LEGISLATIVE ASSEMBLY
FOR THE AUSTRALIAN CAPITAL TERRITORY

STANDING COMMITTEE ON JUSTICE AND COMMUNITY SAFETY
Mrs Giulia Jones MLA (Chair), Ms Bec Cody MLA (Deputy Chair), Ms Elizabeth Lee MLA, Mr Chris Steel MLA

Inquiry into Domestic and Family Violence—Policy approaches and responses

Submission No. 1
Family Court of Australia

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FAMILY COURT OF AUSTRALIA

CHAMBERS OF THE HONOURABLE DIANA BRYANT AO
CHIEF JUSTICE

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22 June 2017

Mrs Giulia Jones
Chair, Standing Committee on Justice and Community Safety
Legislative Assembly for the Australian Capital Territory
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BY EMAIL to committees@parliament.act.gov.au

Dear Ms Jones,

RE: Inquiry into Domestic and Family Violence — Policy Approaches and Responses

Thank you for your letter received on 16 June 2017.

The Family Court of Australia has recently made a submission to the Commonwealth Parliamentary Inquiry into a Better Family Law System to Support and Protect Those Affected by Family Violence. I attach that submission for the Committee's reference.

The Family Court does not propose to make a new submission to the ACT Legislative Assembly's Inquiry and instead we ask that you have reference to the submission made to the federal Parliamentary Inquiry.

Yours sincerely

Diana Bryant AO
Chief Justice

FAMILY COURT OF AUSTRALIA

PARLIAMENTARY INQUIRY INTO A BETTER FAMILY LAW SYSTEM TO SUPPORT AND PROTECT THOSE AFFECTED BY FAMILY VIOLENCE

SUBMISSION BY THE FAMILY COURT OF AUSTRALIA TO THE HOUSE OF REPRESENTATIVES STANDING COMMITTEE ON SOCIAL POLICY AND LEGAL AFFAIRS

3 May 2017

Introduction

1. The Family Court of Australia ('the Family Court' or 'the Court') welcomes the opportunity to contribute to the Parliamentary Inquiry into a Better Family Law System to Support and Protect Those Affected by Family Violence.

2. The aim of the Court's submission is to provide the Standing Committee with background information relevant to its inquiry. To that end, we will respond to each of the Terms of Reference, though some more briefly than others.

Term of Reference 1: how the family law system can more quickly and effectively ensure the safety of people who are or may be affected by family violence, including by:

a. facilitating the early identification of and response to family violence; and

b. considering the legal and non-legal support services required to support the early identification of and response to family violence

3. Together with the Federal Circuit Court, the Family Court has implemented a Family Violence Plan ('the Plan')[1] to respond to clients affected by family violence. The aim of the Plan is to effectively address family violence issues before the court and to provide a safe environment in court for all parties. The Plan encompasses the administration of the court, judicial decision-making and the work of legal practitioners and service providers within the family law system. The priority areas and goals are:

- Area 1: Information and communication
  - Goal: Make the courts' diverse client base, stakeholders and system participants aware of the courts' responses to family violence.
- Area 2: Screening and risk assessment
  - Goal: Adopt best practice risk assessment tools to better address risks to safety or wellbeing for families who are separating or separated.
- Area 3: Operational processes, including safety at court
  - Goal: Ensure the courts' physical layout, processes and practices support client safety while on the premises.
- Area 4: Staff awareness and capability
  - Goal: Give staff the awareness, skills and resources required to ensure all persons experiencing family violence are dealt with appropriately and their safety assured.

[1] *Family Violence Plan 2014–16: Family Court of Australia and Federal Circuit Court* (31 December 2015) Commonwealth of Australia <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/fv-plan>.

- Area 5: Community engagement
  - Goal: Understand the unique issues for particular communities in relation to family violence and use this information to inform administrative practices

4. The Family Court and the Federal Circuit Court are currently in the process of updating the Plan.

5. The courts have also developed Family Violence Best Practice Principles ('the Best Practice Principles') (Annexure A).[2] These are maintained by the joint Family Court–Federal Circuit Court Family Violence Committee. After the *Family Law Act 1975* (Cth) ('the Act') was significantly amended in 2006, the Best Practice Principles were developed in order to assist decision-makers. Later, the Principles became a tool aimed more broadly at providing practical guidance to courts, legal practitioners, service providers and litigants in circumstances where issues of family violence or child abuse arise. They contribute to the courts' commitment to protecting litigants and children from harm resulting from family violence and abuse and are applicable in all cases involving family violence or child abuse (or the risk of either) in proceedings before courts exercising jurisdiction under the Act.

6. Where an allegation of child abuse or family violence is made in Family Court proceedings a 'Notice of Child Abuse, Family Violence or Risk of Family Violence' is required to be filed pursuant to s 67Z of the Act and r 2.04D of the *Family Law Rules 2004* (Cth) ('the Rules'). Upon receipt of this notice, the Registry Manager will notify the relevant child welfare authority pursuant to sub-s 67Z(3) and sub-r 2.04E(4). In the Federal Circuit Court a 'Form 4 – Notice of Risk' must be filed with an application for a parenting order.[3] As for the Family Court, where a Notice of Risk involves child abuse or risk of child abuse the Registry Manager will notify the relevant child welfare authority.[4]

7. Cooperation and information sharing with relevant state courts and authorities is of course important to facilitate early identification and response to family violence. This is discussed in more detail under Term of Reference 6.

8. The Family Court has also had in place for a significant period of time the Magellan program, a streamlined process for the most serious cases alleging child abuse. The program involves early and rigorous case management, including making appropriate interim orders to protect the child, obtaining information from child welfare authorities, and the appointment of an independent children's

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[2] *Family Violence Best Practice Principles* (December 2016) Commonwealth of Australia <http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/family-violence-best-practice-principles>.

[3] *Federal Circuit Court Rules 2001* (Cth) r 22A.02.

[4] *Family Law Act 1975* (Cth) sub-s 67Z(3).

lawyer. This program has been assessed as being a successful means of responding to allegations of serious child abuse.[5]

9. In the context of child-related proceedings, risk assessments are conducted by family consultants appointed by the Court. Family consultants have relevant qualifications and experience in child and family issues after separation and divorce. Risk assessment methods are continuously reviewed and improvements considered. An example of this is the proposed implementation of a pre-appointment questionnaire based on research conducted on risk assessment practices overseas. This has been successfully trialled in Melbourne and Brisbane, and a decision has been made to roll this out nationally.

10. A further initiative of note is the Family Advocacy Support Service ('FASS'). The Commonwealth Attorney General has funded legal aid offices to establish enhanced services in family law registries nationally, in order to provide support in cases where there are allegations of family violence. Using these funds, Victoria Legal Aid has established FASS, which commenced at the Melbourne Registry on 1 May 2017. FASS consists of:

    - an information referral officer to be located on ground level of the court building;
    - additional duty lawyer services to be delivered by the Women's Legal Service Victoria and Victoria Legal Aid; and
    - the presence of the Men's Referral Service and Safe Steps (which supports women).

    We believe that similar services are being planned in other states.

11. In terms of the amount of time that matters take to come on for hearing, it must be noted that current resourcing limits the capacity of the Court to hear matters more quickly. The Court acknowledges that it is unacceptable for matters involving family violence to be maintained in the family law system for a long period of time, as this increases the risk of conflict between parties.

Term of Reference 2: the making of consent orders where there are allegations or findings of family violence, having regard to the legislative and regulatory frameworks, and whether these frameworks can be improved to better support the safety of family members, as well as other arrangements which may be put in place as alternative or complementary measures

12. The Rules provide for applications for consent orders to be made in two ways. Where there are current proceedings before the Court, consent orders can be

[5] Daryl J. Higgins, *Cooperation and Coordination: An evaluation of the Family Court of Australia's Magellan Case Management Model* (October 2007) Australian Institute of Family Studies.

made on an oral application or by lodging a draft consent order.[6] Where there are no current proceedings, consent orders may be sought by lodging an 'Application for Consent Orders'.[7]

13. Where consent orders are sought in a current proceeding each party must advise the Court whether a child or a party to the proceedings has been or is at risk of being subjected or exposed to family violence, and how the consent orders deal with family violence issues.[8] The Court retains discretion about whether or not to make the consent orders as sought, or to make other orders. This discretion will be exercised considering the paramount consideration in parenting proceedings—the best interests of the child[9]—and the need to protect the child from abuse, neglect or family violence.[10] For financial or property proceedings, the Court will not make an order unless it is satisfied in all the circumstances that the orders are just and equitable.[11]

14. The requirements of making a parenting order that is in the best interests of the child or a financial order that is just and equitable apply equally where consent orders are sought by an initiating Application for Consent Orders. These applications are usually considered by a registrar of the Court. The registrar can refer the matter to a judge where appropriate, including to deal with family violence issues. Internal guidelines for registrars draw attention to the decision in *T & N*[12] where Moore J declined to make consent orders that did not take a history of family violence into account. Registrars are also guided by the Best Practice Principles, which include relevant considerations for deciding whether or not to make a consent order where there is an allegation of family violence. These considerations include:

    - the seriousness of the allegations;
    - the extent of the involvement of the child in any incidents of violence or abuse;
    - how the orders address the violence and abuse issues;
    - where provision is made for supervision, the matters referred to in Part F (the final hearing) of the Best Practice Principles;
    - whether there is any reason to believe the orders would be used to continue to control or maintain contact with the parent with whom the child lives;

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[6] *Family Law Rules 2004* sub-r 10.15(1)(a).

[7] Ibid sub-r 10.15(1)(b).

[8] Ibid r 10.15A.

[9] *Family Law Act 1975* s 60CA.

[10] Ibid s 60CC.

[11] Ibid sub-s 79(2).

[12] (2003) FLC 93-172.

- whether there are other issues such as mental illness, drug and alcohol abuse or serious parental incapacity which would present a risk to the child;
- whether the parties have had legal advice;
- whether the Court can be satisfied that the parties have agreed to the orders without pressure;
- whether the party who alleged the violence or abuse is genuinely satisfied the orders do not present an unacceptable risk to the child or any other person; and
- if an independent children's lawyer has been appointed, whether he or she agrees to the consent orders.

15. The making of consent orders can be of considerable benefit to the parties and children, as it saves costs and the need for parties to appear in court. The Court is also aware that at times consent orders may be agreed by a party for reasons other than the best interests of the child, for example fear of further violence or lack of financial resources to litigate.[13] This is addressed in the process for making consent orders set out in the legislation and in the above considerations contained in the Best Practice Principles.

16. Applications for consent orders comprise approximately two-thirds of filings in the Family Court.[14] As such the ability to deal with these efficiently bears significantly on the resources of the Court. Any legislative changes or alternative measures to address family violence in consent order applications may have a significant impact on the workload of the Court. Any such measures would need to include the provision of sufficient funding for their implementation.

Term of Reference 3: the effectiveness of arrangements which are in place in the family courts, and the family law system more broadly, to support families before the courts where one or more party is self-represented, and where there are allegations or findings of family violence

17. In proceedings in the family courts (both in cases where family violence is alleged and cases where it is not) parties, both mothers and fathers, appear unrepresented from time to time. Duty lawyers supplied by legal aid assist with advice to the extent possible and parties may have accessed advice from community legal centres or Women's Legal Services. Unrepresented parties are generally at a disadvantage in proceedings which concern them.

[13] Richard Chisholm, *Family Courts Violence Review* (27 November 2009), 86.

[14] Family Court of Australia, *Annual Report 2015–16* (2016) Commonwealth of Australia.

18. In *Re F*, the Full Court of the Family Court (Nicholson CJ, Coleman and O'Ryan JJ) set out the obligations of a trial judge to an unrepresented party appearing in a case.[15] The judge is required:

- to explain the manner in which the trial is to proceed , the order of witnesses and the right which he or she has to cross examine the witnesses;
- to explain procedures relevant to the litigation;
- to explain any proposed changes to procedure and perhaps the undesirability of interposition of witnesses and his or her right to object to that course;
- to provide advice that the party has the right to object to inadmissible evidence and inquire whether he or she so objects;
- if a question is asked or evidence is sought to be tendered in respect of which the litigant in person has a possible claim of privilege, to inform the litigant of his or her rights; and
- to attempt to clarify the substance of the submissions of a litigant in person.

19. Further, where the interests of justice and the circumstances of the case require it a judge may:

- question witnesses;
- draw attention to the law;
- identify applications or submissions which ought to be put to the court;
- suggest procedural steps that may be taken by a party; and
- clarify the particulars of the orders sought by a litigant in person or the bases for such orders.

20. In addition Division 12A of Part VII of the Act contains principles for conducting child-related proceedings. The five principles are themselves contained in s 69ZN, and are as follows:

> ...
>
> *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.

[15] *Re F* (2001) FLC 93-072.

Principle 3

(5) The third principle is that the proceedings are to be conducted in a way that will safeguard:

(a) the child concerned from being subjected to, or exposed to, abuse, neglect or family violence; 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.

21. In applying these principles, the judge is required, inter alia, to ask each party:

- whether that party considers that the child concerned has been, or is at risk of being, subjected or exposed to abuse, neglect or family violence; and
- whether the party considers that he or she, or another party to the proceedings, has been or is at risk of being subjected to family violence.

The court must then take the procedural steps set out in the rest of s 69ZQ(1) of the Act.

22. Finally, s 69ZX deals with the court's general duties and powers relating to evidence including, inter alia, the power to limit or not allow cross examination of a particular witness.

THE PROTECTION OF VULNERABLE WITNESSES

23. In so far as Term of Reference 3 is directed towards the issue of cross-examination of an (alleged) family violence victim by their self-represented former partner, the (alleged) perpetrator of said family violence, we will refer to witnesses in this position as 'vulnerable witnesses'. These people are usually women but will sometimes be men. We note that if legal aid was available to all parties in family law cases involving allegations of violence, this issue would be resolved. That is a funding matter for government.

24. The joint Family Court–Federal Circuit Court submission to the Victorian Royal Commission into Family Violence considers some of the issues pertaining to cross-examination of vulnerable witnesses (see pages 13–14, Annexure B). We endorse those comments.

25. Cross-examination of vulnerable witnesses is a complicated issue which raises issues of procedural fairness to both parties. The nature of family law litigation means that a case may involve a trial about parenting issues as well as property issues with allegations of violence, mental health issues, substance abuse and claims about new partners of both parents, as well as contested facts in their property dispute. The capacity to challenge evidence where it is contested is a fundamental part of our legal system and integral to the capacity of the judge to make findings where evidence is in dispute. Evidentiary rules provide for less weight to be given to evidence where it cannot be tested. Policy and legislative change is a matter for government but care must be taken to ensure that any change does not involve unintended consequences that disadvantage those who it seeks to protect. Any intended change might best be implemented by piloting a proposal to ascertain what is workable and effective.

26. The Best Practice Principles, discussed above under Term of Reference 1, now include a section on 'Vulnerable witnesses and managing the courtroom' (see pages 16–17, Annexure A) which details the legislative protections available to vulnerable witnesses.

27. Protection for vulnerable witnesses in family law matters is currently available through provisions of the Act, the Rules and the *Evidence Act 1995* (Cth) ('the Evidence Act'). The relevant provisions will be discussed in turn.

The Family Law Act

Parenting matters

28. Part VII of the Act governs decision-making in relation to children in parenting matters. Division 12A of that part contains the principles for conducting child-related proceedings, which include that the court is to actively direct, control and manage the conduct of proceedings (sub-s 69ZN(4)); and is to conduct proceedings in a way that will safeguard the child the subject of the proceedings, as well as the parties, against family violence (sub-s 69ZN(5)).

29. Section 69ZX outlines the court's general duties and powers relating to evidence and provides that the court can limit, or not allow, cross-examination of a particular witness (sub-s 69ZX(2)(i)). The court can also enable vulnerable persons to give testimony via video or in closed court (sub-s 69ZX(1)(c)). Sub-section 69ZX(3) also enables the court to receive into evidence the transcript of evidence in any other proceedings before the court or another court or tribunal; draw any conclusions of fact from the transcript that it thinks proper; and adopt

any of the recommendations, findings, decisions or judgements of any of those courts, persons or bodies.

All matters

30. Part XI of the Act pertains to evidence and procedure.

31. Division 1 of that Part concerns general matters of evidence and procedure. Sub-section 101(1) provides that the court shall forbid the asking of, or excuse a witness from answering, offensive, scandalous, insulting, abusive or humiliating questions, unless it is essential in the interests of justice that the question be answered. Sub-section 101(2) provides that the court must forbid the examination of a witness that it regards as oppressive, repetitive or hectoring, or excuse a witness from answering questions asked during such an examination, unless it is essential in the interests of justice for the examination to continue or for the questions to be answered.

32. Division 2 of Part XI contains provisions relating to the use of video link, audio link, or other means of giving evidence. Section 102D provides that the court may, for the purposes of any family law proceedings, direct or allow a person to appear before the court by video or audio link, or other appropriate means. This power may be exercised on application of a party to the proceedings, or on the court's own initiative.

