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The question has arisen whether the interest of a bankrupt as a beneficiary in property held subject to a discretionary trust forms part of the "asset pool" administered by the bankrupt's trustee in bankruptcy pursuant to the *Bankruptcy Act 1966* (Cth). Cases under that statute suggest that such an interest does *not* form part of the "asset pool".[68]

When one compares the wording of the relevant provisions of the *Bankruptcy Act* with the relevant provisions of the *Family Law Act* – and in particular the expression the "property of the parties to the marriage or either of them" – it is difficult to see why assets held subject to a discretionary trust do not form part of the "asset pool" for bankruptcy purposes but do form part of the "asset pool" for matrimonial property settlement purposes. The dissenting judgment of Heydon J in *Kennon v Spry* avoids such an outcome. The judgments of French CJ and Gummow and Hayne JJ in *Kennon v Spry* must be regarded as an extension of the law.

[68] See *Dwyer v Ross* (1992) 34 FCR 463 at 466-467 per Davies J. Note also *Re Burton; Wily v Burton* [1994] FCA 1146; (1994) 126 ALR 557 at 560 (lines 10-20) per Davies J. Note further the reference by Gibbs J (then a judge of the Federal Court of Bankruptcy) to "beneficial interest" in *Re Buckle; Ex parte Ogilvie* (1969) 15 FLR 460 at 466; [1970] ALR 717 at 721 (lines 45-55), being a passage quoted with approval by Gray J (with whom Bleby J agreed) in *Cirillo v Citicorp Australia Ltd* [2004] SASC 293 at [78].

Family violence and its relevance beyond safety: Some reflections on the Chisholm Report

Juliet Behrens*

This article involves a discussion of some of the key recommendations of Professor Richard Chisholm in the Family Courts Violence Review. It also touches on the report from the Family Law Council and data in the Australian Institute of Family Studies' evaluation of the 2006 Family Law Reforms, which were released at the same time as that Review. Most of the recommendations in the Family Courts Violence Review are welcomed as likely to improve outcomes for women and children living with family violence. Reservations are expressed, however, about some others, and particularly about the recommendation to remove the specific reference to "family violence" in the best interests checklist. A central argument of the article is that any reform must clearly embrace the proposition that family violence is relevant not only from a safety point of view, but also because of the many other ways it has an impact on children's best interests. This is clearly recognised by Professor Chisholm in his report, but arguably underplayed.

As always, it seems, this is a fascinating time to be a family lawyer. On 28 January 2010 the Attorney-General released three reports: the long-awaited evaluation by the Australian Institute of Family Studies (AIFS) of the 2006 Shared Parental Responsibility reforms; Professor Richard Chisholm's *Family Courts Violence Review* (the Chisholm Report); and the Family Law Council's *Improving Responses to Family Violence in the Family Law System*. All three of these reports are available on the Attorney-General's website.[1] All three reports are consistent with the AIFS finding that "the family law system has some way to go in being able to respond effectively to family violence and child abuse".[2] This is in a context in which the AIFS evaluation showed "a clear and strong link between parental experience of family violence and child low wellbeing".[3]

The Chisholm Report makes detailed recommendations for change, not only to legislative provisions and processes specifically related to family violence, but also to the key provisions in Pt VII of the *Family Law Act 1975* (Cth) setting out the framework for decision-making in parenting matters. The focus of this comment is on the Chisholm Report and its recommendations for change to the substantive provisions, but some attention is also paid to the other reports and a brief summary is provided of some of the recommendations for process changes. A key argument I make is that, as Professor Chisholm recognises, family violence is relevant *both* to safety considerations, *and to parenting more broadly*. Key recommendations from his report, including replacing notifications of allegations (Form 4 notifications) with a risk identification and assessment process in each parenting case, are likely to improve safety responses. On the other hand, the rationale around removing the words "family violence" from the list of best interests considerations arguably downplays the non-safety-related relevance of such violence in parenting disputes.

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[1] At http://www.ag.gov.au/www/agd/agd.nsf viewed 30 March 2010.

[2] Kaspiew R, Gray M, Weston R, Moloney L, Hand K, Qu L and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms: Summary Report* (Melbourne: Australian Institute of Family Studies, 2009).

[3] Kaspiew R, Gray M, Weston R, Moloney L, Hand K, Qu L and the Family Law Evaluation Team, *Evaluation of the 2006 Family Law Reforms* (Melbourne: Australian Institute of Family Studies, 2009), p 262.

Background and themes

Professor Richard Chisholm AM, a former judge of the Family Court of Australia, was engaged by the Commonwealth Government in July 2009 to review and report on "the appropriateness of the legislation, practice and procedures"[4] that apply in cases in the family law system where family violence is an issue. As a judge of the court from the mid-1990s until 2004, Professor Chisholm handed down a number of early influential judgments on the issue of the relevance of violence in parenting disputes, pointing to the many ways in which violence is relevant to children's best interests.[5]

At the beginning of the report Professor Chisholm identifies both a descriptive theme in the submissions, and a normative theme for reform.

