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19742014

Australia's approach to domestic violence: focus on coercive control

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Australia's approach to domestic violence: Focus on coercive control

Two Beds and a Coffee Machine¹ Australia's approach to domestic violence: focus on coercive control

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Introduction

As a very young family law practitioner over 24 years ago, my initiation to domestic violence matters became a baptism by fire. I represented a woman Janette who at the time was residing in a Women's shelter in Brisbane. Janette was young when married. She was 18 and her husband, Larry was 22 yrs older. Larry had no previous serious relationship and at the time of marriage he was living with his mother. By occupation Larry was a prison warden at our infamous Boggo Road jail and he was a marksman by hobby.

In short Larry was a paternal terrorist. Larry and Janette's relationship was more of father – daughter relationship than equal spouse. Janette was required to give up her job. Larry and Janette had two children (the child births were occasioned with violence). Larry prevented Janette from having access to money: he doled out bare amounts for housekeeping. By Larry's design Janette was isolated from family and she had no friends. Larry and Janette only socialized with Larry's workmates generally during card games held at their home.

Over the years Larry subjected Janette to horrific, systematic mental and physical abuse that was witnessed by their children. Larry held old world and fundamentalist religious views.

Janette managed to escape with her children during the parties' first separation. It was during this time I received instructions from Janette. Larry was furious with Janette and he cycled through periods of anger, desperation in trying to contact Janette and their children and jealousy about misguided/imagined relationships Janette was supposed to be involved in.

As so often happens in severe domestic violence cases, Janette felt hopeless and accepted Larry's overtures that he had seen the error of his ways and he had changed. Larry and Janette reconciled. Unfortunately the cycle of abuse returned shortly after Janette returned home.

Janette contacted me shortly after the second and final separation. This separation featured unbridled threats from Larry. He was obsessed with Janette. He accused Janette of infidelity. It was only some time after the second separation that Janette met Michael a scout leader and they commenced a relationship. Larry was enraged. With police assistance Janette commenced domestic violence proceedings. During those proceedings and in fact during my cross examination of Larry, he made direct threats of harm toward Janette and Michael. Larry provided no financial support to Janette. We obtained a sole use and occupation order for Janette. Larry moved out of the parties' home enabling Janette and the children to return.

One evening after Janette and Michael went out for the evening, Larry lay in wait under the stairs to the home. On return home, Larry shot Michael point blank dead. Larry shot Janette and seriously injured her. I was woken in the early hours to attend Janette's bedside in the operation theatre to prepare her will.

Larry was charged with murder. Larry argued mitigating circumstances and was convicted of manslaughter. From his prison cell Larry endeavoured to control Janette. Larry sought the return of his impounded guns to his mother and he sought contact with the children.

¹ Savage Garden, refer to lyrics on page

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Janette and the children were relocated assuming a new life and identity.

At that time Janette became the focus for domestic violence campaigns and featured on a 60 minutes program. I lost contact with Janette however it is one of those cases that comes along in your professional career that leaves an indelible mark on you.

The Domestic Violence system in Australia

The courts response to issues of domestic or family violence operates on 2 levels in Australia:

Quite apart from the protection orders made by the State and Territory Courts and the intersection between family violence and the Family Law Act, the Family Law Courts have separate remedies for the personal protection of spouses including:

1. Injunction for personal protection (non molestation) under sections 68B and 114:

(a) Section 68B(1) provides:

(i)

"If proceedings are instituted in a court having jurisdiction under this Part for an injunction in relation to a child, the court may make such order or grant such injunction as it considers appropriate for the welfare of the child, including:

(a) an injunction for the personal protection of the child; or

(b) an injunction for the personal protection of:

(i) a parent of the child; or

(ii) a person with whom the child is to live under a parenting order; or

(iii) a person with whom the child is to spend time under a parenting order; or

(iv) a person with whom the child is to communicate under a parenting order; or

(v) a person who has parental responsibility for the child; or

(c) an injunction restraining a person from entering or remaining in:

(i) a place of residence, employment or education of the child; or

(ii) a specified area that contains a place of a kind referred to in subparagraph (i); or

(d) an injunction restraining a person from entering or remaining in:

(i) a place of residence, employment or education of a person referred to in paragraph (b); or

(ii) a specified area that contains a place of a kind referred to in subparagraph (i)."

(b) Section 68C provides for powers of arresting including:

"(1) If:

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- (a) *an injunction is in force under section 68B for the personal protection of a person (the **protected person**); and*
- (b) *a police officer believes, on reasonable grounds, that the person (the **respondent**) against whom the injunction is directed has breached the injunction by:*
 - (i) *causing, or threatening to cause, bodily harm to the protected person; or*
 - (ii) *harassing, molesting or stalking that person;*

the police officer may arrest the respondent without warrant."

- (c) Section 114(1)(a) provides a court may make such order or grant such injunction including an injunction for the personal protection of a party to the marriage.
- (d) In *Kemsley and Kemsley*⁴ the Full Court held: "The words 'personal protection' do not only refer to [a wife's] physical protection but they are apt to include such matters as the protection of her right to lead her own life without undue interference from the husband."
- (e) In *English*⁵ the Full Court held:

"The undertaking in this case is in very wide terms — namely not to ``annoy, interfere with, assault, molest or harass the other party or cause that party to be annoyed, assaulted, molested or harassed''. With the exception of the undertaking not to ``annoy'' the other aspects of the undertaking namely ``assault'', ``molest'' or ``harass'' each carry with them some concept of objective, discernible conduct. For the reasons referred to above obviously that is not necessarily the case in relation to conduct which it is said has ``annoyed'' the other party.

In our view an injunction or undertaking ought not to be made or received in these terms. The concept of ``annoy'' is so wide and obscure and carries with it such elements of subjectivity that it would be very difficult to predict beforehand the conduct or class of conduct which would constitute a breach of it. It is capable of serious misuse and would involve the Court in contempt proceedings attempting to discern whether it may properly be said that the conduct in question ``annoyed'' the other party and what aspect of objectivity, if any, was required. In our view such a term ought not to be used in this jurisdiction. We appreciate that the terms ``harass'' and ``molest'' have elements of uncertainty or ambiguity about them as well, but not of the same dimension and they have been terms long used in this jurisdiction and are generally reasonably understood."

2. Sole and exclusive use (of residence orders):

- (a) Section 114(1)(f) provides a court may make such order or grant such injunction including an injunction relating to the use or occupancy of the matrimonial home; and
- (b) the Full Court of the Family Court in *Davis and Davis*⁶ said it should take into account "conduct of one party which may justify the other party in leaving the home or in asking for the expulsion from the home of the first party by a court" when deciding whether to issue an injunction giving one spouse exclusive use or occupation of the matrimonial home.

The concept and focus of domestic violence was initially very narrow informed by a general perception that domestic violence was a physical action or assault by a spouse on their partner. Regrettably in some quarters of society today that remains the case. Police forces were ill equipped and there was not a dedicated department specializing and trained in

⁴ [1984] FLC 91-567

⁵ [1986] FLC 91-729

⁶ [1976] FLC ¶90-062, at p 75,309

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domestic violence. In fact police often failed to act on domestic violence complaints because it was a domestic issue. It was the end of an era when family violence was dusted under the carpet. It was the end of an era when there was a cynicism about domestic violence and the cycle of domestic violence (and for instance why a battered wife would return to her violent husband).

There have been significant milestones and changes introduced as the concept of domestic violence has evolved in Australia as a consequence of:

1. many reports into domestic violence commissioned by governments, courts and interest groups;
2. increased awareness and education of lawyers, judges and the community about domestic violence;
3. access to social science research; and
4. widespread redefining of domestic and family violence in legislation and bringing the treatment of the impact of family violence to the foreground in issues such as parenting disputes.

Statistics on Domestic Violence in Australia:

1996

The Women's Safety Australia study conducted by the Australian Bureau of Statistics [ABS] in 1996 was the first national data made available on the incidence and prevalence of domestic violence towards Australian women. The following were features of this study:

1. there was a sample of 6300 Australian women;
2. the study measured the incidence of physical and sexual violence against women (18 years and over) during the 12 months prior to the survey and over their lifetime (since the age of 15);
3. "violence" was defined as "any incident involving the occurrence, attempt or threat of either physical or sexual assault (ABS 1996, p. 2)";
4. such incidents were defined as actions considered offences under criminal statutes in each state or territory;
5. the data does not record other forms of abuse (emotional, social, financial etc) that occur in tandem with acts of violence.

The study included the following results:

1. 23% of women who had ever been married or in a de-facto relationship, experienced violence by a partner at some time during the relationship (ABS 1996, p. 50);
2. 42% of women who had been in a previous relationship reported violence by a previous partner (ABS 1996, p. 51);
3. half of women experiencing violence by their current partner experienced more than one incident of violence (ABS 1996, p. 54). Injuries sustained in the last incident were mainly bruises, cuts, and scratches, but also included stab or gun shot wounds, and other injuries (ABS 1996, p. 55);
4. 12% of women who reported violence by their current partner at some stage during the relationship, said they were currently living in fear (ABS 1996, p. 51);
5. women who experienced physical or sexual violence by a partner were significantly more likely to experience emotional abuse (manipulation, isolation or intimidation) than those who had not experienced violence (ABS 1996, p. 51);



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6. 35% of women who experienced violence from their partner during periods of separation (ABS 1996, p. 57);
7. younger women were more at risk than older women, with 7.3% of women aged 18-24 years having experienced one or more incidents of violence from a current partner in the previous 12 month period as compared to 1.2% of women aged 55 and over (ABS 1996, p. 50);
8. only 4.5% of women who were physically assaulted contacted a crisis organisation;
9. 19% of women who were physically assaulted in the previous 12-month period contacted the police;
10. 42% gave the main reason for not contacting police after the last incident that they wished to deal with it themselves;
11. 58% of women physically assaulted in the previous 12-month period discussed their experience with a friend or neighbour.

2006

Ten years later the Australian Bureau of Statistics released its landmark report, Personal Safety Survey⁷.

Features of this study include:

- 1) the survey was conducted between August and December 2005;
- 2) the sample was approximately 16,400 people (both men and women) around Australia;
- 3) those surveyed were interviewed about their experiences of violence from both male and female perpetrators in the last twelve months, before the age of fifteen and over the lifetime; and
- 4) violence was defined as 'any incident involving the occurrence, attempt or threat of either physical or sexual assault'.

The results of the survey included:

1. in the 12 months prior to the survey around 5.8% (443,800) of women and 11% (808,300) of men had experienced some form of violence;
2. all respondents were three times more likely to experience violence by a man than by a woman (p. 6);
3. since the age of fifteen years, 39.9% (3,065,800) of women and 50.1% (3,744,900) of men had experienced some form of violence (p. 6);
4. of the 4.7% of women who were physically assaulted in the 12 months prior to the survey, 31% were assaulted by their current or previous partner (p. 9);
5. of the 10% of men who were physically assaulted in the 12 months prior to the survey, 4.4% were assaulted by their current or previous partner (p. 9);
6. of the 1.6% of women who experienced sexual violence in the 12 months prior to the survey, 39% had been assaulted by a family member or friend, 32% by other known persons, 21.8% by a stranger, 21.1% by a previous partner and 7.7% were sexually assaulted by a current partner (p. 11 and table 19; p. 33);

⁷ the full publication can be found at: [http://www.abs.gov.au/AUSSTATS/abs@.nsf/ PrimaryMainFeatures/4906.0?OpenDocument](http://www.abs.gov.au/AUSSTATS/abs@.nsf/PrimaryMainFeatures/4906.0?OpenDocument)

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7. of the 0.6% of men who had experienced sexual violence in the 12 months prior to the survey, 44% had experienced assault from a family member or friend in the most recent incident, 35% by another known person and 33% by a stranger (p. 11);
8. since the age of 15, around 2.1% of Australian women experienced violence by a current partner and 15% by a previous partner; and
9. since the age of 15 around 0.9% of men experienced violence from a current partner and 4.9% experienced violence by a previous partner (p. 11).

Pre mid 1980s: the wilderness

Garcia-Moreno et al.⁸ (2006, p. 11) in their multi-country study of domestic violence for the World Health Organisation, state that:

"Until recently, most governments and policy-makers viewed violence against women as a relatively minor social problem, particularly "domestic" violence by a husband or other intimate partner. Since the 1990s, however, the efforts of women's organizations, experts and committed governments have resulted in a profound transformation in public awareness about this problem. Such violence is now widely recognized as a serious human rights and public health problem that concerns all sectors of society."

That statement is typical of what was occurring in Australia.

No fault legislation:

See Altobelli part 1

Chappell – extent of dv – “past 20 years ...”

Victims and perpetrators – Chappell

Tranche 1: the early days mid 1980-1990 – small steps

The model for the State & Territory domestic violence legislation introduced in the period mid-1980 to 1990 was the Domestic Violence and Matrimonial Proceedings Act 1976 (UK).

The relevant legislation was the following:

1. South Australia in the Summary Procedure Act, 1921 (SA), s 99; and in the Domestic Violence Act 1994 (SA), s 4;
2. New South Wales in the Crimes (Domestic and Personal Violence) Act 2007 (NSW) and in the Property (Relationships) Act 1984 (NSW), s 53-55;
3. Queensland in the Domestic Violence (Family Protection) Act 1989 (Qld);
4. Tasmania in the Justices Act 1959 (Tas), s 106A-106F;
5. Western Australia in the Restraining Orders Act 1997 (WA);
6. Australian Capital Territory in the Domestic Violence Act 1986 (ACT);

⁸ Garcia-Moreno, C, Jansen, ah, ellenberg, M, heise, l & Watts, h 2006, 'Prevalence of Intimate Partner Violence: findings from the Who multi-country study on women's health and domestic violence', The Lancet, vol. 368, pp. 1260- 1269. available: <http://search.ebscohost.com/login.aspx?direct=true&db=aph&aN=22569743&site=ehost-live>

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7. Victoria in the Crimes (Family Violence) Act 1987 (Vic); and
8. Northern Territory in the Domestic Violence Act 1992 (NT).

A typical definition of domestic violence at that time is from the legislation of my home State, Queensland:

as any of the following acts that a person commits against another in a domestic relationship:

- (a) wilful injury;*
- (b) wilful damage to the other's property (for example wilfully injuring a defacto's pet);*
- (c) intimidation or harassment of the other, for example:*
 - *following an estranged spouse when the spouse is out in public, either by car or on foot;*
 - *positioning oneself outside a relative's residence or place of work;*
 - *repeatedly telephoning an ex-boyfriend at home or work without consent (whether during the day or night);*
 - *regularly threatening an aged parent with the withdrawal of informal care if the parent does not sign over the parent's fortnightly pension cheque;*
- (d) indecent behaviour to the other without consent; or*
- (e) a threat to commit an act mentioned in (a) to (d).*

Protection Orders were made by our Magistrates Court upon proof of an act of domestic violence and the likelihood of recurrence of domestic violence. The orders provided civil injunctive relief for an aggrieved spouse usually to be of good behavior and not commit an act of domestic violence. Other conditions imposed included the surrender of weapons. The court could make ouster orders and impose exclusionary restraints on a respondent including restraint from entering work place of aggrieved. The civil standard of proof (on the balance of probabilities) applied. If a protection order was breached then it became a criminal offence and the Court had at its disposal a raft of punishments including good behavior bonds, community service, fines and imprisonment.

It was not unusual for an application for a protection order to be met with a cross application for a protection order from the respondent often as a strategy to procure mutual undertakings to avoid a contested hearing.

The focus of early definitions of domestic violence was the product and alignment to criminal offences and not what we now know today to be the multi faceted attributes of domestic violence, the source of domestic violence and behavior.

Domestic violence orders take various forms across the States and Territories of Australia:

1. Protection Orders (QLD & ACT);
2. Apprehended Domestic Violence Order (NSW);
3. Intervention Orders (VIC);
4. Restraining Orders (NT, SA & WA); and
5. Restraint Orders (TAS).

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The Family Law Act

Whilst at the heart of the Family Law Act since its inception in 1976 has been the concept of "no fault" the Family Law Courts over the years have adapted itself to account for domestic / family violence in its deliberations.

