



Domestic Violence and Family Law *

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Family Law in Australia

The Family Court of Australia was established as a federal court under the *Family Law Act 1975 (Cth)*. It was one of the first such systems established internationally to deal with the dissolution of marriage and related issues of property and child custody and access (Brown et al. 2000).

The creation of the Family Court of Australia was an initiative aimed at improving the manner in which separation and marriage dissolution were managed. Informing the vision were humanitarian values - the Court was to be a helping court, the need for improved access to justice was identified. The Court's processes were to be less formal, services were to be provided to remote areas and child-care was to be provided for parents using the Court's services (Family Court of Australia 2002).

Over time, the Family Court also became responsible for custody and access (now termed residence and contact) matters regarding children whose parents were not legally married.

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With respect to the care of children, the vast majority of separating couples reach an agreement, with only five per cent of matters proceeding to a full hearing before a judicial officer (Family Court of Australia 2002).

Domestic violence, child abuse and separation

Domestic violence and separation

Domestic violence is a common issue in marital separation (Sheehan & Smyth 2000). Brown et al. (2001, p. 2) cite research by the Australian Institute for Family Studies which found that: '66 per cent of separating couples point to partnership violence as a cause of marital breakdown, with 33 per cent of the couples describing the violence as serious.'

The domestic violence literature reveals that, for many women, ending the relationship does not necessarily end the violence (Fleury, Sullivan & Bybee 2000). In some cases, the post-separation violence is a continuation of violence which occurred during the relationship; in others, the violence commences with separation. This violence can be serious and life-threatening: approximately thirty per cent of the Australian women killed by male partners are killed after separation (Easteal 1993; Carcach & James 1998).

McMurray (1997) notes that, despite the heightened risk to women's safety at separation, there has been little research about the context of post-separation violence. She cites research by Ellis (1987) which identified three times at which risk to women increases during the marriage dissolution process: 'when the woman has challenged the batterer's control over her, when she takes action that may set back his interests, and when she acts in a way that clearly advises him that she contemplates a future life without him' (McMurray 1997, p. 544). The salience of these factors to the context of women's contact with the Family Court highlights the importance of the Court prioritising the issue of women's safety.

McMurray et al. (2000) explored the male perspective on violence after separation, something which they identified as missing in the literature.

Based on the men's self-report, 55 per cent of the sample were non-violent during the relationship and during the process of separation; 41.7 per cent were violent to their former partner, either during the relationship, after separation, or both; while the remainder did not declare whether or not they had been violent. Within the group which had used violence, 10.9 per cent reported that they were violent both during the relationship and after separation; 30.8 per cent reported violence only during the relationship; and 9.6 per cent reported violence only after separation. The authors commented that: 'The attitudes of these men to violence was (sic) alarming, with almost half the respondents stating that violence is justified at least some of the time.' (McMurray et al. 2000, p. 99) Among strategies rated by the male respondents to stop men hitting their partners, the "fairness of the legal system" was ranked most highly (41.5%), followed by "provision of counselling/support/education" (39 %).

Child abuse in the context of parental separation

Brown et al. (2000) argue that child abuse in the context of relationship breakdown is a neglected area of research, possibly because of the strength of the belief that allegations of child abuse made in the context of relationship termination are merely tactics between disputing parties. From their research in the Family Court, they found that:

The study's findings contradict beliefs about child abuse in the context of partnership breakdown. Child abuse allegation made in the Family Court were found to be false no more frequently than child abuse allegations made in other circumstances: some 9% were found to be false...Moreover, child abuse in the Family Court cases was not mild and exaggerated abuse, but the more severe abuse with physical or sexual abuse being found in some 70% of cases. Once again, the profile of the type of abuse was much the same as that proceeding through the state Children's Court (Brown et al. 2000, p. 852).

The study also found high rates of partner-to-partner violence. Brown (2001) argues that these findings are consistent with, and contribute to, a growing

body of international research into child abuse in the context of parental separation. From an extensive review of this research she argues that:

The recent research, to which Australia has been the major contributor, shows the new reality. It shows that child abuse allegations in this context should not be classed as a red herring, or a diversion stemming from the dispute, but as a red light, an indicator of serious family problems. Child abuse in this context is real and it is serious. Child abuse is a critical event on the way to parental separation and parental separation is a critical event on the pathway to child abuse (Brown 2001, p. 1).

