

This document, co-authored by Professor Patricia Easteal AM (Emeritus, School of Law and Justice, University of Canberra) and Professor Lisa Young (Associate Dean Research, Murdoch School of Law), is submitted to the ALRC as a response to the Family Law Discussion paper.

We have provided numerous extracts from various publications authored by one or both of us. Extracts are indented both on the right and on the left margins. Please note that we have deleted the footnotes for ease of reading but would be happy to provide the ALRC with PDFs of the original journal articles.

2. Education, Awareness and Information Proposal 2-1

We agree. The community needs to know what resources and pathways are available. It is generally recognised that the family law ‘system’ is complex and fractured. People first engage with that ‘system’ in a range of ways and there is no agreed source of information provided to system users. Moreover, most system users have limited resources and may not be able to digest and utilise information provided in a complex format.

Information also needs to be targeted to particular groups as proposed in 2-2 but including those living in rural Australia and those who do not fall into a 2-2 sub group – mainstream suburban communities.

Easteal in *Less Than Equal* (2001) discusses how intersectionality affects the experiences of violence:

In fact, multiple sources of disempowerment are evident in issues of violence, including discrimination and harassment. Yet, as Stubbs and Tolmie have pointed out, violence is a subject in which feminists have been negligent by not informing their work with the diversity of ethnicity, race, disability and sexuality. In the context of the last, for instance, Mason writes:

...represents a violent manifestation of the interaction between the hierarchical systems of both gender and sexuality. Such hostility defies satisfactory comprehension when it is reduced to the simplicity of a singular power relation (gender or sexuality).

Some of the discussion in this chapter accordingly will highlight both violence issues and other examples of special concerns for those who are already designated as ‘other’ due to gender and ‘other’ due to some other deviation from the mainstream standard. I will only touch on four groups and highlight a couple of topics for each. There are many more exacerbating experiences that women have to confront. Plus there are other variables that intersect with gender than the four in these pages.

... What has become apparent to me in writing this chapter is how, for each sub-group, for either mainstream culture or for NESC women, within the dominocentric view of ethnic culture, stereotypes contribute to a construction of deviant sexuality and places these women’s credibility even more in question than for Anglo middle class

heterosexual able-bodied women. And, we have already seen how incredible that mainstream group is judged within the courts. Thus, the dilemma of the multiply-oppressed woman is, at the least, three-fold, that of gender, that of race, sexuality, disability plus the bias that emerges specifically for a female + race, ethnicity, sexuality and disability.

And in *Women and the Law in Australia* (LexisNexis 2010) Eastaer reiterates the importance of an intersectional approach:

And, if she is a woman *and* a member of another minority, consciously and unconsciously, she is likely to be compared to socially constructed norms, which are racist, ethnocentric and homophobic along with being sexist.

This is because we each have a mental filing system in which we place people into categories in our minds, especially those who are different from ourselves. These files can become rigid and generate stereotypes and an in-group and many out-groups.

With respect to prejudice, the implication of this research is that differences within groups will tend to be minimized and differences between groups will tend to be exaggerated. Moreover, if these differences are consistent with well-known stereotypes, the distortion in perception may be highly resistant to change.

Also please see our response to proposal 5-10 for an example of why minority groups need to be consulted.

Proposal 2-2

We agree with 2-2. However, consultation should not be essentialised to these categories as a homogeneous group. For instance, women from Islamic sub cultures, refugees and women with temporary visa status have specific needs and concerns, and so should also be consulted in developing a national education campaign.

Also, please see our response to Proposal 5-10 for an example of why minority groups need to be consulted.

Proposal 2-3

We agree with 2-3.

Proposal 2-4

We agree with 2-4. It is crucial that family violence and child protection agencies and any family law agencies such as the proposed Families Hubs have clear referral/network lines and relationships. These cannot result from policy alone but requires an investment of time and resources in events (such as training) that bring stakeholders together.

Proposal 2-5

We agree with 2.5. The standing working group should have members from ‘intersectional’-type community groups and also recommend some members from the academic community. It is also imperative that this work should start immediately rather than being put off to await proposed reforms. This process will be ongoing as family law is a dynamic area. For this reason, electronic versions of the package (as suggested in Proposal 2-7), which facilitate easy amendment, are vital.

Proposal 2–6

We agree with 2-6.

Proposal 2–7

We agree with both aspects of 2-7 – digital information and information in different languages. Would strongly recommend that the package be developed with community agencies to ensure that the material is user-friendly. What seems user friendly to a public servant with a law degree may not be comprehensible to people in the community.

Proposal 2–8

We agree with 2-8. Just as the standing working group should be heterogeneous and representative of the Australian population, it is essential that any communication strategy/package is sensitive to the many differences in how material is read or seen based on cultural (and other) identity.

3. Simpler and Clearer Legislation Proposal

3–1

We agree with the substance of 3-1 as articulated but wish to highlight a few key points.

First, while it is important to avoid legalese, it is also true that ‘common parlance’ language can be vague and confusing. The 2006 amendments to Pt VII were a prime example of that (for example, precisely what ‘the benefit to the child of a meaningful relationship’ meant was very unclear). It is not the case that spouses and parents will utilise the Act. It is far more important that the wording be as legally precise as possible. This, together with appropriate supporting materials for lay people, will address the issue better than trying to ‘plain English’ the Act. Plain English is not an end in itself and all drafting should be fit for purpose. The purpose of the legislation is first and foremost to regulate as clearly and precisely as is possible. Thus, the litmus test is whether it is clear to lawyers and judges what the sections mean. That is the first and foremost consideration.

Second, it is imperative that more attention is given to the question of the definition of parentage. We agree that there can be separate legislation, but we need to have jurisdictionally consistent approaches, no ambiguity and all obvious situations covered. Further, the Act needs to make clear what it means by ‘parent’ where used, in terms of its link to legal definitions of parentage.

Proposal 3–2

We agree with 3-2. As part of the process of making these forms useable by non-lawyers, a diverse range of people should review these forms. Their feedback could be very useful if those developing the materials approach the task with an open-mind(set).

Proposal 3–3

Language is powerful in contributing to what we see and how we see.

...the language we use creates a lens which helps us perceive the world in certain ways and also can serve as a reflector of the dominant values. ... language has been identified as an influential agent in the way we see the world.’ (From Patricia Easteal, Sally Bradford and Lorana Bartels, (2012) Language, Gender and ‘Reality’: Violence Against Women. *International Journal of Law, Crime and Justice* 40(4): 324–337, <http://dx.doi.org/10.1016/j.ijlcj.2012.05.001>).

We do not disagree with the intent of this proposal, however we consider a more fundamental change should be made. In line with the United Nations Convention on the Right of the Child (arts 3.1 and 19.1), we consider that this section should be along the following lines:

In deciding whether to make a particular parenting order in relation to a child,

- a) Where the child is at risk of harm, a court must regard the safety of the child as the paramount consideration;
- b) A court must regard the best interests of the child as a primary consideration;
- c) A court must regard the rights of the parents and any other relevant persons as a primary consideration; and
- d) A court must consider the child’s *Gillick* competency and, where a child is found to be *Gillick* competent in relation to a matter, only make an order inconsistent with the child’s wishes where that is necessary to protect the child from serious harm.

As a corollary, the s 60CC(2) and (3) factors should not be broken into primary and additional considerations, but rather be one list of factors, that could in fact follow s 60CA. This formulation would ensure protection from harm is prioritised. We argue that while this is the correct interpretation of current s 60CC(2) this has not been how the court has interpreted those sections (see L. Young, S. Dhillon and L Groves, Child Sexual Abuse Allegations and s 60CC(2A): A new era? (2014) 28 *Australian Journal of Family Law* 233). Further, this formulation would ensure that decisions that brought parental and child rights into conflict (like relocation) would not be decided on the basis that a child’s interests must always trump those of a parent, and allow for more balanced decision making. This is consistent with the recognition of all persons’ rights as apparent in the way the CRC articles are articulated. In particular, primary care givers of children should not have their interests in freedom of movement routinely curtailed in a way that non-residential parents do not, on the basis that this best promotes an ideal arrangement as identified by a judicial officer. The judicial officer’s task is to decide where a child will live, when parents cannot agree; not where parents should live to best promote a child’s interests. Indeed, in a recent survey of relocation cases, it was discovered that applications to force parents to move to parent a child were largely made by fathers seeking to force primary carer mothers to follow them in circumstances where they (the

fathers) were not offering to be primary carers themselves (ie they wanted the mothers to move so they could take up an opportunity and wanted the mother there to facilitate their part-time parenting) (unpublished paper by L.Young available on request – under review for publication).

Section 60CC(2)(a) should form part of the general list of factors, as research suggests that having it separated out has facilitated a culture of parental rights of contact. In a general list, this consideration could read as set out in Proposal 3-5.

The proposed insertion of (d), relating to *Gillick* competency, would ensure family court decision makers no longer ignore the question of a child’s competency in appropriate cases (unpublished paper on this paper, by L. Young, available on request – currently under review for publication).

Proposal 3–4

Our suggestions in relation to Proposal 3-3 directly advance most of the matters raised in 3-4 as they would

- Promote child safety by making it the most important factor
- Promote the safety of children’s carers by recognising the rights of persons other than children
- Be consistent with the CRC

Proposal 3–5

Subject to our response to Proposal 3-3 we agree with the recommended changes.