The following cases concerning parenting and family violence under the Family Law Act have shaped the amendments to the Family Law Act that followed in 2006 and 2012:

1. *Jaeger* (1994) FLC 92-492 addressed the admissibility of an affidavit corroborating violence in the mother's household and the trial judge's error in not receiving the affidavit:

The affidavit of F, so far as relevant to this present matter, related to an occasion where she said she went to her mother's home in November 1992 and saw the wife and had a discussion with her, and the wife showed her injuries from which she was then suffering. The overall effect of that, if accepted, was that the wife was suffering from significant injuries and that she ascribed that to an assault upon her by N. The affidavit, if accepted, then went on to depose to the circumstance that F subsequently telephoned the wife and questioned her about her return to N and she said that she had done so for reasons that are set out in that affidavit.

Consequently the general thrust of the affidavit was directed to the question of the possibility of significant violence in the wife's household.

His Honour then said the following:

"I am not really interested in whether the home is a peaceful haven or a bit of a — or a bit rougher than that, I might put it that way. I do not think that that is what affects children or is likely to affect this child."

His Honour then either finally ruled against the admission of the affidavit or reaffirmed his previous ruling against it and he did so at passages including the following:

"The relationship between the wife and her current de facto husband does not really figure in this child's needs. That is as I see it. He does not need his — he does not need the person that would be his surrogate father, if the mother was to get custody, he needs his mother. He also needs his father. The question is which does he need the most, in the light of how he is doing at this time. They are the real issues in nearly all of these cases."

Now, all of that led to counsel for the husband's submission which was that the affidavit was relevant to a significant issue, namely the stability of the relationship between the wife and N, the likelihood of the continuance of that and, particularly having regard to other evidence relating to the child, the question of the child going into a household where violence towards his mother was an issue

It raised the question, the overall question, namely the utility of a change from an environment where it was the husband's case that the child was improving from earlier difficulties, to a household where violence may be occurring towards an important figure in his life, namely his mother.

So, the consequence, in my view, is that his Honour was wrong in rejecting the affidavit of F and that rejection of evidence could have had an impact upon the ultimate outcome"

2. *Patsalou* (1995) FLC 92-580 where the trial judge discussed the significance of domestic violence in parenting proceedings as follows:

"Any suggestion that such behaviour is only relevant to the welfare of children if it 'took place in the presence of the children' or they were 'made aware of it' cannot be supported. In my opinion, the denigration of one parent by the other and the perpetration of violence by that parent against the other is of importance when assessing where the interests of children lie and what future arrangements might best advance their welfare.

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Denigration and/or assault put the target of this behaviour under considerable unnecessary strain which may, in turn, impinge upon the quality of parenting able to be offered to the children for whom that parent bears or shares responsibility. For a parent to conduct himself/herself in such a manner towards the other parent reflects poorly on the assailant's capacity to recognise that by this behaviour they may erode the confidence, dignity and self esteem of the children's other parent and thereby place the quality of parenting able to be offered under unnecessary strain.

It also reflects poorly upon the assailant's capacity to provide children with a positive role model for their own behaviour and methods of resolving disputes and dealing with tensions and stress.

Moreover, the effect upon children of inter-spousal violence is now the subject of a considerable body of research. This shows that, though the effects may vary depending on a number of variables, including age and stage of development of the child and frequency and extent of the violence, they may be profound and long-lasting."

3. *Merryman* (1994) FLC 92-497, in granting interim custody, a restraining order enjoining the husband from coming within a 2km radius of the home and sole and exclusive use of the matrimonial home to the wife in order to preserve stability for the children and for their safety, Justice Mullane found:

The wife's version of the allegations of violence in the marriage was, on the evidence, generally more consistent and more likely than the husband's version. The Court made 14 separate findings of violence by the husband against the wife and children. The evidence established that the husband was an arrogant, assertive, controlling and violent man. He represented a serious danger to the wife and the children.

The husband's violence represented a threat to the children not just in the direct physical sense but also as an inappropriate role model. The husband to be restrained from going within a radius of two miles of the home.

The material facts about domestic violence are detailed in appendix 3.

4. *JG & BG* (1994) FLC 92-515 Justice Chisholm found that due the importance of the topic of family violence, he would identify and state the legal principles relevant to allegations of violence in the context of proceedings relating to guardianship, custody and access, as follows:

In proceedings relating to custody, guardianship and access, evidence of family violence is relevant insofar as it assists the Court in determining what orders will best promote the welfare of the children.

The Court will have regard to the fact that family violence may be directly or indirectly relevant to children's welfare in a variety of ways, and may be relevant even where it is not directed at or witnessed by the children.

So far as the evidence allows, the Court will attempt to understand the nature of any family violence that has occurred and its potential effect on the children.

Where the evidence permits the Court to make findings of contested allegations of family violence, and where such findings are necessary in order to determine what orders will promote the child's welfare, the Court will make the findings.

Where the Court is in a position to make findings on allegations of family violence which are relevant to the children's welfare, but does not need to do so in order to determine what orders will promote the welfare of the children, it may be open to the Court to refrain from making the findings. If such a discretion exists, the Court will exercise it on the basis of a consideration of whether the children's welfare is most likely to be promoted by making or declining to make such findings.

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5. *Blanch v Blanch & Crawford* (1999) FLC 837, the Full Court allowed an appeal against the trial judge's approach to the domestic violence issues and held:

The trial Judge failed to adequately deal with the serious issue of domestic violence in light of its importance as a factor for consideration in the context of parenting orders: s 68F(2)(g), (i) and (j); JG and BG (1994) FLC ¶92-515 and Patsalou and Patsalou (1995) FLC ¶ 92-580 cited. Although it is not necessary for a trial Judge to make specific findings in relation to every issue presented by the parties, in cases of severe and sustained domestic violence the Court is required to give a clear indication whether, and why, it accepts or rejects the case advanced.

The wife's evidence of domestic violence was precise, detailed and corroborated and his Honour's finding that the husband's violence was a product of the relationship rather than his personality was not reasonably open to him. Such a finding attributes responsibility for domestic violence to the victim rather than the perpetrator and is unacceptable.

*Further, the trial Judge failed to adequately address the risk to the children's development arising from growing up under the care and tutelage of a violent role model (quite separately from any risk that they themselves might become victims of the violence) which is a matter to which, regardless of whether or not it is raised by counsel, a Judge of the Family Court **must turn his or her mind**.*

6. *K & K* [2003] FMCAfam 214: The wife brought an application for exclusive occupancy under the provisions of section 68B (which provide for the making of injunctions in relation to a child). The parties had been living separately under the one roof for a period of more than two years. In the month leading up to the filing of the wife's application the situation deteriorated with the wife claiming (and the husband denying), that the husband was not giving her any more money for her own purposes and that there were arguments and unpleasantness in front of the children. There was no allegation of violence. The court held that this was not, despite the wife's assertion that it was unbearable, a situation where the husband's behaviour could be categorised as preposterous. The evidence did not satisfy the court that the conduct of one of the parties had been such that a reasonable man or woman could not be expected to live with that party in the matrimonial home.
7. *KMA & SAN and Anor* [2008] FamCA 1211 @ para 108-116 (this case provides a good summary of the 2006 amendments and the case law regarding family violence).
8. *Murphy & Murphy* (2007) FamCA 79.

There have been three significant amendments to the parenting legislation under the Family Law Act in relation to family violence issues:

1. The 1996 amendments (11/6/96 amendments – family violence provisions – ss60D, 68F, 68J & 68K).
2. The 2006 amendments: best encapsulated in the judgment of Justice Ryan in *KMA & SAN*⁹

108. Family violence is a significant issue in these proceedings. With the passage of the Family Law Amendment (Shared Parental Responsibility) Act 2006 it arguably has even greater prominence than beforehand. The definition of family violence is widened and is now defined as being "conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety." (See s 4). In a note to the definition it is explained that "a person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety." Thus the notion of fear has both an objective and subjective element.

⁹ [2008]FamCA 1211

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109. *In the Explanatory Memorandum of the Family Law Amendment (Shared Parental Responsibility) Bill 2005 (8 December 2005) Parliament explains the significance and effect of its intention concerning the s 60B(1)(b) object and in doing so highlights its prominence. It states:*

35. *The second new object is inserted in new paragraph 60B(1)(b). It recognises that there is a need for children to be protected from physical and psychological harm from being subjected to, or exposed to, abuse, neglect or family violence. The provision recognises that children need to be protected not only from direct harm but also harm caused by being exposed to abuse or family violence that is directed towards, or affects, another person. This would cover, for example, the possible psychological harm to a child caused by the child witnessing abuse against another child, or family violence against a member of the child's family. This new object implements recommendation 2 and conclusion 2.29 of the FCAC Report and recommendations 17 and 18 of the LACA Report. The term 'subjected to' has been retained as well as 'exposed to' in the drafting to make clear that it covers protection both from direct harm and from witnessing violence towards another person.*

110. *At page 13 the Explanatory Memorandum says:*

48. *The amendment to section 60CC creates two tiers of considerations that the court must take account of in determining what is in the best interests of a child. The primary considerations are contained in the new subsection 60CC(2). They include the benefit to the child of having a meaningful relationship with both parents and the protection of the child from physical and psychological harm. The safety of the child is not intended to be subordinate to the child's meaningful relationship with both parents. The intention of separating these factors into two tiers is to elevate the importance of the primary factors and to better direct the court's attention to the revised objects of Part VII of the Act which are set out in the new section 60B (inserted by item 8).*

49. *For example in a case where there is family violence or sexual abuse then keeping the child safe will have particular relevance. In other cases not involving any issues of safety that will be less relevant and the issue of the benefit of a meaningful relationship with both parents will be the primary factor although other factors in the secondary list, such as the child's views, or failure to previously fulfill parental responsibilities without any reason may also be considered as relevant.*

3. The 2012 amendments (7/6/12) [The legislation responds to reports into the 2006 family law reforms and how the system deals with family violence including:

- (a) the Australian Institute of Family Studies: "Evaluation of the 2006 family law reforms";
- (b) the Honourable Professor Richard Chisholm, "Family Courts Violence Review"; and
- (c) Family Law Council, "Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues".

Financial matters and family violence under the Family Law Act:

1. Property settlement and the assessment of contributions:

The Family Court has been circumspect in its approach to the impact of behavior on a property settlement entitlement. Without wanting to open the floodgates the Court has acknowledged in certain extreme instances it will take account of domestic violence when determining a property settlement.



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- (a) *Kennon*¹⁰ is the leading authority of the treatment of domestic violence in property settlement. The Full Court held the following:

"Put shortly, our view is that where there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party's contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been, that is a fact which a trial judge is entitled to take into account in assessing the parties' respective contributions within s 79. We prefer this approach to the concept of "negative contributions" which is sometimes referred to in this discussion.

In the above formulation, we have referred only to domestic violence, for the reasons which we indicated earlier, but its application is not limited to that...

However, it is important to consider the "floodgates" argument. That is, these principles, which should only apply to exceptional cases, may become common coinage in property cases and be used inappropriately as tactical weapons or for personal attacks and so return this Court to fault and misconduct in property matters— a circumstance which proved so debilitating in the past. In addition, there is the risk of substantial additional time and cost.

However, in our view, s 79 should encompass the exceptional cases which we described above. It would not be appropriate to exclude them as a matter of policy because of this risk. It is a matter of commonsense for the lawyers involved and, where that may not be sufficient, it is a matter for a firm hand by the Court at an early stage when a case appears to raise those issues.

*It is essential to bear in mind the relatively narrow band of cases to which these considerations apply. To be relevant, it would be necessary to show that the conduct occurred during the course of the marriage and had a discernible impact upon the contributions of the other party. It is not directed to conduct which does not have that effect and of necessity it does not encompass (as in *Ferguson*) conduct related to the breakdown of the marriage (basically because it would not have had a sufficient duration for this impact to be relevant to contributions)..."*

- (b) *Marando*¹¹ reviewed the authorities to date including *Doherty*:

"This was made especially hard by the husband's abuse and denigration of her and the children in the ways described by them in their evidence, which I largely accept on this issue, as well as by his attitude to 'women's work' and by his drinking which necessitated the wife working especially hard and harder than would be usual in normal situations as homemaker, parent and as the prime navigator of the welfare of this family through the many seas of problems and difficulties which confronted them over the years.

*These are special factors of the kind to which the Full Court drew attention in *Ferraro v Ferraro* [1992] FamCA 64; 16 Fam.LR 1, especially at pages 38, 39 and 47, that being a decision affirmed in *McLay v McLay* 20 Fam.LR 239 at pages 248 to 249, and is no doubt what Baker J had in mind when speaking for the Full Court in *Doherty v Doherty* 20 Fam.LR 137 at page 141. His Honour's remarks, although, in my respectful opinion, obiter and given in an extempore judgment, are entitled to great respect. They do not represent new law. It has been suggested in some quarters since that judgment was delivered that they have, but I disagree with that suggestion.*

*The remarks of Baker J in *Doherty*'s case were simply an expression, in the context of domestic violence, of the passages in *Ferraro*'s case cited above. Neither *Ferraro*'s case nor *Doherty*'s case purported to overrule *Soblusky* (1976) 2 Fam.LR 1, nor *Ferguson* (1978) 4 Fam.LR 312, where investigation of fault or misconduct per se was deprecated. Any intention to overrule *Ferguson* was deprecated in *Ferraro*'s case at page 39, and I am, with respect, unable to accept that either *Fogarty* J*

¹⁰ [1997] FamCA 27

¹¹ [1997] FamCA 9

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or *Baker J*, who were members of the Full Court in both *Ferraro* and *Doherty*, would have intended such decisions to be overruled without expressly saying so.

Accordingly, while in normal circumstances the assessment of the parties' contribution under s.79(4) in this case over so long a period of cohabitation would lead to a conclusion of equality, I am of opinion that the special factors set out above in relation to the wife's contribution to the welfare of the family lead to the conclusion that her overall contributions were thereby so increased as to be greater than those of the husband and, although it is difficult to be precise, to the extent of 55 per cent to the wife and 45 per cent to the husband."

(c) *Lynch and Fitzpatrick (JEL and DDF)*¹² the Full Court (per Justices Holden and Guest) held at [135-6]:

"One can imagine a number of examples where a "special" contribution may not necessarily result in assets to a value of millions of dollars but which ought nevertheless to be recognised. We emphasise that "special", "extra" or "extraordinary" contributions made in the role as homemaker and parent or to the welfare of the family ought to be accorded the same recognition.

136. *This Court has acknowledged that contributions made in this role may be accorded additional weight where the role has been performed in difficult circumstances such as in domestic violence situations or where the role has been performed without the financial, physical or emotional support of the other party. See, for example, Ferraro (supra), Kennon and Kennon [1997] FamCA 27; (1997) FLC 92-757 and C v C [1998] FamCA 114; (1998) FLC 92-824."*

(d) *Kucera*¹³ is a good decision of Federal Magistrate Tom Altobelli that reviews the case law on domestic violence.

