



Shifting the gaze: Will past violence be silenced by a further shift of the gaze to the future under the new family law system?

Zoe Rathus*

In 2006 the Australian Government instituted a major transformation of the family law system with the roll out of family relationship centres across the country and changes to the Family Law Act. This article argues that the new system will shift the gaze away from the history of the 'intact family' in ways that may be dangerous for women and children who have left domestic violence. It will suggest that influences on the practice framework of family relationship centres may unconsciously exclude discussion of past violence. Key features of the 2006 Act are also examined and it is suggested that some of these shift the gaze away from evidence of past violence towards post-separation events and a new ideal future. The possible limited effectiveness of the provisions and processes which deal with protection and family violence is explored. If past violence is not fully ventilated the mother's ability to protect the children post-separation will be compromised and inappropriate and unsafe parenting plans, agreements and orders may be made.

... forget the past, do a deal, go on for the future, the child must have a father ...¹

Introduction

Since 1 July 2006, the Australian family law system has experienced legal and institutional transformation by starting the roll out of 65 family relationship centres and the commencement of the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth) (the 2006 Act) — an amendment of the Family Law Act 1975 (Cth). The Federal Government described the 2006

* BA/LLB(Hons), University of Queensland. Senior Lecturer, Law School, Griffith University; former co-ordinator of the Women's Legal Service in Brisbane from 1989 to 2004.

¹ M Hester and L Radford (with M Føgh, J Humphries, A Mette Kruse, C Pearson, K Qaiser and K Woodfield), *Domestic violence and child contact arrangements in England and Denmark*, The Policy Press, Britain, 1996, p 23. The full quotation is from a welfare officer interviewed about her or his experiences with the new Children Act 1989 (UK) which had become operative in 1991:

... it was very optimistic, it was Children Act mode forget the past, do a deal, go for the future, the child must have a father, the highest concept was the child must have contact with its father, anything, any fears were seen as blocking, as ruling the party.

Act as 'part of the government's bold new reform agenda in family law' intended to bring about 'generational change' and a 'cultural shift in how family separation is managed'.²

This article argues that the cultural shift is also a gaze shift, turning the attention of decision-makers and 'advisers'³ to the future, and largely limiting any backward gaze to the post-separation past. Through this lens the 'intact family' past, which may have involved domestic or family violence (including child abuse), may be forgotten, put aside, in the interests of finding workable, practicable post-separation arrangements for the children. Clearly failure to acknowledge any past family violence may put mothers and their children at risk, so examination of this legislated gaze shift seems constructive during the early interpretive phase of the operation of the 2006 Act.

To a certain extent many of the 'changes' brought in by the 2006 Act are not new and emerged in the Family Law Reform Act 1995. Other aspects of this 'new approach to the family law system'⁴ are arguably extensions of some of the original ideas that came with the establishment of the Family Court of Australia as a new kind of court with a different treatment of relationship breakdown. For example, the flagship counselling and mediation agencies in the new system, the family relationship centres, are intended to serve much the same purpose as the innovative court-based counselling services which were an integral feature of the initial Family Law Act in 1975.⁵

Some of the criticisms of the family law system canvassed in this article similarly have a long history. Issues such as how the family law system deals with family violence and gender relations have been the subject of, or part of, significant research — particularly since the commencement of the Family Law Reform Act 1995.⁶ The many parliamentary and ministerial inquiries into the Family Law Act and its operation have received thousands of submissions from individuals, family law practitioners and human service providers outlining practical problems with the operation of the family law system.⁷ This article cannot traverse this history but it is acknowledged that both the

2 P Ruddock, MP, Attorney-General, *Explanatory Memorandum*, Family Law Amendment (Shared Parental Responsibility) Bill 2005, Australian Parliament, p 1.

3 Under subs 63DA(5) legal practitioners, family counsellors, family dispute resolution practitioners and family consultants are all defined as 'advisers'.

4 The Discussion Paper issued by the Australian Government, in November, 2004 was called *A New Approach to the Family Law System: Implementation of Reforms*.

5 See ss 15(2) original FLA, Act No 53 of 1975 which provided for interviews with a counsellor 'for the purpose of assisting the parties with a view to a reconciliation or the improvement of their relationship to each other and to the children of the marriage', at <http://www.austlii.edu.au/au/legis/cth/num_act/fla1975n531975141/s15.html> (accessed 17 March 2007).

6 See Australian Law Reform Commission, *For the Sake of the Kids: complex contact cases and the Family Court*, 1995; H Rhoades, R Graycar and M Harrison, *The Family Law Reform Act 1995: the first three years*, University of Sydney and Family Court of Australia, 2000; L Moloney, *Do fathers 'win' or do mothers 'lose'? A preliminary analysis of a random sample of parenting judgements in the Family Court of Australia*, seminar presentation at Australian Institute of Family Studies, September, 2000; R Hunter, A Genovese, A Chrzanowski and C Morris, *The changing face of litigation: unrepresented litigants in the Family Court of Australia*, Law and Justice Foundation of New South Wales, 2002.

7 The author participated in writing many submissions to family law inquiries and appearing before many committees as co-ordinator of Women's Legal Service, Brisbane, between 1990 and 2004.

2006 reforms and this article build on a long past.

I have long participated in a debate with successive Australian governments about how family violence should be dealt with in family law legislation and support services. Women's legal services, other legal service providers and women's organisations have constantly monitored proposed changes to the Family Law Act and the family law system, pointing out concerns about how family violence is to be treated. After researching the impact of the 1995 reforms and the consultation processes which surrounded them Armstrong concluded that:

The consistency between their critique and subsequent research demonstrates that agencies like women's legal services are well placed to evaluate the likely impact of legislative change and systemic problems in family law. Their analysis presents the perspective of some of the most vulnerable in the system who otherwise have little opportunity or capacity to voice their concerns.⁸

The history has been that governments have acted on some of the critique and dismissed other parts — perhaps seen as unnecessarily negative. Each successive government endeavours to build in protection for vulnerable clients but satisfying the multitude of players in the hugely complex family law system is an impossible task. The 2006 Act has processes and provisions intended to offer protection to victims of family violence, including the addition of a new section about how to deal with cases involving allegations of child abuse or family violence, s 60K, which will be discussed later. My intuitive concern, looking through the lens of my own particular background, is that the structure of the reform package, the provisions about shared parenting⁹ and the strong philosophical positioning of family relationship centres are so compelling that the protective and violence related provisions will be underutilised or rendered of limited relevance.

The 2006 Act legislatively maximises (with exceptions) post-separation parenting time with both parents, a clear policy intention of these reforms.¹⁰ A shift of gaze to the future seems to be an almost inevitable corollary of this policy. For most children in contemporary Australia maximum post-separation time with both parents means increased time with their fathers because, in most intact families, children spend the majority of their 'parented' time with their mothers.¹¹ There is no strong blue-print of lots of time alone with their fathers in the past to look back to — so everyone looks towards the future.

The emphasis on shared parenting in the future means that the attitude of the original 'residence'¹² parent (formal or informal, but generally the mother) towards the children's contact and time with the other party (generally the

8 S Armstrong, "'We told you so . . .'" Women's legal groups and the Family Law Reform Act 1995' (2001) 15(2) *AJFL* 129 at 154.

9 Including equal shared parental responsibility (s 61DA), the objects clause (s 60B) and the equal and substantial and significant time provisions (s 65DAA).

10 A policy started with the Family Law Reform Act in 1995.

11 See L Craig, 'Do Australians Share Parenting? Time-diary evidence on fathers' and mothers' time with children', 8th Australian Institute of Family Studies Conference, March 2003, at <<http://www.aifs.org.au/institute/afrc8/craig.pdf>> (accessed 17 March 2007).

12 There are now no precise terms for the nature of the particular arrangement in place for a parent and child. The words 'with whom a child is to live' and 'the time a child is to spend with another person' are used in s 64B, the 'parenting orders' section. 'Resident parent' was

father) becomes a focal point.¹³ As a consequence of this, the site of evidence used to predict what would be best for the children may swing from the pre-separation conduct and roles of each parent to the post-separation conduct and attitude of the mother. As lots of time with both parents is generally perceived as good, hesitancy or reluctance about the children spending time with the other parent by a 'residence' parent may offend against the prevailing norm.¹⁴

In demonstrating this gaze shift and the consequential risk of silencing any past violence the article will briefly examine the role of the new family relationship centres and then canvass four key changes brought in by the 2006 Act:

- equal and substantial and significant time post-separation parenting provisions — s 65DAA;
- best interests of children tests and concepts — ss 60B and 60CC;
- 'friendly parent' provision (one of the best interests factors) — subs 60CC(3)(c); and
- costs orders on 'false allegations' — s 117AB.