Child abuse and domestic violence in the context of contact

Concern about the impact of violence on their children is an important factor in the decision of many women to end a relationship in which they are being abused (Hilton 1992; Keys Young 1998). However, as noted above, for these children and their mothers, separation frequently does not end the violence. Rather, 'the site of the struggle shifts and the experience of abuse changes' (McMahon & Pence 1995, p. 194).

The months following separation present the period of greatest risk to women of death or serious injury (McMahon & Pence 1995), yet at this time of heightened danger, the victimised woman is expected to negotiate arrangements of contact and residence (Pagelow 1993). This is a context in which abusive spouses can use issues of contact and residence to continue to exercise coercive control over their partners (Rendell, Rathus & Lynch 2000). It is also a context in which it is frequently assumed that separating couples can put aside their differences 'for the sake of the children' (Sudermann & Jaffe 1999), an assumption which does not reflect understanding of the nature and dynamics of domestic violence, and which can result in an abused woman being labelled as 'implacably hostile' within the legal system (Humphreys 1999) because of her attempts to protect her children and herself from violence by opposing contact.

A study by Radford et al. (1997) in England and Sweden illustrates the struggle, which women experience in attempting to establish safe contact arrangements in the aftermath of relationships in which they have been subjected to violence. Fifty-three women, recently separated from violent partners, were followed up for between three months and two years. Contrary to popular stereotypes, the majority of the women in this study initially supported continued contact between their ex-partners and the children. However, only seven of the 53 women were eventually able to establish contact arrangements in which there was no further violence or harassment. Fifty of the 53 women were assaulted by their ex-partners when taking or collecting children from contact visits. Further:

A particular problem for the women and children was the way that fathers used contact with the children as a route to further abuse the mother, either directly, by harming the children, or indirectly, by a proliferation of court cases. Threats to kill, harm or abduct a child, especially when the women tried to leave, appeared often to be primarily designed to hurt the mother (Radford et al. 1997, p. 477).

However, attempts to stop contact because of safety concerns commonly led to the women being seen as “hostile” or “obstructive” by the courts. Since this placed them at risk of losing their children, women agreed to contact arrangements which compromised their safety and in some cases left the children with the violent partner because they realised that leaving with the children was not possible. The authors comment that the issue of fathers’ “hostility”, evidenced by violence to their ex-partners, was rarely taken into consideration by the courts or the professionals involved (Radford et al. 1997).

A Queensland study (Rendell, Rathus & Lynch 2000) explored the response of the legal and welfare systems to women and children affected by violence and abuse after separation. In a finding similar to the previous study, most of the women initially wanted their children to have contact with their fathers and thought that this would be positive for their children, despite the domestic violence which they had experienced: ‘It was only after the realisation that the

children were unsafe that the women wanted to change the arrangements' (p. 43). The women experienced the abuse and threats to harm their children on contact as part of the pattern of coercive control which is at the core of domestic violence. For example:

'You're still being abused because your children are being abused and they're a part of you and they're in pain and they're unhappy and they're suffering then you're unhappy. So basically they are just an extension of you and that abuse is still inflicted on you through them' (Rendell, Rathus & Lynch 2000, p. 40).

This study explored the responses of two investigatory agencies - the Police and statutory child protection agency, and two family law system agencies - Legal Aid Queensland (LAQ) and Family Court of Australia. Inadequacies in the response to allegations of child abuse after the couple's separation were identified within each system, with the report concluding:

The research...confirms that many of the effects of living with domestic violence on both women and children are poorly understood by decision-makers in the welfare and legal systems. A recurring theme has been the failure of these systems to prioritise the issue of domestic violence and to understand its importance in protecting children from on-going harm from their father after separation. Of particular concern, therefore, is the practice of not viewing domestic violence as a child protection issue (Rendell, Rathus & Lynch 2000, p. 110).