Proposal 3–6

We agree with 3-6. Again the existing section does of course emphasise the importance of Aboriginal ties; however we agree that as with the other factors, the proposed wording prioritises safety of the child(ren).

Proposal 3–7

We do not agree with this Proposal to the extent it proposes replacing the term ‘parental responsibility’. We struggle to think of a term that more accurately captures the notion that responsibility includes both the right, and duty, to take decisions on behalf of a child, and also the obligations of parenthood. Decision making responsibility is only one facet of parental responsibility. It would not include, for example, the obligation of financial support. We imagine that it could be possible to enhance s 61B by adding, “including but not limited to...” and setting out a list of obvious matters.

Question 3–1 How should confusion about what matters require consultation between parents be resolved?

We consider the best you can do is to provide a non-exhaustive list in the Act as examples. Some can be fairly general, but the aim should be to reduce indeterminacy.

Proposal 3–8

We strongly agree with the proposal to put *Rice v Asplund* into the Act. As it stands, the court operates (improperly) on the basis that such a rule exists. It is common in other jurisdictions to have this in the legislation (see further, L. Young and J. Goodie, Is there a need for more certainty in discretionary decision making in Australian family property law? (2018) 32 *Australian Journal of Family Law* 162.)

In relation to the safety issue, we agree. We note that acts of control may begin or become exacerbated post-separation as the perpetrator’s control is threatened. It is well documented that the time of leaving a relationship can be one of the most dangerous for women. For example, one type of economic abuse post-separation is to withhold or reduce child support. This is particularly relevant when the payer is self-employed or paid as on a contract basis and is able to manipulate income figures. As the Women’s Legal Services Australia in a submission to a Parliamentary Inquiry concluded, ... child support ‘can often be a conduit for perpetrators to continue their abuse.’

Circumstances regarding the well-being of the children may change post-separation. Children may be used as pawns to exert control over the mother. The batterer might subtly manipulate the child(ren) or more overtly encourage the child to denigrate her/his mother or by the one parent indirectly and directly contributing to the child(ren) being afraid of or uncomfortable with the other parent. The parent at the receiving end of the child(ren)’s anxious feelings and negative behaviour loses control in their relationship with their child.

In addition, there are separation-specific manifestations of coercive control including stalking behaviours. Stalking is a series of one or more specific behaviours, directed at, and designed to frighten a particular victim. These actions are intended to maintain contact with or exercise power and control over another person. The stalker may follow the victim, keep the person under surveillance, send letters or telephone, damage property or leave material where it is likely to be found by the victim. It is the essence of ‘domestic’ stalking that threats are often not explicitly stated. The threat may be implicit in the nature and repetition of the harassment. Being watched and followed can serve to evoke fear and terror in the victim. Indeed, in the context of an abusive relationship, many seemingly innocent acts become endowed with ominous meaning. Behaviours such as the sending of flowers and ‘love letters’ can serve as a threat to someone in fear of an abusive partner. (Amanda Pearce and Patricia Easteal (1999) The ‘Domestic’ in Stalking: Police and the Law in the ACT. *The Alternative Law Journal* 24(4): 165–169, 174).

Proposal 3–9

We agree with 3-9. We emphasise that all intersectional and minority groups need to be consulted.

Proposal 3–10 The provisions for property division in the Family Law Act 1975 (Cth) should be amended to more clearly articulate the process used by the courts for determining the division of property.

We welcome the conclusion that no case has been made for a shift away from a discretionary system, particularly in the absence of further research.

In relation to process, it is true that, particularly since *Stanford*, there is some confusion about the process for resolving property disputes and certainly when teaching law students, for example, they find it difficult to understand. Again, the aim must be that it is clear to lawyers and judicial officers (with appropriate resources for lay users being able to simplify). While it is possible to ascertain through a reading of the cases since *Stanford* what approach should best be adopted, we agree that Act should be amended to set this out clearly as a process.

Proposal 3–11

We agree with 3-11 but believe that the FLA needs to go further. In Patricia Easteal, Lisa Young and Anna Carline (2018) ‘Domestic Violence, Property and Family Law,’ *International Journal of Law, Policy and the Family*, 32(2) eby005, <https://doi.org/10.1093/lawfam/eby005>, we make the following comments and recommendations concerning property and family violence:

Since those early days, the court – and now the legislature – has come a long way in attempting to ensure that both the law and process of parenting disputes better identify, and respond to, family violence. However, the case for factoring violence into property settlements has been much harder to make and there remains disagreement about the best way forward. We have identified briefly above ways in which issues of family violence can intersect with family law property matters and factors that inhibit family violence being appropriately addressed.

We would suggest there has been a further, and significant factor, which has made addressing issues of family violence in property disputes problematic. Behrens (2010: 211) has argued that the traditional reluctance of family courts to take violence into consideration in property disputes ‘points to an under-valuing of women’s work.’ Echoing this concern in a more general sense, Young (1997: 268) has argued that the historical failure of judges to value appropriately the contributions of women in ‘big money’ cases exposes an implicit judicial bias that undervalues domestic and caregiving labour in favour of traditional ‘breadwinner’ financial contributions. Where women’s contributions to a marriage are not seen to be directly financial, and not believed to be as valuable as earning money, then it is little wonder that even proven serious violence would not loom large in a judge’s assessment of the parties’ respective contributions in so far as they are relevant to the division of assets.

In relation to legislative reform, since ambiguity in substantive laws produces ‘a sieve through which the dominants’ values penetrate’ (Easteal, 2001: 233), any legal provisions will need to be carefully drafted. The experience with drafting problems of the 2006 shared parenting reforms (O’Brien, 2010) suggests great attention needs to be paid to the precise wording used. However, it is key that – as with those parenting reforms – a comprehensive approach, that also addresses process, is adopted rather than just amending the key substantive provisions. For example:

- The Family Law Rules 2004 (Cth) regarding property could provide the same notifiers of violence that exist in relation to parenting matters. Currently, in parenting matters the Rules require the filing of a specified notice under Rule 2.04 where a parent alleges there has been, or there is a risk of, family violence, by one of the parties.
- Rule 10.15A, which requires lawyers to ensure that consent orders address how any concerns of violence are addressed by the orders sought, could be extended so that where, during a hearing, a property order is sought by consent, and there have been allegations of violence, there is an obligation on the alleged victim's lawyer to address the court as to the impact on their client's consent, if any, of the alleged violence.
- Changes in case management processes could be adopted which ensure property cases with alleged violence are identifiable so that pre-trial processes minimize unwanted contact.
- The operation of the Family Violence Best Practice Principles – which presently only apply to parenting matters – could be adapted to cover financial disputes.
- The family violence 'benchbook' could have its modest section on family violence and property expanded to deal in more depth with the particular issues relevant to property.
- The role of mediation (currently 'family dispute resolution' in Australia) could be reconsidered as there is evidence that appropriately structured mediation can provide benefits where family violence is an issue (Kaspiew et al., 2012).

As we indicated at the outset, the time is ripe for the ALRC to consider this issue. If minded to reform property law, the ALRC may recommend wholesale reform or simply consider amendments to the existing framework. In either case, as far as the treatment of family violence goes, it is questionable whether there is much to be gained from looking to other jurisdictions. Like Australia, England and Wales has a highly discretionary model. The key criteria are set down in Matrimonial Causes Act 1973 s25, which includes eight non-hierarchical factors a court is to take into account, one being 'the conduct of each of the parties, if that conduct is such that it would in the opinion of the court be inequitable to disregard it'. To some extent this factor reflects the residual influence of fault in that jurisdiction, but in addition to other matters it does allow violence to be considered. The question then becomes whether the violence was 'inequitable to disregard'; case law indicates that only exceptionally severe forms of domestic abuse will qualify—for example, attempted murder, wounding and attempted rape. Disconcertingly, 'lesser' forms of violence will be disregarded. Hence, in *S v S (Non-Matrimonial Property: Conduct)*, despite convictions for assault occasioning actual bodily harm, the conduct was not construed as being sufficiently grave to be inequitable to disregard. Thus, 'it is only in the gravest of cases - generally those in which the life of one party has been placed in jeopardy - that the courts have accepted that such conduct should influence the outcome of an application' (Inglis, 2003: 185). This problematically limits the

application of the ‘conduct’ factor and in doing so the courts ‘have failed to reflect society’s increasing condemnation of such behaviour’ (Inglis, 2003: 185). Indeed, arguably it normalizes a certain amount of violence in a relationship. It is unlikely the Australian legislature would want to walk down that road.

In Scotland, where there is more direction on how property matters should be decided, the sole opening for consideration of violence is s11(7) of the Family Law (Scotland) Act 1985. This only permits conduct to be considered if it has ‘adversely affected the financial resources which are relevant to the decision’ or ‘it would be manifestly inequitable to leave the conduct out of account’. The first of those provisions would have limited applicability given its direct tie to the value of the assets and the second is akin to the UK fault provision. Fault is also the only basis for considering violence in property matters in the US and civil law jurisdictions rely on tort law and do not see family violence as a property issue, though violence might be relevant to some of the ancillary remedies. Similarly, in Canada, it is only the consequences of violence that can be factored in, through recognition of the impact of violence on a spouse’s future employability (Kelly, 2009).