It also presents an outline of amendments and process changes intended to facilitate the early identification and treatment of violence. These include:

- the elevation of the protection of children to an 'object' — subs 60B(1)(b); and
- the introduction of s 60K — intended to allow courts to 'take prompt action in relation to allegations of child abuse or family violence'.¹⁵

If these latter changes are successful in identifying violence and enabling genuine violence to be proved they will represent important enhancements to the family law system. They may lead to the development of a sophisticated jurisprudence in respect of appropriate and workable orders for families with a history of violence. But there is a risk that the culture of the future will obfuscate family violence and impede the implementation of the provisions and processes dealing with it.

Family relationship centres

Family relationship centres are an essential feature of the government's overall commitment to changing the culture of family law. They are intended to be 'a first port of call when families want information about relationship and separation issues'.¹⁶ One of their objectives is to provide a place to help separating families 'achieve workable parenting arrangements (outside the

the recently abandoned term used to describe the parent with whom the child physically lived for the majority of their time — although there was variation in this pattern.

13 R Kaspiew, 'Violence in contested children's cases: an empirical exploration' (2005) 19(2) *AJFL* 112 at 136.

14 To be discussed in more detail in the section on the 'friendly parent' provisions

15 See section heading.

16 Australian Government, *Family Relationship Centres — Overview*, at <<http://www.familyrelationships.gov.au/www/agd/familyreonline.nsf/Page/RWPFDAE1FF77800FB5CA25721800038A30>> (accessed 18 March 2007).

court system) . . .'.¹⁷ Family relationship centres are a 'major part' of the investment of \$397 million by the Federal Government in the family relationship and breakdown sector over the next four years.¹⁸

Family relationship centres will play a critical role in shaping (or perhaps re-shaping) the family law system as a whole but, because they are fundamentally outside legal discourse and conventions, they may develop a practice framework in which key concepts *behind* the legislation and government rhetoric receive more attention than the 2006 Act itself.¹⁹ But the government has demonstrated an awareness of the key role of the staff of family relationship centres and at the end of 2006 the Attorney-General's Department issued a consultation paper about a new accreditation system for family dispute resolution practitioners.²⁰

Staff at family relationship centres will be given training about the family law system, but there is the risk that the emphasis will be on what the government intended to legislate, the philosophy, rather than what it did legislate. One of the messages to pass on to parents is that maximum involvement with both parents is the best outcome for most children. My concern is that the idea of shared parenting may become so dominant that it may be hard for mothers to raise violence — because discussing past violence will be counter-cultural and offend against the prevailing philosophy.

Considerable resources have been put into these centres and their establishment. Experienced agencies have won the tenders and many skilled managers and counsellors have been engaged. The reality is, however, that the family relationship centres will work with families where there has been violence. Family violence screening processes are notoriously difficult to implement successfully²¹ and some involved in the establishment of family relationship centres have accepted that 'compulsory mediation will see an increase in quantity and complexity of cases, including families where violence has been present'.²² The difficulty of raising violence and having it taken into account in mediation-type settings will be one of the most

17 Australian Government, *Family Relationship Centres — Information Paper*, 22 December 2005, p 2.

18 P Ruddock MP, Attorney-General, 'A new Family Law System: A message from the Attorney-General the Hon Phillip Ruddock MP' in Folder of Materials at the Launch of the Family Relationship Centre, Strathpine, Queensland, in the electorate of Peter Dutton MP, Liberal Party member for Dickson and member of the House of Representatives Standing Committee on Family and Community Affairs in the 2003 Joint Custody Inquiry.

19 Perhaps anticipating the extent to which the 'marketing' [my word] of this legislation could influence its interpretation, Richard Chisholm, a former judge of the Family Court, reminded the 800 plus legal, social science and other practitioners at a recent conference that their job is to apply the actual law that has been introduced and not what the government might have wanted or intended: 'What's Hot and What's Not', 12th National Family Law Conference, Perth, October 2006, author's personal notes.

20 Attorney-General's Department, *A New Accreditation System: Family Dispute Resolution Practitioners*, Australian Government, 2006.

21 For a recent paper dealing with the complex nature and success of screening processes, see R Braaf and C Sneddon, 'Family Law Act Reform: the potential for screening and risk assessment for family violence', *Issues Paper 12*, Australian Domestic and Family Violence Clearinghouse, February 2007, at <http://www.austdvclearinghouse.unsw.edu.au/PDF%20files/Issuespaper_12.pdf> (accessed 17 March 2007).

22 A Bailey and A Bickerdyke, 'Family Violence and Family Mediation', *DVIRC Newsletter*, Autumn 2005, p 10.

significant operational issues that family relationship centres will have to address.

Silencing the violence by shifting the gaze

The literature on mediation suggests that it is a process designed to consider the future. Describing the difference between counselling and mediation Fisher and Brandon explain:

Counselling, to a large degree, concerns itself with the past in order to understand the present and change the future. Mediation concerns itself with the future, and with the past only insofar as this explains the present.²³

Family relationship centres use family mediation models to facilitate agreement between parents. Anecdotal information about the future focus of the culture of family relationship centres is already being reported by domestic violence services and other service providers for women.²⁴ Clients advise that they feel unable to raise violence as a topic for discussion. Whether or not this is a real trend can only be tested by a well-formulated evaluation.

As any agreements made at mediation are reached in private, no jurisprudence emerges and trends are difficult to ascertain. Patterns can be established without family dispute resolution practitioners even being consciously aware of it. But the government has been working hard to establish good practice in its family relationship centres and they 'will be required to participate in a multi-tiered evaluation of the government's package of measures'.²⁵

Given the problems of guaranteeing the screening out of all violence cases, any obstacles to raising family violence as an issue in mediation could have serious consequences. Joint research about mediation conducted by Relationships Australia Victoria and the Domestic Violence and Incest and Resource Centre found that some women, particularly those still traumatised by abuse, experienced mediation as a difficult process — partly because of its focus on the future:

They had a strong sense that mediations and mediation was forward focused, and did not leave scope for accommodating or really acknowledging their abuse.²⁶

This manifested in a dismissive attitude towards violence during the relationship. As one woman commented:

If I tried to talk about the violence she (mediator) would put up her hand and stop me, and move on to the next question.²⁷

The difficulty of raising abuse in mediation type settings was noted by Hunter in her research into legal aid conferencing:

23 L Fisher and M Brandon, *Mediating with Families: Making the difference*, Prentice Hall, NSW, 2002, pp 8–9.

24 Personal communications with community legal centre lawyers and social workers, family law practitioners, domestic violence workers and email list memberships of author.

25 Attorney-General's Department and Department of Family and Community Services, *Operational Framework — Family Relationship Centres*, Australian Government, 2005, p 27.

26 Bailey and Bickerdyke, above n 22, p 12.

27 Ibid, p 12.

In the case of legal aid conferencing there is also, structurally, no space for the determination of disputed facts about violence. Early intervention conferences occur, by definition, at a very early stage of a family law dispute. Lawyers are funded for a limited amount of preparation time with their clients, and then the conference takes place on the basis of minimal information, and with a firm eye to future arrangements rather than past behaviours. Consequently, allegations of violence (and child abuse) are treated as no more than that — merely allegations. There is no opportunity to test them in any way, and as a result they are effectively discounted.²⁸

Given this known research about mediation, the evaluation to be conducted must be able to demonstrate:

- the extent to which family relationship centres mediate couples where there has been family violence;
- the outcome of those agreements;
- how they compare to agreements in violence free relationships;
- how they compare with outcomes in judicially decided cases;
- how they compare with settlements reached with the involvement of lawyers and judicially decided cases;
- their safety; and
- the level of parental satisfaction with the arrangements — analysing mothers' and fathers' experiences separately.