These and other Australian studies (e.g. Kaye, Stubbs & Tolmie 2003) identify contact as a context in which abused women may be exposed to further risk, and in which children and young people can continue to be exposed to the abuse of their mother, and in some cases, of themselves (Humphreys 1999).

Challenges posed to the Family Court in addressing domestic violence

The Family Court is involved with children and families at a time of high stress; when there are significant risks to the safety of significant numbers of women and children; and in a context in which it is frequently claimed that the Court is biased against fathers, despite a lack of evidence to support this claim (Melville & Hunter 2001). Adding to the complexity of its role, is a development unanticipated at the time of the Family Court's establishment:

...without public or professional awareness, child abuse has become a core element of the workload of the Family Court. Furthermore, the Family Court, conceived for matrimonial dissolution purposes, ha[s] become a significant part of the child protection system, almost as significant as the state Children's Court (Brown et al. 2000, p. 852).

As a 'stand-alone' court, the Family Court does not deal directly with child protection matters, which remain the responsibility of state and territory agencies. Once the Family Court becomes aware that child abuse may be involved, it refers the allegation to the relevant state child protection service for investigation. The Family Court proceedings are delayed until the child protection service investigates and formally responds (Brown et al. 2000).

Its role in child protection requires the Family court and state statutory child protection services to work together with much greater collaboration than has been the case in the past. The Queensland study on contact (Rendell, Rathus & Lynch 2000) found that women's reports of child abuse to the state child protection agency tended to be viewed as vindictive, malicious or not serious, when there were concurrent Family Law proceedings. This is similar to the experience of women approaching the NSW Women's Legal Resources Service for assistance (Nanlohy 2002). Similarly, Katzen (2000) found that Police were reluctant to take action on breaches of protection orders when these occurred in the context of contact hand-overs, with 'women told that action would not be taken because "it's a family matter, not a police matter"' (Katzen 2000, p. 131). Given the body of Australian and international

research which refutes the widely held belief that women fabricate allegations of abuse as a tactic in Family Court proceedings (Brown et al. 2001; Brown 2001), the Family Court has a role to play in promoting these findings to other agencies.

Jaffe, Poisson and Cunningham (2001) note that the research about the impact of divorce and separation on children, and the research on the impact on children of living with domestic violence, have largely developed along separate lines. Hence, the emerging evidence of the harmful impact on children and young people of exposure to domestic violence (Edleson 1999a) and of the frequent co-occurrence of child abuse and neglect and domestic violence, estimated at between 30 and 60 per cent (Edleson 1999b), has been slow to influence Family Law practice. As a consequence, practices (such as shared parenting) and core values, such as a belief that contact with both parents should be facilitated after separation, which arise from the findings of the literature on divorce and separation, may be recommended inappropriately or be ordered in situations of divorce when there is a history of domestic violence.

The legislative response

The issue of domestic violence is being approached differently by different Family Law jurisdictions. For example, Humphreys (1999) notes that the U.K. *Children Act* 1989 does not mention domestic violence and there is a strong presumption of contact in favour of the non-resident parent (usually the father). This is a context in which it is argued that increasingly punitive measures are being proposed against women who do not enforce children's contact with their fathers, even where there has been violence and/or child abuse (Harne 2002). In contrast, amendments in 1996 to the New Zealand *Guardianship Act*, place violence 'at the front of the decision-making process' by setting out in detail how allegations and proven cases of violence are to be treated (Rathus, Lynch & Finn 1998, p.219).

Specifically, the amendment introduced a rebuttable presumption that a parent who had used violence against a child or against the other

parent would not have the custody of, or unsupervised access to the child unless the Court could be satisfied that the child would be safe during visitation arrangements (Busch & Robertson 2000, p. 269).

This reflects a recognition that domestic violence often continues after separation, that exposure to it during contact is harmful to children and prioritises the safety of children in custody and access considerations.