(e) *Stellard & Dresdon-Stellard*¹⁴ reviewed the Full Court authority of *Spagnardi* where the Court was not prepared to make a Kennon type order:

288. *In Spagnardi and Spagnardi (unreported) Appeal No EA26 of 2003, 8 September 2003, the Full Court considered the question whether a trial judge may infer from evidence that the result must be that a party's contribution has been affected. (See Spagnardi, par 42).*

289. *At pars 47 – 48 in Spagnardi their Honours said:*

47. *An insufficiency of evidence in the present case leaves the Court with a limited ability to deal with allegations in the context of section 79 proceedings. As Kennon has established it is **necessary to provide evidence** to establish:*

- *the **incidence** of domestic violence;*
- *the **effect** of domestic violence; and*
- *evidence to enable the court to **quantify** the effect of that violence upon the party's capacity to "contribute" as defined by section 79(4).*

48. *We do not agree that the evidence in this case could properly have led to an adjustment pursuant to section 79. There was no suggestion by counsel of (sic) the wife that his Honour did not correctly summarise the evidence in relation to this topic. **The particular deficiency apart from those referred to by the trial Judge is the complete absence of evidence as to how the husband's conduct affected her ability to contribute.**" (emphasis added)*

¹² [2000] FamCA 1353

¹³ [2009] FMCAfam 1032

¹⁴ [2011] FamCA 718

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290. *It is clear, despite these passages, that the Kennon principle is not limited to domestic violence but other forms of conduct falling short of that: Kennon, 84,294.*
291. *Nonetheless, in the present case, in my view, as was the case in **Spagnardi**, there is the "complete absence of evidence" as to **how** the wife's alleged conduct (even if it be regarded as proved) affected the husband's ability to contribute; and further a "complete absence of evidence" to enable me to "quantify" the effect of the wife's alleged conduct (again, even if it be regarded as proved) on his capacity to contribute, or indeed made such more arduous.*
292. *Moreover, whilst it is recognised that in some cases the impact of violence or other conduct on a person is obvious, or a likely inference from the facts, such that certain kinds of violence or conduct must have affected a person's contributions or made them more arduous, in my view such is not the case here. In **Spagnardi** the trial judge at first instance, set out by the Full Court at [45], had said:*
45. *It seems to me that that question of interpretation of the judgment in Kennon is of great importance in resolving this matter. As has been apparent, I have found it a difficult one. It seems to me that the question of whether the evidence in this case is admissible or not, is one of some difficulty. It is partly one of difficulty because the wife's material, although it refers to some specific acts of violence, **does not expressly refer to the impact of the violence on her contributions**. It cannot, however, be the law that the failure to state such matters expressly is **necessarily fatal** to such evidence; there **must be cases where it is obvious or a very likely inference** from the facts, that certain kinds of violence must have adversely affected a person's contributions. **The question in the present case is whether the material on behalf of the wife can be said to fall within that category.**" (emphasis added)*
293. *The husband, in my view, most certainly is not in the position that the matters complained of by him are in that category."*

- (f) *Baranski*¹⁵ also reviews the case law. The facts of Baranski are set out in appendix 1. After referring to the above passage from Kennon, The Full Court held:

"In reality, the obiter dicta of the majority in Kennon (supra) did no more than confirm that, where the contributions of a party are rendered more arduous by the violent conduct of that party's spouse, as the learned Federal Magistrate uncontroversially found them to have been in this case, that is a matter which is relevant to determining the nature and quality of the parties' contributions. Quite apart from the absence of any statutory prohibition upon so doing, it would be illogical and unjust, to find a party's contributions to have been rendered more arduous by virtue of the violent conduct of the other party to a marriage to the time of separation, but not thereafter, in circumstances where making those contributions continued to be arduous notwithstanding that the violent conduct may have ceased. In this case, the husband committed a serious assault upon the wife almost a year after separation...

There has not been any challenge to his Honour's ultimate conclusion that:

402. *The wife says this in her trial affidavit:*

"The husband was controlling of me, his behaviour impacted on my friendships and my relationship with my family. The husband did not like any of my friends or family. He wanted to know where I was and who with. Even when he was away working he would ring me every night and quiz me on my daily activities. Several times a week the husband had obviously been drinking heavily, and he would get angry."

¹⁵ [2012] FamCAFC 18



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I accept that this statement reflects the wife's frame of mind during much of the parties' marriage. She was isolated and intimidated. This had implications for her own level of self esteem and sense of identity. She was frequently frightened of the husband. As such, I am satisfied that her various marital contributions were rendered markedly more arduous by reason of the husband's persistent violent conduct towards her

We are not persuaded that the learned Federal Magistrate erred in his approach to the wife's claim for a "Kennon type adjustment". To the extent that it has been challenged, it has not been demonstrated that the adjustment made by him exceeded the reasonable ambit of his discretion"

2. I turn to the Court's measures to redress financial inequality and financial controlling behavior. In some circumstances one spouse has been suborned by the other spouse who has taken measures to control the access to the parties' funds and withheld from the spouse both financial information and direct access to funds. In some instances the controlling spouse has moved the funds and property beyond the reach of the other spouse to limit or defeat their financial exposure to the other spouse in property settlement and / or maintenance; to exhaust the limited resources of the other spouse in a war of attrition to force the other spouse to capitulate and take an unfavourable settlement (which could include unfavourable parenting terms) or to simply walk away from the fight; or for more sinister purposes to force a reconciliation out of sheer financial desperation. The Family Law Courts have an array of weapons in its armoury to redress the situation for the suborned party including:
- (a) spousal maintenance;
 - (b) disclosure: it is a fundamental platform of the *Family Law Act* and the *Family Law Rules* that the parties provide full and frank disclosure to each other and the Court. A finding of non disclosure can have serious ramifications for the offending party including the Court making property orders beyond the known assets (eg *Weir* (1993) FLC 338 where the Full Court held: "*It seems to us that once it has been established that there has been a deliberate non-disclosure, which follows from his Honour's findings in this case, then the Court should not be unduly cautious about making findings in favour of the innocent party. To do otherwise might be thought to provide a charter for fraud in proceedings of this nature.*"). The Superannuation legislation and regulations are an example of measures available to parties to procure detailed information from the trustee / administrator of the superannuation fund about their spouses superannuation entitlements without the knowledge of their spouse. The trustee is compelled to provide the information (and not inform its member spouse) or risk prosecution;
 - (c) litigation funding orders (interim property settlement or interim spousal maintenance or interim costs or interim injunctions). The current leading authority is *Strahan and Strahan* (Interim Property Orders)¹⁶. The Court has the power to make a series of orders to ensure the financially disadvantaged party is not without the means to fund their litigation. For instance the Court can make a dollar for dollar order ie for each dollar spent on legal fees by the party with the means must be paid to the other party for their legal costs;
 - (d) treating the property of a family trust as property available for division between the parties. The reported decisions of the Family Law Courts are littered with failed attempts to hive off matrimonial property to family trusts to keep from the reach of a spouse (eg *Kennon and Spry*¹⁷);
 - (e) to set aside transactions designed to wholly or partially defeat a property settlement or have the effect of same (section 106B of the *Family Law Act*). This is a powerful remedy where a spouse has colluded with a third party to deal with property to keep it from the innocent spouse's reach;
 - (f) the Court's have extensive powers to injunct to preserve property and the parties' financial circumstances (section 114 of the *Family Law Act*) including making injunctions against third parties (Part VIII A of the *Family Law Act*);

¹⁶ [2009] FamCAFC 166

¹⁷ [2008] FLC 93-388; [2008] HCA 56

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- (g) a sole and exclusive use order can provide accommodation in the relationship residential home for the primary carer and the children of the relationship requiring the controlling party to depart and take up alternative accommodation. This remedy is available to a party despite not having legal title and if ultimately the spouse does not seek to retain the home in property settlement;
- (h) finally a controlling spouse may conduct a program of litigation for the ulterior purpose of harassing and intimidating their spouse. The Family Law Courts can declare the proceedings as vexatious and deal with the abuse of process including costs sanctions and restraining the offending spouse from commencing further proceedings without the leave of the Court (see section 118 of the *Family Law Act*); and
- (i) in a property settlement the Courts can notionally add back property which has been prematurely disposed of prior to the hearing (eg *Townsend*¹⁸) or where funds have been applied in payment of legal costs (*Chorn and Hopkins*¹⁹).

Substantive and normative changes

Education of lawyers / judges: A consistent theme in many submissions made to the Senate Legal and Constitutional Affairs enquiry into the Family Law Legislation Amendment (Family Violence and Other Measures) Bill was the need for the sufficiency of specialist training and education for professional persons involved with the family law system, including judicial officers, family law consultants, family dispute resolution practitioners and legal practitioners.

The development of the law in Australia around family violence has in part been attributable to increased research, awareness and training.

Tranche 2: current Domestic Violence legislation: subtle nuances – evolved thinking

A review of the current State and Territory domestic violence legislation:

1. Tasmania was the first state to introduce the concept of “coercive control” into its definition in 2004;
2. The current State and Territory legislation (which are prescribed laws for the purposes of the family violence provisions of the *Family Law Act*²⁰) are the following:
 - (a) the *Crimes (Domestic and Personal Violence) Act 2007* (NSW);
 - (b) *Property (Relationships) Act 1984* (NSW);
 - (c) the *Family Violence Protection Act 2008* (Vic);
 - (d) the *Domestic and Family Violence Protection Act 2012* (Qld);
 - (e) Pts 1 to 6 of the *Restraining Orders Act 1997* (WA);
 - (f) the *Criminal Law Sentencing Act 1988*, *Intervention Orders (Prevention of Abuse) Act 2009*, and *Youth Court Act 1993* (SA);
 - (g) the *Family Violence Act 2004* and Pt XA of the *Justices Act 1959* (Tas);
 - (h) the *Domestic Violence and Protection Orders Act 2008* (ACT);
 - (i) the *Domestic and Family Violence Act 2007* (NT); and

¹⁸ [1994] FamCA 144

¹⁹ [20004] FamCA 633

²⁰ Reg 19 of the Family Law Regulations 1984

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(j) the *Domestic Violence Act 1995* (NI).

3. The preamble to the Queensland *Domestic and Family Violence Protection Act 2012* (Qld) provides:

"In enacting this Act, the Parliament of Queensland recognises the following -

1 Australia is a party to the following instruments -

Universal Declaration of Human Rights

United Nations Declaration on the Elimination of Violence Against Women

United Nations Convention on the Rights of the Child

United Nations Principles for Older Persons.

2 Living free from violence is a human right and fundamental social value.

3 Domestic violence is a violation of human rights that is not acceptable in any community or culture and traditional or cultural practices cannot be relied upon to minimise or excuse domestic violence.

4 Domestic violence is often an overt or subtle expression of a power imbalance, resulting in one person living in fear of another, and usually involves an ongoing pattern of abuse over a period of time.

5 Domestic violence can have serious impacts on people who experience it, including physical, emotional and psychological harm, and can result in death.

6 Perpetrators of domestic violence are solely responsible for their use of violence and its impacts on other people.

7 Domestic violence is most often perpetrated by men against women with whom they are in an intimate partner relationship and their children; however, anyone can be a victim or perpetrator of domestic violence.

8 Domestic violence is a leading cause of homelessness for women and children.

9 Children who are exposed to domestic violence can experience serious physical, psychological and emotional harm.

10 Behaviour that constitutes domestic violence can also constitute a criminal offence."

4. The current definition of "domestic violence" in the Queensland *Domestic and Family Violence Protection Act 2012* (Qld) ²¹, is typical of the definition in other States and Territories legislation. The definition is as follows:

"8(1) Domestic violence means behaviour by a person (the first person) towards another person (the second person) with whom the first person is in a relevant relationship that -

(a) is physically or sexually abusive; or

(b) is emotionally or psychologically abusive; or

(c) is economically abusive; or

²¹ Assented to by the Queensland Parliament on 17 February 2012 and commenced operation on 17 September 2012

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(d) *is threatening; or*

(e) *is coercive; or*

(f) *in any other way controls or dominates the second person and causes the second person to fear for the second person's safety or wellbeing or that of someone else.*

8(2) *Without limiting subsection (1), domestic violence includes the following behavior –*

(a) *causing personal injury to a person or threatening to do so;*

(b) *coercing a person to engage in sexual activity or attempting to do so;*

(c) *damaging a person's property or threatening to do so;*

(d) *depriving a person of the person's liberty or threatening to do so;*

(e) *threatening a person with the death or injury of the person, a child of the person, or someone else;*

(f) *threatening to commit suicide or self-harm so as to torment, intimidate or frighten the person to whom the behaviour is directed;*

(g) *causing or threatening to cause the death of, or injury to, an animal, whether or not the animal belongs to the person to whom the behaviour is directed, so as to control, dominate or coerce the person;*

(h) *unauthorised surveillance of a person;*

(i) *unlawfully stalking a person;*

8(3) *A person who counsels or procures someone else to engage in behaviour that, if engaged in by the person, would be domestic violence is taken to have committed domestic violence.*

8(4) *To remove any doubt, it is declared that, for behaviour mentioned in subsection (2) that may constitute a criminal offence, a court may make an order under this Act on the basis that the behaviour is domestic violence even if the behaviour is not proved beyond a reasonable doubt.*

8(5) *In this section –*

coerce, *a person, means compel or force a person to do, or refrain from doing, something;*

unauthorised surveillance, *of a person, means the unreasonable monitoring or tracking of the person's movements, activities or interpersonal associations without the person's consent, including, for example, by using technology.*

Examples of surveillance by using technology –

- *reading a person's SMS messages*
- *monitoring a person's email account or internet browser history*
- *monitoring a person's account with a social networking internet site*
- *using a GPS device to track a person's movements*

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- *checking the recorded history in a person's GPS device*
- *unlawful stalking see the Criminal Code, section 359B.*

The legislation provides further guidance by defining the following concepts:

"10 *A child is **exposed** to domestic violence if the child sees or hears domestic violence or otherwise experiences the effects of domestic violence.*

Examples of being exposed to domestic violence –

- *overhearing threats of physical abuse;*
- *overhearing repeated derogatory taunts, including racial taunts;*
- *experiencing financial stress arising from economic abuse;*
- *seeing or hearing an assault;*
- *comforting or providing assistance to a person who has been physically abused;*
- *observing bruising or other injuries of a person who has been physically abused;*
- *cleaning up a site after property has been damaged;*
- *being present at a domestic violence incident that is attended by police officers."*

"11 ***Emotional or psychological abuse** means behaviour by a person towards another person that torments, intimidates, harasses or is offensive to the other person.*

Examples-

- *following a person when the person is out in public, including by vehicle or on foot;*
- *remaining outside a person's residence or place of work;*
- *repeatedly contacting a person by telephone, SMS message, email or social networking site without the person's consent;*
- *repeated derogatory taunts, including racial taunts;*
- *threatening to disclose a person's sexual orientation to the person's friends or family without the person's consent;*
- *threatening to withhold a person's medication;*
- *preventing a person from making or keeping connections with the person's family, friends or culture, including cultural or spiritual ceremonies or practices, or preventing the person from expressing the person's cultural identity."*

12 ***Economic abuse** means behaviour by a person (the first person) that is coercive, deceptive or unreasonably controls another person (the second person), without the second person's consent-*

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- *in a way that denies the second person the economic or financial autonomy the second person would have had but for that behaviour; or*
- *by withholding or threatening to withhold the financial support necessary for meeting the reasonable living expenses of the second person or a child, if the second person or the child is entirely or predominantly dependent on the first person for financial support to meet those living expenses.*

Examples-

- *coercing a person to relinquish control over assets and income;*
- *removing or keeping a person's property without the person's consent, or threatening to do so;*
- *disposing of property owned by a person, or owned jointly with a person, against the person's wishes and without lawful excuse;*
- *without lawful excuse, preventing a person from having access to joint financial assets for the purposes of meeting normal household expenses;*
- *preventing a person from seeking or keeping employment;*
- *coercing a person to claim social security payments;*
- *coercing a person to sign a power of attorney that would enable the person's finances to be managed by another person;*
- *coercing a person to sign a contract for the purchase of goods or services;*
- *coercing a person to sign a contract for the provision of finance, a loan or credit;*
- *coercing a person to sign a contract of guarantee;*
- *coercing a person to sign any legal document for the establishment or operation of a business*

The Department of Communities et al (Qld) Training Manual explains economic abuse as follows:

"The definition of domestic violence in Queensland also includes economic abuse.

The definition includes two broad categories of behaviour that may constitute economic abuse and is framed by reference to the dynamics of domestic violence. Economic abuse is a type of domestic violence in which a perpetrator uses money and other assets as a means of controlling or dominating a victim. Economic abuse can adversely affect a person by denying them their economic or financial autonomy or placing them in a position where they cannot meet reasonable living expenses. The definition and examples distinguish reasonable behaviours relating to financial decisions which arise in the normal course of a relationship from those which are coercive, deceptive or unreasonably controlling without a person's consent. It is a form of domestic violence in its own right. In many instances, the economic abuse may form part of the overall picture of controlling behaviours perpetrated by a respondent. In such instances, the burden of proving separate acts of economic abuse may be reduced. A court hearing an application for a domestic violence order makes its decision based on the civil standard of proof (eg the balance of probabilities); is not bound by the rules of evidence; and may inform itself in any way it considers appropriate (section 145). For these reasons, it is not anticipated that courts would routinely be requiring parties to produce complicated financial statements or reports to demonstrate economic abuse. However, the Court can request any information it considers important to determine whether a domestic violence order is necessary or desirable."

