60CC(2A) will not address the identified problems. Women's Legal Service Brisbane has suggested a re-drafting of s60CC(3)(j) and I endorse this idea and draw largely from their submission in my recommendation.

Recommendation 9

a) There should not be two tiers of considerations.

b) Section 60CC(2A) should not be introduced.

c) If s60CC(2A) is to be introduced, the words 'If there is any inconsistency in applying the considerations set out in subsection (2)' should be deleted so that it simply reads:

> ***the court is to give greater weight to the consideration set out in paragraph (2)(b).***

d) A new subsection along these lines should be introduced as a best interest factor:

> ***Any family violence involving the child or a member of the child's family or household including a consideration of:***
>
> ***i. the nature and seriousness of the violence***
> ***ii. how frequently and recently it (last) occurred***

[67] At [119].

iii. any physical, psychological, sexual and emotional harm caused

iv. the impact of such harm on the child and any member of the child's family or household

(I am sure that an improved list could be prepared after appropriate research and consultation.)

Item 18 – s60CC(3)(c)

The re-introduction of this subsection – even though differently worded from the current Act – is the greatest error of judgment in the Bill. The proposed section is simply too similar to the repealed one – which was very problematic. The Exposure Draft recommended the full repeal of this sub-section and ss60CC(4) and (4A). This is the only satisfactory way to proceed with this part of the reform. This unexpected and unexplained change from the Exposure Draft to the Bill exemplifies the problems with the lack of transparency in the reform process. It is not possible to identify why some of these ideas were returned in this sub-section.

I am particularly concerned by an inconsistency between the Bill and the Explanatory Memorandum. At paragraph 35 the EM suggests that s60CC(3)(ca) will 'require the court to consider the extent to which each parent has *facilitated, or failed to facilitate*, the other parent doing these things …'. That is not what s60CC(ca) of the Bill says at all. If it is intended to re-introduce that idea nothing may be gained from any of these changes at all.

Recommendation 10

a) Paragraph 60CC(3)(c) and (ca) should not be introduced.

b) The concept canvassed in para 35 of the EM is dangerous to whole reform process and must not proceed.

There is an argument that some of the ideas captured in the new s60CC(3)(c) may assist in acknowledging the importance of the role of the past primary carer of the child. I suggest that the relevance of this role to decision-making about parenting arrangements has also been rendered somewhat invisible by the prospective focus of Part VII since 2006. However, if this issue is to be addressed, it should not be buried in s60CC(3)(c) where it is at risk of being misinterpreted and confused with other meanings.

It is interesting to note that the American Law Institute, a prestigious association of elite legal scholars and publishers of *Principles of the Law of Family Dissolution*, have recently embraced the *approximation rule* 'in which postdivorce parenting arrangements would approximate parenting

involvement in the marriage'[68]. Some commentators find merit in this idea[69] while others point out that families undergo many changes after a divorce and the quantity of parenting time does not predict the quality of the parent-child relationship.[70] English commentator, Julie Wallbank, advocates the recognition of 'parental investment'.[71] She suggests that 'both the relative investments and types of responsibilities assumed by mothers and fathers ... prior to the relationship breakdown' should be taken into account in decision-making about children's arrangements post separation.[72] According to Wallbank, this proposal is not simply about creating arrangements that mirror the pattern of care from the intact family, but rather that the 'responsibilities which were assumed during the relationship should provide a starting point for negotiations'.[73]

Recommendation 11

That research be undertaken into the advantages and disadvantages of a best interest factor that specifically refers to the pre-separation roles of each of the parents.

Item 22

I consider this provision to be unnecessary. Although I understand the idea behind ensuring that advisers talk to parents about the best interests of children – I am not sure that this obvious requirement of professionals in the family law system needs to be legislated. One of the very clear messages of all of the reviews and evaluations is that the legislation is too complex and misunderstood by the community. Prescribing longer and longer 'scripts' that professionals are required to rehearse to parents will not make the law more comprehensible to them.[74] These required statements stultify the nature of professional advice and detract from the nuanced tenor required when providing advice in the real dynamics of a family law interview.