Against this context, there is considerable interest in the impact of the changes introduced in Australia under the *Family Law Reform Act* 1995, which came into operation in June 1996 (Harrison & Graycar 1997). The changes introduced included ‘the need to ensure safety from family violence’ (s68K) as one of the guiding principles (Rathus, Lynch & Finn 1998). Changes in terminology – residence and contact rather than custody and access – aimed at emphasising children’s rights to contact with both parents rather than parents’ rights, were a key part of the reforms. The *Reform Act* also emphasises parents’ ongoing “parental responsibility” for children and contains an objects clause (s60B) which includes a list of children’s rights, including the right of contact with both parents (Harrison & Graycar 1997).

A study (Rhoades, Graycar & Harrison 1999, 2000; Rhoades 2000) of the impact of these reforms involved a survey of lawyers, mediators and family counsellors; interviews with Family Court judges, judicial registrars, solicitors and family court counsellors; observation of interim hearings; and review and comparison of 209 reported and unreported pre- and post-*Reform Act* interim and final judgements. The findings of this study provide an Australian case study on the impact of reforms, some of which directly attempted to address the issue of domestic violence.

Among the findings from the comparison of pre- and post-*Reform Act* unreported judgements is that there has been a dramatic decline in the rate of orders refusing contact at interim hearings. (‘No access’ in 24 per cent of pre-*Reform Act* interim judgements compared with ‘no contact’ in 4 per cent of post-*Reform Act* interim judgements (Rhoades 2000)). The most common response to allegations of violence in interim hearings was found to be an

order for a neutral handover, for example at a Contact Centre, or public place such as McDonalds. With respect to final orders, however, the rate of orders refusing contact does not differ markedly from the 'no access' orders prior to the introduction of the reforms (21 per cent pre-Reform and 23 per cent post-Reform) (Rhoades 2000). This pattern is occurring in a context in which the majority of interim court applications 'involve allegations of potential harm to the child, usually because of domestic violence' (Rhoades, Graycar & Harrison 1999, p. 10), and in which there are long delays between interim and final hearings. The evaluators interpret their findings about interim contact orders to indicate that these interim orders are being made in situations 'where contact is not in the child's best interests, and when it may well be unsafe for the child and resident parent' (Rhoades, Graycar & Harrison 1999, p. 65).

The study also found that the 'right to contact' principle appears to have had an effect on relocation, despite a ruling by the Full Court that the Reform Act has not altered the principles involved in relocation decisions (Rhoades 2000). A review of unreported judgements and observation of interim relocation applications found that permission to relocate has rarely been given at an interim hearing and that most injunction applications are successful at the interim stage (Rhoades 2000). The review of interim cases also found that:

...the resident parent is more likely to be ordered to return with the children where she has moved away because of the contact parent's violence, than where she has relocated to take up a new job or join a new partner (Rhoades 2000, p. 128).

These findings about the outcomes of interim hearings are confirmed by another study (Dewar & Parker 1999), whose authors note that they are important because most cases do not proceed beyond an interim stage, either because of legal aid restrictions, delays in obtaining trial dates, the passage of time, or a combinations of factors such as these:

For many parties, interim decisions are therefore final decisions. Yet the opportunity at interim hearings to test evidence (especially where

there are allegations of violence or abuse) is obviously limited; and decisions at interim hearings were generally likely to preserve contact if possible, and thus to favour the non-resident parent (Dewar & Parker 1999, p. 109).

Dewar and Parker argue that outcomes from interim hearings, together with a lack of clarity about what new concepts such as shared responsibility for parenting actually mean in practice, are influential in shaping perceptions about the legislation and about the likely outcomes. 'Parties who are told, for example, that they are likely to be prevented from relocating, will assume that this is reality, even if, when tested, it would be untrue. Perceptions thereby assume a reality of their own.' (Dewar and Parker 1999, p. 107) This accords with the findings of Rhoades, Graycar & Harrison (2000) that women who fear violence report being pressured to agree to contact arrangements which are unsafe.

Another finding of both studies was that, despite the aim of the legislative reforms to reduce litigation, it has in fact steadily increased since the introduction of the reforms. For example, there has been an increase in the numbers of contravention applications brought by non-resident parents. These allege that contact orders have been breached. In 1995/96 there were 786 such applications, increasing to 1,976 in 1999/2000. The study's review of 1998/99 applications, found that the majority were brought by non-resident fathers (89%), and that the majority (62%) were found to be without merit.