The Family Law Rules

33. Rule 15.75 of the Rules provides that a transcript of a hearing or trial may be received in evidence as a true record of the hearing or trial.

The Evidence Act

34. Division 3 of Part 2.1 of the Evidence Act sets out the general rules about giving evidence (ss 26 to 36). Some particular provisions to note are:

- *Section 41 (Improper questions)*
  This section requires the court to disallow a question, or inform the witness that the question need not be answered, if the court is of the opinion that the question is misleading or confusing; is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or has no basis other than a stereotype.

- *Section 81 (Hearsay and opinion rules: exception for admissions and related representations)*
  This section sets out the circumstances in which the hearsay and opinion rules do not apply.

Term of Reference 4: how the family law system can better support people who have been subjected to family violence recover financially, including the extent to which family violence should be taken into account in the making of property division orders

35. The Family Court is mindful of the doctrine of the separation of powers and the fact that the policy of the law is within the exclusive province of government. The question of how the family law system can better support people who have been subjected to family violence to recover financially is a matter of policy. It is thus not appropriate for the Court to comment on the substance of Term of Reference 4.

36. We will however note that in the case of *Kennon & Kennon* (1997) FLC 92-757, the Full Court of the Family Court (Fogarty, Lindenmayer and Baker JJ) held that family violence is a relevant factor in determining a party's contribution under s 79 of the Act. In order to satisfy the *Kennon* criteria, a party must prove (on the balance of probabilities) that they were subject to a violent 'course of conduct' during the marriage, which had a 'significant adverse impact' upon the party's contributions or, in the alternative, which made those contributions 'significantly more arduous'. It is important to keep in mind that the property provisions of the Act are to take account of contributions and other matters in s 75(2), sometimes referred to as 'the needs and the means' of the parties. They include s 75(2)(o): 'any fact or circumstance which, in the opinion of the Court, the justice of the case requires to be taken into account'. The Act, at least as presently drafted, does not punish behaviour (of either party) or compensate for injuries. Remedies for this are to be found in the criminal law and tort law.

Term of Reference 5: how the capacity of all family law professionals—including judges, lawyers, registrars, family dispute resolution practitioners and family report writers—can be strengthened in relation to matters concerning family violence

37. Judges are appointed to the Family Court because of their capacity to deal with family law matters by reason of their training, experience or personality.[16]

38. The Court supports continued professional development for judicial officers, family consultants and staff, and endorses the comments regarding judicial education made by the joint Family Court–Federal Circuit Court submission to the Victorian Royal Commission into Family Violence (see pages 19–20, Annexure A).

39. Judicial officers and family consultants are provided with the opportunity to participate in relevant professional development conferences and seminars. The National Judicial College of Australia has developed a family violence course to

[16] *Family Law Act 1975* sub-s 22(2)(b).

be provided to judges based on a family violence training package provided by the Court.

40. Further to this, the Court recognises the importance of initiatives such as the Family Violence Bench Book and Best Practice Principles. These provide, and will continue to provide, an important and current resource to strengthen the capacity of family law professionals in matters relating to family violence.

41. In relation to administrative staff, the Court has developed a comprehensive eLearning family violence package to strengthen the awareness, knowledge and skills of staff when dealing with clients affected by family violence.

42. The capacity of the courts to efficiently dispose of the work that comes to it in a timely way is integral to a fair and effective system of justice. The longer it takes for a matter to be given a hearing and judgment, the more emotional and financial toll there is on the litigants. This is particularly so in matters involving family violence where a controlling partner can at least seemingly continue to exert influence by virtue of unresolved proceedings. It is vitally important that the courts have adequate resources to enable them to deal with cases in a timely way. At present it could not be said that this is always happening and the judges are acutely aware of that.

Term of Reference 6: the potential for a national approach for the administration and enforcement of intervention orders for personal protection, however described

43. The issue of fragmentation between the federal family law system and the state child protection and protective order regimes is an issue that has received significant attention in recent years.[17]

44. In this respect, the Court notes and endorses the following recommendation by the Family Law Council in the *Interim Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (June 2015):

> **Recommendation 5**
>
> The Attorney-General raise the following matters at the COAG level:
>
> a) The development of a national database of court orders to include orders from the Family Court of Australia, the Family Court of Western Australia,

[17] See, eg, Richard Chisholm, *Information-Sharing in Family Law & Child Protection: Enhancing Collaboration* (Report, Commonwealth of Australia, 2013); Richard Chisholm, *The Sharing of Experts' Reports between the Child Protection System and the Family Law System* (Report, Commonwealth of Australia, 2014); Family Law Council, *Interim Report on Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Interim Report, Commonwealth of Australia, June 2015); Family Law Council, *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems* (Final Report, Commonwealth of Australia, June 2016).

the Federal Circuit Court of Australia, state and territory children's courts, state and territory magistrates courts and state and territory mental health tribunals, so that each of these jurisdictions has access to the other's orders.

b) The convening of regular meetings of relevant stakeholder organisations, including representatives from the children's courts, child protection departments, magistrates courts, family courts, legal aid commissions and Attorney-General's Departments, to explore ways of developing an integrated approach to the management of cases involving families with multiple and complex needs.

c) Amending the prohibition of publication provisions in state and territory child protection legislation to make it clear that these provisions do not prevent the production of reports prepared for children's court proceedings in family law proceedings.

d) The entry into Memoranda of Understanding by state and territory child protection agencies and the federal family courts to address the recommendations of Professor Chisholm's reports.

e) The co-location of state and territory child protection department practitioners in federal family court registries.

f) The development of dual competencies for Independent Children's Lawyers to achieve continuity of representation for children where appropriate.

45. In relation to recommendation 5(e) above, we note that the Melbourne and Dandenong registries of the family law courts, as well as the Family Court of Western Australia, have established co-location initiatives involving the placement of child protection department practitioners within the family law registries in order to support the interface between the two systems. The initiative has been highly successful. As with so many other areas, however, expansion into the other states and territories will require additional funding.

Conclusion

46. As mentioned in the introduction to this submission, our intention has been to provide information that will be of use to the Standing Committee in its Inquiry. We are hopeful that this aim has been achieved.

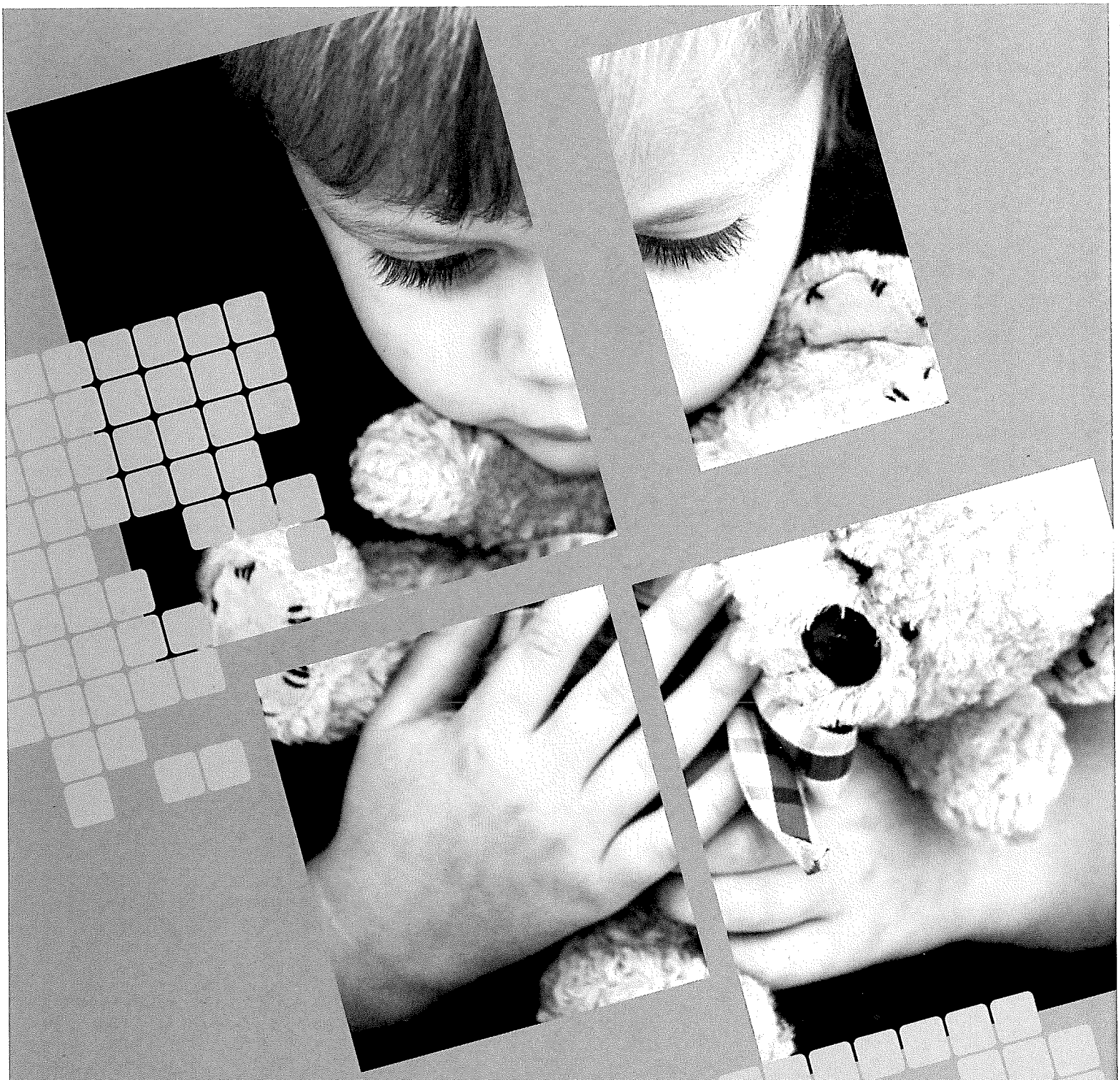
47. We note that Chief Justice Diana Bryant AO is currently scheduled to appear at a public hearing on 20 June 2017. Her Honour looks forward to further assisting the Standing Committee in that context if it is possible to do so.

FAMILY COURT OF AUSTRALIA

PARLIAMENTARY INQUIRY INTO A BETTER FAMILY LAW SYSTEM TO SUPPORT AND PROTECT THOSE AFFECTED BY FAMILY VIOLENCE

ANNEXURE A

Family Violence Best Practice Principles



FAMILY VIOLENCE BEST PRACTICE PRINCIPLES

EDITION 4
DECEMBER 2016

FAMILY COURT OF AUSTRALIA
FEDERAL CIRCUIT COURT OF AUSTRALIA

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FOREWORD – FOURTH EDITION

FAMILY VIOLENCE BEST PRACTICE PRINCIPLES

It is with great pleasure that we release the fourth edition of the *Family Violence Best Practice Principles*.

Protecting families, and particularly children, who are affected by family law proceedings from the effects of family violence is a priority for the Family Court and the Federal Circuit Court.

The revised *Family Violence Best Practice Principles* assists in this critically important task by providing a checklist of matters to which judges, court staff, legal professionals and litigants may wish to refer at each stage of the case management process in disputes involving children.

This publication was first released by the Attorney-General in March 2009. A revised version, encompassing both the Family Court and the Federal Circuit Court, was launched in July 2011. A third edition came into effect in June 2012 to take into account amendments made by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth). It was again revised in April 2013 as a result of the Federal Circuit Court of Australia Legislation Amendment Bill 2012.

The latest amendments highlight the fact that victims of family violence are often traumatised and vulnerable witnesses – and explain the various means of protection available to judges hearing those cases. The updates reflect the extensive powers of the judiciary in regard to the cross-examination of vulnerable witnesses by alleged perpetrators of family violence.

These updates follow a number of reports and events related to family violence, including: the Family Law Council's final report on *Families with Complex Needs and the Intersection of the Family Law and Child Protection Systems*; Women's Legal Services Australia's *Safety First in Family Law*; COAG's *Third National Plan to Reduce Violence Against Women and Their Children* and the COAG National Summit on Reducing Violence against Women and their Children, held in Brisbane in October 2016.

The courts are committed to improving the way in which they deal with issues relating to family violence. The enhanced focus on cross-examination of vulnerable witnesses is an important improvement in this area. We thank the Family Violence Committee for their ongoing commitment to these best practice principles.

We hope you find the revised *Family Violence Best Practice Principles* a practical and useful guide to responding to family violence or abuse when it arises in children's cases.

December 2016

Diana Bryant AO,
Chief Justice,
Family Court of Australia

John Pascoe AC CVO,
Chief Judge,
Federal Circuit Court of Australia

FAMILY VIOLENCE COMMITTEE

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Registrar Philip Cameron, Family Court of Australia

Diane Lojszczyk, Family consultant, Family Court of Australia and Federal Circuit Court of Australia

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BEST PRACTICE PRINCIPLES FOR USE IN PARENTING DISPUTES WHEN FAMILY VIOLENCE OR ABUSE IS ALLEGED

Introduction

These Best Practice Principles are designed to provide practical guidance to courts, legal practitioners, service providers, litigants and other interested persons in cases where issues of family violence or child abuse arise.

After significant changes were made to the *Family Law Act 1975* (Cth)[1] in 2006, the Family Court introduced a suite of Best Practice Principles[2] to assist decision makers. It was later recognised that the Best Practice Principles could be a valuable tool for all individuals and agencies involved in these cases. The notion that the Best Practice Principles could assist a wider audience was informed by a series of reports[3] in which recommendations were made about how courts exercising jurisdiction under the FLA and others should address issues of family violence and abuse.

Statement of principle

These Best Practice Principles have been developed by the Family Court of Australia and the Federal Circuit Court of Australia. They contribute to furthering the courts' commitment to protecting children and any person who has a parenting order from harm resulting from family violence and abuse.

The Best Practice Principles recognise:

- the harmful effects of family violence and abuse on victims
- the place accorded to the issue of family violence in the FLA, and
- the principles guiding the Magellan case management system for the disposition of cases involving allegations of sexual abuse or serious physical abuse of children.

The Best Practice Principles are applicable in all cases involving family violence or child abuse or the risk of family violence or child abuse in proceedings before courts exercising jurisdiction under the FLA.[4] They provide useful background information for decision makers, legal practitioners and individuals involved in these cases.

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1 The words "Family Law Act 1975 (Cth)" will be abbreviated to "FLA".

2 First edition published by the Family Court of Australia on 6 March 2009, second edition published by the Family Court and Federal Circuit Court on 20 July 2011, third edition published October 2012.

3 Professor Richard Chisholm, "Family Courts Violence Review" (27 November 2009); ALRC/NSWLRC Consultation paper, "Family Violence: Improving Legal Frameworks" (November 2009); Australian Institute of Family Studies, "Evaluation of the 2006 Family Law Reforms" (December 2009); Family Law Council, "An Advice on the Intersection of Family Violence and Family Law Issues" (December 2009); Jennifer McIntosh, Bruce Smyth, Margaret Kellaher, Yvonne Wells & Caroline Long, "Post-Separation Parenting Arrangements and Development Outcomes for Infants and Children" (May 2010); Dr Lesley Laing, "No Way To Live" (June 2010).

4 Where we refer to courts we mean the Family Court of Australia and Federal Circuit Court of Australia.

The Best Practice Principles are a voluntary source of assistance to judicial officers and legal practitioners and are not a fetter to a court's discretion (*Cameron & Walker* (2010) FLC 93-445). These Best Practice Principles are not a substitute for evidence in individual cases.

Ensuring the safety of a child is central to all determinations of what is in a child's best interests.

The courts aim to protect children and family members from all forms of harm resulting from family violence and abuse.

All persons attending courts exercising family law jurisdiction are entitled to be safe and the courts will take all appropriate steps to ensure the safety of their users. This includes the creation of an individually tailored safety plan where appropriate.

A safety plan is a document that can be varied at any time and which includes a variety of options available to a person to ensure their safety at court. These include attendance by electronic medium, attendance with support persons, staggered attendances, use of security entrances and, where necessary, security personnel. All court staff are able to prepare a safety plan. Safety planning is one of the strategies that may be implemented to ensure that a person who fears for their safety remains protected from harm. A safety plan for attendances at court events is but one component of safety planning that needs to be incorporated into the individual's overall plan for their safety.

HOW IS FAMILY VIOLENCE DEFINED IN THE FAMILY LAW ACT?

The term 'family violence' has been defined in different ways. To appreciate the context in which courts exercising family law jurisdiction approach this issue, it is important to know how the definition used in the FLA.[5]

The FLA definition is contained in section 4AB. This definition came into effect on 7 June 2012 and is significantly broader than the definition that formerly appeared in the Act.