Repeating the primary considerations in this section does not even elucidate how to deal with the issue central to these reforms – family violence. If any further incursion into professional discretion is warranted, it should be for

[68] R Emery, R Otto and W O'Donohue, 'A Critical Assessment of Child Custody Evaluations', (2005) 6(1) *Psychological Science in the Public Interest,* 1 at 17.
[69] The authors of the above work.
[70] R Warshak, 'Punching the Parenting Time Clock: The approximation rule, social science, and the baseball bat kids', [2007] 45 *Family Court Review*, 600
[71] J Wallbank, '(En)gendering the Fusion of Rights and Responsibilities in the Law of Contact', in J Wallbank, S Choudry and J Herring (eds), *Rights, Gender and Family Law*, Routledge, 2010, p 110
[72] ibid
[73] Ibid, p 114
[74] I discussed my concern with the s63DA 'script' in Z Rathus, 'Shifting the Gaze: Will past violence be silenced by a further shift of the gaze to the future under the new family law system?' (2007) 21 *Australian Journal of Family Law* 87

advisers to explain to parents about the relevance of family violence to parenting matters and encourage disclosure of these matters.

Recommendation 12

a) s60D should not be enacted. I also recommend that s63DA be repealed.

b) If some aspects of s60D are to go ahead, they should be amalgamated with s63DA. There should not be two sections with two different lists of mandatory statements required of advisers.

THE TIME PROVISION – S65DAA

The Bill proposes no amendment to s65DAA and, in some ways, that demonstrates the failure of this Bill to really grapple with the underlying problems of the current legislation. It seems clear from all the research that shared time arrangements are being implemented in families with a history of family violence and child abuse – even families where one of the parents holds current safety concerns.[75] I have argued why this occurs in my presumption article.

One of the reasons I set out is the directionless and opaque guidance about shared time which is provided by s65DAA. It hedges around the real issues hinting at possible contra-indicators – for example – "the parents' current and future capacity to implement" a shared care time arrangement. This seems to be an oblique way of saying that shared time may not be reasonably practicable where there is high conflict. There is no mention of family violence in the list. Perhaps this is because when drafted it was thought that in cases involving family violence or abuse the presumption would have been rebutted under s61DA(2) and s65DAA would have no role. But that is not how the cases have been decided, as I explained above.

Given this reality I believe that it is critical that the government reappraise s65DAA in the context of this review. As I have already said – it should be disconnected from its direct link to the presumption. But I also think it should generally trend towards *exclusion* of families with a history of violence and abuse from shared care. Every case would still be decided on its own facts, of course. In my article I suggest a more positive drafting that would better protect children who have lived with violence:

> An equal time order (or substantial and significant time order) should only be made where:

[75] R Kaspiew, M Gray, R Weston, L Moloney, K Hand and L Qu, *Evaluation of the 2006 Family Law Reforms*, Australian Institute of Family Studies, 2009, p 270

- ◊ The parents live sufficiently close to each for the children to attend ordinary daily activities from both homes; and

- ◊ The parents communicate sufficiently effectively to implement a shared care time arrangement without regular conflict; and

- ◊ There is no past or present serious family violence or conflict.

Perhaps a drafting model that may be more in tune with the apparent approach adopted in the Bill would be:

> If the court is considering making an equal time (or substantial and significant time) order, it must have regard to the following:
>
> - ◊ Whether the parents live sufficiently close to each for the children to attend ordinary daily activities from both homes; and
>
> - ◊ Whether the parents communicate sufficiently effectively to implement a shared care time arrangement without regular conflict; and
>
> - ◊ Whether there is any past or present family violence, abuse or conflict.

Recommendation 13

If there is to be any mention of specific time outcomes, then s65DAA should be re-drafted to become a provision which sets out the pre-requisites, or at least factors to have to regard to, before making an order for substantially shared care time.