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Under section 56, the Court is required to impose standard conditions as follows:

- 56(1) A court making a domestic violence order must impose a condition that the respondent –*
- (a) be of good behaviour towards the aggrieved and not commit domestic violence against the aggrieved; and*
 - (b) if the order includes a named person who is an adult –*
 - a. be of good behaviour towards the named person; and*
 - b. not commit associated domestic violence against the named person; and*
 - (c) if the order includes a named person who is a child –*
 - a. be of good behaviour towards the child; and*
 - b. not commit associated domestic violence against the child; and*
 - c. not expose the child to domestic violence.*

Other relevant provisions of the legislation include:

1. the Court may impose other conditions necessary in the circumstances and desirable in the interests of the parties. Such orders will be made based on: *"The principle of paramount importance to the court must be the principle that the safety, protection and wellbeing of people who fear or experience domestic violence, including children, are paramount"* (s57(2));
2. other conditions include:
 - (a) conditions relating to the behavior of the respondent (s58);
 - (b) conditions relating to the recovery of personal property (s59);
 - (c) conditions limiting contact between parent and child (s62);
 - (d) ouster conditions (s63);
 - (e) ouster condition relating to aggrieved's usual place of residence (s64);
3. an applicant for a protection order must disclose a family law order to the Court. The Court may consider the family law order. See section 78 which provides:

- 78(1) Before deciding whether to make or vary a domestic violence order, the court may –*
- (a) have regard to any family law order of which the court has been informed; and*
 - (b) if the family law order allows contact between a respondent and a child that may be restricted under the proposed domestic violence order or variation – consider whether to exercise its power, under the Family Law Act 1975 (Cth), section 68R or the Family Court Act 1997 (WA), section 176, to revive, vary, discharge or suspend the family law order.*
- 78(2) However, the court must not diminish the standard of protection given by a domestic violence order for the purpose of facilitating consistency with a family law order.*

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78(3) If the court is considering whether to exercise its power as mentioned in subsection (1)(b), the court must give the parties to the proceeding a reasonable opportunity to present evidence and to prepare and make submissions about the exercise of the power.

78(4) However, subsection (3) does not apply if the court is deciding whether to make a temporary protection order under section 47.

78(5) Failure to comply with subsection (1) does not invalidate or otherwise affect a domestic violence order or a variation of a domestic violence order.

There are a number of substantive changes brought about by the 2012 legislation that change the way protection orders are made in Queensland. Importantly the Court may determine the priority of competing applications for protection orders between spouses. Note however a person who has taken action under a prescribed law of a state or territory cannot, however, subsequently institute proceedings in respect of the same matter under s 68B or s 114 of the *Family Law Act 1975*. The class of applicants / relationships has been extended to accommodate a number of different family, carer and intimacy relationships, including intimate personal relationships (including same sex) – spousal, engagement relationship and couple relationship; family relationship (relatives); and informal care relationship

Intersection of Family Violence and the FLA – 7/6/12

The 2012 family violence amendments to the Family Law Act came into effect on 7 June 2012. The purpose of the amendments was to:

- prioritise the safety of children in parenting matters;
- change the definitions of “abuse” and “family violence” to better capture harmful behaviour;
- strengthen advisers obligations by requiring family consultants, family counselors, family dispute resolution practitioners and legal practitioners to prioritise the safety of children;
- ensure the courts have better access to evidence of abuse and family violence by improving reporting requirements; and
- make it easier for state and territory child protection authorities to participate in family law proceedings where appropriate.²²

1. The definition of family violence under the current legislation provides:

4AB(1) For the purposes of this Act, family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (the family member), or causes the family member to be fearful.

Note the behaviour constitutes “family violence” only if it coerces, controls or causes fear.

The definition in the Family Law Act by and large mirrors the state and territory definitions.

4AB(2) Examples of behaviour that may constitute family violence include (but are not limited to):

(a) an assault; or

(b) a sexual assault or other sexually abusive behavior; or

²² Parliament of the Commonwealth of Australia, Family Law Legislation Amendment (Family Violence and Other Measures Bill 2011, Explanatory Memorandum

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- (c) stalking; or*
 - (d) repeated derogatory taunts; or*
 - (e) intentionally damaging or destroying property; or*
 - (f) intentionally causing death or injury to an animal; or*
 - (g) unreasonably denying the family member the financial autonomy²³ that he or she would otherwise have had; or*
 - (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or*
 - (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or*
 - (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.*
- 4AB(3) For the purposes of this Act, a child is exposed to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.*
- 4AB(4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:*
- (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or*
 - (b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or*
 - (c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or*
 - (d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or*

²³ The Law Council of Australia in its submissions to the Senate Legal and Constitutional Committee raised the following concerns about "financial autonomy" and "withholding financial support": The Family Law Section is concerned about what constitutes "financial autonomy"; how do you establish the hypothetical proof "that he or she would otherwise have had" financial autonomy were it not for the conduct; and what amounts to unreasonable as distinct from a reasonable denial, are all problematic concepts that may take up an enormous amount of court time and resources. Despite the concept of reasonableness, the provision may lead to retrospective examination in a way which may not be the intent of the legislation. Further, even in relationships which are not violent, no one has the "financial autonomy, that they would otherwise have had if finances are shared. Consultation and negotiation reasonably undertaken preclude autonomy, which by the definition allows unilateral action. Financial control or coercion may be a feature of abusive relationships and certainly should be included in the definition.....unreasonable "withholding financial support". By its terms, the satisfaction of its conditions effectively require that a court embark on a retrospective maintenance hearing, where it must be established as to the nature and quantum of the needs of the person, that those needs were reasonable and necessary, that they were dependent on the other spouse and could not support themselves for a reason, and that the other spouse then had the capacity to meet the payments needed but unreasonably failed to do so..."

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

The inclusion of the examples are illustrative only (suggested are unnecessary) and do not constitute "family violence" per se.²⁴

In relation to the criticisms directed to the concepts of "financial autonomy" and "financial support", the Honourable Professor Richard Chisholm refers to the filter effect of section 4AB(1) as follows:

*"The critical thing is to look at those opening words in subsection (1) that define what family violence is. If you have words like "coercive" and "oppressive" or whatever those adjectives are, one view is that then it is okay to have the fairly open ended financial thing in those examples because it is only going to be family violence if it falls within those strong words of subsection (1). The main point I would make is that, if you read those examples on their own, you might think that could include all sorts of stuff that is not family violence but you have to read them together with the definition in subsection (1) and so it is very important to get that right."*²⁵

2. The objects and principles of Part VII of the Family Law Act about parenting orders include focus on protecting children from family violence

60B(1) The objects of this Part are to ensure that the best interests of children are met by:

- (a) *ensuring that children have the benefit of both of their parents having a meaningful involvement in their lives, to the maximum extent consistent with the best interests of the child; and*
- (b) *protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and*
- (c) *ensuring that children receive adequate and proper parenting to help them achieve their full potential; and*
- (d) *ensuring that parents fulfill their duties, and meet their responsibilities, concerning the care, welfare and development of their children.*

3. Overarching all considerations of parental responsibility and making parenting orders is the best interests of the child. Section 60CC details how a Court determines what is in the best interests of a child and brings into priority and prominence the place of family violence as follows:

60CC(1) Subject to subsection (5), in determining what is in the child's best interests, the court must consider the matters set out in subsections (2) and (3).

60CC(2) The primary considerations are:

- (a) *the benefit to the child of having a meaningful relationship with both of the child's parents; and*
- (b) *the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.*

60CC(2A) In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).

²⁴ Patrick Parkinson, "The 2011 Family violence Amendments: What different will they make? [2012] 22[2] Australian Family lawyer 1-11

²⁵ Professor Richard Chisholm, Committee Hansard, 8/7/11, p4

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60CC(3)

Additional considerations are:

(a)

any family violence involving the child or a member of the child's family;

if a family violence order applies, or has applied, to the child or a member of the child's family — any relevant inferences that can be drawn from the order, taking into account the following:

a. the nature of the order;

d. the circumstances in which the order was made;

e. any evidence admitted in proceedings for the order;

f. any findings made by the court in, or in proceedings for, the order;

g. any other relevant matter.

4. Obligations on parties and court:

- (a) The Court has an obligation to consider the risk of family violence when making a parenting order whether by consent (section 60CC(5)) or after a contested hearing:

60CG(1) In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order:

(a) is consistent with any family violence order; and

(b) does not expose a person to an unacceptable risk of family violence.

60CG(2) For the purposes of paragraph (1)(b), the court may include in the order any safeguards that it considers necessary for the safety of those affected by the order.

- (b) The Court is obliged to take prompt action in relation to allegations of family violence and will expedite the hearing of cases particularly when a notice (form 4).
- (c) Parties are obliged to file a copy of a domestic violence order (section 60CF(1)) or a written notice about the order.
- (d) If a party, the independent children's lawyer or an interested party makes an allegation of family violence or risk of family violence by one of the parties to the proceedings and the allegation is relevant to the making of an order, then the party must file a form 4 notice and affidavit setting out the evidence supporting the allegations (section 67ZBA(1) and (2)).

5. The Family Law Act contain provisions dealing with any inconsistencies between a parenting order (providing for a child to spend time with a person) and a family violence order to ensure parenting orders and injunctions do not expose people to family violence and to achieve the objects and principles (see sections 68N – 68S) and in particular:

68P(2) The court must, to the extent to which the order or injunction provides for the child to spend time with a person, or expressly or impliedly requires or authorises a person to spend time with the child:

(a) specify in the order or injunction that it is inconsistent with an existing family violence order; and

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- (b) *give a detailed explanation in the order or injunction of how the contact that it provides for is to take place; and*
- (c) *explain (or arrange for someone else to explain) the order or injunction to:*
- a. *the applicant and respondent in the proceedings for the order or injunction; and*
 - b. *the person against whom the family violence order is directed (if that person is not the applicant or respondent); and*
 - c. *the person protected by the family violence order (if that person is not the applicant or respondent); and*
- (d) *include (or arrange to be included) in the explanation, in language those persons are likely to readily understand:*
- a. *the purpose of the order or injunction; and*
 - b. *the obligations created by the order or injunction, including how the contact that it provides for is to take place; and*
 - c. *the consequences that may follow if a person fails to comply with the order or injunction; and*
 - d. *the court's reasons for making an order or granting an injunction that is inconsistent with a family violence order; and*
 - e. *the circumstances in which a person may apply for variation or revocation of the order or injunction.*
- 68P(3) *As soon as practicable after making the order or granting the injunction (and no later than 14 days after making or granting it), the court must give a copy to:*
- (a) *the applicant and respondent in the proceedings for the order or injunction; and*
 - (b) *the person against whom the family violence order is directed (if that person is not the applicant or respondent); and*
 - (c) *the person protected by the family violence order (if that person is not the applicant or respondent); and*
 - (d) *the Registrar, Principal Officer or other appropriate officer of the court that last made or varied the family violence order; and*
 - (e) *the Commissioner or head (however described) of the police force of the State or Territory in which the person protected by the family violence order resides; and*
 - (f) *a child welfare officer in relation to the State or Territory in which the person protected by the family violence order resides."*

The family violence order is invalid to the extent it is inconsistent with the parenting order or injunction that provides for a child to spend time with a person (section 68Q(1)).

Evidence: the Family Law Act permits the relaxation of the rules of evidence in child related matters particularly as provided for in section 69ZT as follows:

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69ZT(1) *These provisions of the Evidence Act 1995 do not apply to **child-related proceedings**:*

- (a) *Divisions 3, 4 and 5 of Part 2.1 (which deal with general rules about giving evidence, examination in chief, re-examination and cross-examination), other than sections 26, 30, 36 and 41;*

Note: Section 26 is about the court's control over questioning of witnesses. Section 30 is about interpreters. Section 36 relates to examination of a person without subpoena or other process. Section 41 is about improper questions.

- (b) *Parts 2.2 and 2.3 (which deal with documents and other evidence including demonstrations, experiments and inspections);*

- (c) *Parts 3.2 to 3.8 (which deal with hearsay, opinion, admissions, evidence of judgments and convictions, tendency and coincidence, credibility and character).*

69ZT(2) *The **court** may give such weight (if any) as it thinks fit to evidence admitted as a consequence of a provision of the Evidence Act 1995 not applying because of subsection (1).*

69ZT(3) *Despite subsection (1), the **court** may decide to apply one or more of the provisions of a Division or Part mentioned in that subsection to an issue in the **proceedings**, if:*

- (a) *the court is satisfied that the circumstances are exceptional; and*
- (b) *the court has taken into account (in addition to any other matters the court thinks relevant):*
- (i) *the importance of the evidence in the **proceedings**; and*
- (ii) *the nature of the subject matter of the **proceedings**; and*
- (iii) *the probative value of the evidence; and*
- (iv) *the powers of the **court** (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence.*

Section 43(1)(ca) of the Family Law Act requires a court to have regard to the need to ensure protection from family violence.

Coercive conduct / control

Domestic violence is the patterned and repeated use of coercive and controlling behaviour to limit, direct, and shape a partner's thoughts, feelings and actions. An array of power and control tactics is used along a continuum in concert with one another.

[Almeida & Durkin 1999, p. 313]

Coercion and control through technologies

The insidious world of technology and cyberspace produces a new frontier for coercive behaviour to control a spouse. I commend the article "The use of information and communication technologies to coerce and control in domestic

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violence and following separation" by Tammy Hand, Dr Donna Chung and Dr Margaret Peters²⁶ which tackles the issues and provides some practical strategies. I provide the following extracts from the paper:

"Non-physical forms of violence include psychological abuse, social abuse and stalking, all of which are documented in the literature. Less well documented are emerging non-physical forms of abuse and control, such as cyberstalking and cyber surveillance, which use digital information and communication technologies (ICTs).

It is widely accepted that domestic violence is aimed at controlling the partner who is the target of violence and abuse (Hague & Malos 2005; Hearn 1998). This abuse of power in the relationship is often associated with a sense of ownership and sexual jealousy (Dobash et al. 2004), and traditionally-held views of women and men, their roles and acceptable behaviours. There has been increasing acknowledgement that non-physical forms of domestic violence are equally significant in their effects on women and children.

Dutton and Goodman (2005) note that coercive control has not received attention from the more general legal response to domestic violence:

Finally, and perhaps most urgently, the role of coercive control in domestic violence needs to be more thoroughly understood in the legal context. In that context, domestic violence is usually understood as a one size fits all category, based on acts of assault alone without regard to the coercive context in which they occur. Moreover, the role of coercive control in extracting criminal conduct is rarely considered in criminal cases (Colvin et al. 2001). Much work needs to be done to bring the notion of coercion in domestic violence into the legal arena. Without attention to this critical element of domestic violence, legal actors hear only parts of the stories that victims bring them every day in court (p. 744).

Stark (2007) has made important contributions to documenting the breadth and pervasiveness of coercive control and its effects on women who are victimised. In essence, he documents how coercive control, through intimidation, isolation and the deprivation of women's liberty, can have more significant effects on women psychologically than does the use of physical violence.

the misuse of ICTs to control and place women under surveillance also runs the risk of being seen as trivial — not as serious as physical violence — and being minimised as 'not really doing much harm'. It could be argued that the misuse of ICTs provides further opportunity for violence against women by extending the apparatus available for coercive control and surveillance. In essence, we are arguing that the misuse of ICTs is not a new form of domestic violence and stalking: rather, the misuse of ICTs provides new and more extensive techniques for the control and abuse of women.

Across the Australian population, mobile phones, computers and Internet use, and digital cameras and recorders are considered everyday goods. As an indicator of growing access, the Australian Bureau of Statistics (2007a) Household Use of Information Technology survey reported that 73% of Australian households had access to a home computer and 64% had Internet access. Among those with Internet access, the majority had broadband (68%), and just over a third of households (31%) had dial-up connections. Mobile phone ownership is less easily estimated.

Because ICTs can locate, communicate with and contact people globally, women's sense of safety can be further eroded, despite what was once considered a 'safe distance'.

It is possible, and it is reported by women, that perpetrators continue abusing ICTs after separation, to maintain control over, and abuse and monitor former partners. It has been consistently found that the time of women's separation from their partners is the time when they are most likely to be killed (Dobash et al. 2004); thus, this is a time at which they need to be free of surveillance.