Section 4AB states:

1. For the purposes of this Act, ***family violence*** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the ***family member***), or causes the family member to be fearful.
2. Examples of behaviour that may constitute family violence include (but are not limited to):
   a. an assault, or
   b. a sexual assault or other sexually abusive behaviour, or
   c. stalking, or
   d. repeated derogatory taunts, or
   e. intentionally damaging or destroying property, or
   f. intentionally causing death or injury to an animal, or
   g. unreasonably denying the family member the financial autonomy that he or she would otherwise have had, or
   h. unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support, or
   i. preventing the family member from making or keeping connections with his or her family, friends or culture, or
   j. unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.
3. For the purposes of this Act, a child is ***exposed*** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.
4. Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:
   a. overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family, or
   b. seeing or hearing an assault of a member of the child's family by another member of the child's family, or
   c. comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family, or
   d. cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family, or
   e. being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

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5 Unless stated differently, all sections are from the Family Law Act 1975 (Cth).

While the definition includes examples of particular behaviour, it is not an exhaustive list. Even though conduct may not be specifically mentioned in the FLA definition, the courts (through section 60CC(3)(m)) may still take such conduct into account.

Unlike the earlier definition, there is no requirement that any fear experienced by the victim of the violence is reasonable. Thus the new definition has objective and subjective elements.

The courts understand that family violence is not homogeneous in its qualities and can arise in a variety of contexts. It is recognised that family violence is widespread and can occur in all socioeconomic and ethnic groups.

The definition of family violence in the FLA is expressed in gender neutral terms. It encompasses abusive acts committed by men and women in heterosexual and same-sex relationships. The courts recognise that women and men can experience family violence. Nevertheless data suggests that women are more often victims of personal violence than men. For example, the Australian Bureau of Statistics' *Personal Safety Survey* (2005) found that of women who had reported being physically assaulted in the 12 months prior to interview, 73,800 or 31 per cent reported being assaulted by a current and/or previous partner. This compares to 21,200 or 4.4 per cent of men who reported being assaulted by a current and/or previous partner in the 12 months prior to interview. The *Personal Safety Survey* also found that 16.6 per cent of women had experienced violence by a partner (including physical threat, physical assault, sexual threat and sexual assault by a current and/or previous partner) since the age of 15 as compared to 5.7 per cent of men.

Importantly, the FLA does not require independent verification of allegations of family violence (such as police or medical reports) for a court to be satisfied that it has occurred. As the Full Court of the Family Court said in *Amador & Amador* (2009) 43 Fam LR 268:

> *Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage, and possibly their children. We cannot accept that a court could never make a positive finding that such violence occurred without there being corroborative evidence from a third party or a document or an admission.*
>
> *The victims of domestic violence do not have to complain to the authorities or subject themselves to medical examinations, which may provide corroborative evidence of some fact, to have their evidence of assault accepted.*

HOW IS ABUSE DEFINED IN THE FAMILY LAW ACT?

The definition of 'abuse' in the FLA was amended and came into effect on 7 June 2012. 'Abuse' is defined as follows:

abuse, in relation to a child, means:

a. an assault, including a sexual assault, of the child, or

b. person (the first person) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person, or

c. causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence, or

d. serious neglect of the child.

The expanded definition of 'abuse' would appear to be intended to reflect current understandings of the diverse ways in which children can be damaged by violence and serious neglect.

DIFFERENT TYPES OF FAMILY VIOLENCE

Family violence takes many forms and, when framing parenting orders, it is important to differentiate between the types of violence. Because individual families and relationships are dynamic and unique, care is required when any system of classification is applied.[6] One well known classification system holds[7] that violence can generally be defined as being within four categories. These are:

- coercive controlling violence
- violent resistance
- situational couple violence, and
- separation instigated violence.

Coercive controlling violence is an ongoing pattern of use of threat, force, emotional abuse and other coercive means to unilaterally dominate a person and induce fear, submission and compliance in them. Its focus is on control, and does not always involve physical harm.

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6 Australian Institute of Family Studies, Submission to the Family Violence Committee of the Family Court and the Federal Circuit Court, May 2011.

7 JB Kelly, MP Johnson, "Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions" (2008) 46 Family Court Review 476.

Violent resistance occurs when a partner uses violence as a defence in response to abuse by a partner. It is an immediate reaction to an assault and is primarily intended to protect oneself or others from injury.

Situational couple violence is partner violence that does not have its basis in the dynamic of power and control. Generally, situational couple violence results from situations or disputes between partners that escalates into physical violence.

Separation instigated violence is violence instigated by the separation where there was no history of violence in the relationship or in other contexts.

CULTURAL CONTEXT

The way in which we attempt to understand the dynamics of family violence and abuse is informed by the diverse cultural context in which it occurs and by the experience of people from different ethnicities, backgrounds and language groups.

It is important to recognise that the concept of 'culture' is not fixed and immutable. Attempting to ascribe certain characteristics to particular cultural groups may lead to erroneous generalisations based on racial or ethnic identification.[8] Making assumptions or generalisations about racial, ethnic or religious groups ignores the intersection between, for example, culture and socio-economic status, age, disability, sexual orientation, place of residence, immigration status and homelessness.

Nevertheless, insofar as broad statements can be made about violence and culturally and linguistically diverse communities, research has tended to suggest that cultural values and immigration status increases the complexities normally associated with family violence and abuse. In a summary of the available research, the Australian Institute of Criminology stated that women from culturally and linguistically diverse backgrounds are generally less likely to report cases of family violence.[9] The factors that may influence this can include:

- being excluded from their community
- the limited availability of appropriate translator/interpreter services and access to support services
- limited support networks
- reluctance to confide in others
- lack of awareness about the law
- continued abuse from immediate family
- cultural and/or religious shame, and
- religious beliefs about divorce.[10]

Policy and service responses, including those of family courts and allied agencies, need to be developed within an understanding of complex cultural dynamics and the inter-relationship between violence, cultural and religious identity and social marginalisation.

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8 Sujata Warrier, "It's in Their Culture: Fairness and Cultural Considerations in Domestic Violence", (2008) 46 Family Court Review 537, p. 539; Kerrie James, "Domestic Violence Within Refugee Families: Intersecting Patriarchal Culture and the Refugee Experience" (2010) 31 The Australian and New Zealand Journal of Family Therapy 275, p. 276.

9 Dr Lorana Bartels, "Emerging Issues in Domestic/Family Violence Research", Research in Practice report no10, Australian Institute of Criminology, April 2010, p. 5.

10 Ibid and references cited therein.

STATUTORY FRAMEWORK

Orders concerning parental responsibility, with whom a child will live and with whom a child will spend time (and how much time), are parenting orders. The child's best interests are the paramount consideration for the courts when making a parenting order. In deciding the arrangements that will promote the best interests of a particular child, the courts must consider the factors set out in Part VII of the FLA. These factors comprise a series of statutory objects and principles, two primary and 14 additional considerations. The first primary consideration is the benefit to the child of having a meaningful relationship with both of the child's parents. The second primary consideration is the need to protect the child from physical or psychological harm from being subjected or exposed to abuse, neglect or family violence. There is sometimes tension between these concepts in cases involving allegations of family violence. However, as a result of the recent legislative amendments, a new provision has been inserted into the FLA (section 60CC(2A)) that requires greater weight to be given to the safety of the child than to the benefit to the child of having a meaningful relationship with both parents.

As part of the additional considerations, judicial officers have to consider the inferences that can be drawn from a family violence order made in relation to a child or a member of the child's family (section 60CC(3)(k)). This applies to all family violence orders irrespective of whether they are or were interim or final, or whether they were made by consent. In so doing, judicial officers are obliged to consider the nature of the order, the circumstances in which the order was made, any evidence admitted in proceedings for the order, any findings made by the Court in proceedings for the order and 'any other relevant matter'. Section 60CC(3)(m) of the FLA permits the courts to take into account 'any other fact or circumstance that the court thinks is relevant'. This ensures that the infinite variety of individual children's circumstances can be addressed.

It is important that people seeking assistance from the courts know **IT IS NOT COMPULSORY** for parties to participate in family dispute resolution processes prior to the commencement of court proceedings, in cases where the Court is satisfied there are reasonable grounds to believe:

a. **there has been** family violence or abuse, or

b. **there is a risk** of family violence or abuse.[11]

Parties to children's proceedings have certain obligations under the Act. These include informing the courts of any family violence order that applies to the child or a member of the child's family (section 60CF), informing the courts if a child or member of the child's family is under the care of a child welfare law (section 60CH) and informing the courts of any notifications to, or investigations by, prescribed child welfare authorities (section 60CI) that relate to an allegation, suspicion or risk of abuse.

Courts exercising jurisdiction under the FLA also have certain obligations.

The former section 60K of the FLA required courts to take prompt action in parenting proceedings in which allegations of family violence or abuse are made that may be relevant to the outcome. That section has now been repealed.[12] In its place are sections 67ZBA and 67ZBB.

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11 For example, a person is exempted from participation in pre-filing family dispute resolution upon production of a current family violence order (s60I(9)(b)) FLA.

12 However, it does continue to apply where a prescribed form, being a *Notice of Child Abuse, Family Violence or Risk of Family Violence* in the Family Court of Australia or a *Notice of Risk* in the Federal Circuit Court of Australia has been filed in accordance with section 60K prior to the commencement of Schedule 1 of the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth) (ie. 7 June 2012).

Cumulatively, they provide that where an 'interested person'[13] has alleged that there has been family violence or the risk of family violence, they must file the prescribed form[14] (Notice); which is a *Notice of Child Abuse, Family Violence or Risk of Family Violence* in the Family Court of Australia and a *Notice of Risk* in the Federal Circuit Court of Australia. Once the Notice has been filed, the courts are required to take prompt action in response to the allegations to protect the child and to enable evidence about the allegations to be gathered as expeditiously as possible.

Cases in which a Notice have been filed will be directed expeditiously to the appropriate decision maker – duty registrar or other judicial officer – for consideration of what steps or type of hearing is necessary for the courts to discharge their obligations pursuant to section 67ZBB of the FLA.

Section 67ZBB requires these obligations to be discharged as soon as practicable and within eight weeks if appropriate.

As a result of the amendments, courts are also required to ask each party to the proceedings whether they consider that the child has been or is at risk of being exposed to child abuse, neglect or family violence (section 69ZQ(1)(aa)(i)). The courts must also ask whether either party to the proceedings considers that they or another party to the proceedings have been or are at risk of being subjected to family violence (section 69ZQ(1)(aa)(ii)).

Formerly, the courts were obliged to make an order for costs when satisfied that a party had knowingly made a false allegation or statement in the proceedings. This included circumstances in which a party had knowingly made a false allegation of family violence. That provision has now been removed from the FLA.

BEST PRACTICE PRINCIPLES

A. CHECKLIST OF LEGISLATIVE REQUIREMENTS TO FOLLOW IN ALL PARENTING CASES IN WHICH ISSUES OF FAMILY VIOLENCE OR CHILD ABUSE ARE RAISED.

In every case, a party or parties MUST:

1. If a party to proceedings is aware a family violence order applies to a child or a member of a child's family, they must advise the Court and file a copy of the family violence order.

   [Section 60CF(1), Rule 2.05(1)]

2. Where a copy of the family violence order is not available, file a written notice containing:
   - an undertaking to file the order within a specified period of time
   - the date of the order
   - the Court that made the order, and
   - the details of the order.

   [Rule 2.05(2)]

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13 Sections 67Z(4) and 67ZBA(4) define an "interested person" as a party, an independent children's lawyer or any other person prescribed by the regulations. At present no other person has been prescribed by the regulations.

14 For proceedings in the Family Court of Australia the form to be used and filed is located in Schedule 2 of the Family Law Rules 2004. For proceedings in the Federal Circuit Court of Australia the form to be used must be in accordance with Form 1 in Schedule 2; see rule 2.04(1B) of the Federal Circuit Court Rules 2001.

3. If a party to proceedings is aware that the child or a member of the child's family is under the care of a person under a child welfare law, inform the Court of the matter.

[Section 60CH(1)]

4. If:

   - a party to proceedings is aware that the child or a member of the child's family has been the subject of:
     a. notification or report to a prescribed state or territory agency, or
     b. an investigation, inquiry or assessment by a prescribed state or territory agency, and
   - the notification, report, investigation, inquiry or assessment relates to abuse, or an allegation, suspicion or risk of abuse that party must inform the Court of the matter.

[Section 60CI(1)]

5. If a party, an independent children's lawyer or other interested person (see definition at footnote 14) makes an allegation of family violence by one of the parties to the proceedings, or of risk of family violence by one of the parties to the proceedings, and that allegation is relevant to whether or not the Court should make or refuse to make an order, file a Notice and supporting affidavit setting out the evidence upon which the allegations in the Notice are based and serve the notice and affidavit upon the person against whom the allegation is made.

[Section 67ZBA(1) and (2), Rule 2.04D(1), Rule 2.04D(2)]

6. Where a party to the proceedings, an independent children's lawyer or any other interested person alleges that a child to whom the proceedings relate has been abused or is at risk of abuse, they must file a Notice and supporting affidavit setting out the evidence upon which the allegations in the Notice are based and serve the notice and affidavit upon the person who is alleged to have abused the child or from whom the child is alleged to be at risk of abuse.

[Section 67Z(1) and (2), Rule 2.04D(1), Rule 2.04D(2)]

In every case, the decision maker MUST:

7. In performing duties and exercising powers in relation to child-related proceedings and in making decisions about the conduct of child-related proceedings, give effect to the principle that the proceedings are to be conducted in a way that will safeguard the child concerned from being subjected to, or exposed to, abuse, neglect or family violence and safeguard the parties against family violence.

[Section 69ZN(5)]

8. In giving effect to the principles for the conduct of child-related proceedings, ask each party to the proceedings:

   - whether the party considers that the child concerned has been, or is at risk of being, subject to, or exposed to, abuse, neglect or family violence,
   - whether the party considers that he or she, or another party to the proceedings, has been or is at risk of being subjected to family violence.

[Section 69ZQ(1)(aa)]

9. Where an exception has been granted from attendance at family dispute resolution because of issues of family violence and abuse having been raised, consider whether to order the parties to attend at family dispute resolution nonetheless.

[Section 60I(10)]

10. Consider whether the urgency of the situation dictates that a parenting order should be made, notwithstanding the parties have not attended family counselling.

[Section 65F(2)]

11. Where a Notice has been filed:
    - consider what orders (interim or procedural) need to be made to obtain evidence about the allegations or to protect the child or a party
    - consider whether to make an order directed to a state welfare authority, pursuant to section 69ZW of the FLA, to require from the authority production of a report or records in respect of notifications of child abuse
    - consider whether to make an injunction for the personal protection of a child or any person with whom the child is involved
    - make any such order the Court considers appropriate, and
    - do so as expeditiously as possible.

[Sections 60B(1), 67ZBB, 69ZN, 69ZW]

12. In determining a child's best interests, have regard to the matters in section 60CC(2) and 60CC(3).

[Section 60CC(1)]

13. In having regard to the matters in section 60CC(2), give greater weight to section 60CC(2)(b) than to section 60CC(2)(a).

[Section 60CC(2A)]

14. Where a family violence order applies or has applied, draw any relevant inferences from the order, taking into account:
    - the nature of the order
    - the circumstances in which the order was made
    - any evidence admitted in the proceedings for the order
    - any findings made by the Court in the order or in proceedings for the order, and
    - any other relevant matter.

[Section 60CC(3)(k)]

15. In considering what parenting order to make, ensure any order, subject to the consideration of the best interests of the child, is consistent with any family violence order and does not expose any person to an unacceptable risk of family violence.

[Section 60CG]

16. If making a parenting order or injunction which is inconsistent with an existing family violence order, specify in the order that this is the case and explain to the parties affected why the order was made and the interaction between the order and the family violence order.

[Section 68P]

Matters that decision makers **MAY** consider in cases involving family violence and abuse:

17. Whether a family dispute resolution practitioner has granted a certificate to a party and the type of certificate granted.

[Section 60I(8)]

18. Whether an exception should be granted to the requirement to attend family dispute resolution prior to the issue of proceedings because there are reasonable grounds to believe there has been abuse of the child or the risk of abuse, or there has been family violence by one of the parties to the proceedings or there is a risk of family violence.

[Section 60I(9)(b)]

19. Where an exception is granted under section 60I(9)(b), whether there are reasonable grounds to believe there would be would be a risk of family violence or there would be a risk of abuse of a child if there were to be a delay in applying for any relevant order.

[Section 60J(2)]

20. Whether to direct a party or the parties to file an affidavit or updating affidavit that addresses this issue.

[Part 15.2 FLR, [15] Rule 10.01 FCCR [16]]

21. Whether the matter should be allocated a date in the duty list, and if so, with what degree of urgency.

[Rule 11.4 FLR, Rule 10.01 FCCR]

22. Whether a state or territory family violence order is in force that applies to the child or a member of the child's family and the terms of that order. The Court may include in any order it makes safeguards for the safety of any person affected by the order.