Having provided this brief snapshot of the challenges confronting these first ports of call in the system, the next part of the article will examine how the legislation itself points to the future, and therefore how legal practitioners, judicial officers and others who consult the law may also have their gaze turned away from the past.

Equal and substantial and significant time post-separation parenting provisions

The equal time and substantial and significant time provisions (the 'equal time type' provisions) are part of the structural package created under the broad philosophy of shared parenting. This article argues that the structure, provisions and processes introduced invite the family law system to focus on how shared parenting can happen in the future thereby concealing potentially relevant past history. But the legislation builds in exceptions and protections, so it is necessary to examine how the whole package might be interpreted — and which aspects are likely to become the dominant discourses in the family law system.

Many of the changes brought in by the 2006 Act have a long history of powerful advocacy by fathers' rights groups culminating in the establishment of a government inquiry into 'Joint Custody' in 2003. The official announcement of the inquiry was given a distinctly gendered edge when the Prime Minister, John Howard, publicly weighed in with his concern that

²⁸ R Hunter, 'Adversarial Mythologies: Policy Assumptions and Research Evidence in Family Law' (2003) 30(1) *Jnl of Law and Society* 156 at 165–6.

'young boys need a male role model in their lives'.²⁹

The nub of the terms of reference of the *Inquiry into child custody arrangements in the event of family separation* was:

whether there should be a presumption that children will spend equal time with each parent, and, if so, in what circumstances such a presumption could be rebutted.³⁰

Rebuttable presumption of equal shared parental responsibility

Importantly the House of Representatives Standing Committee on Family and Community Affairs decided against recommending a presumption of equal time but instead recommended a rebuttable presumption of equal shared parental responsibility — the higher level, significant decision-making aspects of parenting.³¹ It also recognised the relevance of violence and abuse and recommended that there be a 'clear presumption *against* shared parental responsibility . . . where there is entrenched conflict, family violence, substance abuse or established child abuse, including sexual abuse'.³² Equal shared parental responsibility was recommended as a prerequisite to the applicability of the provisions relating to equal time and substantial and significant time.

The committee's proposals for those provisions involved a form of legislative 'script-writing' for advisers and instructions to judicial officers requiring equal time to be the starting point for discussions and decisions. The suggested amendments were intended to ensure that a consistent message that equal time type arrangements should be seriously considered would be conveyed to all separating parents throughout the system. They implemented a 'key part of the committee's view of shared parenting' — 'that 50/50 shared residence (or "physical custody") should be considered as a starting point for discussion and negotiation'.³³

What the 2006 Act actually says about equal time

The section dealing with the 'presumption of equal shared parental responsibility' in the 2006 Act has no presumption *against* equal shared

29 See M Cazzulino and A Kamper, 'Give Dad a go', *The Daily Telegraph*, 20 June 2003, sourced from the Fatherhood Foundation website, at <www.fathersonline.org/give-a-dad-a-go.html> (accessed 17 March 2007).

30 Terms of Reference, House of Representatives Standing Committee on Family and Community Affairs, at <<http://wopared.parl.net/house/committee/fca/childcustody/index.htm>>. The complete term of reference was:

given that the best interests of the child are the paramount consideration, what other factors should be taken into account in deciding the respective time each parent should spend with their parent post-separation, in particular whether there should be a presumption that children will spend equal time with each parent, and, if so, in what circumstances such a presumption could be rebutted.

31 Section 61B of the FLA (which was not amended by the 2006 Act) states that 'parental responsibility . . . means all the duties, powers, responsibilities and authority which, by law, parents have in relation to children'.

32 House of Representatives Standing Committee on Family and Community Affairs, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of a Family Separation*, Cth, 2003, para 2.82, Recommendation 2.

33 *Ibid*, para 2.43.

parental responsibility despite the balance of presumptions for and against recommended by the committee. Instead there are circumstances where the presumption does not or may not apply — and they are expressed in different ways:

- Subsection 61DA(2) provides that it ‘does not apply’ in circumstances of abuse of the child or another child in the living in the family and family violence;
- Subsection 61DA(3) states that it applies in interim hearings ‘unless . . . it would not be appropriate in the circumstances’; and
- Subsection 61DA(4) offers the overarching discretion that it ‘may be rebutted by evidence that satisfies the court that it would not be in the best interests of the child’.

This legislative format generally facilitates the application of the presumption. It is possible to not apply it or to rebut it, but these are clearly the less favoured options. The structure contains a strong message in favour of equal shared parental responsibility — a trigger for other steps along the journey towards equal time.

The legislative script for ‘advisers’ is set out in subs 63DA(2) which provides that, in giving advice to parents about how to agree on arrangements for their children:

the adviser must:

- (a) inform them that, if the child spending equal time with each of them is:
 - (i) reasonably practicable; and
 - (ii) in the best interests of the child;
- they could consider the option of an arrangement of that kind; . . .

A broad range of professionals are defined as ‘advisers’:

- (5) *adviser* means a person who is:
- (a) a legal practitioner; or
 - (b) a family counsellor; or
 - (c) a family dispute resolution practitioner; or
 - (d) a family consultant.

‘Advisers’ are very influential in decision-making. The message implicit in what a person’s lawyer, the mediator or the counsellor says is a powerful force in terms of what a party includes in their material (application or affidavit), how they participate in settlement discussions and what they might settle for in an agreement or plan. These instructions will require the different ‘advisers’ throughout the separation process to keep suggesting an equal time arrangement to parents.³⁴

Although, from the wording, equal time type arrangements should only go

³⁴ This article cannot canvass the literature for and against equal time arrangements for children. See B Symthe, ‘Parent-child contact schedules after divorce’ (2004) 69 *Family Matters* 32; A Rowlands, ‘Recent Developments in Shared Parenting and Joint Custody: A Personal View from the Court’ at The 14th Annual Family Law Masterclass Conference, Sydney, May, 2005; C Caruana, ‘Legislating for shared parenting: The “joint custody” inquiry makes recommendations for change’ (2004) 67 *Family Matters* 16; A Samson, ‘The Wisdom of Solomon: (Yet another) Parliamentary Review of the Post-Divorce Arrangements for the Care of Children under the Family Law Act’ (2004) 13(3) *Polemic* 33;

ahead if it is in the best interests of the particular child, it is noteworthy that the issue of 'reasonable practicability' is listed before best interests of the child. Further, it seems that the adviser would be required to suggest the equal time option very early in the process. There appears to be no prerequisite of ascertaining whether the couple is appropriate for equal shared parental responsibility before advisers are bound to follow the section. There is no requirement for an assessment as to whether any of the subss 61DA(2) or (4) exceptions apply. Subsection 63DA(1) simply refers to the situation where an adviser is giving advice 'in relation to parental responsibility for a child following the breakdown of a relationship'. Women who have experienced violence may well find themselves with advisers following the politically and legislatively ordained script.³⁵ This highlights the importance of advisers being sensitive to the issues raised in this article.

The classic study of family law outcomes by Maccoby and Mnookin in California demonstrated that a history of violence is not an impediment to couples negotiating a shared parenting arrangement of some kind:

couples frequently negotiate joint legal or physical custody in order to resolve serious disputes. This explains the rather disturbing finding that extreme hostility does not deter couples from negotiating dual-residence arrangements; on the contrary, such arrangements usually occurred when fathers 'insisted on sharing the child's time more equally than the mother would have wished'.³⁶

The intended pervasive nature of the equal time type arrangements becomes apparent by examining the instructions to judicial officers. Unlike the script for 'advisers', these instructions appear at first to be triggered only where an equal shared parental responsibility order has been made. The opening words of the two subsections which deal with equal time type orders are:

If a parenting order provides (or is to provide) that a child's parents are to have equal shared parental responsibility for the child . . . [then a court must consider an equal time type order].³⁷

However, in the first decision of the Full Court of the Family Court regarding the interpretation of the new amendments, it was held that:

while the application of the presumption of equal shared parental responsibility may be the trigger for the operation of s 65DAA, it is not the only basis upon which the court may make an order for equal or substantial and significant time to be spent by the parents with the child.³⁸

The court goes on to explain that consideration of equal time type orders should happen if either party has made application for such an order — and anyway, should always happen in the general course of considering what is in

S Gilmore, 'Contact/Shared residence and child well-being: Research evidence and its implications for legal decision-making' (2006) 20 *Int Jnl of Law, Policy and the Family* 344.