The behaviours used by domestic violence perpetrators to control their partners frequently involve threats against, or manipulations involving the children. Such behaviours are readily transferable to the context of Family Law actions about residence and contact (McMahon & Pence 1995; Rendell, Rathus & Lynch 2000). Despite the intentions of the Australian law reforms to promote a positive model of shared responsibility for parenting, it appears that in practice the reforms have not assisted women affected by domestic violence:

At the very least, the Australian model creates uncertainty about the extent of the resident parent's decision-making autonomy, an uncertainty that itself can be exploited by an ill-intentioned former partner. As our findings show, some fathers will deliberately use this lever as a way of seeking control over their former partners, requiring the resident parent to "negotiate every step of the way" (as one respondent put it) with the other parent (Dewar & Parker 1999, pp. 108-109).

With respect to the impact of the reforms on the court's response to domestic violence, Rhoades (2000, pp. 132 -133) concludes:

There has also been the development of a right to contact ethos that has displaced the case-law principles about the effects of domestic violence that emerged in the years before the reforms were enacted...the Reform Act treats violence in relationships as an exceptional situation. That approach is at odds with the profile of cases that now find their way into the family law litigation system in Australia, and which are therefore most likely to be affected by the legislation.

Both studies of the impact of the Family Law reforms (Dewar & Parker 1999; Rhoades, Graycar & Harrison 2000) acknowledge that their findings cannot be attributed solely to the changes in legislation. The *Reform Act* has been implemented in a context that includes reduced legal aid funding, new Commonwealth legal aid guidelines for family law cases, court delays (Dewar & Hunter 2001) and the establishment of government funded contact centres. Despite the emphasis which now appears to be given to the notion of the child's "right to contact" with both parents, there is little evidence of space for introducing a child's perspective into the decision-making process, leading Dewar and Parker (1999, p. 111) to comment that the 'emphasis on shared parenting may have further downgraded the child's point of view...'. That children may have very different perspectives, which are not heard or addressed by current approaches, is found in Smart's (2002) research with

children about their experience of divorce and post-separation contact and residence arrangements.

This discussion illustrates the complexities, which Family Law seeks to address. It also highlights the difficulties with which women struggle in dealing with violence, and in attempting to protect their children from exposure to violence, following separation. In attempting to escape violence, women and their children may be re-victimised by the legal system if it fails to recognise the impact of domestic violence both on women and on children and young people and so fails to make safety central to decision making about contact and residence (Sudermann & Jaffe 1999).

Many legal and mental health professionals may try to minimize the impact of abuse and suggest that an individual can be an abusive husband but a good father. This belief is inconsistent with our knowledge of the trauma children suffer in these circumstances (Sudermann & Jaffe 1999, p.37).

New Approaches

Contact centres

One initiative which is proposed to address issues of safety is the establishment of visitation, or 'contact' centres. In Australia, ten pilot contact services were funded by the federal government in 1995/96 and a comprehensive evaluation and research strategy, including a child impact study, was implemented (Strategic Partners 1998). Additional services have subsequently been established. The role of these services is to facilitate children's contact with non-residential parents, through the provision of both supervised contact and 'changeovers' between residential and non-residential parents (Strategic Partners 1998). An important finding of the evaluation was that: 'To date, contact services have been designed and oriented for parents more than children' (Strategic Partners 1998, p. x). With regard to safety, the child impact study found that, for a sample of older children:

Three-quarters of these children said they felt safe to visit here. Those who did not were all in supervised contact. None of them were seen by staff to be high vigilance cases, and in each case, staff were unaware that the child was significantly worried by some aspect of the visiting process (Strategic Partners 1998, p. 78).

This illustrates the challenges involved in ensuring that such services place the needs of children at the centre of service delivery.