[Section 60CF, 60CG]

23. Whether one or both of the parties should be ordered to attend family counselling or family dispute resolution, or an appropriate course, perpetrator of domestic violence program, or another program or service.

[Section 13C]

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15 The letters 'FLR' refer to the *Family Law Rules 2004* (as amended) being the applicable rules for the Family Court.

16 The letters 'FCCR' refer to the *Federal Circuit Court Rules 2000* (as amended) being the applicable rules for the Federal Circuit Court.

24. If one or more of the parties is directed to attend such a course or program, what orders are necessary to protect the safety of any person subject to such an order?

[Section 13C(4)

25. Whether any safety plan is in place for court events and whether a safety plan needs to be formulated. In particular, should consideration be given to the party being housed in a secure room during a court event or giving evidence by video link? Should arrangements be made to escort a party to and from court? What security is necessary for any given event?

[Section 69ZN(5)]

26. Should a case started in the Federal Circuit Court be transferred to the Family Court, with or without a request for inclusion in the Magellan List?

27. Whether there are unresolved criminal or state welfare proceedings and, if so, whether the family law proceedings should be adjourned until finalisation of those proceedings or whether the person against whom proceedings have been instituted should be invited to apply for a certificate under section 128 of the *Evidence Act 1995* (Cth).

28. Whether the address of the party making the allegations should be suppressed.

[Section 69ZN(5)]

29. Whether any person not currently a party to the proceedings should be joined as a party.

[Rule 6.02(1) FLR, Rule 11.05 FCCR]

30. Whether the child or children should be independently represented.

[Section 68L]

31. Whether to request a child welfare officer to intervene in the proceedings.

[Section 91B]

32. Whether it would be appropriate to make either an interim parenting order or a procedural order without notice to the other party and in the absence of a party.

[Section 69ZN(5); Parts 5.3 and 5.4 FLR, Rule 5.01 FCCR]

33. Whether a family report should be ordered.

[Section 62G]

34. Whether a person with expertise and clinical experience in family violence or abuse should be appointed to prepare a report.

[Part 15.5 FLR, Rule 15.09 FCCR]

35. Whether a person should be required to make the child available for an examination for the purpose of preparing a report about the child for use by an independent children's lawyer.

[Section 68M(2)]

36. Whether subpoenas should be issued to compel the production of documents.

[Part 15.3 FLR, Part 15A FCCR]

37. Whether the person alleging family violence or abuse should be permitted to give evidence by electronic means from another location.

[Section 102D(1)]

38. Whether to transfer the matter to another court.

[Section 33B, Rules 11.17 and 11.18 FLR, Section 39 FMA, Rule 8.02 FCCR]

B. VULNERABLE WITNESSES AND MANAGING THE COURTROOM

Victims of family violence are often traumatised and vulnerable witnesses. To ensure parties are afforded fair and equal access to justice and those at risk of harm are not re–traumatised by the court process, it is essential that judicial officers and practitioners utilise the courts powers to achieve a fair hearing.[17]

In addition to the courts general powers to regulate its own processes, courts exercising jurisdiction under the FLA:

1. May direct or allow a person to give testimony and/or appear by video or audio link (for example from another location or in the same court facility).

[Sections 102C–102D FLA]

2. Must forbid the asking of offensive, abusive and hectoring questions unless it is essential to the interests of justice.

[Section 101(1) and (2) FLA]

3. May disallow questions asked in a manner or tone that is inappropriate or based on stereotype.

[Section 41 Evidence Act 1995 (Cth)]

4. Disallow misleading or confusing questions.

[Section 41 Evidence Act 1995 (Cth)]

5. A child cannot be called as a witness or be present in court unless the Court makes an order to the contrary.

[Section 100B(2) FLA]

6. May change the venue of a hearing to a safer location.

[Section 27A FLA, Section 52 FCCA, Rule 11.17 FLR, Rule 8.01 FCCR)]

In child related proceedings:

7. The Court is to actively direct, control and manage the conduct of proceedings and is to conduct proceedings in a way that will safeguard parties to proceedings against family violence.

[Section 69ZN FLA]

8. The Court can give directions or make orders about how particular evidence is to be given.

[Section 69ZX(1)(c) FLA]

9. Make orders limiting, or not allowing, cross-examination of a particular witness.

[Section 69ZX(2)(i) FLA]

10. Receive into evidence the transcript of evidence in any other proceedings before the court or another court or tribunal, and draw from that transcript any conclusions of fact that it thinks proper, and adopt any of the recommendations, findings, decisions or judgment of those bodies.

[Section 69ZX(3) FLA]

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In the exercise of its general powers to control proceedings the Court may:

11. Require that an alleged perpetrator be shielded from view while the victim is giving evidence.
12. Allow the victim can have a support person near them while giving evidence.
13. Close the Court to the public or exclude specific persons from the courtroom.
14. With forewarning refuse permission to continue cross-examination.
15. With forewarning determine the proceedings be concluded without further input from a party.

Evidence of an admission is not admissible unless the court is satisfied that the admission was not influenced by violent, oppressive, inhuman or degrading conduct whether towards the person who made the admission or towards another person, or a threat of that kind. *[Section 84 Evidence Act 1995 (Cth)]*

Judicial officers should also consider the possible impact of family violence on the victim's ability to give evidence. For example, coping strategies to deal with the violence and memories **may** mean that a victim has:

- difficulty giving testimony about the violence in a linear, time-ordered sequence
- difficulty recalling collateral detail surrounding the violence
- emotional detachment such that testimony can be given in an unemotional, flat, detached manner
- inability or difficulty offering complete information about abuse and violence (by virtue of the tendency to minimise memories), and
- exaggerated startled and defence responses resembling anger, hostility and aggression.[18]

C. FAMILY AND OTHER EXPERT REPORTS

Family and other expert reports can provide the Court with an independent forensic assessment of particular issues. Commonly these include the children's relationships with the parties, the children's views and the parties' parenting capacity. It may include the emotional and psychological effects of exposure to family violence, the effect upon a child or partner victim of contact with the perpetrator and whether therapeutic intervention may assist a perpetrator to live without violence. The expert appointed should have specialised knowledge based on his or her training, study or experience. The expert's role is to assist the Court in an impartial way with matters within his or her knowledge and capability.

[Rule 15.59 FLR, Division 15.2 FCCR]

Reports from experts, counsellors and social workers who have seen either of the parties over a period of time can also provide the Court with a valuable source of information on particular issues.

If the Court makes findings of fact about the allegations of family violence or abuse or the risk of family violence or abuse prior to the report process, the report writer is to be provided with a copy of the findings and the report is to proceed on that basis.

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18 Neilson, Dr L (2009) Domestic Violence and Family Law in Canada: A handbook for Judges, Ottawa National Judicial Institute

In considering the appointment of an expert witness to prepare a family report or other report, the Court may wish 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 of being exposed to the risk of family violence or abuse, on the children and any party to the proceedings

In the framing of orders for a family report or other export report, the judicial officer may wish to consider the following matters[19] and, where appropriate, direct the reporter to:

1. Specifically address the issue of family violence or abuse or the risk of family violence or abuse.
2. Assess the harm the children have suffered or are at risk of suffering if the orders sought are or are not made.
3. Consider whether or not there would be benefits, and if so, the nature of those benefits, if the child spent time with the person against whom the allegations are made.
4. Assess whether the physical and emotional safety of the child and the person alleging the family violence or abuse can be secured before, during and after any contact the child has with the parent or other person against whom the allegations are made.
5. Ascertain the views of the child or children in light of the allegations of family violence or abuse or the risk of family violence or abuse when it is safe to do so.
6. Where family violence or abuse is established, report on:
    - the impact of the family violence or abuse
    - whether the person acknowledges that family violence or abuse has occurred
    - whether the person accepts some or all responsibility for the family violence or abuse
    - whether, and the extent to which, the person accepts that the family violence or abuse was inappropriate
    - whether the person 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 there is a need for the child and the other parent or carer to receive counselling or other form of treatment as a result of the family violence or abuse
    - whether the person 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 person who has behaved violently or abusively and who is seeking to spend time with the child can reliably sustain that arrangement and how it will occur so that the child feels safe.

The reporter also needs to be informed whether the whereabouts of the party making the allegations has been suppressed and that those whereabouts not be revealed in the reporting process.

19 Adapted 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.

D. THE INTERIM HEARING STAGE

The interim hearing stage is a critical time for families where there is family violence and often takes place in a context of urgency. It is unlikely the Court would be able to make findings about disputed facts because not all relevant evidence is available or tested. However, the urgency of the situation and the serious nature of allegations, particularly in terms of a child being exposed to family violence or abuse, requires the Court to consider whether to make interim orders. Even though the evidence available is limited, the Court must still assess risk in such cases in considering what interim orders to put in place pending a final hearing.

The 'PPP' screening tool is a useful mechanism in the assessment of risk.[20] This screening tool analyses risk by reference to three factors: the potency, pattern and primary perpetrator (PPP) of the violence. The screening tool is not a predictive device but does give a useful framework of factors to look for when considering the risk of family violence.

Potency of violence (level of severity, dangerousness or risk of lethality)

1. Are there any threats or fantasies of homicide and/or suicide? If so, does the person have a specific plan to act on them?
2. Are weapons available (guns, knives, etc.) indicating the means are accessible?
3. How extreme was any prior violence? Were injuries caused, and if so, how serious?
4. Is the person highly focused upon/obsessed with the specific victim as a target of blame?
5. Is there a history of mental illness – especially thought disorder, paranoia, or severe personality disorder?
6. Is the person under the influence of drugs or alcohol, indicating diminished capacity to inhibit angry impulses? Is there a history of substance abuse?

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20 Peter G. Jaffe, Janet R. Johnston, Claire V. Crooks & Nicholas Bala, "Custody Disputes Involving Allegations of Domestic Violence: Towards a Differentiated Approach to Parenting Plans" (2008) 46 Family Court Review 500.

7. Does the person express a high degree of depression, rage, or extreme emotional instability (indicating a propensity to act irrationally and unpredictably)?
8. Is the party recently separated or experiencing other stressful events such as, loss of job, eviction from home, loss of child custody, or severe financial problems?

Pattern of violence and coercive control

9. Is there a history of physical violence including destruction of property? Threats (to hurt self or loved ones)? Assault or battery? Sexual coercion or rape?
10. Has there been disregard or contempt for authority (e.g. refusal to comply with court-ordered parenting plans, violation of protective orders, a criminal arrest record)?
11. How fearful and/or intimidated is the partner?
12. Is there a history of emotional abuse and attacks on self-esteem?
13. Does one party make all decisions (e.g. about social, work and leisure activities; how money is spent; how children are disciplined and cared for; household routines and meals; personal deportment and attire, etc.)?
14. Has the partner been isolated/restricted from outside contacts (e.g. with employment, friends and family)?
15. Is there evidence of obsessive preoccupation with sexual jealousy, and possessiveness of the partner?
16. After separation, have there been repeated unwanted attempts to contact the partner (e.g. stalking, hostage-taking, threats or attempts to abduct the partner or child)?
17. Have there been multiple petitions/litigation that appear to have the purpose of controlling and harassing?

Primary perpetrator indicators: Who is the primary aggressor, if either?

18. Who provides a more clear, specific and plausible account of the violent incident(s)? Who denies, minimises, obfuscates, or rationalises the incident? (The victim more likely does the former; the perpetrator the latter).
19. What motives are used to explain why the incident(s) occurred? (Victims tend to use language that suggests they were trying to placate, protect, avoid, or stop the violence, whereas perpetrators describe their intent being to control or punish).
20. What is the size and physical strength of each party relative to the amount of damage and injury resulting from the incident(s)? Does either party have special training or skill in combat? (Perpetrators who are better equipped are able to cause the greater damage).
21. Are the types of any injuries or wounds suffered likely to be caused by aggressive acts (the perpetrators) or defensive acts (the victims)?
22. If the incident(s) involved mutual combat, were the violent acts/injuries by one party far in excess of those of the other? (Violent resistors tend to assert only enough force to defend and protect; when primary perpetrators retaliate, they are more likely to escalate the use of force aiming to control and punish).
23. Has either party had a prior protective order issued against them – whether in this or a former relationship (indicating who was determined to be the primary aggressor in the past)?

E. FRAMING INTERIM ORDERS

The following considerations are likely to be important in framing interim orders in cases in which there are disputed allegations about family violence and abuse and where the fundamental task for the Court is an assessment of the degree of risk involved in the making of an order.

1. What is the likely risk of harm to the child if an interim order is made for the child to spend time with a person against whom allegations of family violence or abuse have been made?
2. Given the nature of the allegations against the person and the extent of the evidence to hand, is it in the best interests of the child to spend any time or communicate with that person and, if so, what orders should be made to ensure the safety of the child pending further investigation. In particular:
   - Should any time between the person and child be supervised?
   - If so, should the time be professionally supervised, for example at a children's contact centre?
   - Who should pay the costs of supervision?
   - If not, where should the time take place and who should supervise it?
   - How long should the visits be and where should the child be exchanged between the parties?
   - Are arrangements required for a secure place for changeover?
   - Should other persons effect the exchange of the child or be permitted to attend handovers with one or other of the parents?
   - What safeguards should be put in place to secure the safety of the child and of the parent with whom the child lives before, during and after any time the child spends with the other parent?
   - Is the order made consistent with any applicable family violence order and does it ensure that the parent concerned is not exposed to an unacceptable risk of family violence?
   - Will the order expose the parent affected by the family violence to continuing emotional and/or physical abuse?
3. Should the party seeking to spend time with the child, as a precondition to that time, be ordered to attend:
   - a post-separation parenting course.

     [Section 65LA]
   - an appropriate course, program, or other therapeutic intervention, e.g. as may be recommended by a family consultant or other expert?

     [Section 13C]
4. If the Court makes an interim order, should compliance with any order for the child to spend time with the parent be supervised by a family consultant?

   [Section 65L]
5. If the Court makes an order precluding contact between a child and one parent, should contact between the child and extended family members be considered?

F. THE FINAL HEARING

Decision makers need to consider closely the circumstances of each alleged incident of family violence in terms of its context and characteristics and the nature of the relationship between the persons affected by it, particularly the balance of power between them.

Of critical importance to decision makers are considerations of how children have been affected by exposure to family violence and what measures can be taken to ensure their future safety by any order that the court makes.

Some of the effects on children who are aware of family violence, or who witness family violence, or are aware of actual threatened family violence towards a parent include the following:

- physical and emotional damage occasioned by attempts to intervene in incidents of family violence arguments
- psychological damage evidenced by aggression and anxiety; lower self-esteem and other behavioural problems
- anxiety and apprehension at separation from a parent whom they perceive needs their protection
- fear and insecurity while in the care of a parent whom they have observed to have harmed someone else, and
- poor role modelling with consequences for their own future behaviour leading them to become either the perpetrator or victim or both of family violence.

The brain is at its most plastic (that is, most developmentally receptive to environmental input via neural pathways) in early childhood. Thus the younger the child the more likely the child is to suffer residual and pervasive problems following traumatic experiences such as witnessing family violence or being abused or neglected.[21] Exposure to such experiences can alter a developing child's brain in ways that can result in a range of inter-related psychological, emotional and social problems including: depression and anxiety; post traumatic stress disorder; problems with emotional regulation; substance misuse; relationship difficulties; and physical problems including cardiovascular disease, diabetes and stroke.[22]

The effects of family violence on the abused adult and the abuser also requires consideration. Factors to consider include:[23]

- Although in the majority of cases the risk of future family violence diminishes after separation, where there has been coercive controlling violence the intensity may escalate.
- Perpetrators of coercive controlling violence are more likely to have difficulties parenting. Common features include lack of warmth, coercive tactics and rejection of the children.[24]
- Individuals who have a pattern of partner abuse and who resolve conflicts using physical force are likely to be poor role models for their children.
- Abusive ex-partners are more likely to undermine the victim's parenting role.
- Diminished parenting capacity for adult victims of family violence is not uncommon.

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21 Perry B., "Applying Principles of Neurodevelopment to Clinical Work with Maltreated and Traumatized Children", (2006) in Working with Traumatized Youth in Child Welfare, Ed. by Nancy Boyd Webb, Guilford Press NY, 40.

22 National Scientific Council on the Developing Child, "Excessive Stress Disrupts the Architecture of the Developing Brain" (2005), Working Paper No3, p. 2.