35 This is reminiscent of the issue raised by Hunter's legal aid research referred to earlier, above n 28.

36 Maccoby and Mnookin in J Cohen and N Gershbain, 'For the Sake of the Fathers? Child Custody Reform and the Perils of Maximum Contact' (2001) 19 *Canadian Family Law Quarterly* 121 at 171.

37 Subsections 65DAA(1) and (2).

38 *Goode and Goode* (2006) FLC 93-286 at [48].

a child's best interests.³⁹ Therefore a court must *consider* equal time type orders whether or not there is a relevant history of child abuse or family violence and whether or not the presumption of equal shared parental responsibility has not been applied or been rebutted. Of course, a court should only order such an arrangement if it finds it would be in the best interests of the relevant child. This interpretation would appear to be contrary to the government's intention. In the Australian Government's *Fact Sheet Ten*, 'Dealing with family violence and child abuse' family law system clients are advised that:

If there has been violence or child abuse or there is a risk of it, the court is not obliged to consider a child spending equal or substantial and significant time with both parents.⁴⁰

And where there has been violence, and therefore the trigger for s 65DAA has not been activated, the court does not consider equal time type orders under the guidelines provided by that section. It does so at large. And in so doing, it will look to the future — not necessarily entirely displacing the past, but with the future certainly providing the framework for the court's decision-making.

If an order for equal shared parental responsibility has been made, then s 65DAA provides that the court has an obligation to consider whether an equal time type order would be in the best interests of the child and whether such arrangement 'is reasonably practicable'.⁴¹ Subsection 65DAA(5) provides a checklist of factors that might make equal time type arrangements impracticable. All five of the factors relate to the present and/or the future, and only two of them also relate to the past:

- (a) how far apart the parents live from each other; (*present*) and
- (b) the parents' *current* and *future*⁴² capacity to implement an arrangement for the child spending equal time, or substantial and significant time, with each of the parents; (*present and future*) and
- (c) the parents' *current* and *future*⁴³ capacity to communicate with each other and resolve difficulties that might arise in implementing an arrangement of that kind (*present and future*); and
- (d) the impact that an arrangement of that kind would have on the child (*past, present and future*); and
- (e) such other matters as the court considers relevant (*past, present and future*).

Of course, the continuing impact of past violence may well be captured by reference to the present where those interpreting the information have the necessary skills and sensitivities to draw the causal link. For example, erratic and disorganised behaviour by a mother could be perceived as a consequence

³⁹ Ibid, at [46] and [47].

⁴⁰ See Australian Government, *Fact Sheet Ten*, 'Dealing with family violence and child abuse', at <[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(22D92C3251275720C801B3314F7A9BA2\)\[FactSheet_10.pdf/\\$file/FactSheet_10.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(22D92C3251275720C801B3314F7A9BA2)[FactSheet_10.pdf/$file/FactSheet_10.pdf)> (accessed 17 March 2007).

⁴¹ Subsection 65DAA(5).

⁴² Emphasis added.

⁴³ Emphasis added.

of past abuse, or proof of an allegation by the father that the mother suffers from mental health problems.

Silencing the violence by shifting the gaze

It is arguable that the new equal time type provisions in the Family Law Act really create a new version of best interests of children. As Batagol commented at the time of the Joint Custody inquiry:

There is a danger that equal time will become a competing consideration to the best interests of the child standard in making decisions about the care of children. A standard of equal time has the danger of misleading parents, judges and registrars — those who make decisions about the care of children — away from a focus on quality of parenting and toward a focus of equality of time.⁴⁴

A 'focus on quality of parenting' would, of course, require looking at the past while a 'focus of equality of time' requires looking to the future. As identified, it is very clear that the items in the s 65DAA practicability checklist may be interpreted as referring largely to the present and future and limit the backward glance.

An equal time regime makes a close examination of pre-separation events seem rather irrelevant — so 'past tense' — not part of the culture at all. Certainly trying to describe the very limited parenting role played by a father during the relationship will be quite removed from the centre of any inquiry in the new mode, although it may seem very important to the mother. Further, a mother trying to prove detail of abuse that occurred months or years ago, before the parties separated, may find that her attitude is perceived as discordant or obstructive, even though still technically relevant under s 60CC(3).

The best interests of children tests and concepts

When the Family Law Act was first introduced in 1975 there was very little guidance for judges about how to make orders for children's post-separation living arrangements. Section 64 stated that the 'welfare of the child' was the 'paramount consideration'⁴⁵ and that a court should make such order 'as it thinks proper'.⁴⁶

A checklist of factors to take into account was not introduced until 1983.⁴⁷ This early best interests list largely focused on the past — and perhaps the present — although there are hints of the future.⁴⁸ Subsection 64(1)(bb) listed:

- (i) the nature of the relationship of the child with each of the parents of the child and with other persons; (*past and present*)

44 B Batagol, 'A rebuttable presumption of joint custody: Research-v-ideology in the battle over our children' (2003) 28(5) *AltLJ* 230 at 233.

45 Subsection 64(1)(a).

46 Subsection 64(1)(c).

47 As the result of a recommendation of a Joint Select Committee — Parliament of Australia, *Report of the Joint Select Committee on the Family Law Act, 1980*, Vol 1, pp 58–9. Interestingly the committee was chaired by Phillip Ruddock MP.

48 Subsections mentioning 'change' really invite a look back at the past and forward to the future.

- (ii) the effect on the child of any separation from:
 - (A) either parent of the child; or
 - (B) any child, or other person, with whom the child has been living; (*past, present and future*)
- (iii) the desirability of, and the effect of, any change in the existing arrangements for the care of the child; (*past, present and future*)
- (iv) the attitude to the child, and to the responsibilities and duties of parenthood, demonstrated by each parent of the child; (*past and present*)
- (v) the capacity of each parent, or of any other person, to provide adequately for the needs of the child, including the emotional and intellectual needs of the child; (*past and present*)
- (vi) any other fact or circumstance (including the education and upbringing of the child) that, in the opinion of the court, the welfare of the child requires to be taken into account; (*past, present and future*) . . .

These criteria were extended in 1995 with the Family Law Reform Act. That Act also introduced an object and principles section early in Pt VII of the Act.⁴⁹ The new s 60B contained an overarching philosophical object about children ideally receiving the best in life and parents giving their best to their children. It was, however, the principles subsection that proved highly influential in interpreting Pt VII, stating, *inter alia* that, 'except when it is or would be contrary to a child's best interests, children have the right to know and be cared for by both their parents . . .'.⁵⁰

What the 2006 Act actually says about best interests of children

Objects clause — s 60B

The structure of the amendments in the 2006 Act will be very important to their interpretation. The new s 60B now elevates an 'old' principle to an object and includes a second object about child safety. It states, *inter alia*:

60B Objects of Part and principles underlying it

- (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; . . .

Subsections (c) and (d) are general ideals for children based on the old s 60B(1) object clause.

Unfortunately, this section has been drafted in a perplexing manner. The words 'best interests of children' should simply not occur in the introduction.

⁴⁹ The Part which deals with children's cases.

⁵⁰ Subsection 60B(2)(a) and (b) as introduced by the FLRA 1995.

Their existence and position really turn the subsections that follow into a kind of definition of best interests of children — one which competes with the definition created by subs 60CC(2) and (3). This confusing drafting was not present in the Exposure Draft and nor was the protection of children an object. The inclusion of the words ‘best interests of children’ in the introduction seems to have occurred when the House of Representatives Standing Committee on Legal and Constitutional Affairs, in reviewing the Exposure Draft, agreed to elevate the idea of child safety from one of the factors to be taken into account in s 60CC(3) to an object. In so doing the committee seemed to consider it necessary to also ‘make more explicit reference to the need for consistency and the paramountcy of the best interests of the child’.⁵¹

The section would be clearer if it read:

The objects of this Part are to ensure that:

- (a) children have the benefit of both of their parents having a meaningful involvement in their lives except when it is or would be contrary to a child’s best interests; and
- (b) children are protected from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

The principles are set out in subs 60B(2) and provide, inter alia:

- (2) (except when it is or would be contrary to a child’s best interests):
 - (a) children have the right to know and be cared for by both their parents, [regardless of whether they are together or separated]
 - (b) children have a right to spend time on a regular basis with, and communicate on a regular basis with, both of their parents [and other significant people]
 - (c) parents jointly share duties and responsibilities concerning the care welfare and development of their children.