²⁶ Australian Domestic and Family Violence Clearinghouse, "The use of information and communication technologies to coerce and control in domestic violence and following separation" by Tammy Hand, Dr Donna Chung and Dr Margaret Peters, Stakeholder Paper 6, January 2009

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The home use of computers and the Internet has risen considerably in the past ten years. Southworth et al. (2007) note that domestic violence perpetrators can use such technologies in abusive and harmful ways to monitor and harass their current or former intimate partners. There are five main areas which have been identified to date:

- *computer monitoring software;*
- *keystroke logging;*
- *instant messaging and chat rooms;*
- *checking browser history; and*
- *email tampering.*

Researchers define specific acts of email stalking to include:

- *unsolicited threatening and/or obscene emails;*
- *sending viruses;*
- *flooding a victim's email box with junk mail (known as 'spamming'); an*
- *sending long emails that use all of the victim's computer memory (known as 'mail bombing'), which may include the emailing of images.*

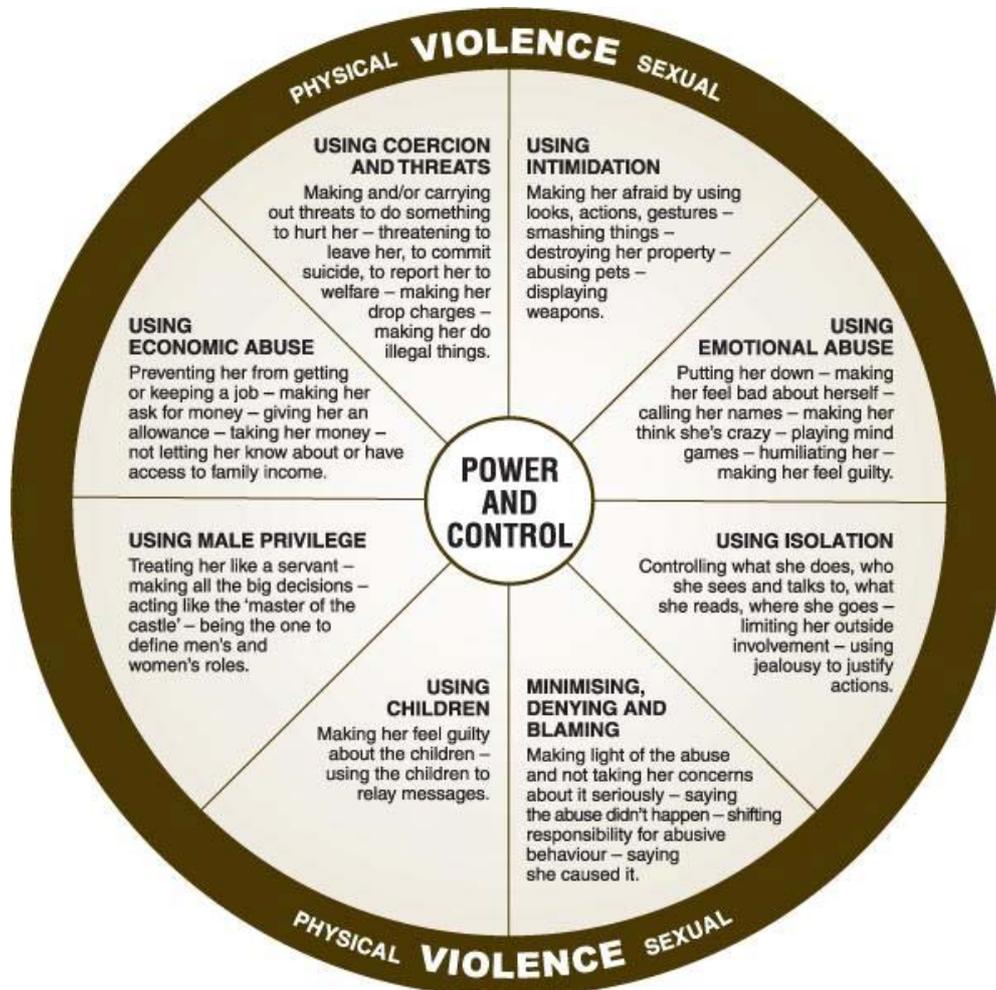
Internet stalking does not involve direct communication with the victim; instead, cyberstalkers make use of the Internet to endanger and defame victims...

Examples of Internet stalking may include:

- *impersonating the victim, and revealing false and/or misleading and personal information about the victim on the Internet, which may incite unwanted and unwelcome attention to the victim, both in cyberspace and in the physical world (Finn & Banach 2000; Ogilvie 2000a; Sullivan 2002); and*
- *generating a web page(s) about the victim that monitors and/or slanders the victim (Ogilvie 2000a; Sullivan 2002)."*

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Power and Control Cycle



©Pence and Paymar (1986). Reference: Pence, E. & Paymar, M. (1986). Power and Control Tactics of Men who Batter. Duluth, MN: Minnesota Program Development, Inc.²⁷

"People who work with both victims and perpetrators are aware that violence is one tool among many that the perpetrator uses to gain greater power in the relationship in order to deter or require specific actions from women, win arguments, or demonstrate their dominance. The term coercive control usefully describes a whole pattern of strategies employed by a man against a woman. Such strategies occur in an ongoing, even relentless pattern including isolation, intimidation, belittling, humiliation, threats, withholding of necessary resources such as money or transportation, and abuse of the children, other relatives, or even pets. The result for most women is an experience of entrapment, of having every aspect of their life controlled. Evan Stark (2009)"²⁸

²⁷ These graphics were reproduced from The Hurt Project: DVD Training Guide. Perth, Western Australia, with the kind permission of the author of the DVD Training Guide, Nicole Leggett, Project Officer, WCDFVS. Reference: Women's Council for Domestic and Family Violence Services, Western Australia. (2008); White Ribbon Foundation PO Box 20, Killara NSW 2071 ABN: 57 126 739 544 P: 02 9453 1811 F: 02 9972 7121 www.whiteribbonday.org.au

²⁸ Stark, E., 2009. Coercive Control: How Men Entrap Women in Personal Life. 1st ed., Oxford University Press, USA.

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Argues that men's violence against women is best understood as analogous to a form of hostage taking rather than an assault incident.

Focusing only on physical acts of violence also obscures the main means men use to establish control by the micro regulation of everyday behaviours associated with stereotypic female roles, such as how women dress, cook, clean, socialise, care for their children, or perform sexually.

It is true that perpetrators have little respect for women but the central issue is their desire for control over women rather than their lack of respect. The issue is one of systematic power inequalities and a society that supports men's entitlement to a range of gender privileges.

Therefore, it is important to recognise that men who seek to coercively control women do so because the range of benefits are high and the risks, of being caught or stopped, are low. The benefits to men are great: he is more likely to be serviced, have food prepared for him, have the house cleaned, have children prevented from disturbing him, have sex on demand. He is likely to gain material benefits, including money and other resources. He can keep her under control to prevent any risk she may have affairs or seek support from friends or family.

Men use a range of techniques to achieve coercive control. One of the most valuable and commonly used techniques is the disguise. This means that men will behave and present one way when abusing the woman in private (a terroriser), and very differently when in public, at work or socialising (a charmer). This ability to put on a disguise not only prevents people detecting his abuse but also acts to confuse and isolate the woman further. She thinks, 'maybe there's something wrong with me because he's acting so nice with them.'

The particularly private nature of such 'cleverness' makes it very hard for many of us even to detect men's violence against women. Even worse, some men are able to express attitudes supportive of gender equality and respect for women while continuing to perpetrate abuse. Many well intentioned education programs make the mistake of assuming that positive attitude change is the best sign of success. Instead we need to be careful to use measures that are indicative of improvements in women's real safety and rights resulting from men's actual daily relations with women.

The dominant sense of manhood in Australia is built on the idea of being tough, in control, competitive and smart. Coercive control is the logical outcome of enacting this unfortunately commonplace form of masculinity."²⁹

Maluka

In *Maluka*³⁰ the honourable Justice Benjamin provided a detailed review of the published literature on domestic violence particularly concerning coercive and controlling behavior. The case was heard after the 2006 amendments to the Family Law Act that introduced the laws concerning shared parental responsibility but before the June 2012 amendments to the Family Law Act. On appeal³¹ the Full Court of the Family Court of Australia overturned parts of the judgment particularly in relation to the trial judge overreaching his findings and the manner in which he informed himself about the literature and it influenced his judgment.

Integral to the appeal was the manner in which the evidence was received and whether the court ought to apply strict rules of evidence under section 69ZT(3) of the Family Law Act. Section 69ZT has changed the law in relation to aspects of evidence in child related proceedings. Rather than this type of evidence only being admitted in exceptional circumstances, in child related proceedings evidence of this type will now only be excluded in exceptional circumstances and otherwise in accordance with section 69ZT(3) of the Family Law Act. On rehearing following the appeal the trial judge, Justice Coleman held "the Court will apply the provisions of the Evidence Act to the proceedings in accordance with the power to do so created by section 69ZT(3) of the Act".³²

²⁹ White Ribbon From Violence to Coercive Control: Renaming Men's Abuse of Women

³⁰ [2009] FamCA 647 [24 July 2009]

³¹ [2011] FLC 93-464

³² [2012] FamCA 379

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However there were significant parts of the trial judgment that were not appealed and the review of the literature is worth considering as it is one of the few reported decisions in Australia that addresses coercive and controlling behavior to date.

The father does not seek to overturn all orders made by the trial Judge. He does not challenge those which gave the mother sole parental responsibility, the children live with her, the 500 metre boundary and restraint which prevents him approaching them at nominated locations or the order which, in the event of breach, enables him to be arrested without warrant. The focus of the father's challenge relates to those orders which would impede his ability to spend time and communicate with the children at a children's contact centre for two hours each fortnight pending further order.

The relevant facts about domestic violence are set out in Appendix 2. In short, the alleged **family violence** and abuse of the mother and the children by the father includes serious assaults of the mother, stalking, vandalism to property of the mother and her present partner, intimidation, threats of violence (including a history of death threats), verbal abuse, controlling behaviour, isolation and dominance. The mother claims she and the children live in fear and terror of the father and have lived with that fear and terror for many years.

The trial judge granted sole parental responsibility of the parties' two children to their mother. This aspect was not appealed. His Honour held:

The facts and circumstances in this case are such that there could be no basis upon which any effective co-parenting of these children can take place. The parental responsibility of the two children can only be left with the mother. To leave her to in any way negotiate with the father would enable the coercive controlling violence to continue and to be perpetuated. It would, in my view, prevent the mother from proper parenting of these children [353]

The judge's review of the social science research and literature and his findings about coercive / controlling behavior by the children's father, included the following:

372. *At a conference in February 2007 the National Council of Juvenile and Family Court Judges and the Association of Family and Conciliation Courts brought together experienced practitioners and researches to identify and explore conceptual and practical tensions that have hampered effective work in which families where domestic violence has been identified or alleged.*
373. *Amongst the papers delivered at that conference were the following:-*
- *Nancy Ver Steegh & Clare Dalton, "Report from the Wingspread Conference on Domestic Violence And Family Courts", published Family Court Review Volume 46 No. 3, July 2008 pp 454 to 475 ("Ver Steegh & Dalton's report"),*
 - *Joan B Kelly and Michael P Johnson, "Differentiation Amongst Types of Intimate Partner Violence: Research Update and Implications for Interventions", published Family Court Review, volume 46 No. 3, July 2008 pp 476 to 499 ("Kelly & Johnson paper"), and*
 - *Peter G Jaffe, Janet R Johnston, Clare V Crooks and Nicholas Bala, "Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans", published Family Court Review, volume 46, No. 3, July 2008 pp 500 to 522 ("Jaffe & Johnston's paper").*
393. *The authors of all three papers discuss the different types of **family violence**. In Kelly & Johnson's paper they describe them into falling into different patterns such as:-*
- ***coercive**, controlling violence;*
 - *violent resistance;*
 - *situation of couple violence;*

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- *situation instigated violence.*

394. *They say that **coercive** controlling violence is sometimes described elsewhere as intimate terrorism.[152] Whichever description is used it is seen as an ongoing pattern of the use of threat, force, emotional abuse and other coercive means to unilaterally dominate one partner and induce fear, submission and compliance.*
395. *In Kelly & Johnson's paper they say of coercive and controlling violence:-*
- Coercive**, *Controlling Violence: intimidation; emotional abuse; isolation; minimising, denying, and blaming; use of children; asserting male privilege; economic abuse; and coercion and threats. (Pence & Paymar, 1993). Abusers do not necessarily use all of these tactics, but they do use a combination of the ones that they feel are most likely to work for them. Because the non-violent control tactics may be effective without the use of violence (especially if there has been a history of violence in the past), **Coercive** Controlling Violence does not necessarily manifest itself in high levels of violence. In fact, Johnson (2008) has recently argued that the recognition of "incipient" **Coercive**, Controlling Violence (cases in which there is a clear pattern of power and control but not yet any physical violence), and Stark (2007) has argued, even more dramatically, that the focus in law should shift from the violence itself to the **Coercive** control as a "liberty crime".*
396. *In many ways the facts as between the parties that I have determined in this case fit most, if not all, of the indicators of coercive controlling violence. The father has used coercion, control, violence, intimidation and threats throughout the relationship, including after separation. He seeks to intimidate and control the mother with the attendant violence, abuse, isolation and aggression. From time to time he focuses this on the children. He dominates and controls the children, particularly X, but his behaviour with regard to Y and her reaction to his verbal abuse of her in June 2008 is indicative of his continuing **coercive** controlling violence.*
397. *The father exercised economic power to control and manipulate the mother and effectively the children. He endeavoured to isolate mother and in effect continues to do so. In that process he denies or minimises his involvement and culpability.*
398. *The father was angry at his incarceration in January 2009 and yet has little or no insight into the years of emotional abuse, physical abuse and control that he exercised over the mother and the children.*
399. *The effect of that long term violence, control and manipulation imposed by the father on the mother has from time to time undermined the mother's parental authority and undermined her parenting role. An example of this was the father's refusal to allow his daughters to be flower girls at a wedding. He endeavoured, without success, to persuade the court that this was a "joint decision". It was the father imposing his will on the mother. He would have no other outcome if the children would not be flower girls. His focus was on himself not on his daughters. I accept that the father threatened to ruin the wedding if his daughters were to attend in that way.*
400. *The mother's belief as to extremes of risk and her acceptance of a broader view of the risk to the children are, it seems to me, very much an impact of the **coercive** controlling violence that has been perpetrated upon her for many years.*
401. *Such is the degree of violence, control, isolation and other factors contained in these reasons in respect of the mother and the children, there is a real concern into the future as to the safety of the mother and consequently the children. The father is not inhibited by any barriers. The domestic violence orders have not caused him to reconsider his position or to moderate his behaviour, it has driven it underground.*
402. *The mother has determined that such is her fear of the father that she will leave the person with whom she is presently living and take herself and the children into hiding. In the course of the long relationship the mother has, from time to time, resisted the violence and in doing so has exposed herself to greater levels of threat, intimidation and violence.*

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403. *I am satisfied that the father represents a real danger to the mother and the children of continuing his **coercive** controlling violence and that the mother ought to have the ability to bring up these children free of that behaviour and its consequential fear and the children ought to be able to escape the direct and indirect consequences of that behaviour and the actuality of that behaviour by the father.*

I have considered the balance between the benefits of that claimed meaningful part of his relationship with the children and his coercive, controlling violence and I determine that the detriments flowing from that relationship were far greater and will be far greater than the benefits flowing from the relationship.