While contact centres can play an important role in enhancing the safety of some women and children in the aftermath of a violent relationship, the establishment of these centres does not automatically assist children to resolve the impacts of traumatic exposure to domestic violence (McIntosh 2000). From their experience in establishing and operating a visitation centre in Duluth, Minnesota, McMahon and Pence (1995) caution that the establishment of such centres in itself does not resolve the complex issues surrounding contact and residence, but rather 'makes them more visible and urgent' (p.202). Hence they saw it as essential that the visitation centre become an 'agent of change', implementing this through the establishment of a visitation and custody interagency committee, which encourages all involved with these issues to be 'self-reflective about their assumptions and practices' (p.202). They conclude:

Visitation centres can be sites in which gender inequality and its destructive consequences for children are reproduced. Alternatively, they can become opportunities for a broader response to violence that resists reproducing social relations of domination and violence. Understanding the harm done by violence from the standpoint of children is central to this resistance (McMahon & Pence 1995, p. 204).

In Australia, the decision to implement a research and evaluation strategy over the first two years of the contact centres' development, provided valuable data for the ongoing development of these services within a framework of good practice. From the child impact study which formed part of the

evaluation, McIntosh (2000, p. 16) formulated the following recommendations to respond to children affected by domestic violence:

- staff of contact centres need to be trained in early identification of children who are distressed by visiting;
- court orders which jeopardise children's emotional well-being and recovery from violence should be challenged;
- contact should be based on the perpetrator of violence demonstrating 'understanding of the child's experience of violence and a willingness to work toward a recovery of trust', and the child's readiness.

Developing different responses where violence and/or abuse is an issue

Sudermann and Jaffe (1999) argue that system change is essential to avoid women and children escaping domestic violence being re-victimised by the Family Law system. They provide a chart as a guide to legislative and policy reform, which proposes that cases be streamed into separate pathways depending on whether or not there are allegations of child abuse and/or domestic violence in the context of the separation. Sudermann and Jaffe's proposal highlights the following points, in situations where there are allegations of violence:

- 'Safety planning has to be the central focus rather than the promotion of the children's relationship with the visiting parent
- Assessing the lethal nature of the relationship is more important than asking the parents to put the past behind them
- Assessments have to include measures of the nature and impact of violence
- Specialized services such as supervised visitation centres and staff trained in woman abuse are essential' (Sudermann & Jaffe 1999, p. 37).

In Australia, the Family Court has recently introduced pilot programmes that reflect the recognition that cases involving allegations of violence and abuse

require a different response from the Family Law system – Project Magellan in Victoria (Brown et al. 2001) and the Columbus Project in Western Australia (Monaghan 2000). Project Magellan is a pilot project conducted in Victoria for managing Family Court residence and contact disputes when allegations of serious child physical and/or sexual abuse have been made. Although domestic violence was not a criterion for inclusion in the pilot, in 75 per cent of cases in the study, it was identified during the course of the research. The principles underlying the programme were:

- an inter-organisational approach
- focus on the children in the disputes
- priority on early intervention so that resources were injected into the dispute from the outset
- the use of a judge-led, tightly managed and time-limited approach
- the use of court ordered expert investigations and assessments from the State child protection service and the court counsellors
- the use of a court ordered legal representative for every child, funded by legal aid
- the use of a multidisciplinary team.

The evaluation of the pilot programme was extremely positive. In comparison with an earlier study of child protection cases within the Family Court, the pilot programme reduced the number of hearings by almost 50 per cent, from an average of five court events to three and reduced the time taken by almost 50 per cent, from an average of 17.5 to 8.69 months. Cases proceeding to a judicial determination were reduced from 30 per cent to 13 per cent and the incidence of highly distressed children was reduced from 28 to 4 per cent. There was also a reduction in the cost of cases, attributed to the investment of resources in the very early stages of the disputes rather than towards the end (Brown et al. 2001).

The 'Columbus Project', currently being piloted in Western Australia, is modelled on the 'Magellan Project', but includes cases which involve allegations of both domestic violence and child abuse.

Conclusion

The growing research evidence on the impact of domestic violence on children and young people, the increased risk of harm to women at separation and the evidence that contact can be a context for ongoing abuse of women and children, pose enormous challenges for Family Law. Conflict over whether the focus of the Court should be on facilitating contact or ensuring safety, is at the heart of much of the contemporary debate in this field.

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