The descriptive theme which he identifies as running through many of the submissions to the Review is the so-called "victim's dilemma". He describes it in this way:

> It applies where the victim has experienced family violence and has well-founded fears for the safety of the children if they are in the care of the perpetrator … [and] seeks orders that will protect the children from risk (such as orders for no contact or for only supervised contact) … the dilemma is that the seeking of such orders, and spelling out the reasons for the fear of risk, may be seen as vindictive or punitive, dwelling on the past and old grievances, or as a way of alienating the children from the perpetrator.

This creates a concern that, if the court does not accept the evidence it might:

> take an adverse view of the victim, and not only fail to make the orders sought by the victim, but make orders placing the children with the perpetrator for longer periods … Such an outcome, the victim would believe, would place the children at additional risk of harm.[6]

The consequence is, then, that:

> a victim who is rightly focussed on protecting the child therefore faces an agonising choice: balancing the risk to the child from not taking protective action against the risk to the child of doing so unsuccessfully, with the consequence that the child spends more time with the perpetrator.[7]

The normative reform theme identified by Professor Chisholm is that "family violence must be disclosed, understood, and acted upon", in other words:

> [t]he family law system, and each component in it, needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding.[8]

Key recommendations: Substance

The Chisholm Report recommends that three substantive provisions in Pt VII, which have particular relevance to cases involving allegations of family violence, be amended. They are the so-called "friendly parent" provision (s 60CC(3)(c)), the specific costs provision dealing with knowingly false allegations and statements (s 117AB), and the provision requiring advisers (including lawyers) to give certain information to parents in certain circumstances (s 63DA).

Professor Chisholm summarises this set of recommendations in the following way:

> The "friendly parent" provision should be amended so it recognises that parents sometimes need to take action to protect children from risk; that the specific and separate costs provision dealing with knowingly false allegations and statements should be replaced by a simple reference to the giving of

[4] Chisholm R, *Family Courts Violence Review* (27 November 2009), p 4.

[5] See, for example, *In Marriage G* (1994) 122 FLR 209; 18 Fam LR 255; [1994] FLC 92-515.

[6] Chisholm, n 4, p 27.

[7] Chisholm, n 4, p 28.

[8] Chisholm, n 4, p 5.

> knowingly false evidence in the provision that deals with costs; and that the information that advisers are required to provide should reflect not only the importance of parental involvement but also the importance of safety for children.[9]

Each of these provisions was introduced through the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth). Two of them (the "friendly parent" provision and the "advisers" provision) were the subject of significant concern expressed by a group of prominent family law academics prior to their introduction in a submission to government, subsequently published.[10] The "friendly parent" provision has arguably been the most significant contributor to "the victim's dilemma". I welcome these recommendations wholeheartedly.

Professor Chisholm also recommends the government "reconsider the set of provisions dealing with parental responsibility and the guidelines for determining what is in the child's best interests".[11] The bases for these recommendations appear to be three-fold: (1) to reduce complexity and confusion; (2) to reduce what he refers to as a focus on parental entitlements rather than children's best interests; and (3) to move away from what he says has become a "common view that the court is required to order that the children spend equal or near-equal time with each parent except where there is family violence".[12] Empirical evidence clearly demonstrates the existence of complexity and confusion about the provisions, and this is self-evidently an argument for reform, particularly where legal provisions are often self-applied. I would argue that it is not the case that both mothers' and fathers' "entitlements" are the focus of decision-making under the 2006 reforms. Rather, there is a focus on fathers' entitlements, arguably at the expense of both children's and mothers' (particularly those escaping family violence).[13] Further, while it may well be a common view that equal or near-equal time will be ordered except where there is family violence, the AIFS evaluation demonstrates that shared care arrangements are no less likely when parents express safety concerns.[14] Chisholm's recommendations may well result in a reduction in the incidences of inappropriate shared care arrangements. As I explain below, however, I have concerns about reducing any emphasis in the provisions on family violence and its relevance in decision-making about parenting orders.

Both the Chisholm Report and the Family Law Council Report recommend consideration be given to amending the provisions dealing with parental responsibility. For Chisholm the key is removing the link between decisions about parental responsibility and those about time.[15] Thus, he recommends removing the word "equal" from the presumption in s 61DA of the *Family Law Act* (largely because he argues that it suggests to users of the system something about time, but also because of the need to be clear that parents can act independently in relation to third parties like those providing medical treatment to children).[16] He recommends considering amending s 61DA so that it creates a presumption in favour of each parent having "parental responsibility".[17]

The Family Law Council also notes the "perception in the community that equal shared parental responsibility equates to equal time" and recommends the Attorney-General "give consideration to clarifying either through legislative amendment or public education the intention of" the provisions.[18]

[9] Chisholm, n 4, p 7.

[10] Banks C et al, "Review of Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005" (2005) 19 AJFL 79. Section 117AB was included after the release of the Exposure Draft and after the submission was made.

[11] Chisholm, n 4, p 7.

[12] Chisholm, n 4, p 9.

[13] Kaspiew R et al, n 3, 219.

[14] Kaspiew R et al, n 3, 233.