Thus, if the ALRC recommends legislative reform directly addressing violence and family property, whether in the context of wholesale, or more modest property reforms, it will be in new territory. We suggest this requires novel ways of thinking about these intertwined issues. If the current framework remains, there is no reason a provision requiring the court to take violence into account cannot specify a range of relevant considerations. Existing considerations such as future needs impacts and impact on contributions could be included. But a specific provision could also identify family violence as a ‘negative’ contribution, in the context of contributions to both family wealth and the welfare of the family. While the Australian Full Court has been wary about accepting compensation as a general goal of property proceedings, this does not mean a principle of compensation cannot be explicitly imported in respect of violence. At one level this could be to recognize an assault to save separate expensive civil proceedings, but that would not need to be the limit of recognition of compensation.

If the ALRC recommends more fundamental reform of property, then this provides an opportunity to reconsider, and make explicit, the principles underpinning family property law, in the same way that Part VII dealing with parenting disputes does. While the FLA does not specifically state that its ‘future needs’ component of a property settlement has the purpose of compensating relationship generated economic disadvantage, this is precisely what it does, and what it is intended to do. One option might be an underlying principle of compensating relationship generated disadvantage (not solely economic, as for example in Scotland), which could inform any specific provision on family violence (as well as provisions dealing with more directly financial matters) allowing for a broader consideration of the harms victims of violence suffer. Of course, this would not have to be in place of any direct provisions allowing for victims of violence to

claim some compensatory payment as part of a property settlement. As noted above, there could be a variety of ways family violence is considered, just as is the case in the Australian provisions on parenting disputes.

There may understandably be some caution about reverting to what seems a fault-based paradigm. However, careful drafting can allay this concern, because the issue at hand is neither what caused the relationship breakdown nor some notion of punishment. Family property law is, at its heart, remedial. It seeks to avoid the inequities that would arise in certain interpersonal relationships if the normal rules of property prevailed. Those financial inequities arise out of the same dynamics and power imbalances that make women so vulnerable to violence within their family; they are not distinct, but rather intertwined issues. Any provisions would thus simply provide statutory recognition of, and recompense for, this.

Whatever legislative route is taken, the issue of proof of violence remains problematic. And while law reform and professional training are required for change, they are not sufficient. Changing the *Family Law Act*, even if accompanied by increased understanding of the manifestations, dynamics and effects of domestic violence, does not address the underlying systemic inequities facing victims of violence in property matters. The existence of unwritten gendered subtexts limits the ability of effectuating change simply through rewording substantive law. However, these are not reasons for not providing the best possible solutions available for victims of violence – they are simply caveats.

Proposal 3–12

We strongly agree with 3-12. All policy and legislation need to be underpinned with a solid empirical basis. It must be remembered that the purpose of property and spousal maintenance provisions is essentially remedial to counteract the economic disadvantage that women (most usually) face as a result of the impact of traditional family models. It is not sufficient to build a case for change to these areas on arguments of efficiency and certainty. An efficient, certain law that further impoverishes primary carer parents is no solution at all. For example, there is currently no evidence at all to suggest that jurisdictions with different, less discretionary, approaches to property settlement result in outcomes that are at least as fair as those achieved under Australian law. Take for example the Scottish situation – the only evidence to date is that lawyers like the law. There may well be advantages to change, but in deciding how to change the law, we need to have clear, and nuanced, evaluations of the impact of other systems that are perceived to offer benefits.

Proposal 3–13

We agree with 3-13.

Proposal 3–14

We agree with 3-14.

Proposal 3–15

We agree with 3-15. Super-splitting is very difficult for anyone other than specialists to understand. We have witnessed this confusion when teaching Family Law to law students.

Proposal 3–16

We agree with 3-16.

Proposal 3–17

We agree with 3-17.

Question 3–3

The question of BFAs is a difficult one. We do not support the abolition of BFAs and are not generally concerned about their current operation which provides some opportunity to regulate one's financial affairs by agreement, but allows the agreement to be reviewed in appropriate circumstances. Also, it must be remembered that BFAs provide a solution (albeit not a commonly used one due to cost) for separated couples. In our view, BFAs should be most easily overturned where the couple has children together, and the terms of the BFA do not adequately recompense a primary caregiver for the past and future negative financial impact of taking on that role. We also agree that there is a case for making BFAs easier to challenge where there is family violence. Rather than requiring parties to prove unconscionable conduct, duress, or undue influence for example, it would be more appropriate to assume that a BFA that is preceded by family violence is not enforceable. Equally, a BFA that is followed by family violence should not be enforceable. One very strong argument (in addition to more obvious ones) in favour of such an approach, is that, if well publicised (including as a recital to the agreement), this would be a strong disincentive to engage in family violence.

Proposal 3–18

We agree with 3-18.

Proposal 3–19

We agree with 3-19. See our response to 3-11 above.

Question 3–4 What options should be pursued to improve the accessibility of spousal maintenance to individuals in need of income support? Should consideration be given to:
· greater use of registrars to consider urgent applications for interim spousal maintenance;
· administrative assessment of spousal maintenance; or
· another option?

The introduction of a more robust system of child support has reduced the situations in which spousal maintenance is likely to be viable. However, for those cases where it is an

option, as with all maintenance applications, there is a reluctance to pursue it due to its limited nature and thus the relative cost of securing legal advice to obtain it.

It is deeply disturbing that the federal government chose to limit this inquiry so that it did not consider court structure etc (particularly as it was at the same time working on a proposed restructure of the courts). Those matters, and the issues raised in this inquiry, are inextricably linked.

This question raises the option of an alternative to court determination (ie administrative assessment) and we have taken this opportunity to express a view on the appropriate body to determine family law matters, which would include spousal maintenance.

In our view, it is correct to say that the family law system is in need of an overhaul, as it is not fit for purpose. This is NOT because of problems with the bulk of the statutory provisions, though they can be improved. The government's repeated goal of trying to 'fix' family law by changing the Act needs to give way to a commitment to developing a system more fit for purpose. There needs to be wrap around, easily accessible, support services, with a relatively cheap and quick option for resolving disputes. Family law litigants are thrown into great financial distress by being required, no matter how simple the matter, to navigate what is still a very traditional adversarial process if they cannot reach agreement. In our view, and as previously recommended to the government, a specialist tribunal is an appropriate solution. A lawyer sitting with, say, a psychologist, and financial matters by a lawyer sitting with an accountant should resolve parenting matters. Tribunal members should have powers akin to those of Child Support departmental decision makers, so that in financial matters non-disclosure problems are minimised. There are a great many matters that end in court proceedings where the outcome is obvious, but in the absence of agreement one party has no choice but to give in, or go to court. The cost to all concerned, including the community, is a scandal. Processes should be simplified, inquisitorial in nature, and timeframes much tighter. There is a place for court proceedings, but that should be limited.

In such a process, spousal maintenance applications could be dealt with more expeditiously. Indeed, appeals from child support change of assessment and other decisions could be shifted to such a tribunal, thus freeing the AAT.

We note the federal government's decision to essentially do away with a specialist court system. We will not elaborate much here, but we argue that the system must, at all costs, be specialist. One cannot put the average legal dispute (tort, contract, property, intellectual property, and so on) in the same category as deciding what will happen to children, and how a family should divide up their assets after separation, bearing in mind their children and so on. Australia has been seen as a world leader with its specialist system – while it does need reform as suggested above, we should not throw the good out with the bad.

4. Getting Advice and Support

Proposal 4-1

We strongly agree with 4-1. However, we are concerned about resource implications for all levels of Government and therefore how realistic this proposal is in practical and sustained terms. This is not dissimilar to what was envisaged when FRCs were proposed.

Again, this comes down to the government seeing reform as a whole of system reform, that does rely on changes to the Act and reorganising some existing court structures.

Proposal 4–2

We agree with 4-2.

Proposal 4–3

We agree with 4-3 with the proviso that this will require significant financial investment by all levels of Government plus effective communication between different Government departments.

Proposal 4–4

We agree with 4-4 and would include people living in rural Australia and older women's special needs plus the need to recognise the plurality of indigenous Australians and the other named groups.

Proposal 4–5

We agree with 4-5. Evaluation before and on-going monitoring are essential.

Proposal 4–6

We agree with 4-6. It is of course extremely important that those screening for complex needs are experienced/educated and therefore able to identify these individuals.

Proposal 4–7

We agree with 4-7.

Proposal 4–8

We agree with 4-8.

5. Dispute Resolution

Proposal 5–1

We agree with 5-1.

Proposal 5–2

We agree with 5.2. As discussed in Patricia Easteal, Lisa Young and Anna Carline (2018) 'Domestic Violence, Property and Family Law,' *International Journal of Law, Policy and the Family*, 32(2) - women- particularly survivors of family violence - are not on a level playing field.

Women (and, as we discuss below, particularly victims of violence) may succumb to pressure to settle family property disputes in part because of their financial circumstances. Horizontal and vertical work segregation with women in the lower paying occupations, plus a persistence in gendered division of labour in the private sphere, contribute to a gender pay gap and savings gap (not least in superannuation) (Easteal, 2010: 2). Accordingly, employment statistics show that women make up ‘71.6 per cent of all part-time employees, 36.7 per cent of all full-time employees, and 54.7 per cent of all casual employees’ (ABS 2015). Further, the 2017 Australian gender pay gap of 23.1 per cent for full-time total remuneration (Workplace Gender Equality Agency, 2017: 15) reflects a figure that has been fairly constant over the previous three decades.