The theme that children spending time with both parents is beneficial for them is strong and it may be difficult to determine what level and nature of evidence will be required to prove that applying these principles would be contrary to the best interests of a particular child in a particular case.

Silencing the violence by shifting the gaze

In terms of where the gaze is drawn by s 60B(1), there is no doubt that subs (a) is about the future. It might seem that subs (b) is about the past — that the safety of children would be predicted by looking at their past relationships with those who wish to spend time with them now — however, using the word ‘protecting’ to commence it seems to imply that it refers to the present and future. Subsection (b) requires a decision-maker to ask the very complex question — are these particular children at any risk of harm? The way that is answered by individual decision-makers will depend on how they deal with any available evidence about violence, the prediction of future risk by the expert witnesses involved in the case and how the rest of the best interests factors are interpreted.

⁵¹ House of Representatives Standing Committee on Legal and Constitutional Affairs, *Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005*, Canberra, 2005, para 2.176, Recommendation 17.

This seems to have rendered the ‘unacceptable risk test’ into an object, which on the face of it promotes and prioritises the protection of children. Although the existing case law might support limited or ‘no contact’ orders in some of these families,⁵² empirical research into what happens in many unreported cases suggests that not all past violence is considered relevant in the unacceptable risk paradigm.

In a study of how the family law system dealt with domestic violence after the 1995 reforms, Kaspiew found that the idea of ongoing contact took precedence over the dangers of violence:

In the Family Reports in the sample, the theory of identity formation underlies recommendations for ongoing contact with a parent who is violent, abusive or mentally ill. A common theme in the psychological material is that the absence of a flawed father is more problematic for a child’s long term development than is his presence. Such arguments focus on the long term consequences for the child of the absence of a relationship with a flawed father, rather than the short term consequences of exposure to a parent who may be abusive.⁵³

Much of the available evidence about any violence will be contained in the family report and evidence from the family consultant. The outcome will depend significantly on that person’s way of predicting risk and their perception of the relevance of past violence. Where those experts take the view identified by Kaspiew, they fail to acknowledge the *long term* consequences of being exposed to and witnessing abuse — ‘the intergenerational transmission of violence’.⁵⁴ The links between being exposed to or directly subject to abuse and violence as a child and perpetrating and perpetuating those behaviours as an adult, are well established.⁵⁵

Best interests considerations

The list of ‘best interests considerations’ is now contained in s 60CC. Subsection 60CC(1) states that ‘in determining what is in the child’s best interests, the court must consider the matters set out in subsections (2) and (3)’. Subsection (2) states:

The primary considerations are:

- (a) the benefit of 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.

In this subsection there are no exceptions or qualifications applied to the first factor, making it inconsistent with s 60B(1)(a) which ends with the limiting statement of ‘to the maximum extent consistent with the best interests of the child’. Without this qualification, there will be cases where both (a) and (b), which are apparently of equal value, cannot be applied. The courts will

52 *M and M* (1988) 166 CLR 69; FLC 91-979; 12 Fam LR 606; *B and B* (1988) FLC 91-978; 12 Fam LR 612.

53 Above n 13, at 125–6.

54 C Thomsen, J Crouch, P May, S Gold and J Milner, ‘Predicting Adult Risk of Child Physical Abuse from Childhood Exposure to Violence: Can Interpersonal Schemata Explain the Association’ (2005) 24 *Jnl of Social and Clinical Psychology* 981 at 981.

55 *Ibid.*, at 981–2.

have to determine what level and kind of evidence about abuse will be required before a judicial officer will find that (b) overrides (a) in a particular case. Women will generally carry this evidentiary burden and violence in the family is often difficult to prove.⁵⁶

Subsection 60CC(3) then lists the 'additional considerations'. Those most obviously relevant to protecting children are:

- (j) any family violence involving the child or a member of the child's family;
- (k) any family violence order that applies to the child or a member of the child's family, if:
 - (i) the order is a final order; or
 - (ii) the making of the order was contested by a person

This new structure may significantly constrain the way in which the past might be used to predict the future. Structural problems arose with the interpretation of the 1995 reforms. There was nothing in the 1995 s 60B about safety or violence. The emphasis was on a child's right to contact. Violence and abuse was only mentioned in the best interest factors set out in s 68F(2). As the then Chief Justice of the Family Court opined in 1999:

This situation highlights a conflict within the legislation which on the one hand requires the court to ensure the child's right to contact with both parents and on the other the court's responsibility to protect the children from abuse both direct and witnessed.⁵⁷

That tension in statutory interpretation seems, for at least some couples, to have resolved in favour of the overriding message of the objects and principles — order contact.⁵⁸

Now there is arguably a different tension — this time between 'protecting children from physical or psychological harm'⁵⁹ in both the objects clause and the primary considerations and taking into account, as an 'additional consideration' any 'family violence involving the child or a member of the child's family' or 'any family violence order'⁶⁰ in the family. It may seem that proving facts relevant to the family violence additional considerations would

56 As Nicholas Bala observed in Australia last year: 'The biggest issue in Canada in the family law context, as in Australia I suspect, is not the theoretical legal issue of whether spouse abuse should be taken into account in dealing with custody and access, but the practical question of whether a victim can prove that she has been abused.' See N Bala, 'The Canadian Experience' in Attorney-General's Department, Department of Families, Community Services and Indigenous Affairs and Australian Institute of Family Studies, *Proceedings of the International Forum on Family Relationships in Transition: Legislative, practical and policy responses*, Canberra, 2005, p 147.

57 A Nicholson, 'Court Management of Cases Involving Child Abuse Allegations', 7th Australasian Conference on Child Abuse and Neglect, 1999, Perth, p 20, at <http://www.familycourt.gov.au/presence/connect/www/home/publications/papers_and_reports/archived_papers/archived_paper_Court_management_of_cases> (accessed 18 March 2007).

58 Rhoades, Graycar and Harrison, above n 6; M Kaye, J Stubbs and J Tolmie, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence*, Families, Law and Social Policy Research Unit, SLRC, Griffith University, 2003; and K Rendell, Z Ratus and A Lynch, *An Unacceptable Risk: A report on child contact arrangements where there is violence in the family*, Women's Legal Service, Brisbane, 2002.

59 Subsections 60B(1)(b) and 60CC(2)(b).

60 Under the 2006 Act a family violence order must be final or have been contested to fall within the definition. This new definition links in to the discussion on false allegations. The

lead to an order being made which implements the protective intention of s 60B(1)(b) but there is no legislative connection between these aspects of Pt VII. Making positive findings under subs 60CC(3)(j) or (k) does not trigger any particular provision or order. This suggests a strange, and potentially dangerous, failure to directly link past violence to present and future safety. There is a possible disconnect between the meaning and treatment of any violence that occurred during the relationship and future safety.

This kind of reasoning places the predictive decision about future safety squarely with the social scientists whereas proving whether or not violence has occurred rests with lawyers. This suggests that the new changes elevate the position of social workers, psychologists and other social scientists to 'expert gatekeepers' and risks pathologising the victim of violence while averting the gaze from the violence itself and the party responsible for it.

It is suggested that the construction of the best interests of the child through the ss 60B and 60CC(2) and (3) tests create a focus on the future. The repeated promotion of the benefits of involvement with both parents, the confusing and inconsistent application of the exception to this concept and the emphasis on predicting the 'need to protect' children from harm may blunt an examination of the past and a thorough investigation of the violence which has occurred.

'Friendly' parent provision

Perhaps one of the most dangerous provisions in the new amendments is the 'friendly parent' subsection⁶¹ positioned at number three in the list of 'additional considerations' relating to best interests of children:

The willingness and ability of each of the child's parents to facilitate, and encourage, a close and continuing relationship between the child and the other parent.⁶²

The idea for this provision appeared for the first time in a 2004 document, *A New Approach to the Family Law System: Implementation of Reforms (Discussion Paper)* under the unhelpful heading 'Provisions from overseas models'. Without describing what mischief such provisions might be enlisted to overcome, the discussion paper listed two factors from the Florida legislation which were in the mould of 'friendly parent' concepts.⁶³

requirement for a final order is because fathers' rights groups have succeeded in their claims that women make up allegations of domestic violence and obtain orders from Magistrates Courts for tactical advantage in family law proceedings.