23 Kelly and Johnson, above n 7, 489-490.

24 Jaffe, Johnston, Crooks, & Bala, above n 18.

Jaffe and Johnston comment:

> *For the majority of victims, separation from the perpetrator of domestic violence may provide an opportunity for improvement in both general functioning and parenting capacities. However, those who have been victimized by prolonged abuse and control are likely to suffer sustained difficulties – like anxiety, depression, substance abuse, and posttraumatic stress disorder – all of which can compromise their parenting for some time... During the court process, these parents may present more negatively than they will in the future once the stress of the proceedings and life changes have attenuated.*[25]

At the final hearing, the decision makers would ordinarily consider the following matters:

1. Whether the rules of evidence should apply to the issue of family violence. The Full Court in *Maluka v Maluka* (2011) FLC 93-464, at paragraphs 122 and 123, said:

> *122. The Full Court decisions in Johnson v Page (2007) FLC 93–344 and Amador v Amador (2009) 43 Fam LR 268 adopt a common approach to s 69ZT. Namely, that the decision to apply sub-section (3) is discretionary which discretion is to be exercised in accordance with the factors contained therein. Application of the sub-section is discussed in terms of its application to issues, and not the entire hearing, although the later course is permissible.*
>
> *123. We do not accept ... that the effect of s 69ZT is to establish a rule of general application that in cases where a court is asked to terminate a child's relationship with a parent, a judge would err if he or she failed to apply the rules of evidence excluded by s 69ZT(1) of the Act to an issue or to the entire hearing. It must be remembered that it is not uncommon for such cases to involve, in effect, a risk assessment exercise which may not include consideration of whether to make positive findings of sexual abuse or consider conduct which would constitute criminal offences in the upper range of seriousness. There are sound reasons associated with the protection of children and victim partners why, notwithstanding an order is sought to terminate a child's relationship with a parent, a judge might determine the risk issue by reference to ss 69ZT(1) and (2) of the Act.*
>
> *[Section 69ZT(3)]*

2. Is it possible to make findings of fact on the balance of probabilities regarding the nature and degree of family violence between the parties and its effect on the child and the parent with whom the child is living?
3. If the Court determines that it cannot or should not make a positive finding that there has been violence or abuse, the Court must determine whether there is an unacceptable risk of it.
   (see *M v M* (1988) 166 CLR 69)
4. If it was found that one party has perpetrated family violence on the other party, consider the extent to which the violence features:
   - coercive controlling violence
   - violent resistance
   - situational couple violence, or
   - separation instigated violence.

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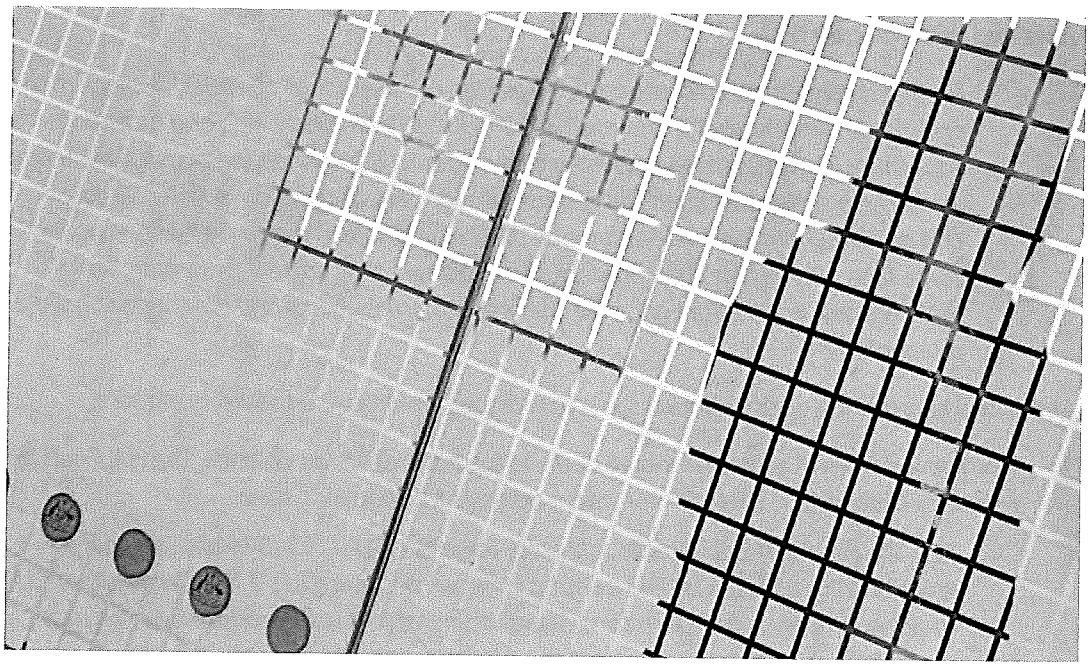
25 Ibid p 503.



Does the violence include:

- the use of coercion and threats
- intimidation
- emotional abuse
- financial control
- the use of children as means of controlling one party
- the use of tactics to isolate one party, or
- has the perpetrator attempted to minimise or deny the violence, which has occurred, or blame the other party for the violent behaviour?

Findings on these questions will assist the Court to identify violence that represents a real threat to the wellbeing of children, including in relation to appropriate role modeling. This may require specific attention in the design of orders which will keep the victim and child safe.

G. MATTERS TO CONSIDER WHERE FINDINGS OF FAMILY VIOLENCE OR ABUSE, OR AN UNACCEPTABLE RISK OF FAMILY VIOLENCE OR ABUSE, HAVE BEEN MADE

The ability of the Court to determine the future impact and magnitude of risk of exposure to family violence on children is likely to be influenced by the categorisation of the violence to which any child has been exposed in the past. As stated by the Family Law Council in 2010, 'It is no longer scientifically or ethically acceptable to speak of domestic violence without specifying loudly and clearly, the type of violence to which we refer'.

It is important for decision makers and service providers to stay informed of current research and information about the nature and impact of family violence.

Courts may be assisted by evidence about current research from fields of psychology, psychiatry and social work in determining the likely impact of family violence on child development, child health and parental capacity.[26]

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26 As to admissibility of academic opinion, see *McGregor & McGregor* [2012] FamCAFC 69.

The following factors[27] are likely to be central to the determination of whether the Court should order that a child does or does not spend time with a parent against a specific finding has been made of family violence or abuse (or whom the Court considers poses a risk to the child of future exposure to family violence or abuse):

1. The effect of the family violence or abuse on the child.
2. The effect of the family violence or abuse on the parent with whom the child is living.
3. The degree of insight or motivation of the parent against whom a finding of family violence or abuse has been made. In particular, is that parent motivated by the child's best interest or a desire to either intimidate or control the other parent?
4. Where a parent who has been found to have exposed a child to family violence and wishes an order to be made to spend time with that child:
    - the degree of acknowledgement by that parent that family violence has occurred
    - whether that parent has accepted some or all of the responsibility for the violence
    - the extent to which that parent accepts that family violence was inappropriate and the degree of insight exhibited of the likely ill-effects on the child of such behaviour
    - has the parent concerned expressed regret or remorse for his or her behaviour?
    - does the parent concerned recognise that he or she has been an inappropriate role model for the child concerned?
    - has the parent concerned participated, or are they willing to participate, in any program or course of treatment designed to prevent a recurrence of family violence by him or her in future?
    - does the parent concerned have the capacity to sustain an ongoing arrangement to spend time with the child and is he or she genuinely interested in the child's welfare?
    - does the parent have any understanding of the impact of his or her behaviour on the other parent concerned, both in the past and currently?
    - the capacity of the parent found to have been the perpetrator of family violence to provide adequate care for the child, and
    - the nature of the relationship between the child and the parent found to have been the perpetrator of family violence.
5. In cases where the Court is considering that the child have limited or no time with the parent concerned:
    - what will be the effects on the child of a deprivation of relationship with that parent?
    - what will be the consequences for the child of losing the opportunity to know that parent at first hand?
    - what will be the consequences for the child of losing the opportunity to know grandparents and other relatives on that parent's side of the family?
    - what will be the consequences for the child of losing the opportunity to interact with a parent who loves him or her and is able to provide some benefits for the child concerned?
    - what will be the consequences for the child and parent concerned of being deprived of the opportunity to repair their relationship and undo the harm done as a result of the parent's violent behaviour?

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27 See the Sturge & Glaser report, which discusses the effect on children of being exposed to domestic family violence and the circumstances in which a child should have no contact with a parent who has used or exposed the child to family violence, referred to in Re L Contact: Domestic Violence) [2000] 2 FLR 334 (UK case).

- will such an outcome diminish the prospect of the parent and child reconnecting when the child is older and more able to make a mature and personal decision about whether he or she wishes to have a relationship with that parent in future?

6. What are the views of any child concerned in respect of spending time with a parent who has been found to be violent and what weight should be given to those views?

H. OTHER MATTERS TO CONSIDER

Cases involving findings of family violence or abuse pose real difficulties. The essential task for the Court is to determine the extent of risk which violent and abusive conduct poses for the child concerned and to fashion orders which are commensurate with the degree of risk involved.

In some cases, the degree of risk will be determined to be unacceptable and, therefore, it is in the best interests of the subject child that no orders be made for the child to interact directly or indirectly with the parent who presents that risk.

In other cases, the Court may consider a range of strategies which would protect the child and family in the context of the possible benefits to the child in maintaining some form of relationship with the parent concerned. In particular, the court may consider the following in determining what the best outcome is for the child concerned:

1. Should time spent between the child and the parent be supervised, and if so, by whom and under what conditions, particularly:
    - who should be the supervisor
    - how should the supervisor be chosen
    - should it be a professional supervisor
    - is it feasible to commit the parties to long term professional supervision
    - how long and frequent the visits should be
    - the appropriateness and limits of using a children's contact centre. If so, does the policy of the centre accommodate the order envisaged
    - should others, such as siblings or relatives, attend the supervised visits
    - how should changeover occur
    - who should pay the cost of the supervisor
    - whether telephone contact with the child is permitted and under what conditions, including the time of such contact, the duration of such contact and the number of times per week, and
    - whether contact via other electronic means, such as email, SMS and webcam, is permitted.
2. The form and limits of communication between the parent and child.
3. Should the parent concerned undergo treatment or attend a course of counselling or education as a precondition of spending any time with the child?
4. Should the Court make an order under section 68B for the personal protection of the child or the parent with whom the child lives?
5. What are the terms of any existing family violence order?
6. Is the proposed order consistent with a family violence order?

7. Should the order be supervised by a family consultant for a limited period?
8. If the Court makes a final order, should the parties be referred to an external Parenting Orders Program for supervision and support?[28]
9. Should the Court make orders that allow the ongoing wellbeing of the child to be monitored in circumstances where strategies to protect the child are deemed necessary when orders support some sort of relationship between the child and the perpetrator of the family violence?
10. If the Court makes an order precluding contact between a child and one parent, should contact between the child and extended family members be considered?

I. CONSENT ORDERS

When a court is asked to make consent orders which would result in a child spending time with a parent or other person against whom allegations of family violence or child abuse have been made, the parties to the proposed orders must provide an explanation of how the order attempts to deal with those allegations.[29] In addition to section 60CC factors, the decision maker may consider the following before deciding whether to make such an order:

- the seriousness of the allegations
- the extent of the involvement of the child in any incidents of violence or abuse
- how the orders address the violence and abuse issues
- where provision is made for supervision, the matters referred to in Part F of these Best Practice Principles
- whether there is any reason to believe the orders would be used to continue to control or maintain contact with the parent with whom the child lives
- whether there are other issues such as mental illness, drug and alcohol abuse or serious parental incapacity which would present a risk to the child
- whether the parties have had legal advice
- whether the Court can be satisfied that the parties have agreed to the orders without pressure
- whether the party who alleged the violence or abuse is genuinely satisfied the orders do not present an unacceptable risk to the child or any other person, and
- if an independent children's lawyer has been appointed, whether he or she agrees to the consent orders.

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28 Where separating families are in high conflict over parenting arrangements, Parenting Orders Programs are available to help parents focus on their children. These programs are provided by a number of community based organisations funded under the Family Relationships Services Program.

29 See Rule 10.15A FLR and Rule 13.04A FCCR.

In the event the Court is not satisfied about any of these matters, consideration may be given to the following:

- ordering the appointment of an independent children's lawyer
- ordering a family report or other expert report
- ordering a section 69ZW report
- hearing evidence to determine the nature and extent of any violence or abuse and whether or not there is an unacceptable risk to the child if the orders are made, and
- ordering the parties to participate in a therapeutic intervention prior to the making of orders.

If the Court is satisfied it is in the best interests of the child to make the proposed consent orders and those orders provide for a child to spend time with a person against whom allegations of family violence or abuse 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.[30]

J. TIME STANDARDS FOR COURT EVENTS

In hearing and determining applications for parenting orders in which allegations of family violence or abuse, or the risk of family violence or abuse, are put forward as a reason to make or refuse to make a parenting order, the courts aim to achieve the following time standards between court events, while recognising that matters that require urgent attention will be accorded priority:

1. Where a Notice was filed with an initiating application or in response to an initiating application, the proceedings should be listed before a judicial officer within eight weeks from filing the notice or within six weeks if an abridgment of time has been granted.
2. In the Family Court, if during a Case Assessment Conference or a Registrars' Procedural Hearing List the registrar considers it appropriate for interim orders to be made, the matter should be listed in a Judicial Duty List within four weeks.
3. Where an independent children's lawyer is ordered, the matter should come back before a judicial officer no later than eight weeks from the date of order.
4. Where family counselling or family dispute resolution is ordered, the matter should come back before a judicial officer no later than eight weeks from the date of order.
5. Where parties are ordered to attend an appointment with a family consultant, the matter should come back before a judicial officer no later than eight weeks from the date of order.
6. Where a family report is ordered, the report is to be completed no later than 12 weeks from the date the report was ordered or not later than two weeks prior to the hearing for which it is required.
7. Where a section 69ZW report is ordered, the matter will be listed 10 to 12 weeks later.

30 See "Parenting orders – what you need to know", prepared by the Attorney-General's Department with the assistance of Professor Richard Chisholm AM, October 2016.

FAMILY COURT OF AUSTRALIA

PARLIAMENTARY INQUIRY INTO A BETTER FAMILY LAW SYSTEM TO SUPPORT AND PROTECT THOSE AFFECTED BY FAMILY VIOLENCE

ANNEXURE B

Family Court–Federal Circuit Court submission to the Victorian Royal Commission into Family Violence

FAMILY COURT
OF AUSTRALIA

FEDERAL CIRCUIT
COURT OF AUSTRALIA

VICTORIAN ROYAL COMMISSION
INTO FAMILY VIOLENCE

SUBMISSION
BY THE FAMILY COURT OF AUSTRALIA AND FEDERAL CIRCUIT COURT OF AUSTRALIA

6 August 2015

INTRODUCTION

1. The Family Court of Australia (Family Court) and Federal Circuit Court of Australia (Federal Circuit Court) ("the courts") are grateful for the opportunity to contribute to this important Commission into family violence. Although the Commission will report to the Parliament of Victoria and these courts are created by legislation enacted by the Commonwealth Parliament, the issue of family violence is an Australia wide issue which does not recognise state boundaries. Hence it is appropriate that with the consent of the Commonwealth Attorney General, our courts assist the Commission in its work. However, the Commission's Terms of Reference are broad and extend further than matters upon which the courts could appropriately comment. This submission will thus focus on the second of the Commission's Terms of Reference; being on the interaction of federal family law and state laws in relation to family violence. Information will also be provided about various organisational initiatives designed to make the registries safe and to equip staff to recognise, understand and deal with family violence.

2. It should be observed at the outset that although the Commission is required to adopt the definition of "family violence" contained in s 5 of the *Family Violence Protection Act 2008* (Vic) for its work, in this submission the term "family violence" applies the definition of family violence set out in s 4AB of the *Family Law Act 1975* (Cth) ("Family Law Act")[1].

COURTS EXERCISING FAMILY LAW ACT JURISDICTION

3. Australia operates according to a system of co-operative federalism, whereby governmental powers are allocated between Commonwealth and state governments. The Commonwealth has specific powers under the Australian Constitution and the states and territories exercise residual powers. Constitutional responsibility for parental rights and the custody and guardianship of children is vested in the Commonwealth. Responsibility for public intervention by the state in care and protection issues and the criminal law lies with the states and territories. As a consequence state intervention in children's lives is dealt with by state courts and private family law disputes are dealt with by courts exercising federal jurisdiction, in particular, the Family Court and Federal Circuit Court.

4. When the Family Court was established it took over the matrimonial causes jurisdiction exercised by state and territory Supreme Courts, but only in relation to divorce and ancillary relief. In the following years, state and territory parliaments referred to the Commonwealth powers which were invested in the states and territories, including in relation to de jure and de facto couples.

Jurisdiction continued to grow and the Family Court now has jurisdiction in relation to all private family law disputes, relevantly including all children other than those under the care of a person under a child welfare law (s 69ZK). Allied to this is the power to accrue additional jurisdiction required to determine, in one court, a single justiciable issue. The weight of authority is against the Family Court having power to accrue jurisdiction to bind a state child protection agency unless that agency has submitted to the court's jurisdiction (*Secretary, Department of Health and Human Services v Ray and Ors* (2012) 45 Fam LR 1).