At the time of relationship dissolution and when family law ancillary matters need to be negotiated, this socioeconomic inequality is increased as a consequence of the feminization of post-separation poverty, which means that women are ‘more likely to be financially disadvantaged than men’ (Smyth and Weston, 2000:8). From recent data, researchers continue to find that ‘... in the short term following divorce, women experienced a substantial fall in equivalised household incomes compared to their pre-divorce incomes.’ This financial negative effect was ‘roughly halved six years after divorce compared to the effect in the year following divorce’ (deVaus et al., 2015). However, it is in the first few years post-separation that most family law property divisions take place as married parties have one year after their divorce is finalized to bring an application for a property settlement; de facto partners must apply within two years of the relationship breakdown under the FLA, ss 44(3) and (5).

This very significant short-term drop in finances occurs at a problematic time for women and may mean that pursuing legal matters in the courts becomes more difficult given the costs of quality private representation (Braaf and Meyerling, 2011:20); the need to settle for whatever one can get will be a more common ‘reality’ for women.

...

A further important issue is the extent to which the property settlement process itself may be used as a form of abuse. Three factors in particular need to be highlighted: financial coercive control, pressure to settle and vexatious litigation.

1. Financial coercive control

Coercive control is defined by domination and intimidation (Kelly and Johnson, 2008), with a tendency for violence to escalate (Neilson, 2004). It manifests in a number of ways - one is economic. For instance, as described for some immigrant women by Easteal

(1996), the perpetrator may take absolute control of the finances and allocate little or no money to his partner:

‘I was never allowed a credit card or bank account. I wasn’t allowed friends or phone calls. I wasn’t allowed to go out. I was put down constantly. ... My problem was that I didn’t see it for what it was. And I was in an extremely violent situation before I realised it’ (Easteal, 1996: 90).

Financial violence, as with physical, sexual and emotional manifestations of control, often continues and even escalates with separation (Altobelli, 2009: 194). Estrangement may provide the perpetrator with the opportunity to financially control their victim by exerting control in a private settlement between the couple with mediation, and/or by litigating excessively. We examine these further next.

2. Pressured to settle – unequal playing field

Much of family law is conducted ‘in the shadow’ of the law with most matters settling outside of the court. Only a minority of disputes culminate in a hearing,ⁱ and even then some parties may resolve matters with a consent order. However, agreement does not necessarily reflect satisfaction, let alone fairness, especially if either of the parties felt under pressure within the negotiation (Trinder and Kellett, 2007: 329). This may be particularly so in property cases where there are also children (Behrens, 2010: 212). A perceived need to settle quickly can of course apply more pressure where a woman is motivated by the imperative of securing safety for herself and her children.

As we have noted above, research confirms that women are the financial losers from separation; in terms of property division this is intensified in cases involving violence whether the outcome is the result of private ordering or a court determination (Sheehan and Hughes, 2001; Sheehan and Smyth, 2000; Fehlberg and Milward, 2014).

‘...there is no longer any doubt that women experience the heaviest financial losses in the divorce equation. Battered women suffer doubly from this inequity, because economic control is often a facet of the coercive relationship between them and their abusers’ (Lee, 2002: 275).

A woman’s perception of ‘equal’ influence in mediation (as found by Kelly and Johnson, 2008) may be questionable if there is a history of violence (Astor, 1992) given its effects which may include (but are not limited to): feelings of powerlessness, low self-esteem, anxiety, substance abuse, (Hegerty et al., 2013: 274) PTSD (Pico-Alfonso et al 2006: 608), depression (Campbell, 2002: 1333), fear of

having any sort of contact with an abusive partner (Crawford et al., 2009: 78), and an impaired capacity for paid employment, which has arisen as a result of these mental and physical health issues (Braaf and Meyerling, 2011:20), or because victims are prevented from working whilst in the relationship and thus lack work experience (Braaf and Meyerling, 2011: 11).

These accompaniments and effects of coercive control contribute to inequality and an unequal ability to be heard. As such, a victim does not enter ‘alternative’ dispute resolution processes as an equal partner (Field, 2010: 29). Many report the negotiating process as distressing (Trinder and Kellett, 2007: 329). Moreover, conciliation is not successful at resolving ‘embedded conflict’ between the parents, such as anger, hurt and distrust, and thus parental conflict may remain (Trinder, 2008).

Proposal 5–3

We agree with 5-3.

Proposal 5–4

We agree with 5-4.

Proposal 5–5

We agree with 5-5.

Proposal 5–6

We agree with 5-6.

Proposal 5–7

We agree with 5-7. However, we note that non-disclosure would be less of an issue if the suggestion for an inquisitorial style tribunal set out in response to Proposal 3-4 above were adopted.

Proposal 5–8 and 5-9

We agree with 5-8 and 5-9.

Proposal 5–10

We agree with 5-10.

We provide here one example of the communication differences in illustrating the importance of recognising that a homogeneous model of dispute resolution is not appropriate: indigenous women who have experienced violence testifying in court. From Satomi Hamon, Patricia Eastaol and Trevor Ryan, 2018 ‘Issues for Indigenous Rape

Victim Witnesses: the Limitations of Victim Protection Measures' (Accepted *Southern Cross University Law Review*)

The question and answer method for eliciting evidence customarily used in Western courts can be inappropriate for Indigenous witnesses who are not accustomed to this method of communication. Their customary way of communicating may tend to emphasize narrative and indirect means of eliciting information. If not recognised and accounted for, these differences belie any commitment to equality before the law.

In addition to the style of questions, Indigenous witnesses can be disproportionately burdened by their content. Cross-examination practices can be seen to reflect the theoretical view that the Western legal system is a place where dominant stories are told and played out to the detriment of those whose stories are 'marginalised, transmuted and silenced.' Such dominant narratives include racist stereotyping of Aboriginal women as 'promiscuous, inherently bad, alcoholic, dishonest and culturally inferior.' These stereotypes contribute to the perception that incidents of sexual assault are the fault of Indigenous women. They also influence the types of questions Indigenous women are asked in the courtroom. Research such as the NSW project *Heroines of Fortitude* has demonstrated that Indigenous victims experienced discriminatory and abusive treatment in court hearings on the grounds of race and gender. The study found that 'Aboriginal complainants were regularly bullied, harassed and intimidated during cross-examination,' and that 'the credibility of many Aboriginal women was frequently attacked with the use of racist myths and stereotypes about Aboriginal culture.' Almost all of the Indigenous complainants observed were asked during cross-examination if they had made a false accusation of sexual assault for victim's compensation. Many questions were based on assumptions that Indigenous women were habitual drinkers: they were asked on average over 20 questions in relation to drinking on the day of the sexual assault. There were also many instances where judicial officials used humiliating and derogatory terms for Indigenous complainants, such as calling the complainant an 'unsophisticated Aborigine'.

B *Gratuitous Concurrence*

Given the cultural and linguistic divide between European and Indigenous culture, there are many opportunities for miscommunication. Courts must also navigate linguistic diversity in Indigenous languages and dialectal differences in Australian Aboriginal English. Merely one common example of miscommunication is the phenomenon of 'gratuitous concurrence', the Indigenous practice of 'saying yes to a question, regardless of whether the speaker agrees with the proposition being questioned, or even understands it.' In *R v Anunga*, Foster J explained the practice:

...most Aboriginal people are basically courteous and polite and will answer questions by white people in the way in which they think the questioner wants. Even if they are not courteous and polite there is the same reaction when they are dealing with an authority figure.

Gratuitous concurrence has been recognised by Australian courts as a reason for restricting leading questions in the cross-examination of Indigenous witnesses. In applying this exception, courts have considered factors such as the geographical, educational, and linguistic background of the witness. Yet this is an imperfect test according to sociolinguist Diana Eades:

[J]udicial officers (like many lawyers) still tend to look to clear markers of traditionally oriented practice to evaluate the relevance of a person's Aboriginality. However, sociolinguistic research on Aboriginal ways of using English ... do not appeal to use of an Aboriginal language to help provide guidance on a person's likely bicultural communication ability. Eades argues that the person's social network is also important in determining whether that person is likely to engage in phenomena such as gratuitous concurrence.

C *Recollection of Events*

Indigenous witnesses in a Anglo-centric court may have unique challenges conveying certain constructs such as times and dates, measurements and complex physical descriptions. This is due to a number of factors including the stress of speaking in another language and the strange and formal environment of a courtroom. Further, there may be a collision between how time and space are conceptualised: Indigenous communities see time as 'a cyclical process of events' as opposed to the Western linear view. Indigenous witnesses may communicate details in terms relative to 'geographical, climatic or social matters.' Diana Eades provides an example of this: 'The specific question: "How many drinks did you have?", would be answered either vaguely, as in "Oh, must have been quite a few" or through being specific in relation to another situation, such as: "Must be more than Freddie".' These differences in conceptualising time and space can contribute to misunderstanding and miscommunication resulting in 'the capacity of culturally different witnesses to provide information about culturally different concepts and actions within the adversarial mode [to] be compromised.'