61 Much of the discussion on this subsection is also relevant to subs 60CC(4) and (4A). Subsection 60CC(4)(a) invites examination of 'the extent to which [each parent] has fulfilled or failed to fulfil their responsibilities as a parent' and appears to permit a look at the intact family past, but subs 60CC(4)(b) shifts the gaze to the post-separation period scrutinising how each parent has facilitated the *other* parent's fulfilment of their parental responsibilities. Subsection 60CC(4A) demands that any look at the pre-separation past should only be a glance because the court is required to '... have regard, in particular, to events that have happened, and circumstances that have existed, since the separation occurred'.

62 Subsection 60CC(3)(c).

63 Australian Government, *A New Approach to the Family Law System: Implementation of Reforms (Discussion Paper)*, November, 2004, pp 13–14. The two concepts were; 'that one parent is more likely to allow the child frequent contact with the other parent, and, the willingness and ability of each parent to facilitate and encourage a close and continuing parent-child relationship between the child and the other parent.'

It was argued against at the 2005 Inquiry into the Exposure Draft of the Bill by the National Abuse Free Contact Campaign (NAFFC) stating that it 'will systematically obstruct people from declaring issues of violence'.⁶⁴ However, the influential Shared Parenting Council of Australia (SPCA)⁶⁵ endorsed the concept and the committee decided to include it, believing that concerns about silencing violence were 'unwarranted' given that 'the court must consider the safety of the child as a primary consideration in determining best interests'.⁶⁶

Silencing the violence by shifting the gaze

Again the focus is on the post-separation attitude of the mother with no appreciation that hesitancy to send a child on contact may reflect past violence and/or an understandable, and even reasonable, lack of trust in the ability of the father to parent positively. Altobelli notes that the "friendly parent doctrine" focuses the litigation on the other parent's conduct . . . and distracts attention from the child'.⁶⁷

Women survivors of domestic violence invest vast emotional resources in trying to facilitate good and healthy parenting by their children's fathers. According to Berns, even in the twenty-first century 'Rousseau's understanding of the mother's critical role in forming a bond between father and child, continues to resonate'. She suggests that other 'modern feminist scholars . . . are at one over the wife/mother's role in mediating family relationships, during marriage providing the "emotional labour" needed to preserve relationships and bind men into family life — into, in short, their role as fathers'.⁶⁸

If the mother cannot *prove* that abuse is likely to occur her failure to facilitate contact becomes inexcusable — the problem and obstruction to the dominant philosophy. It must be recalled that the relevant parts of the objects section⁶⁹ and the 'primary' considerations in s 60CC(2) are about protecting children from harm in the future. Research into family report writers under the old law shows the gaze turning when abuse cannot be proved and 'friendly parent' ideas are employed:

Where allegations of child abuse were not able to be determined it was the resident mothers' demeanour and support for contact that appeared to be more the focus of the assessment and the most significant factor in determining whether or not there was parental alienation. In the court expert reports mothers who are anxious, angry, protective and against contact, are castigated into the role of 'over anxious',

64 Above n 51, para 2.198.

65 The SPCA is an umbrella organisation for a range of fathers' rights groups which was incorporated in 2002 — a few months before the announcement of the Joint Custody Inquiry. Its vice-president is Barry Williams, one of Australia's most vocal and long-term advocates for fathers' rights, having operated at least since the 1980s.

66 Above n 51, para 2.204.

67 T Altobelli, *Shared Parenting Reforms*, Television Education Network and Tom Altobelli, p 19.

68 S Berns, 'Mothers-in-law: Lying down for the father again' (2005) 31(2) *Hecate: An Interdisciplinary Jnl of Women's Liberation* 78 at 79.

69 Subsection 60B(1).

‘over-protective’, ‘bitter’, or ‘personality disordered’ mothers who are acting in their own, and not their children’s best interest.’⁷⁰

When the relevance of violence and its on-going affect on the mother is not understood this can lead to a misinterpretation of her post-separation attitude and conduct. What she sees as protective behaviour on behalf of her children will be re-framed as uncooperative obstruction. Friendly parent provisions operate in a number of states in the United States⁷¹ and research into their operation identifies the focus on the post-separation conduct and attitude of the mother:

Despite their reasonable reluctance to co-parent, battered women may end up being labelled uncooperative, with an increased risk of losing their children.⁷²

A key piece of the research framework of the Abuse Free Contact Group in Queensland in the late 1990s was that women’s post-separation conduct is deeply affected by the domestic violence with which they lived:⁷³

When violent partners, who have spent little time alone with the children during the relationship demand long periods of contact after a separation, this causes enormous concern for women. They have never, or rarely, seen their former partners display the skills necessary for parenting such as being child-centred in decision-making, being interested and involved in the children’s lives or displaying the organisational skills necessary in running a home including cooking, washing and other general domestic chores. The men may be living in accommodation which is unsuitable for children. They may rarely exercise affectionate behaviour such as hugging or staying quietly with a child who is disturbed and cannot sleep. The mothers are also afraid that violence towards the children may be unrestrained in their absence as the protector.⁷⁴

I argue that subs 60CC(3) says to women who parent with violent partners and fathers:

No matter how many years you tried to make your partner a safe and involved father while you were together, no matter how much that exhausted you nor how often you failed and had to deal with the consequences of his abuse, now that you have separated, perhaps precisely because you were unsuccessful in this mission, you must not stop. It is still your job to ‘facilitate’ the relationship between your children’s father and his children.

70 A Hay, ‘Child Protection and the Family Court of Western Australia: the experiences of children and protective parents’, Conference Paper, Child Sexual Abuse: Justice Response or Alternative Resolution, Australian Institute of Criminology, Adelaide, 2003, p 26.

71 M Brown, ‘Child custody in cases involving domestic violence: Is it really in the “best interests” of children to have unrestricted contact with their mother’s abusers?’ (2001) 57 *J Mo B* 302 at 306.

72 D Saunders, ‘Child Custody and Visitation Decision in Domestic Violence Cases: Legal Trends, Research Findings, and Recommendations’, at <<http://www.vaw.umn.edu/documents/vawnet/custody/custody.html>> (accessed 12 October 1998) cited in B Barlow, ‘Divorce Child Custody Mediation: In Order To Form A More Perfect Disunion?’ (2004-05) 52 *Clev St L Rev* 499 at 513–14.

73 K Rendell, Z Ratus and A Lynch, *An Unacceptable Risk: A report on child contact arrangements where there is violence in the family*, Women’s Legal Service, Brisbane, 2002, p 38.

74 *Ibid*, pp 53–4.

And if the mother is resistant to this idea, suddenly she may become the 'gatekeeper',⁷⁵ an impediment to the father's relationship with his children.

But if women are at risk of being labelled unfriendly by raising violence, this may well mean that many women will either choose, or be advised, to stay silent, as the NAFCC suggested to the 2005 committee. This analysis is confirmed in research from the United States:

A friendly parent provision . . . gives the batterer additional power: a woman who does not want contact between her children and the battering spouse cannot so inform the court, lest she seem uncooperative or 'unfriendly'.⁷⁶

In 2004 there were hearings in Alaska when amendments to a similar provision were under consideration. Evidence was given to a House Judiciary Committee by individual women, domestic violence workers and legal practitioners. A strong theme was the extent to which a friendly parent provision discourages, and even frightens victims out of making, disclosures of abuse. One attorney with 10 years practice experience explained to the committee that:

she is forced to advise clients that despite concerns regarding their safety and the safety of their children, they have to appear to be friendly to the other party and sometimes permit visitation or they risk losing their children. This isn't the message that should be sent to victims of abuse.⁷⁷

Ideas like the 'friendly parent' concept embed themselves deeply in the culture of practice. It becomes a way to interpret post-separation conduct and can become 'dispositive' for some role players.⁷⁸ In other words, an apparently unfriendly parent is seen as an uncooperative cultural rule breaker. This is a practice framework which could easily permeate family relationship centres without family dispute resolution practitioners even really being conscious of its pervasiveness. It will be important to be alive to this possibility in conducting the evaluation of family relationship centres and to design questions and analytical tools which will reveal any inappropriate operation and application of this concept.