5. The Family Court operates in all states and territories other than Western Australia. Western Australia elected to maintain a state based court structure upon which federal jurisdiction is conferred.

6. The Federal Circuit Court was created by the enactment of the *Federal Magistrates Court Act 1999* (Cth) and commenced operation in 2000. The Federal Circuit Court exercises jurisdiction in general federal law matters throughout Australia and in family law matters, in all states and territories other than Western Australia. Although the Federal Circuit Court's jurisdiction was initially quite limited, it has continued to grow and, in family law matters, it is invested with almost concurrent jurisdiction to that of the Family Court. The differences in jurisdiction have no bearing on the Commission's work. The Federal Circuit Court determines the greatest volume of family law cases of any court in Australia.

7. Appeals from judges of the general division of the Family Court and judges of the Federal Circuit Court exercising family law jurisdiction lie to the Appeals Division of the Family Court. Appeals are by way of rehearing but subject to the establishment of an error of law. The role of the Appeals Division is to correct error as well as to elucidate the law and set precedents.

8. The division of casework between the Family Court and the Federal Circuit Court is underpinned by a protocol which the Chief Justice and the Chief Judge published for the guidance of the legal profession and parties to enable matters to be directed to the court appropriate to hear them. Under the protocol, the Federal Circuit Court judges undertake the bulk of family law cases, whilst the more complex cases and appeals are dealt with by the Family Court. The effect of the protocol is that the types of matters listed below are determined in the Family Court:

    - International child abduction;
    - International relocation;
    - Disputes about whether a case should be heard in Australia;

- Special medical procedures (such as gender reassignment and sterilisation);
- Contravention and related applications in parenting cases concerned with orders made by judicial determination by a judge of the Family Court in the preceding 12 months;
- Serious allegations of sexual abuse of a child warranting transfer to the Magellan or similar list and serious allegations of physical abuse of a child or serious controlling family violence warranting the attention of a superior court;
- Complex questions of jurisdictional law; and
- If the matter proceeds to a final hearing, the hearing is likely to take in excess of four days.

9. Cases which do not come within these categories are determined in the Federal Circuit Court. The effect of the protocol is that the Family Court deals with the most complex and intractable parenting disputes which require substantial court time. Although there are occasions when cases that the protocol would otherwise have determined by one court are determined in the other court, the protocol provides a useful guide to the nature of the work undertaken by each court.

10. Reference must also be made to arrangements by the Commonwealth with the states and territories which enable magistrates of state and territorial courts to exercise family law jurisdiction (ss 39(2) and (7)). The effect of this is that state and territory magistrates exercise limited original jurisdiction in family law subject to an appeal de novo to the Family Court. Although they perform an important role in the Australian family law system and are the point at which many people involved in the breakdown of a marriage or relationship first come into contact with a court, it is not appropriate that we make submissions in relation to the operations of those courts.

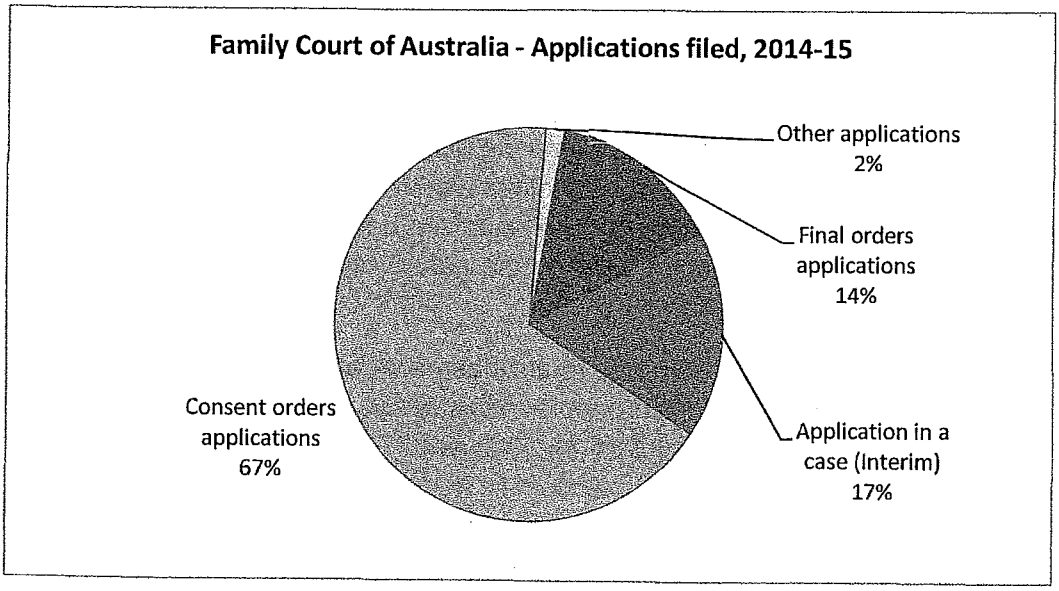
DIVISION OF WORK BETWEEN THE TWO COURTS

11. The courts share premises and administration. Since the establishment of the Federal Circuit Court there has been a progressive shift in the balance of filings between the two courts. For the last two years, the share of filings between the Family Court and Federal Circuit Court (including transfers and excluding appeals) has been stable at 85% - 87% for the Federal Circuit Court and 15% - 13% in the Family Court. The two tables which follow provide a summary of the applications for final and interim orders dealt with by the two courts for the 2014/2015 financial year:

Table 1: Family Court: period 2014-2015

Application	Filed	Finalised	Pending	% Filed
Final orders applications	2936	3028	2982	14%
Application in a case (Interim)	3476	3333	1428	17%
Consent orders applications	13,662	13,457	1012	67%
Other applications	323	290	222	2%
Total	20,397	20,108	5644	100%

Applications for Final Orders - Issues sought	
Parenting only	30%
Financial only	55%
Parenting and financial	13%
Other	2%



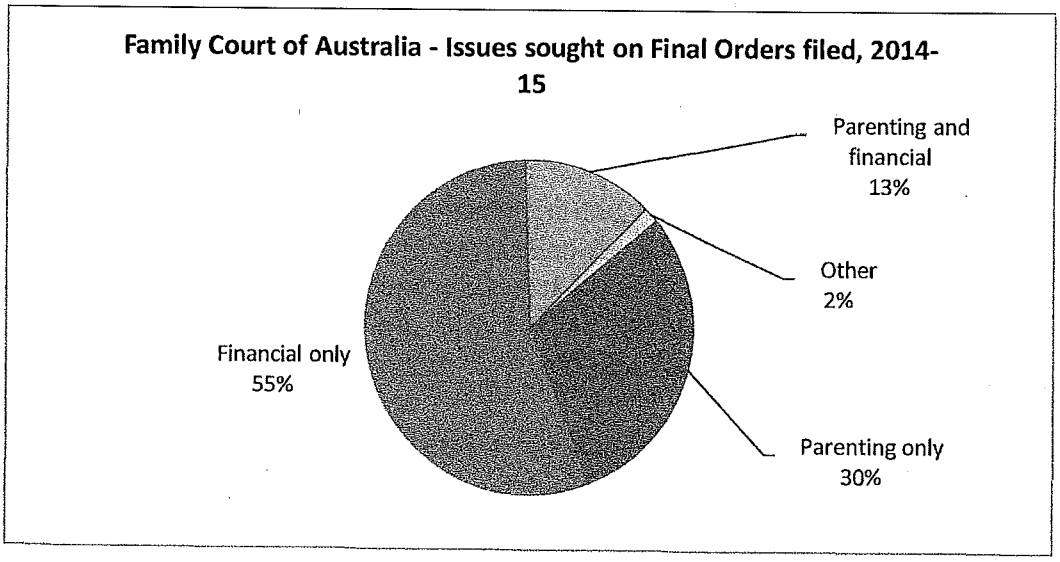
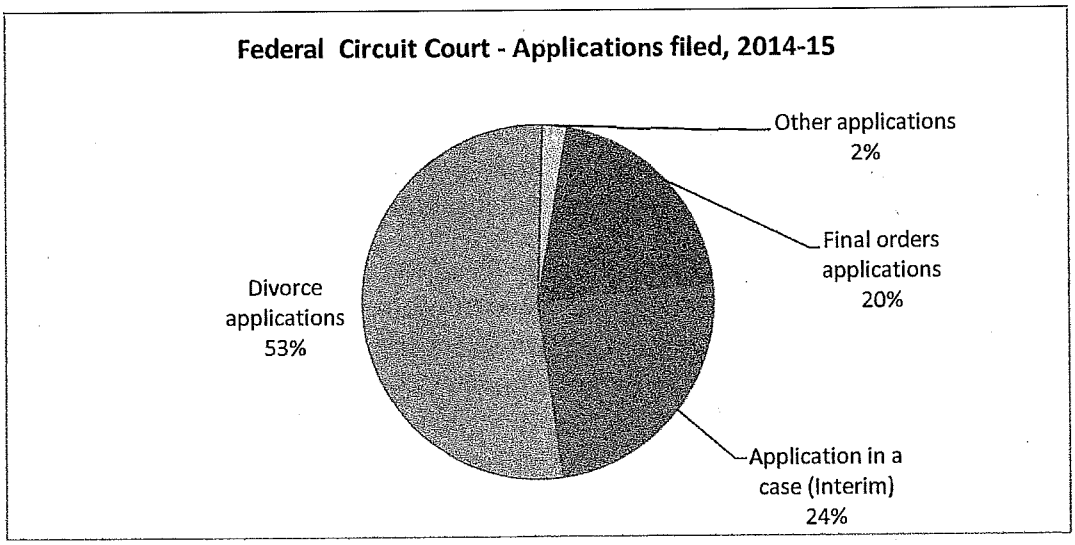
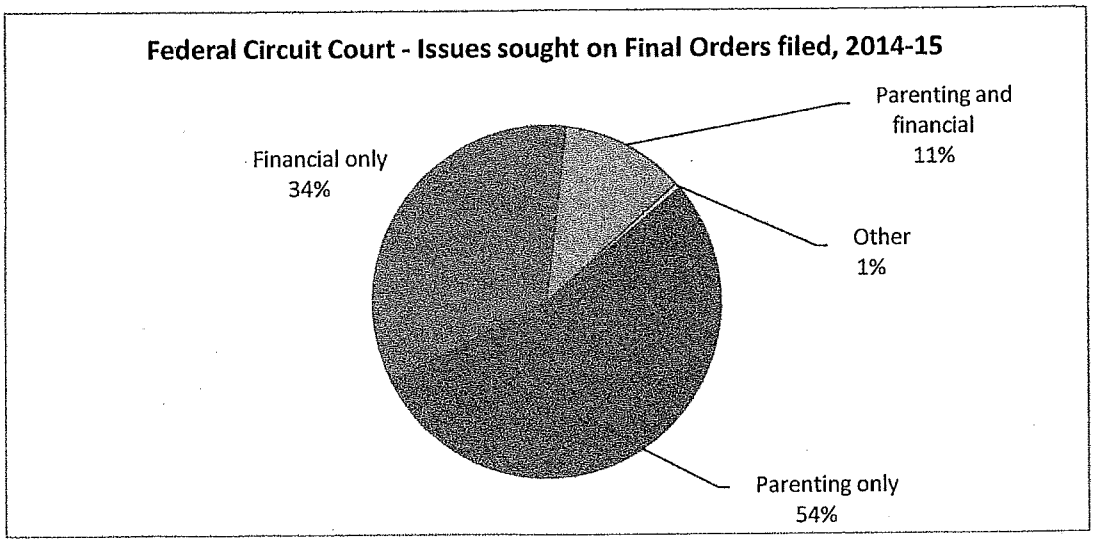


Table 2: Federal Circuit Court: period 2014-2015

Application	Filed	Finalised	Pending	% Filed
Final orders applications	17,685	16,526	16,051	20%
Application in a case (Interim)	21,112	20,279	6835	24%
Divorce applications	45,593	43,132	10,136	53%
Other applications	1990	1 806	976	2%
Total	86,380	81,743	33,998	100%

Applications for Final Orders - Issues sought	
Parenting only	54%
Financial only	34%
Parenting and financial	11%
Other	1%





12. For the last nine years, the Australian Institute of Family Studies ("AIFS") has conducted a review of trends in filings in the two courts. The most recent report (Report No. 30 published 2015) analyses the courts' data for the period between 2004-2005 and 2012-2013. The key findings concerning the complexion of work undertaken by the two courts reveal:

    - 52% of the Family Court's caseload is property settlement matters (compared with 30% in 2004-2005);
    - 14% of the Family Court's caseload (compared with 18%) comprises children and property settlement matters;
    - 34% (compared with 53%) are solely children's cases;
    - In the Federal Circuit Court, the relative distribution of property and children's matters is the reverse of that in the Family Court.

13. The data presented in the AIFS report does not speak to questions of complexity and risk. As will be discussed later, both courts deal with cases which involve family violence and risk issues. Because the courts' case management processes are different, it follows that to the extent the Commission may explore the interaction of federal and state laws and the courts, it will need to be careful to distinguish between the courts and to ensure that the discussion reflects the current law and practices.

14. The overwhelming preponderance of applications filed in either court are resolved by agreement and with consent orders. In the Family Court consent orders are mostly made by registrars exercising delegated powers. There is a simple process available in the Family Court for the making of orders by consent in cases which are not otherwise before a court. If the case has commenced before a judge, the judge will determine whether or not orders should be made as sought.

15. The case management of family law proceedings in the Federal Circuit Court utilises a pure docket system in which the docketed judge deals with the matter on its first date until finalisation. Self-evidently, in the Federal Circuit Court consent orders are made by judges.

16. The consent of the parties does not relieve the court from determining the application on the basis of the child's best interests (s 60CA) albeit the court is not obliged to apply ss 60CC(2) and (3).

17. Both courts have rules which require a party, or if represented, the party's lawyer to inform the court when making consent orders whether he or she considers a party or child has been or is at risk of family violence and, if allegations have been made, how the consent order attempts to deal with the allegations (r 10.15A FLR and r 13.04A FCCR). *T v N* (2003) 31 Fam LR 257

is an example of a case where, because of safety concerns for a child, the Family Court refused to make the proposed consent orders.

THE FAMILY LAW ACT AND PARENTING ORDERS

18. In the 40 years since its inception, the Family Law Act has been amended almost 80 times and been the subject of a number of parliamentary reviews[2]. Care arrangements for children have always been governed by Part VII and, albeit described differently, always proceeded on the basis that the best interests of the child is the paramount consideration (s 60CA). However, the criteria by which the best interests of a child is established have changed often, with that issue being initially at large[3] and now governed by an array of primary and additional considerations (s 60CC), the interpretation of which is informed by the objects (s 60B) of Part VII (*Goode v Goode* (2006) FLC 93-286; *Aldridge v Keaton* (2009) FLC 93-421; *Maldera & Orbel* [2014] FamCAFC 135). The obligation on courts to take into account any other relevant matter (s 60CC(3)(m) means that the uniquely individual aspects of a family can be addressed) (*Mulvany v Lane* (2009) Fam LR 418).

19. The most recent reforms are those introduced by the *Family Law Legislation Amendment (Family Violence & Other Measures) Act 2011* (Cth).

20. The purpose of the 2011 reforms was to amend Part VII thereby enabling the courts and the family law system generally to respond more effectively to parenting cases involving violence or allegations of violence. The most important changes instituted by the 2011 reforms were:

    - Repeal of provisions which may deter disclosure of family violence.
    - When considering what is in a child's best interests to give greater weight to protecting children from harm than to maintaining meaningful relationships.
    - Changed the definitions of "family violence" and "abuse" of a child to reflect a contemporary understanding of what constitutes family violence.
    - Refined the approach to family violence orders as part of considering a child's best interests.
    - Requiring family consultants, family counsellors, family dispute resolution practitioners and legal practitioners to encourage parents to prioritise the safety of the children.
    - Reporting requirements for family violence and abuse were improved to ensure that the courts have better access to evidence in this regard.

- Making it easier for state and territory child protection authorities to participate in family law proceedings (immunity from costs).

21. Since 2006, the primary considerations contained in s 60CC(2) of the Family Law Act have been:

    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.

22. The 2011 reforms inserted a new ss 60CC(2A), which provides:

    In applying the considerations set out in subsection (2) the court is to give greater weight to the considerations set out in paragraph (2)(b).

23. Thus the balance between the two primary best interests considerations was altered and priority is given to the safety of children over the benefit to children of having a meaningful relationship with both parents.

24. Other significant concerns emerging from various reports[4] resulted in the removal of the so-called "friendly parent" provisions (the extent to which a parent had facilitated or failed to facilitate a child's relationship with its other parent) by amending s 60CC(3)(c) and repealing ss 60CC(4) and (4A). The contentious costs section, s 117AB was also repealed. These reports suggested that this section operated as a disincentive to disclosing family violence for fear it would lead to a costs order if claims of family violence could not be substantiated.[5]

25. Under the 2011 reforms, the definition of "family violence" became:

    (1) For the purposes of this Act, ***family violence*** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the ***family member***), or causes the family member to be fearful.