D *Body Language*

Some non-verbal communication cues such as hand gestures and facial expressions that are used by Indigenous people have different meanings from what they mean through a Western or Anglo lens. For example, avoidance of eye contact is customarily a gesture of respect in Indigenous culture, whereas in Western societies it is often regarded as indicative of 'shifty, suspicious or guilty' behaviour.

Another illustration is sign language. Hand gestures and movements of the eyes and head are an essential and integrated part of Aboriginal English. These may be subtle or quick and not be noticed or understood by the Court, with the result that the full meaning of a witness's response is not conveyed. Further, the *Aboriginal Benchbook for Western Australian Courts* notes that someone in the back of a

courtroom may use subtle gestures to intimidate an Indigenous witness while she is giving evidence, which could go unnoticed by the court.

E *Silence and 'Women's Business'*

Silence does not have a consistent meaning across cultures. In Western culture, silence in answer to a question is generally 'interpreted to the detriment of the silent person', implying that the person being asked the question has something to hide, or that they do not know the answer. In contrast, silence is an important part of Indigenous communication indicating respect and thoughtfulness.

This Western-centric interpretation of silence can be especially detrimental to Indigenous women giving evidence, as illustrated in the conviction of Robyn Kina. Kina had been subjected to violence from her de facto partner, including sexual assault. During interviews with police and lawyers, she responded to many questions with silence and this was 'wrongly interpreted by an interviewer as unwillingness to answer, or lack of relevant knowledge, or agreement with a proposition.' Yet silence is a culturally appropriate response to questions concerning descriptions of body parts understood not to be 'the business of men' by some Indigenous women:

...when a woman has to give details of a sexually intimate nature as a witness it can be profoundly embarrassing to face a male audience, and more so if she is from a cultural background in which these matters are never discussed in front of men.

Proposal 5–11

We agree with 5-11.

6. Reshaping the Adjudication Landscape Proposal 6–1

We agree with 6-1. The landscape needs work to better deal with gender inequality and family violence. As we conclude in Patricia Easteal, Lisa Young and Anna Carline (2018) 'Domestic Violence, Property and Family Law,' *International Journal of Law, Policy and the Family*, 32(2) eby005, <https://doi.org/10.1093/lawfam/eby005>

While it is not beyond the judiciary to develop sophisticated legal tests, such decision-making does not take place in a vacuum; it certainly does not take place in a space of gender equality. The gender inequalities we have identified as operating when property intersects with violence in the family law system are a reflection of the same societal imbalances between men and women seen more broadly in society. As long as such imbalances exist in society, they will inevitably be mirrored in the legal system (Tolmie et al., 2010: 302).

The reality then is that men and women are on unequal ground by the time they enter the family law system as exemplified by women's relative impoverishment following a relationship breakup. For that reason and numerous others already discussed,

many women are keen to settle family law disputes, which makes the ground even less level yet. Settlement may be further skewed by women's problematic negotiation of a male dominated legal system.

When family violence victimization is added to the equation, these inequities are magnified and likely worsened at key points in the family law processes (Daw, 1995). As it is axiomatic that male dominated legal processes and substantive law favour those with resources and those who can best play its 'games,' women, particularly victims of violence, are less able to either harness or 'work' the legal system. This was illustrated above as we have shown how women's (relative) inability to afford legal representation coupled with vexatious litigation may affect how they fare in hearings. And we have also seen how the relationship between gender, communication, violence and power contribute to an uneven playing field in alternative forms of dispute resolution.

So, and perhaps not surprisingly, we would argue the system must be re-designed, legislation reformed and the people involved in the practice of family law educated in such a way as to counter the imbalances described and the likelihood of any adverse or unjust outcomes. It is important that anachronistic norms are replaced with new information and approaches, and legal professionals are educated as to the realities of domestic violence, and the needs of victims.

Proposal 6-2

We agree with 6-2. However we would emphasise how problematic screening and disclosure can be. As we write in and as we conclude in Patricia Easteal, Lisa Young and Anna Carline (2018) 'Domestic Violence, Property and Family Law,' *International Journal of Law, Policy and the Family*, 32(2) eby005, <https://doi.org/10.1093/lawfam/eby005>

'To state what may seem obvious, evidence of violence can only be considered if it has been given. It is well understood that victim witnesses may not disclose either in Court or to their legal representative. Feelings of intimidation (Victoria Law Reform Commission, 2006: [11.1]), shame (Field, 2010: 199) and victims regarding themselves as lacking credibility (Australian Law Reform Commission, 2010: 18) may all contribute to non-disclosure together with feeling unsafe talking about the abuse in public (as in court) and in the presence of their ex-partner (Laing, 2010: 61).

Hunter (2008: 186-187) reported a family court victim respondent describing how 'she was never allowed to speak about the violence she had experienced, and never felt heard'. Other research has found the same perception by victims of being silenced: '[women] felt that their experiences of family violence had been ignored, minimized or suppressed by lawyers and judges within the legal system' (Bagshaw and Brown, 2010: 135). A further problematic factor for women in family, criminal and other legal processes is that, even if they do disclose and testify about abuse, gender differences in communication discussed above are likely exacerbated when there has

been violence (Field, 1998: 276) Victims of violence tend to speak in hesitant, indirect and self-effacing language (Easteal, 2010: 11). They may hedge what they say: ‘Well, um. Looks as if probably’ (Holmes, 2006: 9). Going a step further, women may even ascribe self-blame as was starkly illustrated by Robin Kina. Arrested for killing her partner, she answered questions concerning her violent partner’s assaults, by tagging her responses with statements such as: ‘But I probably deserved that’; or, ‘I probably caused him to do that by my behaviour’ (Easteal and Hopkins, 2010: 112).’

Proposal 6–3

Subject to our comments to earlier proposals, and assuming the courts still deal with family law matters, we agree with 6-3.

Proposal 6–4

We agree with 6-4. Giving judicial officers (or tribunal members) a more inquisitorial role, with attendant powers, will ameliorate problems of non-disclosure and self-representation.

Proposals 6–5 and 6-6

Subject to our earlier comments in answer to Question 3-4, we agree with 6-5 and 6-6.

Proposal 6–7

We agree with 6-7. However, we hope that high risk refers to the likelihood that the matter includes FV and not a designation of some types of violence as more serious than other types.

Because of an unconscious gradation of violence by judges and other gatekeepers, we are concerned that relevant matters could fall through the cracks as Easteal, and Grey (2013 Risk of Harm to Children from Exposure to Family Violence: Looking at How it is Understood and Considered by the Judiciary. *Australian Journal of Family Law* 27: 59–77) found to occur in some child abuse cases (involving witnessing) that did not end up in the Magellan list.

‘Programmes involving a consistent coordination of police, court staff and human service providers...’ could play an important role in changing attitudes. To this end, it is likely that policy directions such as the Family Violence Best Practice Principles and initiatives such as the Magellan Program work in conjunction with legislation to better protect children. It is interesting though that none of the 30 child abuse cases in our sample were on the Magellan list. Evidently the abuse was not deemed as serious enough or the party or lawyer did not facilitate the process by completing the requisite Form 4. With Magellan, ‘the Court orders expert investigations and assessments from the respective state/territory child protection agency and/or the Court family consultant.’ Perhaps seriousness of physical abuse is a measurement or assessment best left to Family

Counsellors and child protection workers who would be better able to investigate thoroughly allegations if these matters were routinely put on the Magellan List without the lodgement of a form 4.’

The guidelines for Magellan also do not consider exposure as an injury that qualifies the matter for inclusion on the List:

The parameters of the Magellan project are quite clear. Emotional abuse is not included, nor is the child being a witness to domestic violence. There must be a clear allegation that a child has been sexually abused or seriously physically abused.

Yet as we write above, the psychological research has shown that ‘with the exception of sexual abuse, witnessing family violence has been found to have an even greater negative impact on children than being a victim of violence.’ Witnessing is mentioned in the recommendations of the *National Council’s Plan for Australia to Reduce Violence against Women and their Children* suggesting that Commonwealth and State and Territory governments need to work together to ensure that the National Framework for Protecting Australia’s Children meets the needs of children who witness and/or experience domestic and family violence. This includes State and Territory child protection agencies working with Commonwealth agencies or Courts.

Therefore, we recommend that in addition to the word ‘serious’ being deleted, that the program should be expanded to include family violence matters in which there is the risk of witnessing or exposure harms. A uniform integrated response would better ensure that informed investigation of individual cases would take place, translating into more in-depth and uniform child welfare expert evidence to better inform judicial perceptions of risk of harm. There are resource issues for the State, Territory and Commonwealth Governments in implementing this recommendation; however we believe such a multi-disciplinary response would be a most worthwhile investment in promoting family law processes and reasoning that are in harmony with the National Child Protection Framework’s aim to ensure that ‘Australia’s children and young people are safe and well.’

Proposal 6–8

We agree with 6-8 and note that this already occurs in WA.

Question 6–4

We reiterate our comments in answer to Question 3-4.

We believe that the government should resource collaborative practice or at the least fund research into how CP works with coercive control, (or not).