From 1 July 2007, a court cannot hear an application under Pt VII unless the applicant has filed a certificate in compliance with s 60I(8) of the Family Law Act. That section empowers family dispute resolution practitioners to issue a range of influential certificates which include:

- (a) the person did not attend family dispute resolution due to refusal of that person or others to attend;
- (aa) the person did not attend family dispute resolution because the family dispute resolution practitioner considers it would be inappropriate;

75 The term 'gatekeeper' was used by Joan Kelly to describe some mothers in relation to the father's relationship with his children both pre and post-separation, 'What Family Lawyers and Judges Need to Know About Children and Divorce', 12th National Family Law Conference, Perth, October, 2006, author's personal notes.

76 Brown, above n 71, at 307.

77 Alaska State Legislature, *House Judiciary Minute*, March 2004, per Christine Pate, at <http://www.legis.state.ak.us/basis/get_single_minute.asp?session=23&beg_line=01301&end_line=02281&time=1310&date=20040301&comm=JUD&house=H> (accessed 13 February 2006).

78 M Dore, 'The "Friendly Parent" Concept: A Flawed Factor for Child Custody' (2004) 6 *Loyola Jnl of Public Interest Law* 41 at 46.

- (b) the person attended and 'made a genuine effort to resolve the issue or issues';
- (c) the person attended but that person or another 'did not make a genuine effort to resolve the issue or issues'.

Those parents whose attitude offends the culture of cooperation may find themselves with a certificate that they 'did not make a genuine effort to resolve the issues'.⁷⁹ These may label future litigants as uncooperative in the court system before they have even filed.

Finally, there is a further twist in the way that friendly parent provisions influence interpretation of conduct. Research conducted by the Australia Law Reform Commission into complex contact cases reported that there was a:

common view . . . that some custodial parents intimidate and brainwash the children to refuse contact or to be distressed by it. This view argues that this behaviour should be regarded as a form of psychological child abuse.⁸⁰

Thus, the pre-separation abuse of the mother by the father is metamorphosed into post-separation abuse of the children by the mother in a shift in time and blame. The former victim becomes the current abuser and must be prevented from being able to continue her abuse in the future.

Costs on false allegations provision

The idea that women make false allegations of violence in the family to enhance their position in family law proceedings is part of the ancient mantra of the fathers' rights groups. They even say that women make false allegations for the 'pleasure in the suffering they thereby cause men'.⁸¹ Successful lobbying by the fathers' rights groups led to the inclusion of a punitive provision aimed at this alleged problem even though there was no empirical data to show this was a real problem.

When the Chief Justice of the Family Court, Diana Bryant QC, gave evidence to the 2005 Committee examining the Exposure Draft she 'suggested that by the time these cases came to court there are usually a number of pieces of evidence to corroborate the allegations made'. She also noted that maliciously false allegations are rare and mistaken false allegations are likely to be more common.⁸²

The committee admitted that, on the evidence before it, it is 'unable to determine to what extent the allegations of family violence made in family law proceedings are actually false but accepts that these allegations do occur' and suggested this as an area for further research.⁸³ Despite this it concluded that there should be an 'explicit provision' that courts should impose a costs order where it 'is satisfied that there are reasonable grounds to believe that a false allegation has been knowingly made'.⁸⁴

⁷⁹ Subsection 60I(8)(c).

⁸⁰ Australian Law Reform Commission, *For the Sake of the Kids: complex contact cases and the Family Court*, 1995, para 2.39.

⁸¹ M Kaye and J Tolmie make that point in 'Fathers' Rights Groups in Australia and their Engagement with Issues in Family Law' (1998) 12 *AJFL* 33 at 54.

⁸² Above n 51, pp 29–30.

⁸³ *Ibid*, p 30.

⁸⁴ *Ibid*, p 37.

The final wording of the costs provision is:

s117AB Costs where false allegation or statement made

if: . . .

- (b) the court is satisfied that a party to the proceedings knowingly made a false allegation or statement⁸⁵ in the proceedings.
- (2) The court must order that party to pay some or all of the costs of another party, or other parties, to the proceedings.

The first mention of such an idea came with the 2004 discussion paper again. It contained a proposal for costs consequences for parties whom, it later transpired, had made false allegations of violence for the purpose of being excluded from a family relationship centre.⁸⁶ This is indicative of the government's determination to keep people out of court wherever possible and to punish those who attempt to thwart their plans.

Silencing the violence by shifting the gaze

The possibility of such a provision silencing violence was recognised by the Attorney-General's Department in its submission on the 2005 Exposure Draft which contained no specific provisions for costs penalties on false allegations. The department explained 'the government decided not to proceed with that measure because there were concerns that this would discourage people from relying on the exceptions [to using the family relationship centre process] where there were genuine family violence and abuse issues'.⁸⁷

Despite the reluctance of the lead department, a similar provision went ahead. It expertly demonstrates the shifting of the site of abuse in terms of both identity of perpetrator and chronology — from the father's pre-separation abuse of the mother (and maybe the children) to the mother's post-separation pathological abuse of the children (diagnosed by an expert) by making these false allegations and using them to deny the children contact with their father.

Effect of s 60k and new court processes

A possible bulwark against the silencing of the violence is s 60K which requires courts to take 'prompt action'⁸⁸ when allegations of child abuse or family violence are made in materials filed in the courts in children's proceedings. There is a view that the politics behind this section relates to fathers' protestations that women routinely make 'false allegations' about violence and that this provision will catch out these female liars early.

⁸⁵ The insertion of the words 'or statement' appears to be the Attorney-General's answer to concerns that false denials are also a problem. See P Ruddock, MP, Attorney-General, 'Address to International Forum — Family Relationships in Transition: Legislative, Practical and Policy Responses', *Australian Institute of Family Studies Forum*, Canberra, 1 December, 2005, at <http://www.ag.gov.au/agd/WWW/MinisterRuddockHome.nsf/Page/Speeches_2005_Speeches_1_December_2005_-_Speech_-_Address_to_International_Forum_-_Family_Relationships_in_Transition> (accessed 13 April 2007).

⁸⁶ Australian Government, *A New Approach to the Family Law System: Implementation of Reforms (Discussion Paper)*, November 2004, p 6.

⁸⁷ Above n 51, p 37.

⁸⁸ See heading to section.

Whatever the politics, where the section is triggered there will be a close examination of violence allegations. If proved, a parenting order which acknowledges the violence can be made. However, if proof is elusive, a mother may find herself in a very vulnerable position in the court.

Section 60K is not an automatically triggering section though. To bring it into operation a party must file a Form 4 *Notice of Child Abuse or Family Violence*. It seems, however, that the filing of a Form 4 is not standard in every case where an allegation of violence is made. In *Goode*,⁸⁹ a case which involved allegations of family violence, the Full Court made no reference to s 60K and it seems that neither did the interim hearing judge.⁹⁰

Cases involving violence are already a significant proportion of the courts' children's cases.⁹¹ If every case where violence is mentioned were diverted on to the s 60K track a majority of the cases may be there. It seems possible that only the more 'serious' cases of physical violence will be identified as s 60K cases. This appears to be contrary to the government's intention. In its online *Fact Sheet Ten* about 'Dealing with family violence and child abuse' the government promises that:

The law now requires courts to act without delay in such cases. An important new requirement is that they promptly consider cases that raise issues of family violence or child abuse. The courts will have to quickly consider the need to make any orders to ensure there will be sufficient information to resolve the issues and to ensure that appropriate protections are in place.⁹²

The court is also rolling out its less adversarial children's trials process and implementing Div 12A of Pt VII, *Principles for conducting child related proceedings* — another aspect of the 2006 Act. These new processes will affect the family law landscape dramatically and may assist to identify cases where violence is relevant and ensure the issues are properly ventilated. However, in an article outlining findings of an evaluation of the Children's Cases Pilot Program, a forerunner to the less adversarial children's trials, Hunter notes that '[c]ases containing allegations of domestic violence pose possibly the greatest challenge for Div 12A proceedings'.⁹³ She also cautions against a future focus permeating those processes:

the messages conveyed to parties in CCP to look to the future rather than the past, to focus on the children rather than on the adult conflict, and to avoid adversarialism, may inhibit a party from raising the issue of violence because to do so may appear provocative or antagonistic.