*As such it is not in the best interests of the children to spend face to face time with the father. I had considered allowing some communication by letters and cards, however on considering the evidence of the past **coercive**, controlling violence and the risk that such letters and cards could enable the father to discover the whereabouts of the mother and children, I determine that it is not in the best interests of the children for them to have communication with the father by any means including by telephone, letters or cards.*

419. *In the present case, unlike the matter before Waller LJ [the decision of the England and Wales Court of Appeal in *Re L, V, M & H (Children)* (2000) EWCA Civ 194; 2002 FamLR (UK) 334], the father has not acknowledged that he has acted inappropriately. He has done nothing to demonstrate that he understand the nature of his behaviour, let alone deal with it. There is an unacceptable risk that his coercive, controlling violence will continue into the future. The children and their mother need to be protected from such violence.*

[443] *The principles suggest to Judicial Officers that they should consider the extent of which the allegations of **family violence** are consistent with the principle features of "Controlling **Family Violence**" and setting out the matters which may be considered at final hearing including but not limited to the extent that the violent party is alleged to have:-*

1. *used coercion and threats;*
2. *used intimidation;*
3. *used emotional abuse;*
4. *used tactics to isolate the other party;*
5. *minimised and/or denied the abuse;*
6. *blamed the other party for the violent behaviour;*
7. *used the children as tools; and*
8. *denied the other party access to fiscal resources.....*

On the facts before me I am able to find that the father used coercion and threats, intimidation, emotional abuse, as tactics to isolate the mother, has denied and/or minimised abuse, blamed the mother and others for his abusive behaviour, used the children as tools and has endeavoured to deny the mother access to financial resources. As such his behaviour is consistent with controlling family violence as well as physical and emotional violence.

*I am satisfied that the effect of the **family violence** and abuse by the father is established and it has had a significant detrimental affect on both the children and on the mother.*

456. *I am satisfied that much of these proceedings are seen by the father as a way of seeking to control or maintain control of the mother and that his driving motive is related more to his feelings about the mother rather than about the children.*

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*The father's **coercive**, controlling violence towards the mother during the marriage in the presence of the children, the use of Y as a "human shield", when he was being threatened by Mr W with an axe, his repeated breaches of the Family Violence Orders, his post separation harassment and stalking of the mother are a serious reflection on his attitude and his responsibilities of parenthood.*

474. *A parent's capacity for violence is a relevant factor in assessing the character and suitability as a carer. Professor Patrick Parkinson, in his article Custody, Access and Domestic Violence (1995):-[164]*

Violence is a window on the soul. It reveals much about the character of the person his or her capacity to control anger, to resolve conflict peacefully, to deal with frustration.....It may be indicative of a tendency to dominate, control and coerce the children rather than to nurture and empower them. It might reveal much to a court about how well the parent can cope with crises in parenting, and other stressors, and about his or her capacity for empathy.

475. *Violence is a significant factor in this case. It has been the subject of findings throughout these reasons, and I reiterate them in regard to this particular factor. The father is a violent person who has imposed that regime of **coercive**, controlling violence upon his family. Even when exposed he is unable or unwilling to acknowledge it....*

[494] *It is unfortunate that to have safe and secure lives the mother and children need to conceal their whereabouts. In essence this family will go into hiding to prevent further stalking, threats and possible violence from the father. As I have said in these reasons, the father's approach to his violence and to **family violence** orders is such that I infer that he is unlikely to comply with these orders. His **coercive** controlling violence against the mother and children has to date not brought about any significant consequences for him under the criminal justice systems in either Tasmania or Western Australia. The burden of proof in criminal proceedings by its nature has the capacity to leave vulnerable spouses and children exposed to violent people, such as the father. Sadly the interaction between the criminal justice system and domestic violence is often reactive rather than proactive.*

Kozovski – Altobelli

Baranski

*Baranski*³³ is a more recent decision of the Full Court of the Family Court of Australia (comprising Chief Justice Bryant and Justices Coleman and Ainslie-Wallace)(delivered on 10 February 2012). The background to the domestic violence as found by the court is detailed in appendix 1 to this paper.

In relation to the violence the trial Federal Magistrate found:

In my view, the evidence is clear that the parties' relationship was one marked by endemic violence. Their story together is a tragic one marked by frequent fighting followed by separation and then reconciliation. Neither of them was able to find a way to break this cycle of recurring and destructive violence between them...

However, I am concerned that he does not fully appreciate the gravity of what he has done and the long term consequences of it for [the wife] and, given that she is their primary carer, vicariously for [X] and [Y]. I am also concerned that he has not in the past been fully committed to changing his behaviour thorough [sic] some course of therapy or counselling. Although he admitted wrong doing, I did not find his acknowledgements of his wrong doing particularly compelling....

Clearly, given his current position and his desire to maintain a relationship with [X] and [Y], [the husband] has no viable alternative but to acknowledge his past culpability. He did so many times during the course of the hearing.

³³ [2012] FamCAFC 18

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However, my impression, sadly, is that he did so without either conviction or insight but only because he felt that his circumstances dictated that he had no alternative. At a visceral level, he blames the wife for his current predicament

The impression I derived from [the husband's] evidence is that he thought [X] and [Y] were peripheral in some way, to his violent behaviour towards their mother. I do not accept that this is so. The children were part of a household in which violence played an integral role. They were exposed to their father suborning their mother through extreme violence. They observed significant physical injuries, on their mother's person, inflicted by their father, on more than one occasion....

The violence committed by [the husband] against [the wife] was endemic in their relationship and serious in its intensity. In my view, the evidence indicates that the degree of violence inflicted by [the husband] on [the wife] was increasing. It is not an exaggeration to say that the final assault, committed by him, on the wife, was potentially lethal...

The Full Court endorsed the trial Federal Magistrates reliance upon the following statement of Dame Elizabeth Butler-Sloss, President of the English Court of Appeal in *Re L (Contact: Domestic Violence)*³⁴:

"The family judges and magistrates need to have a heightened awareness of the existence of and consequences (some long term), on children of exposure to domestic violence between their parents or other partners. There has, perhaps, been a tendency in the past for courts not to tackle allegations of violence and to leave them in the background on the premise that they were matters affecting the adults and not relevant to issues regarding the children. The general principle that contact with the non-resident parent is in the interests of the child may sometimes have discouraged sufficient attention being paid to the adverse effects on children living in the household where violence has occurred. It may not necessarily be widely appreciated that violence to a partner involves a significant failure in parenting – failure to protect the child's carer and failure to protect the child emotionally."

The Full Court held:

"...we do not perceive any inconsistency between the statement of principle in Re L, to which his Honour referred, and the provisions of Part VII of the Act. Albeit perhaps expressed somewhat differently in the numerous provisions of Part VII relating to family violence.."

Other reported decisions on coercive or controlling behavior include:

Parkinson article

Remedies

Subject to the best interest of the child, proven systematic family violence may lead to the following outcomes for the perpetrator:

1. Loss of parental responsibility – the other parent is ordered sole parental responsibility (for all aspects of the care, welfare and development of the child).
2. No time spent between perpetrator and child (alternatively any time is to be supervised). The Courts will protect children from harm from abuse and family violence. Judges have made it clear that encouraging continuing parental involvement cannot be allowed to compromise children's safety (see *Adams v Adams* (No. 8 - Final Orders).

³⁴ [2012] FamCA 379



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Best practice guidelines

"The Family Court has always recognized the risk to children and spouses of family violence, abuse and the risk of abuse. In March 2009 the Family Court published Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged. These Best Practice Principles were developed:-

in recognition and understanding of the devastating effects of family violence and abuse on victims; in furtherance of the commitment of the Family Court to protecting children and parents from harm resulting from family violence and abuse.

The Best Practice Principles were developed having regard to the Court's Family Violence Strategy; the guidelines set out in the Court's Magellan case management system; and to meet the legislative recognition of the place accorded to family violence under the Act.

The Best Practice Principles are a very useful checklist for parties, legal practitioners and judicial officers when dealing with allegations of family violence and/or abuse"³⁵

Paul Doolan³⁶ at the 2011 IAML 25th Anniversary Meeting at Harrogate gave an overview of the then 2nd version of the Best Practice Guidelines and circulated a copy of the guidelines. Since that time, with the 2012 amendments the Family Law Courts have revised and issued a third version of the Best Practice Guidelines. A copy of the third edition of the Guidelines is provided in Appendix 4 to this paper. The guidelines provide a comprehensive roadmap for handling domestic / family violence issues before an Australian Family Law Court.

Impacts of domestic and family violence

The impact of domestic / family violence is universal and include the following (referencing the reported research and survey of the impact in Australia):

1. Health outcomes:

- (a) Until 2004 when Vichealth published its study, *The Health Costs of Violence: measuring the burden of disease caused by intimate partner violence*, domestic violence had not been generally been regarded in Australia as a public health issue.
- (b) the study showed that (p. 25):
 - (i) for women under 45 years of age intimate partner violence is responsible for 9% of the total disease burden, less for older women and 3% in all Victorian women;
 - (ii) the greatest disease burden (60%) is associated with mental health problems, including suicide, drug use and risky levels of smoking and alcohol consumption; and
 - (iii) intimate partner violence contributes more to the disease burden in Victorian women aged 15-44 years than illicit drugs, alcohol, physical inactivity, body weight, cholesterol, blood pressure or tobacco. The study listed some of the known health outcomes of intimate partner violence (Vichealth 2004, p. 21);
- (c) the fatal impacts include:
 - (i) femicide (the killing of women);
 - (ii) suicide;

³⁵ Maluka [2009] FamCA 647 [6-9]

³⁶ IAML fellow, Barkus Doolan Lawyers Sydney Australia; Paper "International Hot Tips and Topics From Seasoned Family Law Veterans", 8/9/11

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(iii) life-threatening sexually transmitted infections (eg HIV); and

(iv) death of mother or infant during or following childbirth.

(d) the non fatal impacts include:

(i) physical injuries;

(ii) problems related to reproductive health;

(iii) a range of mental health problems;

(iv) harmful use of drugs and alcohol; and

(v) a range of other disorders.

2. Homicide

3. Homelessness:

(a) Women and children are often forced to leave their homes to escape domestic and family violence. they face not only the loss of their homes but also the disruption of their social support, as well as children's schooling and social networks. In many cases the perpetrator of the violence remains in the family home.

(b) *The co-existence of poverty and domestic violence has been long known. Women experiencing domestic violence are vulnerable to low paying jobs, inadequate income support and homelessness, even though they have established work histories much the same as those women who have not been abused.*

Their capacity to sustain work, should they find it, is often constrained by child care responsibilities, fears for their children's safety, poor health (including violence-induced disabilities) and social isolation as a result of the violence.

Many women who have lived with domestic violence have a disrupted work history. A man's abusive behaviour can deter a woman from work in the first place, or render her unable to work effectively – by depriving her of sleep, for example, or by harassing her while at work – thereby threatening her employability.

Not only do domestic violence and welfare support go hand-in-hand, but domestic violence is the most common cause of homelessness for women. In turn, the children of homeless families are more at risk of experiencing disadvantage and poverty over their lifetimes.³⁷

4. Children witnessing violence:

Australian studies also show a high percentage of children are exposed to domestic violence. The Personal Safety Survey (Australian Bureau of Statistics 2006) found that:

(a) 49% (111,700) of people who experienced violence from their current partner, had children in their care, of whom 27% (60,700) said the children had witnessed the violence (p. 11); and

(b) of the 61% who had children in their care during previous incidents of violence, 36% said the children had witnessed the violence (p. 11).

³⁷ Staving off poverty: women leaving domestic violence, by Lucy Healey, published in Good Policy, Good Shepherd Youth & Family Service newsletter, Volume 7, no.1 Autumn 2011



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5. Costs (health and economic):

- (a) *This year the cost of violence against women and their children to the Australian economy reached \$14.7 billion. Almost half of this figure (48 per cent) was attributed to the pain, suffering and premature mortality rates experienced by victims and survivors of violence.*³⁸
- (b) *Not only is the cost to the Australian economy expected to rise to \$15.6 billion by 2021³⁹, the World Health Organisation revealed that intimate partner violence is the most common type of violence, affecting 30 per cent of women worldwide. The impact is felt by younger generations as well, with one in four young Australians having witnessed violence against their mother⁴⁰.*

No longer the dirty secret kept in the closet

Key stakeholders (including government and domestic violence interest groups) are currently driving advertising campaigns conducted in Australia to increase awareness:

1. White Ribbon:

- (a) For instance: *"This year, White Ribbon is encouraging men to stand up to violence against women with the knowledge that thousands of good men have got their back. White Ribbon's new campaign concept for 2012 is being launched this week with a TV commercial featuring NRL legend, Nathan Hindmarsh, Middleweight World Boxing Champion, Daniel Geale, and Underbelly Badness stars, Matt Nable and Jason Montgomery...."* (Stand up to violence: White Ribbon's got your back, White Ribbon Day 25/11/12);
- (b) Go to: <http://www.whiteribbon.org.au/heydate>;
- (c) <http://www.youtube.com/user/WhiteRibbonAust/featured>; and
- (d) http://www.youtube.com/watch?v=_ghqblX8kxM&list=PLd1FUljnzCl7pjFeG6F3nBmNj5xs2Vdrq.

³⁸ The Cost of Violence against Women, 2013, KPMG

³⁹ Time for Action, 2009, KPMG

⁴⁰ Young People and Domestic Violence, 2001

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2. Australian Government: Say no campaign



3. Make the call - domestic and family violence prevention

- (a) *Non-physical forms of domestic and family violence such as controlling behaviour, stalking, threats and verbal abuse can cause serious damage, and can quickly turn into physical abuse.*
- (b) *Make the call is a Queensland-wide campaign incorporating advertising, social media, posters and helpcards distributed through community services and campaign partners. The campaign supports local community awareness raising activities during Domestic and Family Violence Prevention Month in May.*
- (c) *We are aiming to:*
 - (i) *increase community awareness that domestic and family violence is not just physical abuse. Controlling and obsessive behaviours can seriously affect a person's emotional and psychological wellbeing, and may lead to serious injury or sometimes even homicide;*

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(ii) *give people with concerns about someone they know information about warning signs and how to help*⁴¹.

4. NSW Gov launches world-first smart phone app to protect from domestic violence via Komosion

(a) *A new smart phone app for people who are experiencing domestic and family violence, created by Komosion for Women NSW, was launched today by NSW minister for family and community services and minister for Women, Pru Goward.*

(b) *Says Goward: "This app is the first of its kind in the world to combine information with access to help services, the ability to create a trusted network of friends who can be easily contacted with an agreed message and a GPS system to 'call-for-help' alert recipients of the sender's location."*

(c) *It was developed and launched in conjunction with police and women's refuge representatives*⁴².

Two Beds and a Coffee Machine⁴³

*And she takes another step
Slowly she opens the door
Check that he is sleeping
Pick up all the broken glass
And furniture on the floor
Been up half the night screaming
Now it's time to get away
Pack up the kids in the car
Another bruise to try and hide
Another alibi to write*

*Another ditch in the road
You keep moving
Another stop sign
You keep moving on
And the years go by so fast
Wonder how I ever made it through*

*And there are children to think of
Baby's asleep in the back seat
Wonder how they'll ever make it
Through this living nightmare
But the mind is an amazing thing
Full of candy dreams and new toys
And another cheap hotel
Two beds and a coffee machine*

*But there are groceries to buy
And she knows she'll have to go home*

*Another ditch in the road
You keep moving
Another stop sign
You keep moving on
And the years go by so fast
Wonder how I ever made it through*

*Another bruise to try and hide
Another alibi to write
Another lonely highway in the black of night
But there is hope in the darkness
You know you're going to make it*

*Another ditch in the road
You keep moving
Another stop sign
You keep moving on
And the years go by so fast
Silent fortress built to last
Wonder how I ever made it*

⁴¹ <http://www.communities.qld.gov.au/communityservices/violence-prevention/make-the-call/about-the-make-the-call-campaign/make-the-call-domestic-and-family-violence-prevention>

⁴² <http://www.campaignbrief.com/2013/05/nsw-gov-launches-world-first-s.html>

⁴³ Savage Garden, from the album "Affirmation" Songwriters: JONES, DANIEL/HAYES, DARREN STANLEY, © Warner/Chappell Music, Inc.

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Appendix: 1

Facts in *Baranski*

BACKGROUND

The parties commenced cohabitation in 2004. Their cohabitation was volatile. The wife was found by the learned Federal Magistrate to have been the victim of family violence at the hands of the husband on a number of occasions during their cohabitation. None of the findings of fact made in relation to those events has been challenged before this Court.

The parties' relationship ended in violence on 13 May 2008.

On 27 May 2008 a domestic violence order was made against the husband by a Magistrates Court.

On 21 July 2009, the husband pleaded guilty to a breach of the apprehended violence order made against him in the Magistrates Court the previous year. He was sentenced to imprisonment, and incarcerated on 4 February 2010.