Patricia Easta Jessica Herbert and Jessica Kennedy (2015) Collaborative Practice in Family Law Matters with Coercive Control-type Violence: Preliminary Thoughts from

the Practitioner Coalface. *Family Law Review* 5 (1): 13–33 look at CP and matters with family violence. They conclude:

If screening is done, and violence identified, could the process then be made safe? Can the playing field be leveled with enough trust re-established to permit interest-based negotiation? It would appear that the answer is a qualified ‘Yes’ as described by our survey respondents and as assessed by violence victims who have participated in a somewhat similar dispute resolution project (the Coordinated Family Dispute Resolution (CFDR)). That pilot project aimed to provide FDR in matters with violence and included cross-disciplinary professionals working collaboratively with case management. By using multiple sessions and with screening and legal advice, the aim was to lessen power imbalance. Support professionals and lawyers helped prepare the victim; they were also sometimes present at some or all of the mediation sessions. These professionals reported that their presence neutralized violent partner’s tendency to intimidate and control. And, where mediation sessions were handled carefully, the data from parents indicate that the process could be safe and empower them to make appropriate arrangements for their children, and it even improved the capacity of some to communicate with their ex-partners.

We believe that this positive assessment of CFDR bodes well for the potential value of using CP in cases involving family violence. Certainly, some of the lawyers, like the one below, although not asked to assess relative merits, thought that CP was a better process for victims of violence than the alternatives:

It is ... better than litigation as it provides a forum in which both victims and perpetrators can receive assistance from experts if necessary, and it avoids the "he says, she says" battle that often occurs in Court and the victim is given a voice.

Such viewpoints need to be tested by an evaluative study similar to that done for the CFDR pilot project. Indeed, more research could further illuminate any benefits and/or drawbacks of CP. Such a project might include in-depth interviews with victims, perpetrators, lawyers, and/or other Collaborative professionals who engage in the multi-disciplinary approach. If the sample were large enough, we could learn which model of CP seems to work best with particular facts, personalities and type of coercive control.

Another cautionary note: Access to this legal path may be problematic for some survivors of family violence. A victim’s economic circumstances may be compromised by the behaviour of their violent party, issues of mental and physical health and/or their capacity to work. Because of the uncertainty associated with the costs of CP, reforms to financial assistance in law and policy should be made for CP to be more accessible to relatively impoverished clients. It would be beneficial if:

Legal Aid [were] able to facilitate the Collaborative process, or [if] a modified version of Collaborative Law [could] be run through the Courts, so that those with less money can also have the benefit of this process.

Further, in remote Australia, there are few, or none, of the resources required for CP, and it may be less effective in such cases without such resources. We recommend that the Commonwealth Government provide the funding for training of lawyers in CP and for professionals who might be part of the process.

Indeed it is important that lawyers practicing CP have been properly trained and fully understand the aim and process of CP. This includes knowing how to negotiate using an interest-based approach, and understanding the dynamic of the CP model and their role in providing advocacy for their client within the CP model. Lawyers also must learn how to negotiate in an open forum (as opposed to a traditional approach) and in having reality testing conversations with their client. Additionally, they need to be fully aware of the sometimes disguised and/or indirect manifestations and effects of coercive control. With these insights, understanding, and skills, the CP legal practitioner can work more effectively at ‘morphing’ the process, as we described earlier, and can better equalise power differential. Lawyers and other practitioners (if it is multidisciplinary) can then work with the clients to address the dysfunctional dynamic, with all parties focused on how best to divide the ‘orange.’

Proposal 6–9

While we agree with 6-9 in principle we wonder in practice whether the government would fund something so potentially broad in its scope. We note that if a tribunal was used then resolving disputes over the implementation of orders be made much simpler.

Proposals 6–10 to 6-12

We agree with 6-10 to 6-12.

7. Children in the Family Law System Proposal Proposals 7–1 and 7-2

We agree with 7-1 and 7-2.

Proposal 7–3 The Family Law Act 1975 (Cth) should provide that, in proceedings concerning a child, an affected child must be given an opportunity (so far as practicable) to express their views.

We agree with 7-3 however we believe the Act should go further. See our response to Proposal 3-3 above in relation to mature minors and Gillick competency. In our view, the

reasons for the court not hearing directly from children in appropriate cases do not stand up to scrutiny when other jurisdictions are considered. While children should never be required to have a view, greater consideration should be given to judicial officers hearing directly from children (and particularly Gillick competent children) in appropriate cases.

Proposals 7–4 and 7-5

We agree with 7-4 and 7-5.

Proposal 7–6

We agree with 7-6.

That assessment of risk needs to be made at the hearing level also. From Alicia Prest, Patricia Eastal and Fanny Thornton, 2018 ‘When the Mother-child Tie in Parenting Orders is Outweighed by Other Factors: A Snapshot in Time’ (in press *Australian Journal of Family Law*)

Evidentiary issues and implications for reform

Inconsistencies in, and indeed the indeterminate nature of, family law make it difficult to predict how allegations of abuse will be treated in family law proceedings. Despite it being held that victims of domestic violence do not have to ‘provide corroborative evidence of some fact, to have their evidence of assault accepted’, unless ‘strong probative evidence’ of family violence is available to support the allegations, the Court may be unable to ascertain on the balance of probabilities that an alleged abuse has occurred. Certainly, in the sample judgments the courts were not swayed to limit time between the father and child where the mother’s allegations could not be adequately corroborated with her evidence consistently held to be inadmissible, unfounded or unaccepted. Nevertheless there might be deemed sufficient evidence to support a finding of the mother’s incapacity to facilitate a relationship between the father and child and the psychologically damaging effects of that incapacity.

Such a disturbing inconsistency warrants possible legislative amendments to the *Family Law Rules* or interim non-legislative requirements, such as a Practice Direction. An inquiry by the Commonwealth Attorney-General with submissions and a roundtable could bring together the experiences and insights of academic and legal practitioner experts with the aim of identifying ways to ensure that the standards of evidence and the applicable tests evolve beyond those already provided for at common law, including those in *M v M*. It could also decide if and how Courts could be required to give a mother’s allegations of the father’s abusive actions towards the child(ren) considerable weight unless there is a significant fact or circumstance, such as proof that the mother is not a credible witness, to minimise that weight.

Proposal 7–7

We agree with 7-7 though this is not a change.

Proposals 7–8 and 7-9

We assume this advocate is in addition to the best interests advocate of an ICL, where one is appointed.

Proposal 7–10

While we consider children should be able to have representation in appropriate cases, we are confused as to how this will work. An ICL is a best interests lawyer not an advocate for the child. What is suggested here is that this SLR also takes a best interests approach. How will their roles differ? Also, this seems to ignore the possibility that a child is capable when competent of instructing counsel and this should be considered for mature minors.

Proposal 7–11

We strongly agree with 7-11, particularly in relation to children being able to meet with judicial officers. While children, especially younger children, may not routinely speak directly with a judicial officer, we consider that the court's reluctance to hear directly from children in appropriate cases is unjustified and a breach of children's fundamental right to express their views in a matter directly concerning them. The possibility of a third party conveyor of views shaping and contextualising the child's views in light of their own view of what is best for the child cannot be underestimated. This is particularly true of mature minors. Indeed, with very mature minors, they will generally be Gillick competent and should, if they wish, be able to participate actively in proceedings concerning them. No adult would accept the treatment that is afforded to mature minors in family court in this regard.

Proposal 7–12

We strongly agree with 7-12.

Proposal 7–13

We agree with 7-13.

8. Reducing Harm

Proposal 8–1

We are very much in agreement with 8-1.

Patricia Easteal and Dimian Grey (2013) Risk of Harm to Children from Exposure to Family Violence: Looking at How it is Understood and Considered by the Judiciary. *Australian Journal of Family Law* 27: 59–77 found that witnessing continued to be minimized as a harm.

To date, there is a paucity of research that focuses on the extent to which witnessing or exposure to family violence is considered and weighted by the judiciary compared to other forms of violence, such

as the direct abuse of a child. Children exposed to violence have similar long-term negative health and social outcomes to children who are a direct target of abuse. We look at how specifically the Family Law Act 1995, 2005 and 2012 amendments have defined and included exposure as a harm. We examine 60 judgments made since the 2006 amendments came into force in which the facts included alleged family violence, and exposure and/or child abuse. We find that unsupervised time was the determination in most (70%) of our sample but was less likely in matters which involved only allegations of direct child abuse. Having identified the complexities of the unacceptable risk test, judicial indeterminacy and a legislative emphasis on maintaining a meaningful relationship with both parents, we look at whether and how exposure to violence has been understood, considered and weighted and how judicial officers attempt to minimise potential risk of harm to the child. For a number of reasons — including the importance of corroborating expert evidence that we found in our analysis — we recommend that the Magellan List be expanded to include family violence matters in which there is the risk of exposure harms.

Exposure to family violence, or its after effects, does not seem to be attributed the same level of potential harm to children as direct abuse, especially sexual interference with a child. In two thirds of the 15 matters with child exposure, unsupervised time was ordered as compared to 43% of the matters involving child abuse alone. This is despite research clearly showing that exposure to family violence is extremely harmful to children and that family violence is correlated with a heightened risk of child abuse. The latter is illustrated in our sample with about one third of child abuse allegations also including allegations of exposure or violence occurring between adults.’