26. Section 4AB(2) contains examples of matters that may involve or constitute family violence. The definition of "abuse" was also changed and the phrase "exposed to family violence" was, for the first time, defined in the Family Law Act.

27. By s 4(1) abuse, in relation to a child, means:

    (a) an assault, including a sexual assault, of the child; or

    (b) a person (the ***first person***) involving the child in a sexual activity with the first person or another person in which the child is used, directly or

indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or

(c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or

(d) serious neglect of the child.

28. The words "exposed to family violence" are defined in s 4AB(3) to mean "... if the child sees or hears family violence or otherwise experiences the effects of family violence".

29. Examples of situations that may constitute a child being exposed to family violence include, but are not limited to, the child:

(a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or

(b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or

(c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or

(d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or

(e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

30. Although the Commission may undertake its own examination of each court's judgments[6], the following judgments constitute a useful sample of the manner in which interim hearings determined in light of the 2011 reforms are decided:

- *West & West* [2015] FCCA 336;
- *Whitby & Zeller* (No. 2) [2014] FamCAFC 239;
- *Eaby & Speelman* [2015] FamCAFC 104.

31. Those authorities make it quite clear that the court is required to address risk issues at an interim hearing. In that respect, in *Deiter & Deiter* [2011] FamCAFC 82, the Full Court said:

> The assessment of risk is one of the many burdens placed on family law decision makers. Risk assessment comprises two elements – the first requires prediction of the likelihood of the occurrence of harmful events, and the second requires consideration of the severity of the impact caused by those events. In our view, the assessment of risk in cases involving the welfare of children cannot be postponed until the last piece of evidence is given and tested, and the last submission is made... (footnotes omitted)

32. Set out below is a sample of final judgments which apply the 2011 reforms:

- *Aston & Gregory* [2015] FCCA 318;
- *Essey & Elia* [2013] FCCA 1525;
- *Vallas & Vallas* [2015] FCCA 924;
- *Wemble & Dautry (No. 2)* [2014] FCCA 2847;
- *Griffin & Trueman* [2014] FamCA 596;
- *Vance & Carlyle* [2014] FamCA 651;
- *Shivas & Darby* [2014] FamCA 1149;
- *Mabart & Haselden* [2012] FamCA 793.

THE FAMILY LAW ACT AND INJUNCTIONS

33. In addition to making a parenting order which restrains contact with a child, ss 68B and 114 give courts exercising family law jurisdiction power to grant injunctions, including restraint against approaching, entering or remaining in premises where the child, a parent of the child, and others (s 68B(1)(b)) live or spend time. Sections 68C and 114AA(1) enable the court to give police the power to arrest without warrant the person to whom the injunction is directed if the conditions in the sections are established. Although orders of this type are made frequently the powers of arrest appear to be rarely used.

34. It is obvious that the personal protection afforded by these injunctions can also be achieved by an Intervention Order made under state legislation, relevantly the *Family Violence Protection Act 2008 (Vic)*. The combined effect of s 114AB(1) and reg 19(a) of the Family Law Regulations 1984 is that ss 68B and 114 do not exclude or limit the operation of the Victorian Act. This may explain why the powers of arrest referred to are rarely used.

THE INTERACTION OF INTERVENTION ORDERS AND THE FAMILY LAW ACT

35. Section 68R of the Family Law Act empowers a state court (for example, Magistrates Court of Victoria) when making or varying an intervention order to revive, vary, discharge or suspend a parenting or other order (s 68R(1)(a)-(d)) to the extent that the family law order requires or authorises a person to spend time with a child. The power is exercisable on application by any person or on the initiative of the court but requires that the court has before it material that was not before the court that made the family law order or injunction. Thus, for example, a police prosecutor and a victim could activate s 68R.[7] Section 68T deals with interim orders and provides the suspension or variation will operate for 21 days. The intention being that within 21 days the revival, variation or suspension will be further considered by a court exercising jurisdiction under the Family Law Act. Thus, the court with the most recent evidence about the family has the power to address the effect of an elevated risk of exposure to family violence.

36. Anecdotally, the power contained in s 68R is not used. Perhaps this is because the application for an Intervention Order is often the first contact a family has with the court system and thus there is no order under the Family Law Act which needs consideration. Another possibility is that the volume of Intervention Order applications is so substantial that police and state courts do not have the capacity to do more than solely address the application for Intervention Orders. This means there is the potential for inconsistency between Intervention Orders and orders made pursuant to the Family Law Act which, self-evidently, may create confusion about which orders prevail and whether or not a person the subject to an Intervention Order, can approach their child and/or former partner.

37. The Commission may care to examine the extent to which Victorian courts exercise powers conferred by s 68R – and s 68T and any barriers to those powers (particularly s 68T) being used effectively.

38. If the powers conferred by ss 68R – 68T inclusive were to be extensively exercised by state courts, there are obvious resource implications for the Family Court and Federal Circuit Court. Stated simply, the federal courts do not have the capacity to readily absorb an increase in their caseload because of family law orders made by state courts, particularly in respect to work which must be dealt with urgently. An increase in this type of work would suggest that the 21 day time limit referred to in s 68T would require further consideration. It would be consistent with the time limit contained in s 67ZBB (court to take prompt action in relation to allegations of child abuse or family violence) for s 68T to be amended to eight weeks. Having said that, discussions have commenced between the Federal Circuit Court and state courts in Brisbane and

Parramatta with a view to facilitating an urgent listing in the Federal Circuit Court of any family law application necessitated by the family violence evidence given to the state court.

39. Section 68P operates somewhat similarly to s 68R. In essence, it enables a court exercising family law jurisdiction to make orders inconsistent with an existing state family violence order. The section imposes obligations on the court which are self-explanatory and relevantly requires the court to give reasons for doing so. Again, the point of the section is it enables the court with the most recent evidence about the family to make orders which governs the situation. The effect of s 68Q is that to the extent that the state order is inconsistent with the subsequent family law order, the family violence order is invalid. Anecdotally, the power contained in s 68P is not used often. The reason for this would appear to be that state orders are sensibly drafted to avoid conflict between state protection orders and orders made under the Family Law Act.

INDEPENDENT CHILDREN'S LAWYERS

40. The primary function of an independent children's lawyer is to assist the court to make a determination that is in the best interests of the children (s 68LA). This role has particular importance in proceedings where one or both of the parties is self-represented and who may not have the knowledge or skills to present appropriate evidence relevant to the determination (*Re K* (1994) 17 Fam LR 53).

41. Other important aspects of the role of the independent children's lawyer are to explain to children the nature of the proceedings and how they can be heard; garnering expert evidence, helping the parties and the court to develop a plan which enables the children to have meaningful relationships with their parents if it is safe to do so; suggesting what arrangements might be put in place to enhance the safety of children where there are elements of risk involved; and assisting the parties to find non-litigated solutions to the current dispute (s 68LA(5)) (*P & P* (1995) 19 Fam LR 1).

42. Legal Aid policy funding decisions can have a significant impact on the work of the court. This was particularly noticeable in Victoria during the years in which legal aid placed a limit on the number of independent children's lawyers it would fund. The consequence was that there were many cases in which serious allegations of risk to a child were made but an order for the appointment of an independent children's lawyer was not implemented. This meant that, at times, the court could not be confident that it had all of the relevant evidence, especially where one or more of the parties were unrepresented.

Cross-examination of victims of family violence

43. Further, lack of adequate legal aid funding may result in victims of family violence themselves having to conduct the litigation against the perpetrator of the violence and thus find themselves cross-examining the perpetrator and being cross-examined by the perpetrator. From time to time, suggestions have been made that governments fund an advocacy service similar to that which is used in certain states in criminal trials, where an advocate conducts the cross examination of the alleged victim in place of a self-represented accused.

44. In broad terms, we are not persuaded that such a suggestion recognises the significant difference between criminal and family law proceedings, even where the subject matter, violence, is the same. For example, in a criminal trial, while violence may be the sole factual and legal issue for determination, often the alleged victim is but one of the witnesses in the case. In the family law context, the victim is a party to the proceedings and the issue of family violence is only one of the issues to be determined although it may permeate the whole of the factual matrix of the case. It is difficult to see how such a system would sensibly sequester the cross-examination of an alleged perpetrator as to family violence from the cross examination on other issues in the case.

45. Further, unlike in a criminal context, where the victim is a witness and is to a considerable degree protected by the fact that the proceedings are conducted by police or by the Office of the Director of Public Prosecutions, in family law, the victim is a party and, where self-represented, will have interaction with the perpetrator throughout the case, not merely while giving evidence.

46. While ultimately a matter for government funding, a better and more effective approach to the issue would be to provide sufficient resources to enable parties to have legal representation where there is an allegation of family violence at the upper end of severity.

47. We are acutely conscious that the Commonwealth has a significant role in relation to funding legal aid bodies in relation to Commonwealth matters. And, that the demand for legal aid services notoriously outstrips the resources made available to legal aid commissions. However, there is an important policy difference between the approach taken by Victoria Legal Aid to funding independent children's lawyers at final hearings and that adopted by other legal aid commissions, for example, New South Wales. The current Victoria Legal Aid guidelines provide that the independent children's lawyer is required to appear at trial but without counsel unless one of the exceptions identified in its guidelines apply. The practical effect of the guidelines is that counsel usually appears without the independent children's lawyer or an instructing solicitor. It will be immediately apparent that counsel will not have met the child and does

not have the benefit of instructions from the independent children's lawyer throughout the hearing.

48. An alternate model which it is accepted has obvious funding ramifications is for the independent children's lawyer to be funded to instruct counsel, particularly if the case is complex. The Commission might consider the extent to which the New South Wales model might be made available in Victoria.

EVIDENCE ABOUT FAMILY VIOLENCE

49. Courts make decisions based on evidence. If material that could be relevant evidence is not placed before the court self-evidently it cannot be taken into account. The experience of both courts is that the evidence of violence in family law cases has generally not involved the perpetrator being convicted of a violence related offence or intervention by child protection agencies in the family. Of course, one of the challenges in relation to cases concerned with family violence is how to encourage or indeed compel a victim of family violence to disclose that fact and present evidence which enables the court to understand the nature and characteristics of that person's experience and thus provide an individual and nuanced response to the issue. Before that issue is discussed it needs to be understood that parenting proceedings are not conducted inter-partes (*M & M* (1988) FLC 91-979; *U & U* (2002) 211 CLR 235) as that term is generally understood and that hearings are conducted in accordance with Division 12A of the Family Law Act.

50. Division 12A legislates for active case management of child related proceedings and operates so that many of the more restrictive rules of evidence do not apply and for the court to admit evidence subject to weight (s 69ZT) (*Maluka v Maluka* (2001) 45 Fam LR 129). The changes are based on principles derived from the Children's Cases Program undertaken by the Family Court, which tested various case management practices so as to diminish the adversarial nature of proceedings and increase child focus. One of the five principles in Division 12A requires that the proceedings are conducted in a way that safeguards the child from or exposure to abuse, neglect or family violence, and the parties to the proceedings from family violence (s 69ZT(5)).

Family Consultants

51. Both courts use the specialist services of family consultants, in the case of the Family Court primarily those employed by the court (s 11A) and for the Federal Circuit Court a combination of s 11A and external consultants appointed pursuant to s 11B. Family consultants are registered psychologists or social workers with tertiary qualifications and no less than five years related experience. Reports provided by family consultants accord with the Australian

Standards of Practice for Family Assessment and Reporting published this year by the two courts and the Family Court of Western Australia.

52. Family consultants are involved in both pre-trial and trial processes in various ways. Their functions are described in s 11A and include family violence screening. All communications are reportable and short memoranda or oral evidence may be given in interim hearings to assist the court to identify the issues in dispute, risks and concerns and what expert evidence may be of assistance. If a matter is to proceed to a final hearing they may be required to provide a family report pursuant to s 62G.

53. The family consultants are presently testing the use of a behaviourally based family violence screening questionnaire. It is an adaption of the Mediators' Assessment of Safety Issues and Concerns, Practitioner Version 2 (MASIC – 2P; Beck, Hotlzworth-Munroe and Applegate 2012) (MASIC).[8] This is a questionnaire submitted by each party prior to an interview with the family consultant. Trials of the questionnaire were commenced in April 2015 by the courts at Melbourne and Brisbane. An evaluation will be completed by late 2015.

Prescribed Notices

54. Notwithstanding this initiative, screening for family violence by family consultants is less available in the Federal Circuit Court than it is in the Family Court. Because victims of family violence often struggle to disclose that fact, the Commonwealth Parliament, courts[9] and the legal profession[10] have taken steps to ensure as far as possible, evidence of that type is placed before the court.[11] Sections 67Z and 67ZBA collectively require a party or interested person to file a notice in the prescribed form of allegations of child abuse, family violence or risk of family violence. The filing of a prescribed notice triggers s 67ZBB which requires the court to take prompt action in relation to allegations of child abuse or family violence. The section requires the court to consider what interim or procedural orders should be made to:

    (a) gather evidence about the allegation as expeditiously as possible; and

    (b) protect the child or any parties to proceedings.

55. As has already been mentioned, the section nominates an eight week timeframe if it is possible.

56. It is the experience of both courts that prior to the 2011 reforms there was widespread non-compliance by parties with the existing obligation to file the prescribed form and a consequential under-reporting of matters which should have been referred to a child protection authority. Hence the 2011 reforms

strengthened the obligations on parties and interested persons. The Family Court uses the prescribed notice in accordance with the Act.

57. However, the volume of cases dealt with by the Federal Circuit Court presents particular challenges in identifying cases where a party alleges there is a risk of family violence and/or child abuse. It is for this reason that in January 2015 the Federal Circuit Court introduced a new notice of risk which must be filed by every party to an application for parenting orders. The compulsory nature of the form is designed to operate as a broad based risk screening device in relation to all issues which may present a risk to a party or a child. It is the experience of the Federal Circuit Court that by imposing an obligation on all parties to answer questions about risk issues has resulted in disclosures that might not have been given in their affidavits.

58. Any notice of risk which alleges abuse of child is sent by the Federal Circuit Court to the relevant child protection authority. The obligation to file the notice in every parenting case has seen a substantial escalation in the number of notices sent by that court to child protection authorities. The Federal Circuit Court considers that the increase reflects the previous under-reporting of family violence and child abuse.

59. Set out below are two tables which identify the number of prescribed notices filed in each court in recent years. For both courts, the statistics reveal a significant increase in filings triggered by the 2011 reforms.

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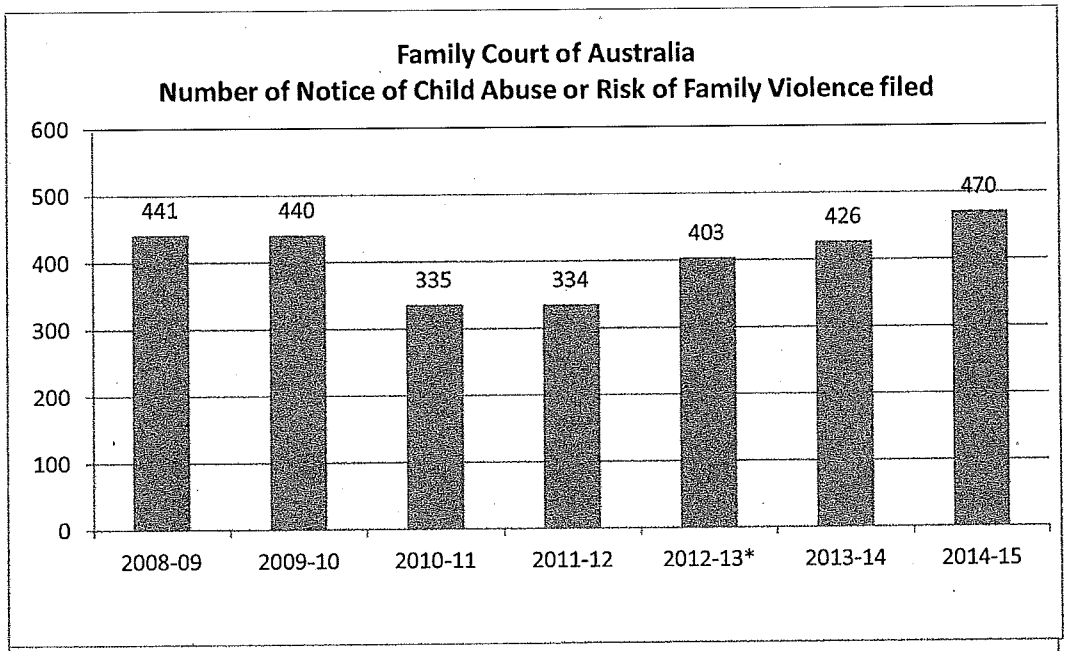
Table 3: Family Court of Australia

Notice of Child Abuse or Risk of Family Violence lodged

	Filings - Family Violence Notices filed						
	2008-09	2009-10	2010-11	2011-12	2012-13*	2013-14	*2014-15*
Notice of Child Abuse or Risk of Family Violence	441	440	335	334	403	426	470
% of Cases (Final orders)	11.5%	11.9%	10.3%	10.2%	14.4%	14.6%	16.0%

*On 1 July 2012, new definitions and rules on Family Violence were enacted.