The husband was released on home detention on 3 September 2010, and paroled on 3 November 2011. The evidence before the learned Federal Magistrate was that the husband would be formally eligible for parole on 3 September 2010.

*The learned Federal Magistrate made a "Kennon type adjustment" (see *Kennon & Kennon* [1997] FamCA 27; [1997] FLC 92-757; 139 FLR 118) in favour of the wife which, together with her post separation contributions, amounted to 10 per cent. Overall, the wife's contributions were assessed at 55 per cent and those of the husband at 45 per cent.*

To understand the wife's fear of the husband in context, it is useful to set out a number of other paragraphs of the wife's affidavit in which she recorded her account of violent incidents perpetrated by the husband.

4. *Within a couple of nights of meeting the husband we had an argument. The husband starting [sic] hitting the walls punching several holes, and it is my recall that he broke or hurt his hand. I blamed myself for making him angry and went back the next day to apologise.*

...

6. *There were many other incidents of violence and anger including when the husband punched me in the face giving me a black eye. I did not report it or seek medical attention. On another occasion the husband pushed me out of his moving work utility. A passing motorist called the Police who attended. I was hysterical and in pain but the Police held me in the cells for four (4) hours before letting me go home. During the time the husband went home to care for [T] and [Z]. I sought medical attention the next day for my badly grazed leg. I still have the scarring from this incident.*

...

9. *The husband's violence continued in Adelaide. In 2005 we went to the Clipsal 500 where the husband's firm had a corporate tent. The husband became angry and was hitting me with fist [sic] over my head, face and body. I called the Police and he was charged. I was badly bruised and cut on my head.*

...

15. *In September 2007 the husband assaulted me by attacking me with his hands and fists and verbally abusing me. I called the Police and they took the husband away and told him he was not to return to the house for a week and told me I had to leave the house. The husband was charged with assault of me but I later had the charges withdrawn.*

...

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17. *We reconciled in February 2008 after the husband agreed to go to counselling about his anger and violence.*
18. *However the husband's threats, violence and domineering manner continued. The husband would explode at anytime and I felt fearful. I would always hide my bag which contained my phone in case there was a problem, so I could ring for help.*
19. *On 13 May 2008 there was an argument and the husband had laid me on my back on the kitchen table and was screaming in my face. My bag on this day was hidden in [X]'s bedroom and when I could I went and got my phone and called the Police for assistance. I then left the room and remember telling the husband that the Police were on the way. I then saw the husband running at me and recall backing away into [X's] bedroom. I woke up on the front porch. My left eye would not open and I was covered in blood. ...*
- ...
48. *[Mr M] and the girl left at around 6pm and the husband and I went inside. As we went inside I recall saying something. I do not recall what I said but there was no animosity between the husband and me and so I do not believe I said anything contentious. However, after I said it the husband then hit me hard over the head causing me to fall to the floor. I asked the husband why we couldn't both sit down and talk about things but he kept repeating "no, no, no" and he hit me again over the head. He then started kicking and punching me while I was on the floor. At one stage I remember him holding me upside down and banging my head on the floor and the bench.*
49. *My son [Z] aged 15 was present and was yelling at the husband and trying to intervene and pull him away from me. Both the children [X] and [Y] were present and witnessing this violence. They were crying and screaming and both were next to [Z].*
50. *I believe I lost consciousness as I do not recall the husband stopping the beating. My next memory was hearing someone telling me the ambulance was coming. The ambulance officers said I was in and out of consciousness. I could not see and I was in agony.*
- ...
52. *I was taken to hospital by ambulance for treatment for my wounds. I had numerous stitches for 2 separate lacerations to my head. I received a scan for the many bruises on my body. The Police took photographs at the house of the blood and my injuries and they removed a frypan which had been used in the attack by the husband upon me. The handle was badly bent.*
53. *I was released from hospital the next day. I could feel my ribs moving and was sure they were broken so I saw my doctor on 10 March and after scans it was confirmed that 2 ribs were broken and a further scan confirmed that a third rib was broken and my lungs were bruised. ...*
54. *For around three months (3) I had difficulty walking, and was in great pain all over my body. Both my knees were badly swollen and my arms and legs covered in bruises. I had two black eyes and grazes to my face and the inside of my mouth was cut.*

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Appendix 2

Facts in *Maluka*

BACKGROUND FACTS

"To give context to this appeal it is useful to record key components of the chronology of events. Primarily these are taken from the trial Judge's reasons or are otherwise not the subject of challenge in this appeal.

The mother was then aged 37 years and the father aged 33 years.

The parties married in September 1999.

The parties resided in Western Australia during the early part of their relationship.

X was born in June 2001.

In September 2002, the father suffered an electric shock at work. The mother said that the father's behaviour to her thereafter deteriorated.

In 2002 when pregnant with Y and X was about 16 months, the father slapped the mother across the face. The mother left for two to three days but returned after the father apologised.

Y was born in June 2003.

On Christmas Day 2003, the father hit the mother on the head five times and pulled her hair. This was the first time she contacted police and on their advice, she left and took Y with her. The father insisted X remained with him. The following day the mother returned to the father.

On a number of occasions in 2003 and 2004 the mother attended a medical centre where she gave a history of violence by the father towards her. Documents produced by the medical centre record the notations of the mother's treating doctor: "hubby violence [sic], can't leave though. fist into face. punch in the face. called the police, told to come here not provoked ... tenderness across [her] nasal bridge, also tender across left infraorbital area two finger mark bruises across right upper arm ... does not want to leave him, afraid that she will be killed. He has promised to kill her. Discussed options open to her". His Honour found the doctor's observations corroborated the mother's evidence about the father's violence.

In 2005, the mother went to a women's refuge where it was documented she was "... concerned [the father] may obtain one [a gun] and kill her as he has threatened to ... [the mother] unsure of being at refuge but is scared to remain at her home, wants violence to stop".

On about 27 January 2005, the father went to the home of a friend of the mother's where he believed the mother was present. The father refused to leave and only did so after police arrived.

On 27 October 2005, the father "subjected [the mother] to a violent physical attack" whilst driving. This finding related to the mother's evidence the father hit her in the face. With police assistance the mother left the home but later returned. This is the last time the father was physically violent to the mother according to his Honour.

On 1 October 2006, the parties' home was attacked during which the father was confronted at the front door by a man who was known to the father. The man wielded an axe and wanted to fight him. In the belief the man would not hurt a child, the father picked Y up. This was a frightening incident in which fortunately no-one was physically hurt. There is no challenge to his Honour's findings the father put his concerns for his own welfare and interests ahead of the need to protect his daughter.

Immediately after the incident described above the father left Western Australia for Tasmania where the mother and children joined him three months later.

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In June 2007, a friend of the mother, Mrs L observed the father speak harshly to X and the child appeared frightened.

In early 2008, Mrs L heard the father, in a discussion about couples separating, say to the mother "[d]on't think about it, and don't think about leaving me".

On 21 June 2008, the parties separated. The mother sought assistance from the police to leave the family home. The police put in place a Police Family Violence Order for the protection of the mother and children from the father ("PFVO"). This is an order made pursuant to the Family Violence Act 2004 (Tas). The father said the order was made without foundation.

On 17 July 2008, the mother commenced parenting proceedings in this Court. As final orders she sought that the children live with her and "... the question of the Respondent Father's time with [the children] be reserved". Included in her initiating application was an application for interim orders, which relevantly proposed:

- *the children spend time with the father supervised at a contact centre;*
- *the appointment of an ICL;*
- *the father complete a "Changing Abusive Behaviour Program"; and*
- *the father undergo a psychiatric or psychological assessment.*

When the mother commenced these proceedings, she filed a Notice of Child Abuse or Family Violence. There the mother provided details of behaviour by the father towards the children which she said satisfied the definition of "abuse" contained in s 4(1) of the Family Law Act 1975 (Cth) ("the Act").

After separation, Mrs L and another friend of the mother, Ms N, sought restraint orders against the father. They claimed his behaviour concerned them. The behaviour complained of related to the father telephoning and approaching them for information about how he could contact the mother and seeking their help to contact her. The father denied his behaviour was such that orders were necessary. In August 2008, separate restraint orders were made for the protection of Mrs L and Ms N from the father.

On 8 August 2008, the father filed a response to the mother's initiating application.

The father proposed he and the mother have equal shared parental responsibility for the children, and they live with her. He sought to spend time with the children each alternate weekend and overnight each Wednesday during school term, for one half of all school holidays, as well as nominated special occasions. He agreed the appointment of an ICL was appropriate and, sought interim orders to spend time with the children from after school Friday until the commencement of school Monday each alternate weekend, overnight each Wednesday and at other times in accordance with the parties' agreement. Changeover would take place at the children's school.

The competing applications for interim orders were determined on 11 August 2008 on which occasion interim orders were made by consent for the children to live with the mother. Arrangements for the children to spend time with the father remained contentious and it was ordered he spend supervised time with them at a contact centre each weekend or, if that could not be accommodated by the contact centre, each alternate weekend. As part of a package of orders in relation to the parties' coming into contact with each other, the father was restrained from attending "... the Contact Centre or its vicinity before the time with the children is to start and shall promptly leave the Contact Centre and the vicinity when the time with the children is to end".

Fortnightly supervised time for the children with the father commenced at a contact centre on 17 August 2008. This was the first time the children had seen him since the parties' separation in June.

After interim orders were made for the children to spend time with the father at the contact centre the father was often in the vicinity of the contact centre before and after the children's visits.

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On 6 August 2008, the mother saw the father's car parked five cars along across the street from where she was staying with Mr U (a friend of the parties and the mother's current partner). When the mother ran back to the home, the father ran after her. He banged on the door and "created a scene". Police were called.

On 7 August 2008, the father was charged with breach of the Family Violence Order made for the mother's protection. This related to the father's approach to her the day before during which it was alleged he "knocked on the front door of a residence [he] knew her to be frequenting at the time". By then the PVFO had been supplanted by an interim Family Violence Order made under the same legislation. He pleaded guilty on 5 September 2008 to a breach of that order. The offence was established but no conviction recorded. Upon the father entering an undertaking to be of good behaviour final disposition of the charge was adjourned for 12 months.

In August/September 2008, the father telephoned Mr U and described what the mother had been wearing. Mr U received a large number of telephone calls and messages from the father in which he enquired about the mother and tried to persuade him to help the father speak to or meet with her.

The children last spent time with the father at the contact centre on 7 December 2008. They have not seen him since.

On 19 December 2008, the father was charged with a further breach of the interim Family Violence Order made for the mother's protection. In relation to the breach charge it was alleged "between 03/07/2008 and 12/12/2008 at various location [the father] contravened the said [interim Family Violence Order], in that [the father] stalked [the mother]; [the father] approached [the mother] directly on [P] Road on the 12/12/2008 stating "You start doing as I say" and then you made a threatening gesture towards her by drawing your hand across your throat". The same day the father was charged with stalking the mother between 22 June 2008 and 12 December 2008 with the intention of causing her fear. The father denied behaving in the manner alleged.

On 5 January 2009, police informed the mother that Mr J, who is acquainted with the father and Mr U, notified them that the father told him he planned to kill her. Police immediately removed her and the children to a place of safety. So that it is clear, the police took the mother and children to a refuge where they remained until the father was remanded in custody.

On 8 January 2009, the father was charged with a further breach of the interim Family Violence Order and breaching conditions of his bail. These charges related to the threat reported by Mr J. The father was remanded in custody where he remained until released on bail on 7 April 2009. The father denied behaving in the manner alleged.

On 16 January 2009, the mother filed an application for interim orders in which she sought to discharge those orders made 11 August 2008 which enabled the father to spend time with the children. The mother also applied for interim orders which would enable her to move the children interstate, change their surname and restrain the father from spending time or communicating with them. At the same time, a second Notice of Child Abuse or Family Violence was filed. This related to the threat reported by Mr J.

On 6 February 2009, the father filed a response to the mother's application for interim orders. Simply put, he sought that her interim application be dismissed.

The competing applications for interim orders were abandoned and the applications for final orders were listed for hearing to commence on 30 March 2009.

On 12 March 2009, the mother filed a third Notice of Child Abuse or Family Violence. This related to allegations she made about the father's behaviour towards Y in June 2008, which she intimated raised the spectre the father may have sexually abused the child. His Honour was not satisfied the father sexually abused the child. Rather, the child hid because he smacked her. This is the last occasion in relation to which it is alleged the father physically hurt one of the children.

The final hearing commenced before the trial Judge on 30 March 2009 for nine days. On 8 May 2009 the trial Judge reserved his decision.

The Associate to the trial Judge wrote to the parties' solicitors and ICL on 10 June 2009. The Associate referred to "published material on domestic violence", copies of which were enclosed. The lawyers were advised the trial Judge "wishes to have regard to this material" and invited submissions as to "whether His Honour is entitled to have regard to



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such material and/or what regard (if any) he should have ...". Written submissions were invited by 19 June 2009, and an opportunity to supplement written submissions with oral argument on 22 June 2009 was provided.

The hearing resumed on 22 June 2009 in relation to the trial Judge's mooted consideration of the publications referred to in his Associate's letter. Judgment was reserved."

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Appendix 3:

Facts in *Merryman*

The wife raised allegations of a long history of violence by the husband. The husband generally denied them.

He was convicted of having assaulted the wife on 19 February this year. That was the occasion when T cut his hand when opening a tin of cat food. The husband was upstairs in bed after working shift work. The wife got the children up at about 6.00am to prepare them to leave with her and to then leave them with her mother while she went to work. She argued with T downstairs about which shorts he should wear and eventually allowed him to try on his preferred pair which she said were too small.

When he got into them they were so small he could not get them off. Eventually the wife, who was in a hurry, had to cut them off him. The wife called him a bastard and repeatedly said words to the effect, "Hurry up, I haven't got all [expletive deleted] day". Then the husband heard the car and thought it was being reversed up the driveway. The driveway is a steep driveway and the evidence is that the parties usually do not reverse out. In fact, the wife on this occasion was maneuvering the car by turning it around to drive frontwards out the drive.

T was to feed the cat while she did this. He cut his hand on the tin of cat food as he opened it. He screamed. The husband got out of bed, went downstairs and to the outside stairs and as he came down those stairs he passed T who was bleeding from the left hand. The wife by then had left the car. She ascended the stairs to assist T. When the husband and the wife drew level on the stairs the husband assaulted the wife by punching her to the head four times in the presence of both children.

The husband was later arrested by the police and charged with assault. He pleaded guilty at Wallsend Court that day and was ordered not to assault, molest or interfere with her. The husband in these proceedings alleged that he did not punch the wife but took hold of her and shook her. However, he conceded that the police version of the facts which was given in court that day was consistent with the wife's version in these proceedings.

In addition, the evidence of the wife's mother as to the marks on the wife's face and neck observed by her at 6.20am that morning is consistent with the wife's version of the assault and inconsistent with that of the husband.

Notwithstanding the restraining order of the Wallsend Court which restrained the husband from assaulting, molesting or harassing the wife, the husband has contacted the wife at her mother's house where she has been residing since she left home on 27 June.

He has threatened her on those occasions and he has threatened her family. On 13 August at about 4.00pm he telephoned the wife after he had taken the children to the Family Court Counselling Service pursuant to an order for the children to have counselling with their mother. He said to her on that occasion:

- You have broken your domestic violence order and my solicitor is going to tear your throat out. You are a [expletive deleted]. Don't ever turn your back because I'm going to get you. Even if I'm out of this country for three years you better keep looking over your shoulder. You're gone, sweetheart.*

She said to him:

You're full of [expletive deleted].

He said:

- Am I? We will see. Don't ever turn your back. Just keep looking over your shoulder.*

She said:

- You are just full of bluff.*

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He said:

- *That's why I'm standing where I am with my kids and you have [expletive deleted] all. This is my house.*

The husband, in cross-examination rejected the proposition that he had struck the wife on several occasions during the marriage. He preferred the expression "slapped her" and he said that he had slapped her on two occasions. Then he conceded that on one of those occasions he had hit her with a chair.

In cross-examination the husband conceded that several years ago T was eating custard at the kitchen table. He said T threw some on the wall and spat some on the floor. He said he chastised T by pushing T and the chair over onto the floor.