Question 8–2

Yes. The harms of exposure need to be emphasised. Examples of witnessing and more examples of emotional coercive control could be provided in the definition. Additionally, specific examples of financial coercive control and sexual coercive control could be given. It is extremely important for as many examples to be listed as possible.

Proposal 8–2

We agree with 8-2. As we have emphasised in previous responses intersectionality and differences from mainstream lenses and experience must be recognised. We also believe strongly in the importance of legislation and policy to be constructed with an educated and informed frame.

Proposal 8–3

We agree with 8-3.

Vexatious litigation can be a type of financial abuse (and a type of coercive systems

control). Examples of such behaviours include: repetitively instigating proceedings, or trying to take control during already existing proceedings, by applying for access to children, property and pets, and refusing to mediate, accumulating court costs. According to Fitch and Easteal (2017 'Vexatious Litigation in Family Law and Coercive Control: Ways to Improve Legal Remedies and Better Protect the Victims,' *Family Law Review*, 7, 103-115):

Controlling behaviours can be 'indirect, subtle and psychologically traumatic, involving threats of harm, humiliation and insults, and financial or legal abuse.' Family violence is often characterised by one party attempting to control the other party and stalking by one party attempting to have contact with the other against their wishes.

Similarly, a key feature of at least some vexatious litigation is an attempt to control the other party or maintain contact with them through persistent litigation. It appears that some vexatious litigants appear to be using [the system] as a vehicle for control and harassment of the other party.

The perpetrator may use the legal system and other 'systems' to control the mother. One US study found that a type of post-separation abuse included 'emotional abuse that took place outside of interactions with their assailants' - e.g., the ex-husband might repeatedly and falsely report a mother to Child Protective Services.

Proposals 8-4 and 8-5

We agree with 8-4 and 8-5.

Question 8-3

We do not believe that VL should turn on 'frequency'. It is about whether the VL is another manifestation of coercive control. While 'repeated' has its issues too, it is at least a better choice than frequent. As Fitch and Easteal (2017 'Vexatious Litigation in Family Law and Coercive Control: Ways to Improve Legal Remedies and Better Protect the Victims,' *Family Law Review*, 7, 103-115) conclude:

Better screening tools and approaches to deal with violence are required to educate family law practitioners and judicial officers with professional development programs that include understanding coercive control. This could be facilitated by amending the Legal Profession Uniform Law to add IPV education requirements with all practitioners mandated to complete as a part of their continuing legal education (see, eg, *Legal Profession Uniform Conduct (Barristers) Rules 2015*; *Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015*, etc). Such training could also examine how to identify vexatious-like behaviour, the remedies available, and appropriate referrals for support services.

Education is also important for the perpetrators of coercive control-type VL. They must have these behaviours explained to them and remedial action taken. Mental health issues may be evident and so a properly qualified professional, such as one that is trained in domestic violence, can teach concepts such as proportionality, reasonableness and

acceptance to this type of vexatious litigator. However, a challenge remains that the professional will need to have extensive knowledge of the court system and the case itself in order to gently show the perpetrator that the behaviour is disproportionate to the circumstances (as research has shown that some vexatious litigants are unable to recognise the disproportion).

Question 8–4

From Fitch and Eastal (2017 ‘Vexatious Litigation in Family Law and Coercive Control: Ways to Improve Legal Remedies and Better Protect the Victims,’ *Family Law Review*, 7, 103-115):

Respondents provided quite a few suggestions concerning costs. These included: making severe costs orders with an uplift for exemplary costs (noting that this could run the risk of more appeals, where it might be possible to demonstrate lack of merit); more liberal use of adverse costs orders and parties not bearing their own costs; and the removal of filing fee exemptions for vexatious litigations. Respondent 1 pointed out though that by the time it is appropriate to apply for a vexatious litigant order, the non-vexatious party has already incurred substantial costs so it may not be financially viable to apply for those orders. A solution to this could be parties being allowed to apply for leave from the court to seek vexatious litigant orders with those costs borne by the vexatious party, if successfully declared as such. Note this could be quite effective if the standard were lowered reducing the difficulty of declaring a party as vexatious.

We suggest that these orders could be at the discretion of the judicial officer. More information, training and guidance would increase efficacy. For instance, a judicial officer needs to know if the party applying for those orders is in financial hardship with orders only granted if satisfied that the party may be put under further financial strain if the orders are not granted.

Proposals 8–6 and 8-7.

We agree with 8-6 and 8-7.

9. Additional Legislative Issues

Proposals 9–1 to 9-7.

We agree with 9.1-9-7.

Question 9–1

This question is poorly framed as it assumes that sterilisation of children with disabilities falls into a similar category as what is seen to be treatment for a recognised condition. A state body should be responsible for dealing with sterilisation that is non-therapeutic because of the possibility of a conflict of interest between the parent and child. There

should be no court oversight of treatments for recognised conditions, unless of course there is a dispute in which case the relevant parties can bring the matter to court under the welfare power in s 67ZC.

Proposal 9–8

We agree with 9-8. We would note though that there are many different indigenous cultures; Aboriginal concepts of family should not be essentialised.

Question 9–2

The section might say that ‘family’ must be interpreted according to the relevant cultural context, and so may mean different things in different contexts. A sub-section could list definitions.

10. A Skilled and Supported Workforce Proposals 10–1 and 10-2

We agree with 10-1 and 10-2.

Proposal 10–3

We agree with 10.3. Suggestions for increased DV training and education for legal practitioners are standard in the recommendations of research articles, law reform reports and victim advocacy submissions. We have written many papers that recommend education concerning family violence for all those working in Family Law. For example, from Patricia Easteal, Lisa Young and Anna Carline (2018) ‘Domestic Violence, Property and Family Law,’ *International Journal of Law, Policy and the Family*, 32(2):

So, and perhaps not surprisingly, we would argue the system must be re-designed, legislation reformed and the people involved in the practice of family law educated in such a way as to counter the imbalances described and the likelihood of any adverse or unjust outcomes. It is important that anachronistic norms are replaced with new information and approaches, and legal professionals are educated as to the realities of domestic violence, and the needs of victims.

And Fitch and Easteal

Research has suggested that while the *FLA* requires that attention be given to family violence, courts are reliant on the evidence that is brought before them. This means family lawyers play an integral role in identifying and adducing the evidence.

Lawyers need to understand that some victims of family violence might be reluctant to disclose it, or disclose it in detail, unless the demeanour of the lawyer is such as to give them confidence, or unless the lawyer asks specific questions. Lawyers, and judicial officers, and perhaps others, might learn to become more sensitive to the impact of their manner, and way of speaking, on people who have been exposed to violence, especially those from non-mainstream communities.

Better screening tools and approaches to deal with violence are required to educate family law practitioners and judicial officers with professional development programs that include understanding coercive control. This could be facilitated by amending the Legal Profession Uniform Law to add IPV education requirements with all practitioners mandated to complete as a part of their continuing legal education (see, eg, *Legal Profession Uniform Conduct (Barristers) Rules 2015*; *Legal Profession Uniform Law Australian Solicitor's Conduct Rules 2015*, etc). Such training could also examine how to identify vexatious-like behaviour, the remedies available, and appropriate referrals for support services.

And Eastal and Grey:

Engendering discussion amongst judicial officers about subjectively held definitions of harm and risk might help to bring about practical changes in outcomes for children. It is likely that there is variation in understanding of the realities of family violence. Judicial officers could no doubt benefit from learning more about the seriousness of exposure to violence that exposure is far broader than witnessing and the correlation of abuse with adult violence. They could learn about the potential risk to the child if unsupervised time is ordered since the couple violence may persist in various ways after separation and/or a violent partner may repeat such behaviour with a new partner.

Proposal 10–5

We strongly agree with 10-5. Indeed, we would generally argue that, where possible, lawyers facilitate mediation for property matters. However, at the very least mediators should be well versed in the principles that apply under the Act. Given the considerable financial imbalance, and the other exigencies that may persist around the time of settlement, it is imperative that protections are put in place to minimise the chance that agreed settlements further disadvantage women, in particular primary carers of children.

Question 10–2

This is a difficult question to answer, because in reality it would need to be fairly extensive in a range of ways. First there is the issue of understanding how the law would address the situation (which is complex) and there is the need to understand financial matters in some detail (things such as tax, superannuation, financial statements, company structures, how trusts work and so on). In our view, where parties can afford it, low cost arbitration overseen by former judges and senior family lawyers is a good process particularly for more complex matters.

Proposal 10–6 and 10-7

We agree with 10-6 and 10-7.

Proposal 10–8

We strongly agree with 10-8. Judges (and lawyers) and all professionals working in family law need more training about the dynamics, manifestations and effects of family violence. From Patricia Easteal, Lisa Young and Anna Carline (2018) 'Domestic Violence, Property and Family Law,' *International Journal of Law, Policy and the Family*, 32(2) eby005, <https://doi.org/10.1093/lawfam/eby005>

IV. ISSUES CONCERNING THE FAMILY COURTS' RECOGNITION OF DOMESTIC VIOLENCE

The challenges in obtaining appropriate financial relief are further exacerbated by the difficulty of proving family violence in court proceedings. Ubiquitous legal concepts and phrases, such as “reasonable”, “just”, “necessary” [and] “fair” (Carline and Easteal, 2014: 50) that appear in these contexts and which may seem neutral are in fact embedded in layers of male-dominated stratigraphy. Where such concepts/phrases are applied in the exercise of discretion, the potential for bias to be masked increases. Therefore, it is not difficult to identify ways in which legal gatekeepers’ (unconscious and hence invisible) values and beliefs have improperly affected how family violence is treated in family law processes.