It seems that the allure of the future is already well entrenched in this new process and is potentially obstructing a full examination of allegations of violence.

89 *Goode and Goode* (2006) FLC 93-286.

90 See *Goode and Goode* [2006] FamCA 819.

91 See T Brown, M Frederico, L Hewitt, and R Sheehan, *Violence in Families: The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia*, The Family Violence and Family Court Research Program, Monash University and the Australian Catholic University Canberra, 1998, p 17.

92 Australian Government, *Fact Sheet Ten*, above n 40.

93 R Hunter, 'Child-related proceedings under Pt VII Div 12A of the Family Law Act: What the Children's Cases Pilot Program can and can't tell us' (2006) 20 *AJFL* 227 at 231.

Conclusion

Part of the purpose of this article is to give decision-makers and decision-facilitators in the family law system an insight into how easily a policy direction can potentially influence interpretation. Women who have lived with domestic violence may fare poorly in this future focused environment because their post-separation conduct will be deemed 'unfriendly', uncooperative and counter-cultural. Decision-makers and decision-facilitators need to be aware of this and tailor their advice or orders around understanding this and accommodating it.

Awareness of the impact of domestic violence on the post-separation conduct of a woman and permitted validation of her concerns may actually allow her to move forward — slowly — to contemplate a new and different future of some form of shared parenting.⁹⁴ But if the system chides her for needing to deal with the past this may immobilise her, affect her ability to co-parent and even her ability to parent. Crafters of family law system agreements, parenting plans and orders should consider developing innovative models 'in which the wrongs of the violence [are] admitted, acknowledged and accounted for, and in which that violence fundamentally affect[s] what parenting arrangements might be made'.⁹⁵

The various evaluations of the different aspects of the new family law system should be alive to the possibility of this future focus and design and structure research questions to test for it and its consequences. Broad consultation will be essential with service providers who work with clients who access the system — family law practitioners, domestic violence workers, all kinds of community workers, Child Support Agency staff, community legal centre practitioners, and maybe teachers in schools who will watch shared care and all other arrangements play out in Australia's classrooms.

It could be dangerous for some Australian women and their children if the refrain is endlessly and mechanically repeated:

... forget the past, do a deal, go on for the future, the child must have a father ...
... said the family dispute resolution practitioner to the parent, the legal practitioner to the client, the family consultant to the party, the judicial officer to the litigant ...

Postscript

The major writing and research for this article was undertaken by November 2006 before much case law, at first instance or appellate level, had arisen in

94 In research conducted in the United Kingdom, Day-Scalter noted the importance of acknowledging the past in moving on '... the stories subjects tell to make sense of their divorces are important for them; how they reinterpret the past, from the vantage point of the present, influences how they deal with present concerns, how they negotiate the ambivalences of attachment and loss, and how they prepare themselves to face an uncertain future': S Day Scalter, 'Divorce — Coping Strategies, Conflict and Dispute Resolution' [1998] *Fam Law* 150 at 151.

95 J Behrens, 'Meeting the needs of victims of domestic violence with family law issues: the dangers and possibilities in restorative justice' (2005) 1 *Int Jnl of Law in Context* 215 at 226.

respect of the new amendments. From my random and selected readings of the case law to date, including hearings at first instance, I make some observations about developments judicial decision-making relevant to the analysis presented in this article:

- (1) Although I have read many cases where allegations of family violence or child abuse have been made I have found no discussion of s 60K nor judicial comment on the failure of the parties to have filed a Form 4 in any available decisions of the Family Court. This suggests that the section is not being accorded the significant role proposed, thereby creating ambiguity in the application of s 60B(1)(b) and s 60CC(2)(b) in cases where violence is alleged. Interestingly I have identified two cases available on the Federal Magistrates Court website where s 60K is mentioned.⁹⁶ Again Form 4's had not been filed in either case, however, despite these omissions Brown FM, who presided over both cases, noted that the 'import' of the section is that consideration of issues of family violence 'must occur expeditiously' once raised.⁹⁷
- (2) Some judges are very carefully weighing whether or not to apply the presumption of equal shared parental responsibility. Where there are allegations of violence, the presumption may well be held to be rebutted (at trial) or inappropriate to apply (at interim hearings).⁹⁸ This is critical to the operation and interpretation of the new Pt VII. However the legislation can lead judicial decision-makers down a worrying path. In *Skelton and Donaldson*⁹⁹ the presumption was applied despite allegations of violence by the mother and some indicia of dysfunctional family dynamics in both homes. This facilitated a decision in which an 18 month old child was ordered to spend equal time with both parents on a rotating roster of three days and three nights.¹⁰⁰ It is hard to imagine how shifting between two socially complex homes every three days could be in the best interests of an infant.
- (3) Some of the judges are interpreting the first primary consideration in an interesting way. An unreported decision of Bennett J in *C and G*, is quoted favourably by Benjamin J in *Elsbeth and Peter*.¹⁰¹ The point is made that s 60CC(2)(a) does not necessarily mean that courts should 'take the benefit to the child of having a meaningful relationship with both of the child's parents as a given'. Rather 'the court must evaluate the nature and quality of the relationship to establish whether any "benefit" or meaningful relationship exists'.

⁹⁶ *H & W* [2006] FMCAfam 376 (unreported, 27 July 2006, BC200606005) and *S & McL* [2006] FMCAfam 686 (unreported, 15 December 2006, BC200611002).

⁹⁷ *H & W*, *ibid*, at [93].

⁹⁸ See *Charles and Charles* [2007] FamCA 124 at [146], a trial before Cronin J; *N & M* (2006) FLC 93-296 at [184], a trial before Rose J; *Leslie and Arbuthnot* [2007] FamCA 118 at [33], an interim hearing before Stevenson J.

⁹⁹ [2007] FamCA 35 in which Warnick J dismissed an appeal by the mother against an interim decision of Jarrett FM.

¹⁰⁰ Thereby not even enabling the establishment of regular weekly patterns.

¹⁰¹ [2006] FamCA 1385 at [48].

This idea appears to have had some resonance in other cases where the judges seek to determine whether, in fact, the children would benefit from a meaningful relationship with a problematic parent.¹⁰²

- (4) In an early case, Justice Rose¹⁰³ drew a clear connection between the s 60CC(3)(j) and (k) family violence additional considerations and the second primary consideration of protecting children — s 60C(2)(b). He described the additional considerations as ‘the substratum of facts of factual platform for the purpose of the “primary considerations”’ and went on to explain that ‘the need to protect a child from physical or psychological harm will require findings on a historical basis of any family violence and consideration of family violence orders, each of which are discrete matters’ [in the additional considerations list]. Such interpretation would answer some concerns I have raised about the structure of s 60CC, but it not clear whether this interpretation has been generally taken up. Further, where the allegations of violence remain untested or unproved, the role of s 60CC(2)(b) becomes less clear.

I suggest that these robust judicial interpretations may represent the high water mark of independence from the rhetoric and philosophy driven by the government’s reform agenda. It could well be that agreements which emerge from family relationship centres will not reflect this developing jurisprudence but will be influenced more by the legislative script-writing discussed in the article and financial and structural difficulties of accessing the courts. It will be vital to ensure that evaluations of the new system compare and contrast outcomes derived at different stages of the process through the system to endeavour to establish whether there are different responses to background issues such as family violence, child abuse and other kinds of social disadvantage. Critical stages to examine include:

- parenting plans from family relationship centres and other counselling and mediation services;
- agreements and consent orders reached with input from lawyers;
- agreements and consent orders in matters settled after litigation has commenced; and
- judicially determined orders.

It is my hunch that agreements reached by parents about post-separation arrangements for their children will not be bargained in the ‘shadow of the law’, if that includes the case law, but will be bargained in the shadow of shared parenting and equal time type notions deeply embedded in the scripts, promotional material and training that are an integral part of this reform package.

102 Eg, *Charles and Charles* [2007] FamCA 124 at [154].

103 *N & M* (2006) FLC 93-296 at [35] and [36].