The court found that the wife presented as generally more truthful than the husband and her evidence was generally more consistent with that of other witnesses and documentary evidence. However, there were other matters that reflected poorly on the husband's credit. He purported in his oral evidence that the court had made a previous order on an occasion when both parties were present that the children have no access with the wife. That was untrue.

He claimed that he encouraged the children to have access with their mother but there has been no access in nearly eight weeks. He offered no access. He arranged for a silent telephone number and he did not give the wife the number although he knew that she had been telephoning the children. He did not arrange any access by the children with their maternal grandmother. He also became extremely agitated when he saw the children's maternal grandmother at the counselling appointment and had altercations with a lady on the staff who he described as "the Sheila" and also with a supervisor. He made strenuous efforts to prevent the children seeing their grandmother on that occasion.

His evidence that a lawyer told him to take the children out of the counselling session on that occasion when he spoke to a lawyer by telephone, is so unlikely as to be unbelievable.

There was also evidence that the children told the wife that they had been told that they were not allowed to see her or speak to her. The court accepts her evidence of what the children told her and accepts that the husband told the children that the court, the husband's lawyer, a "guardian" and the Department of Community Services had said that the children must not have contact with their mother and that the mother is not allowed to have contact with them.

The finding is that the husband's evidence that he has encouraged access is false.

There are other matters which also go to the issue of violence and the likelihood of the wife's other allegations of violence being true. The husband concedes he has, in the past, abused and belittled the wife in front of the children by statements such as:

- *"You are an unfit mother"; "You need psychiatric help"; and "I'm tired of you harassing and intimidating us, I've had a gut full of you, just get out."*

The husband concedes that in an argument with the wife in about 1989 he threw a coffee table through a large picture window. The husband admitted that when the wife rang the child, M, at his home on 21 July and chatted with her he spoke to the wife on the telephone and said:

- *This is your ex-husband. If you ring here again harassing these kids you will wish you weren't born.*

The wife alleged that in 1986 that the husband, after they had been entertaining friends, had been drinking and playing his stereo loud. The police arrived and she turned the volume down at their request. After they left the husband turned the volume back up to its previous level. The wife then removed the electrical plug from the socket. Her evidence was that the husband then seriously assaulted her by throwing her to the ground and kicking her repeatedly to various parts of the body, especially the rib cage.

The husband's version was that he slapped her only once. The husband's version is inconsistent with the wife's injuries observed by her mother the next day, particularly injuries of extensive bruising to the rib cage. It is also inconsistent with the wife's conduct in leaving the house that night and remaining at a shelter for two days. His evidence was that he had only drunk two beers and that he was so concerned about what happened that night that he saw a doctor the following morning and had a blood sample taken. That evidence was as to his level of alcohol consumption unlikely, but otherwise

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it was more consistent with the wife's version of what actually happened that night. The court therefore accepts the wife's version of the events that night.

The court accepts the unchallenged evidence of the wife's mother that she has, on occasions, seen bruising to the wife's body, particularly her face and around her eyes which the wife has sought to disguise by wearing sunglasses.

Since the wife left the home on 27 June the husband, at M's request, has enrolled M in a different high school. She had been attending her former high school with friends from her primary school days and her infants school and pre-school days. The husband took this action without consulting the wife.

During the marriage the husband did not disclose to the wife details of his earnings, finances and savings. He borrowed substantial sums from her father without her knowledge. From his savings he paid for four trips to the United States and the purchase of two Harley Davidson motor cycles for himself.

During the hearing the husband appeared arrogant in that when the wife gave her evidence he turned his chair sideways to the bench and sat for much of her evidence with his arms folded, facing the side wall of the court room. I put this matter to the husband's solicitor in addresses.

The husband was aware that Ts' school teachers were concerned that he had a hearing problem and advised that he have a hearing test. The husband was advised by the Department of Community Services after separation to have Ts' hearing tested. The husband did not do so. He said in court:

- *I've had nine years to observe that boy and I know when he wants to hear something and he doesn't. I know what he hears.*

He took T eventually for a hearing test only after the Department of Community Services raised the matter again with him. The Department of Community Services advised the husband on 5 July to take M to counselling and referred him to a counselor. On the evidence it appears the husband did not carry out that recommendation.

The husband refuses to accept that T has a weight problem. He is not concerned that the boy, since separation, has become obese. He has not persisted with the diet that the wife used for T and he has sought no professional help.

The husband in his evidence, consistent with his statement to the wife by telephone on 13 August referred to the jointly owned matrimonial home as "my house".

Since separation the husband has given the child, M, a prescription sedative drug called Rohypnol which was prescribed for him before separation. He said his medical knowledge was limited to what he learned in a first-aid course with the US military. He did not know the dosage for a child. He did not know if the drug was appropriate for a child. He did not know if there was any risk to a child taking it. He did not consult a doctor. He gave her the drug on at least four separate occasions. The drug is not recommended for children under 15 because safety and efficacy have not been established in that age group. Dr Watson, who gave evidence, has been a general practitioner for more than 50 years. He has never prescribed Rohypnol for a child. The husband said he was prepared to rely on his own judgment. He said:

As a parent that's my right.

The husband, since separation, has slept with M on at least four occasions. The wife complained to the Department of Community Services that on some of those occasions she had found M in a sedated and disoriented state in the husband's bed with him and believed the child had been given Rohypnol. The officers of the Department of Community Services, when they discussed these complaints and allegations with the husband on 5 July, advised him not to sleep with his 13 year old daughter again. The husband conceded, however, in his evidence that on one occasion since then he has slept with M.

The husband's evidence is that notwithstanding that the husband had for some time sought to have the wife leave the matrimonial home prior to her departure on 27 June, and notwithstanding that his evidence does not admit that there is any possible chance of a reconciliation, on 21 July 1993 the husband filed out a life assurance proposal with Sun Alliance Insurance for life assurance on his own life but also for life assurance on the wife's life. He offered no explanation as to why he sought to insure the wife's life.

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The wife's version of the allegations of violence in the marriage is, on all the evidence, generally more consistent and more likely than the husband's version. The court makes the following findings:

1. *In Seattle in the United States in 1978 the husband punched the wife to the face and punched her on the body about five times.*
2. *In about 1979 in Seattle the wife was pregnant and driving a motor vehicle when the husband punched her to the head.*
3. *In 1980 the husband threw the wife against walls several times and back-handed her to the head.*
4. *In 1981 at Edgeworth the husband was intoxicated, he came home and threw all the meal preparations from the table and kitchen benches onto the floor. The preparations included hot fat. He did this after the wife refused to go to a hotel and obtain more beer for him. He advanced on the wife, threatening her. She had no avenue of escape and as he approached, she defended herself with a fork she was holding. She stabbed him in the arm. He then struck her repeatedly with a closed fist. That assault involved at least 10 blows.*
5. *In 1984 the husband, when the parties were driving home from Raymond Terrace, punched the wife to the head when she was driving the vehicle. She stopped the car. He threw her to the ground and sat on her. He then struck her with a closed fist repeatedly. She suffered serious concussion, lacerations, bruising and swelling.*
6. *In 1986 at Teralba the husband struck the wife in the mouth with an open hand.*
7. *In 1987 at the matrimonial home in Teralba the husband struck the wife in the head with a closed fist and pushed her down a flight of five stairs.*
8. *In about 1989 on the occasion of the husband throwing a coffee table through a plate glass window he grabbed the wife by the face, gouged her right eye and struck her twice to the face with a closed fist. She suffered bruising, lacerations and swelling.*
9. *In 1991 at Teralba the wife was ironing, the husband struck the ironing board. It fell. He then grabbed the wife's hair at the back of her head and slammed her face into a wall injuring her face and damaging the wall.*
10. *In 1991 at Teralba the husband struck T with an open hand to the head twice, lifted him off the ground, slammed his back on the side of the car and threw him into the back seat of the car.*
11. *In 1991 at Teralba the husband said to the wife after she had used money from an account without his permission:*

I'll fix you, I can fix your car so that you can be heading down the road and have an accident.

He then punched her twice to the head with a closed fist.
12. *In 1992 at Teralba the husband tipped a saucepan of hot spaghetti over the wife's head.*
13. *On Wednesday, 3 March 1993, the husband told the wife after she had seen a solicitor about her rights regarding property settlement:*

I'll fight you all the way. You could end up like one of those families where the whole family is killed by a shotgun.
14. *In a conversation with the wife on 21 July the husband said to the wife:*

My mother told me to hit you with a hammer, but I'll let the court do that. You'll end up paying my legal costs, too, and I'll be the winner. The police can come here and look for a gun and they won't see it, but you might.



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On 18 July officers of the Police Department had searched the house for firearms but without finding any.

The evidence establishes that the husband is an arrogant, assertive, controlling and violent man. He represents a serious danger to the wife and to the children.

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Appendix 4

Best Practice Guidelines

FAMILY VIOLENCE BEST PRACTICE PRINCIPLES

EDITION 3.1 – APRIL 2013

(October 2012 edition revised in April 2013 as a result of the Federal Circuit Court of Australia Legislation Amendment Bill 2012)

First published – March 2009

Revised – July 2011

Third Edition – October 2012 (July 2011 updated to reflect the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011*)

Family Violence Committee

Justice Ryan, Family Court of Australia (chair)

Justice Collier, Family Court of Australia

Justice Stevenson, Family Court of Australia

Judge Brown, Federal Circuit Court of Australia

Judge Hughes, Federal Circuit Court of Australia

Judge Altobelli, Federal Circuit Court of Australia

Principal Registrar, Family Court of Australia (Angela Filippello)

Family consultant (Diane Lojszczyk)

Senior Legal Research Advisor, Family Court of Australia (Kristen Murray)

FOREWORD - THIRD EDITION FAMILY VIOLENCE BEST PRACTICE PRINCIPLES

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

Protecting families and particularly children who are engaged with the family law system from the effects of family violence is a priority for the Family Court and the Federal Circuit Court. The revised Family Violence Best Practice Principles assists in this critically important task by acting as a checklist of matters that judges, court staff, legal professionals and litigants may wish to have regard to at each stage of the case management process in disputes involving children.

The Best Practice Principles were released by the Attorney-General in March 2009 and a revised version, encompassing both the Family Court and the Federal Circuit Court, was launched by the Attorney-General in July 2011.

This third edition of the Family Violence Best Practice Principles takes into account recent amendments made by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth), the preponderance of which came into effect on 7 June 2012.



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Those amendments are designed to provide better protection for children and families at risk of violence and abuse. They seek to achieve this objective by:

- prioritising the safety of children in parenting matters;
- changing the definitions of “abuse” and “family violence” to better capture harmful behavior;
- strengthening advisers’ obligations by requiring family consultants, family counsellors, family dispute resolution practitioners and legal practitioners to prioritise the safety of children;
- ensuring that courts have better access to evidence of abuse and family violence by improving reporting requirements; and
- making it easier for state and territory child protection authorities to participate in family law proceedings where appropriate.

The *Family Violence Best Practice Principles* have been revised and updated to reflect these changes to the law.

Our thanks go to the Family Violence Committee and particularly to the Committee Chair, the Hon. Justice Judy Ryan, for undertaking this task.

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

October 2012

Diana Bryant AO, Chief Justice, Family Court of Australia

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



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Best Practice Principles for Use in Parenting Disputes when Family Violence or Abuse is alleged

Introduction

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

After significant changes were made to the *Family Law Act 1975* (Cth)⁴⁴ in 2006, the Family Court introduced a suite of Best Practice Principles⁴⁵ to assist decision makers. It was later recognised that the Best Practice Principles could be a valuable tool for all individuals and agencies involved in these cases. The notion that the Best Practice Principles could assist a wider audience was informed by a series of reports⁴⁶ in which recommendations were made about how courts exercising jurisdiction under the FLA and others should address issues of family violence and abuse. This is the third edition of the *Family Violence Best Practice Principles*. They have been revised to reflect changes made to the FLA by the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth). Those amendments commenced on 7 June 2012 and apply to proceedings issued on or after that date. Where proceedings had been issued prior to 7 June 2012, the preponderance of amendments do not apply and the second version of the *Family Violence Best Practice Principles* remain operative.⁴⁷

Statement of principle

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

The Best Practice Principles recognise:

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

The Best Practice Principles are applicable in all cases involving family violence or child abuse or the risk of family violence or child abuse in proceedings before courts exercising jurisdiction under the FLA⁴⁸. They provide useful background information for decision makers, legal practitioners and individuals involved in these cases.

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

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

⁴⁴ The words "Family Law Act 1975 (Cth)" will be abbreviated to "FLA".

⁴⁵ First edition published by the Family Court of Australia on 6 March 2009, second edition published by the Family Court and Federal Circuit Court on 20 July 2011.

⁴⁶ Professor Richard Chisholm, "Family Courts Violence Review" [27 November 2009]; ALRC/NSWLRC Consultation paper, "Family Violence: Improving Legal Frameworks" (November 2009); Australian Institute of Family Studies, "Evaluation of the 2006 Family Law Reforms" (December 2009); Family Law Council, "An Advice on the Intersection of Family Violence and Family Law Issues" (December 2009); Jennifer McIntosh, Bruce Smyth, Margaret Kellaher, Yvonne Wells & Caroline Long, "Post-Separation Parenting Arrangements and Development Outcomes for Infants and Children" (May 2010); Dr Lesley Laing, "No Way To Live" (June 2010).

⁴⁷ Note however that although section 60K of the FLA was repealed as of 7 June 2012 and sections 67ZBA and 67ZBB substituted for it, if a Notice of Child Abuse or Family Violence had been filed before 7 June 2012, section 60K continues to apply.

⁴⁸ Where we refer to courts we mean the Family Court of Australia and Federal Circuit Court of Australia.



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

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

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

How is family violence defined in the Family Law Act?

The term 'family violence' has been defined in different ways. To appreciate the context in which courts exercising family law jurisdiction approach this issue, it is important to know how the definition used in the FLA⁴⁹.

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

Section 4AB states:

1. For the purposes of this Act, **family violence** means violent, threatening or other behaviour by a person that coerces or controls a member of the person's family (**family member**), or causes the family member to be fearful.
2. Examples of behaviour that may constitute family violence include (but are not limited to):
 - (a) an assault; or
 - (b) a sexual assault or other sexually abusive behavior; or
 - (c) stalking; or
 - (d) repeated derogatory taunts; or
 - (e) intentionally damaging or destroying property; or
 - (f) intentionally causing death or injury to an animal; or
 - (g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
 - (h) unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
 - (i) preventing the family member from making or keeping connections with his or her family, friends or culture; or
 - (j) unlawfully depriving the family member, or any member of the family member's family, of his or her liberty.
3. For the purposes of this Act, a child is **exposed** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.

⁴⁹ Unless stated differently, all sections are from the Family Law Act 1975 [Cth].

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4. Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:
- (a) overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
 - (b) seeing or hearing an assault of a member of the child's family by another member of the child's family; or
 - (c) comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
 - (d) cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
 - (e) being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

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

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

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

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

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

Where domestic violence occurs in a family it frequently occurs in circumstances where there are no witnesses other than the parties to the marriage, and possibly their children. We cannot accept that a court could never make a positive finding that such violence occurred without there being corroborative evidence from a third party or a document or an admission.

The victims of domestic violence do not have to complain to the authorities or subject themselves to medical examinations, which may provide corroborative evidence of some fact, to have their evidence of assault accepted.

How is abuse defined in the Family Law Act?

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

abuse, in relation to a child, means:

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

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- (b) person (the first person) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or
- (c) causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or
- (d) serious neglect of the child.

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

Different types of family violence

Family violence takes many forms and, when framing parenting orders, it is important to differentiate between the types of violence. Because individual families and relationships are dynamic and unique, care is required when any system of classification is applied⁵⁰. One well known classification system holds⁵¹ that violence can generally be defined as being within four categories. These are:

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

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

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

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

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

Cultural context

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

It is important to recognise that the concept of 'culture' is not fixed and immutable. Attempting to ascribe certain characteristics to particular cultural groups may lead to erroneous generalisations based on racial or ethnic

⁵⁰ Australian Institute of Family Studies, Submission to the Family Violence Committee of the Family Court and the Federal Circuit Court, May 2011.

⁵¹ JB Kelly, MP Johnson, "Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions" (2008) 46 Family Court Review 476.