A good example is the application of the standard of proof for findings of violence. The evidentiary standard in family law matters is the civil standard of the balance of probabilities, not the criminal standard of beyond reasonable doubt. That is, ‘when the law requires the proof of any fact, the tribunal must feel an actual persuasion of its occurrence or existence before it can be found’. The Family Court has held that when deciding a parenting dispute and whether contact should occur with an alleged perpetrator of violence, the factors that must be considered when making a finding about family violence include the ‘seriousness of the allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding’. A clear example of the way male-centric covert biases operate in the application of this standard is that the questions of ‘seriousness’ and ‘gravity of consequences’ are viewed entirely from the alleged perpetrator’s perspective. Put simply, the gravity of the consequences of a finding of no sexual abuse, where sexual abuse has occurred, are arguably no less grave (indeed they are arguably far more grave) than a finding of abuse where no abuse has occurred – particularly where proceedings are not criminal but rather about contact (Young et al 2014). Moreover, the terms ‘seriousness,’ ‘inherent unlikelihood,’ and ‘gravity’ are vague, open to interpretation and likely to be affected by the judicial officer’s understanding (or not) of things such as the ways that coercive control can be exerted and the frequency of sexual abuse and its consequences.

There is compelling evidence that mistaken beliefs about family violence, entrenched views on gender roles and personal prejudices have, and continue to, impact on judicial reasoning and weighting with decision-making affected by beliefs about what behaviours constitute domestic violence and the dynamics and causes of such violence. Take for example the finding of one judicial officer (pre-dating our sample)

who described the family violence as ‘situation specific. That is, it was related to the relationship between the husband and the wife...’. This ‘finding’ was made in the absence of any expert evidence, and without any detailed discussion of family violence either generally or in this case. The judicial officer further explained why, in a previous decision, he had declined to extend the *Kennon* principle (even if it was good law, which he doubted) ‘to *only* verbal violence’, a position clearly contrary to the law.⁴

Similarly, in a 2012 case, *Hashim v Hashim*, despite the father behaving in a physically and verbally violent and frightening way when removing a child from a classroom and then lying about the incident (as well as allegedly threatening the teacher’s family that it would not be good for her to give evidence), Justice Judith Ryan concluded this was not the father’s ‘usual’ behaviour and appeared to discount its significance as it was only proof of violence occurring during the separation process.

Not only might violent men be characterized as having a moment of inappropriate behaviour, we are well used to the notion too that histrionic women may exaggerate. Judicial officers may also minimize the harm a woman suffers. Justice Eric Baker considered that pushing/hitting with an open hand which sometimes resulted in bruising to the victim’s face and body was ‘of a relatively minor nature’ and not *appearing* ‘to be part of any long term strategy on the part of the husband to cause harm to the wife or to the children ...’. Even if in more recent times a judicial officer may not trivialize physical violence so easily, such statements are indicative of the way in which decision makers are so easily able to be influenced by their own particular views on violence. In the absence of evidence and absence of a good appreciation by judicial officers of the nature, extent and consequences of family violence, personal prejudice or simple misunderstanding is very likely to hold sway.

Having said this, as we show below, in considering family violence in *Kennon* adjustment decision-making, some members of the judiciary are increasingly showing an appreciation of the complex dynamic and effects of family violence. As Justice Sharon Johns notes in *Pilch & Pilch*:

‘Society and the law have changed in the 19 years since *Kennon*’s case was decided. Now more than ever, there is a greater understanding within the community as to the damaging impact of controlling behaviour, verbal and physical abuse within relationships’.

Further, the recognition by Judge Heather Riley in *Charlton & Charlton* that the husband’s emotional abuse (by criticizing the wife’s intellectual ability) could adversely impact upon the wife’s contribution by undermining her confidence in the work sphere is a case in point.

From Patricia Eastal and Dimian Grey (2013) Risk of Harm to Children from Exposure to Family Violence: Looking at How it is Understood and Considered by the Judiciary. *Australian Journal of Family Law* 27: 59–77:

The small number of cases is of course too limited to allow for any conclusions about the effect of legislative prioritising of child protection. It does allow us though to conclude that decision-making in these types of cases continues to involve judicial assessment of coercion, control, fear, violence and measurement of harm and risk. Therefore, the crucial question is how do judicial officers define and gradate harm and how do they understand the dynamics and manifestation of family violence? Chisholm has recommended:

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

... Engendering discussion amongst judicial officers about subjectively held definitions of harm and risk might help to bring about practical changes in outcomes for children. It is likely that there is variation in understanding of the realities of family violence. Judicial officers could no doubt benefit from learning more about the seriousness of exposure to violence that exposure is far broader than witnessing and the correlation of abuse with adult violence. They could learn about the potential risk to the child if unsupervised time is ordered since the couple violence may persist in various ways after separation and/or a violent partner may repeat such behaviour with a new partner.’

Question 10–4

Requirement for any potential appointee to show that (s)he has undergone intensive training program concerning family violence and also issues concerning the intersectional sub-groups. Screening should be done to uncover strong biases.

Question 10–5

Perhaps the steering group established under Proposal 3 could assume an advisory role.

Proposal 10–9

We agree with 10-9. We are concerned about the amount of influence currently held by these individuals as their evidence is often relied upon in judicial decision-making. As concluded by Alicia Prest, Patricia Eastal and Fanny Thornton, 2018‘When the Mother-

child Tie in Parenting Orders is Outweighed by Other Factors: A Snapshot in Time' (in press *Australian Journal of Family Law*):

We have observed that judicial decision-making is rightfully influenced by the ICL's views and the Family Consultant's evidence. As the ICL receives a Family Consultant's report, there is arguably some nexus between a Family Consultant's recommendations and the ICL's proposed Orders, which in cases where the father was granted responsibility for, and primary care of, the children, were mostly in favour of the father. The ICL appears to be highly regarded by the Court, so there appears to be a chain of influence taking place.

Our concern here is that the responsibility for assessing the parent-child relationships lies with a sole Family Consultant who, in an artificial and strained environment, may be observing a relationship dynamic that might not be reflective of the mother and child's previous 'normal' relationship. This is even more likely the case in circumstances where the mother and child have not seen each other for a period because of a prior suspension of that time, for example as a result of interim orders pending the Family Consultant's report.

We suggest therefore that consultations with the families in parenting proceedings could be undertaken outside of sterile office environments and otherwise unnatural settings. Both the parent and child(ren) could feel more relaxed with each other at home, a park or some other child-friendly venue which would be conducive to producing their usual behaviour with each other. Also, to increase the likelihood that the Family Consultant(s) obtain an accurate understanding of the mother-child relationship or observe the redevelopment (or not) of the mother-child relationship, observations and interviews ought not to be a one-off, particularly in circumstances where the child has not seen his or her mother for a period.

Further, given the importance of this evidence, we recommend that a minimum of two Family Consultants separately assess the children and their relationships with their parents (and/or any other person applying for Parenting Orders or relevant to proceedings) on separate occasions to gauge whether their observations are consistent. If there is disparity between the two reports, then there should be an option to engage a third Family Consultant to undertake a final assessment, with the most consistent findings of the three reports being given greater weight by the Courts.

We note that counter-arguments would likely include access to Family Consultants, associated costs and over-interviewing of the child. Family Consultants appointed by the Court incur no cost, but there can be significant delays to access those Family Consultants. Private Family Report Writers may be more accessible in terms of availability, but are costly at approximately (\$3,000 - \$9,000.00)

which may be unaffordable for many parents. Government could assist by covering all or part of the costs for private consultants or by providing funding for more Court appointed consultants.

Any reluctance to fund these measures or concerns about the child being over-interviewed should be allayed and outweighed by the need to ensure that decisions made about the care of and responsibility for Australian children are indeed made in the best interests of the child.

Proposal 10–10

We agree with 10.10. See our response to 10-9.

Proposals 10–11 – 10-14

We agree with 10-11 – 10-15.

11. Information Sharing

We generally agree with the Proposals in this section; that is, we support measures to facilitate information sharing.

12. System Oversight and Reform Evaluation

Proposal 12-1

We do not disagree with the proposal to have an oversight body charged with the matters set out in 12-1. However, given the crucial importance of this body we would like to see considerable consultation about its creation, its role and powers, and to ensure there is a transparent process for its set up and staffing. We are concerned that political influence could hamper its effectiveness, given the highly charged nature of this area, and the ease with which anecdote (either unsupported or contrary to evidence) holds sway with politicians in this area.

Proposal 12–2

We agree with 12-2 but again are concerned about both proper resourcing and political independence.

Proposal 12–3

We agree with 12-3 but note our concerns re political independence.

Proposals 12–4 to 12-11.

We agree with 12-4 12-11.

ⁱ For example, in the 16-17 year in the Family Court of Australia, 85% of the matters (both parenting and property) where an application was actually filed did not proceed to a final trial: Family Court of Australia, *16:17 Annual Report*, 29.