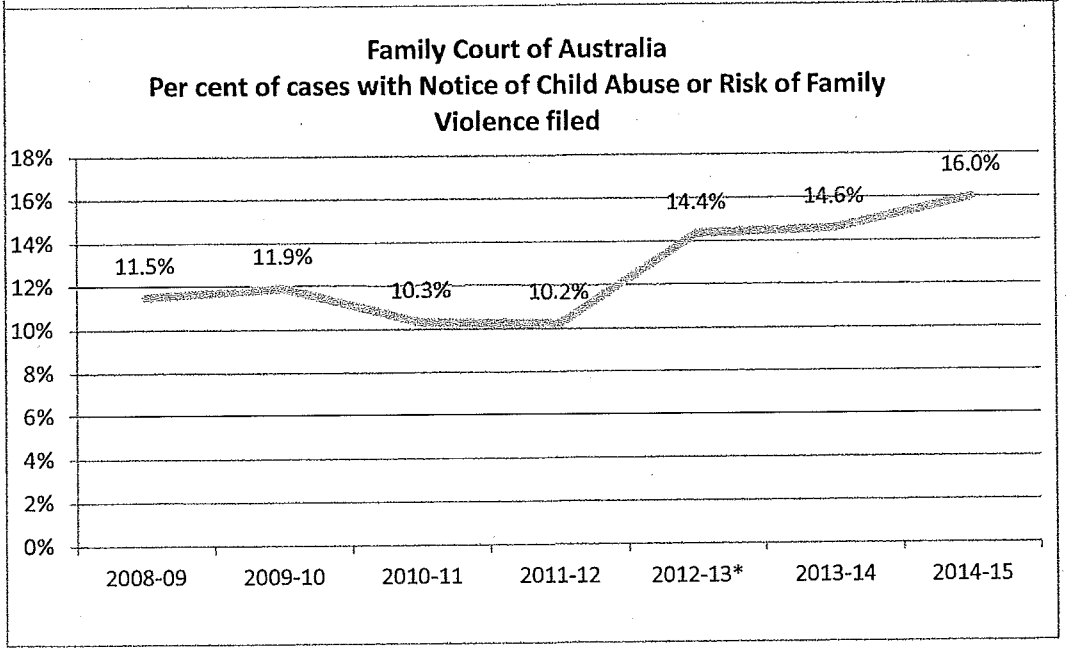
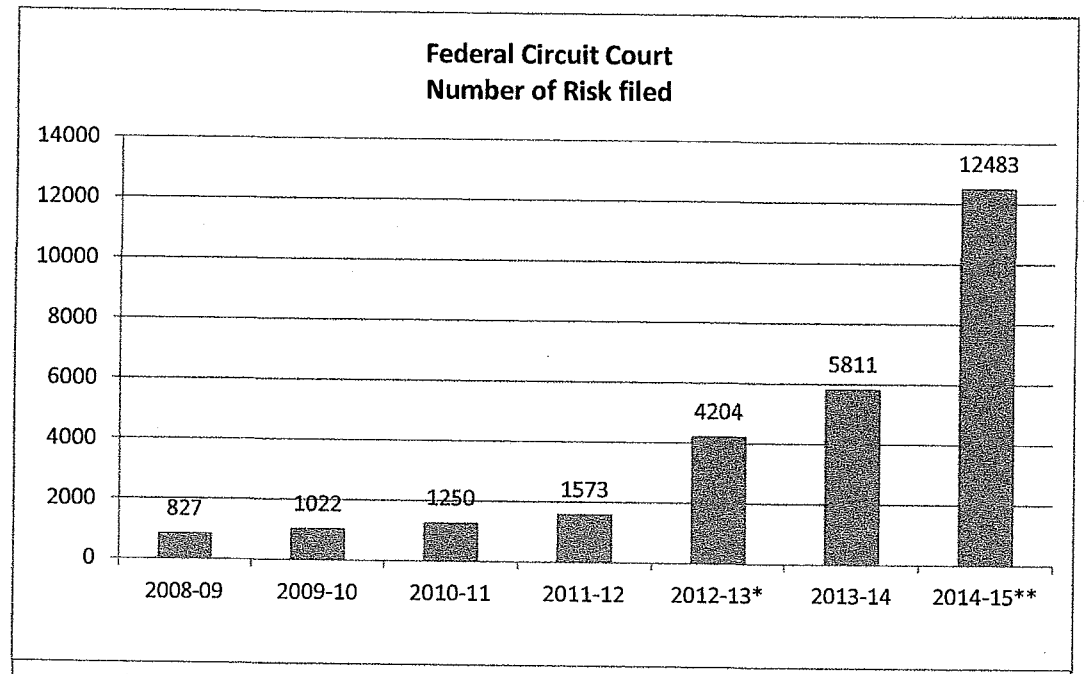
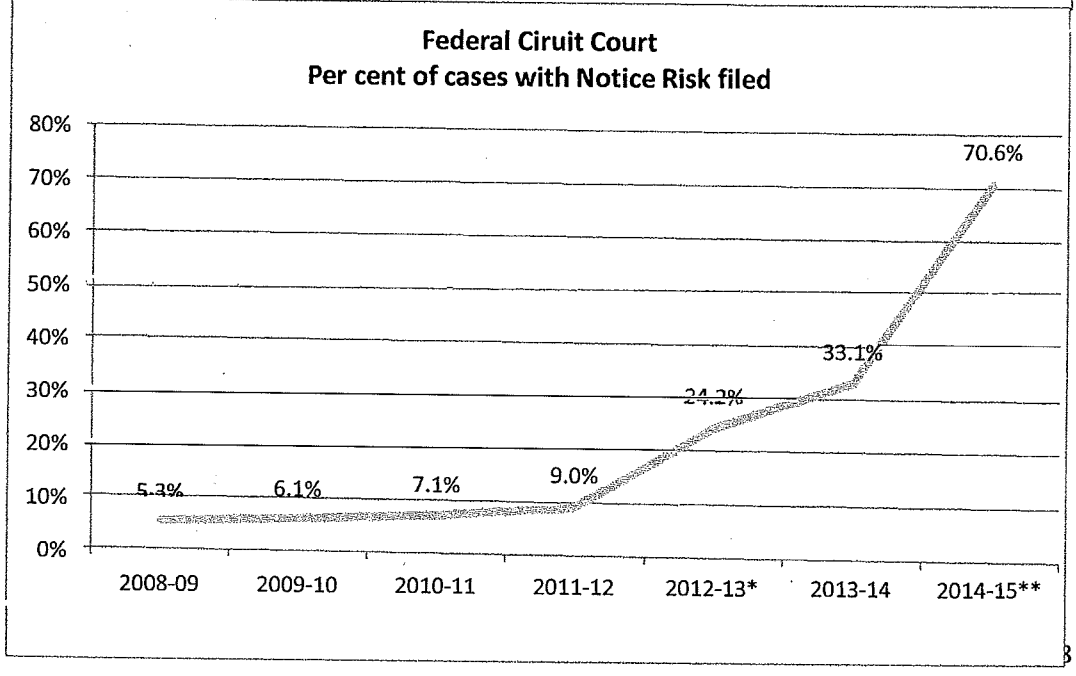


Table 4: Federal Circuit Court
Notice of Risk lodged (Child Abuse and/or Family Violence)

	Filings - Family Violence Notices filed						
	2008-09	2009-10	2010-11	2011-12	2012-13*	2013-14	*2014-15***
Notice of Child Abuse or Risk of Family Violence	827	1022	1250	1573	4204	5811	12483
% of Cases (Final orders)	5.3%	6.1%	7.1%	9.0%	24.2%	33.1%	70.6%

*On 1 July 2012, new definitions and rules on Family Violence were enacted.
** - Following a pilot in SA, on 1 January FCC introduced a Notice of Risk that is to be filed on every child matter.





60. For 2012-13 the Family Court transmitted 305 prescribed notices to child welfare agencies and in the following year 383. For the Federal Circuit Court, 2,952 prescribed notices were referred in 2012-13 and 4,217 in 2013-14. The compulsory obligation introduced in January 2015 should result in a significant increase over the preceding year.

61. Initially some authorities treated each notice of risk as a notification requiring investigation. However, the threshold for action to be taken by the child protection authority is usually higher than the matters which come within the definition of family violence and child abuse in the Family Law Act. A number of the state child protection authorities now triage the notice of risk to assess whether or not the allegations fall within the agency's statutory requirements for intervention.

62. The Federal Circuit Court has engaged with state and territory child protection authorities with a view to developing methods of ameliorating the resources ramifications on authorities of the increase in prescribed notices sent to them. In some locations, such as Parramatta, the court and child protection authority has developed a means by which the authority provides streamlined information to the court at an early stage. This has reduced the frequency of s 69ZW requests and subpoenas for the production of documents.

63. Effective communication of information between the courts and child protection agencies also means that the courts can avoid unproductive s 91B requests that a child protection agency intervene in family law proceedings. Collaboration between the courts and the Victorian Department of Human Services has led to innovations such as the co-location of a Departmental Officer at the Melbourne and Dandenong registries. This has dramatically improved the ability of the courts to receive and exchange information in relation to family violence and child abuse.

64. The Commission may care to consider the manner in which state child protection agencies receive and provide information about family violence to courts exercising jurisdiction under the Act.

EDUCATION AND TRAINING

65. At its inception, the Federal Circuit Court allocated judicial work on the basis that the judges would undertake all of the work of the court. As time passed, informal divisions developed. Essentially, as family law comprised the majority of the work of the Federal Circuit Court, judicial appointments reflected that and the majority of judges hear cases of a type in which he or she specialised in practice. Although a number of judges preside across all jurisdictions, the majority sit in the field of specialisation they chose in practice.

66. It follows that in both courts family law work is overwhelmingly undertaken by

specialist judges[12].

67. The National Judicial College of Australia provides courses for judges and an orientation course for newly appointed judges. The Australian Institute of Judicial Administration conducts education for judges, including in relation to family violence. Judges of both courts participate in training by these agencies and Justice May is President of the AIJA. The AIJA has secured Commonwealth funding to prepare a Family Violence Benchbook for use in all courts.

68. The Family Court has provided specialist education in family violence, inter alia, since 1995. Judges in both courts attend an annual conference which includes judicial education, and are encouraged to attend conferences in which these kinds of issues are discussed. Family Court judges are required to invest in five days of judicial education annually.

69. In addition, the child disputes services provide monthly seminars which are available electronically nationally on topics relevant to parenting cases, including issues of family violence. Examples of seminar topics include:

- Borderline Personality Disorder implications for parenting capacity - Dr Peter Krabman;
- Recent research findings on the impact of separated families including implications of exposure to family violence on the social ,and emotional development of children -Dr Rae Kaspiew (AIFS);
- Mens Behavioural Programs- Do they work and should we refer?- Professor Thea Brown;
- Forensic examination of violence in a family law context - Dr Chris Lennings;
- Child Emotional Abuse - the difficulty of assessing non - physical maltreatment - Dr Dana Glaser;
- The immediate, medium and long term implications of childhood trauma- overview of the impact of brain development, behaviour, attachment relationships and mental health - Susan Adams (CDS).

70. This seminar series is provided for family consultants and judges of both courts.

Administrative and Organisational Focus on Family Violence

71. The courts have made significant investments of financial resources and staff time to ensure staff have the training they need to provide sensitive client services, help them cope with the demands of helping a needy and often traumatised customer base and have registries that are safe.

Family Violence Action Plan 2014 - 2016

72. Registries of the Family Court and the Federal Circuit Court have well developed policies designed to keep people safe which are subject to constant review. The Family Violence Strategy first published by the Family Court in 2005 is now reflected in the courts' *Family Violence Action Plan 2014 - 2016*[13]. The current plan was developed by the Family Violence Committee which is a joint committee of both courts. The areas of focus of the current plan are:

- Information and communications
- Screening and risk assessment
- Operational processes, including safety at court
- Staff awareness and capability
- Community engagement
- Linking services

Safe Court Environment

73. The original plan resulted in the redesign of court registry public areas to include:

- Airport standard security screening at the entrance of the registries so that no one could attend court or other events in possession of a weapon or something which could be used as a weapon; and
- Counter service areas were restructured so that people can sit down at a client service desk and talk across that desk at the same level as the client service officer. More sensitive information can be discussed in relative privacy and referrals effectively made.[14]

Safety Plan

74. A safety plan may be developed for attendance at court. Safety plans are available to all parties. These plans, tailored to a party's particular needs can encompass the use of separate waiting rooms and safe rooms, security escort to and from court rooms and conference rooms, staggered arrival/departures, teleconference and shuttle conferencing and the use of support persons. Video conferencing allows the alleged victim to provide evidence from a separate and safe location as appropriate and security personnel are available to be in the courtroom where necessary.

75. The policy is to regularly enquire whether there are safety concerns. It is not enough to ask about risk of family violence once and client service officers thus at each point of contact with clients ask if there are any safety concerns about attending court.

Accessible Information

76. The National Enquiry Centre enables parties to make a call to obtain information with the assurance that the advice is of a high quality and provided by well trained staff. This centre now allows "web chat" which means that an instant messaging system is available from our enquiry service to a party who needs quick accessible information including any links to procedural advice or referral information. This may be very important to a person in a violent situation.

77. The courts' web sites have recently been redesigned to create more accessible pages for people seeking access to justice. There is specific information for those who are in violent situations. In addition there are pages for children which are especially designed to provide age appropriate content (5-8 years; 9-12 years; 13-18 years) and include assurances for children that they are entitled to be safe.

78. The courts' portal is also a convenient access point where a party can readily establish the status of his or her case; what listings are scheduled; and any orders made. This can be crucial especially where there are concurrent proceedings in state jurisdictions.

Other Initiatives

79. The Family Violence Best Practice Principles were developed by the Family Court and Federal Circuit Court joint Family Violence Committee. They are designed to provide practical guidance to courts, legal practitioners, service providers, litigants and other interested persons in cases where issues of family violence or child abuse arise. They contribute to furthering the courts' commitment to protecting children and any person who has a parenting order from harm resulting from family violence and abuse. They have been amended from time to time in and most recently following the 2011 reforms.

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[1] References to statutory provisions are to the *Family Law Act 1975* (Cth) unless stated otherwise

[2] See, for example, Commonwealth, Joint Standing Committee on Family Law, the Family Law in Australia (Volumes 1 and 2) Parl Paper No 150 (1980); Commonwealth, Select Committee in Family Law – Certain Aspects of its Operation and Interpretation, Family Law Act 1975: Aspects of its Operation and Interpretation, Parl Paper No 326 (1992); Commonwealth, Standing Committee on Family and Community Affairs, Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation, Parl Paper No 43 (2003) "Every Picture Tells a Story"

[3] Although the court was enjoined not to make an order contrary to the wishes of a child over 14 years except in special circumstances

[4] AIFS - *Evaluation of the 2006 Family Violence Law Reforms*, Dec 2009; The Hon. Prof. Richard Chisolm AM, *Family Courts Violence Review*, Nov 2009; Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Law and Family Law Issues*, Dec 2009; Australian Law Reform Commission *Family Violence: Improving Legal Frameworks* ALRC 117, Consultation paper 2010 and Report February 2012

[5] For a preliminary analysis of the effectiveness of the 2011 reforms see The Hon. Justice Stephen Strickland and Kristen Murray "*A Judicial Perspective on the Australian Family Violence Reforms 12 Months On*" (2014) 28 Australian Journal of Family Law.

[6] The Family Court and Federal Circuit Court are open courts and judgments are available on the courts' websites and Austlii.

[7] A family law order may not be discharged in an application for an interim Intervention Order (s 68(R)(4)

[8] This implements recommendations made by the ALRC

[9] Family Violence Best Practice Principles

[10] Law Council of Australia: Best Practice Guidelines for Lawyers Doing Family Law

[11] The Australian Law Reform Commission *Family Violence: Improving Legal Frameworks* ALRC 117, Consultation paper 2010 and Report February 2012 contains a useful discussion of difficulties about disclosing family violence

[12] For an examination of the judges' apparent understanding of family violence see Easel and Grey: Risk of harm to children from exposure to family violence: Looking at how it is understood and considered by the judiciary (2013) 27 AJFL 59

[13] See http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/about/policies-and-procedures/fv-plan

[14] Also refer "*Fortress or Sanctuary Enhancing Court Safety by Managing People, Places and Processes*", Report on Study funded by the Australian Research Council, Linkage Project, December 2014