[15] Chisholm, n 4, pp 125-126, 135-136.

[16] Chisholm, n 4, p 136. It is less clear whether Chisholm is of the view that there should continue to be a legal requirement *as between parents* to consult in relation to major long-term issues, as there is now under s 65DAC of the *Family Law Act*.

[17] Chisholm, n 4, p 136.

[18] 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* (December 2009), Recommendation 13.

Specifically it recommends that consideration be given to providing in the legislation that, in determining whether to make an order for equal shared parental responsibility, a court should be required to consider whether such an order is "reasonably practicable".[19] I would agree that greater attention should be paid to the appropriateness of decisions ordering equal shared parental responsibility, particularly in high conflict cases. Arguably, however, the particular amendment recommended by the Family Law Council would create further complexity in Pt VII and, through repetition of the criterion of reasonable practicability, would result in additional equating of the parental responsibility and time provisions. These are exactly the sorts of problems which the Chisholm Report argues it is important to address.

Intriguingly and perhaps most controversially, the Chisholm Report recommends consideration be given to the removal of "family violence" both as a "primary factor" in assessing best interests, but also as a factor mentioned specifically in what Professor Chisholm recommends should be a much briefer, undifferentiated list of best interests considerations. He recommends this approach in preference to an alternative (which he recognises) of strengthening the family violence provisions.[20] This recommendation, which at first glance appears to be inconsistent with moving towards a more effective approach to dealing with family violence, needs to be considered in the context of other recommendations, as well as in light of the changes to the general approach to decision-making about children which Chisholm is recommending.

The argument here is a subtle and important one:

> The artificial prominence given to the two factors [benefits of a meaningful relationship with both parents, and protection from harm] under the present law seems to reflect ideas about parental entitlements: it can be seen as reflecting the main arguments addressed to the parliamentary committees in the course of what has been called the "gender wars", and may also reflect the idea that spending equal time with the child is the right of a parent, forfeited only if the parent has been violence [sic] or abusive.[21]

The recommendations of the Chisholm Report would provide for the continuing relevance of family violence in decisions about children's best interests under the *Family Law Act* in the following ways:

1. Protection of children from harm from being subject to abuse, neglect or family violence would, under Professor Chisholm's recommendations, continue to be an object of Pt VII embodied in s 60B, alongside the other current objects, including "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".
2. Professor Chisholm's undifferentiated list of best interests considerations would include "the capacity and willingness of each parent or other relevant person to provide for the child's safety, welfare and well-being, and the extent to which each of the child's parents has fulfilled, or failed to fulfil, his or her responsibilities as parent" (proposed new s 60CC(2)(d)).

This latter provision would replace the so-called "friendly parent principle", discussed above. The fact that a parent has perpetrated "family violence" would clearly be relevant under the proposed new paragraph. But there would no longer be a specific provision requiring the court to give consideration to "any family violence involving the child or a member of the child's family" (currently s 60CC(3)(j)). Chisholm's explanation is that: "although family violence is obviously relevant to any assessment of the child's safety and well-being, … there seems no proper reason to single it out among matters that might threaten a child's safety".[22]

[19] Family Law Council, n 18, p 84. Council recommends that this would require the courts to have regard to at least: "(a) the parties' capacity and/or willingness to communicate co-operatively; (b) the extent of any family violence; (c) the impact such an order would have on a child".

[20] Chisholm, n 4, p 130.

[21] Chisholm, n 4, p 9.

[22] Chisholm, n 4, p 139.

While, with respect, I agree entirely with the need to simplify the provisions for decision-making in Pt VII of the *Family Law Act*, I would argue that this particular amendment and the explanation given for it is arguably inconsistent with the insight elsewhere in the report that "family violence" does not *just* give rise to safety considerations. In a section of his report headed "Violence, parenting and children", Chisholm identifies the ways in which family violence is relevant to decision-making *in addition to* its relevance to safety considerations for children. These include that "violent behaviour by a parent is a poor example for children", that violent behaviour "can have a disabling impact on the parent who is subjected to it", and that witnessing violence damages children's psychological well-being.[23] The current requirement to have regard to "any family violence involving the child or a member of the child's family" provides a pointed basis for a decision-maker to consider both the safety and the additional relevance of such violence. Despite this, the AIFS evaluation showed continuing "lack of understanding among professionals, including lawyers and decision-makers, about family violence and the way in which it affects children and parents".[24] While Professor Chisholm's more succinct list of best interests considerations would clearly not exclude these considerations, the failure to mention family violence specifically would arguably lead to diminished, rather than increased, attention to these ways in which family violence has impacts on best interests.

It is notable also, that while "family violence" would not be specifically mentioned in the best interests list, the other current "primary consideration" (although significantly re-expressed) *would* be: namely a proposed s 60CC(2)(c) – "the benefit the child has received, and is likely to receive, from a meaningful relationship with both of the child's parents". As is clear from these words, Professor Chisholm has reformulated this consideration to ensure that emphasis is placed not on the abstract idea that children benefit from meaningful relationships with their parents, but on concrete evidence about what benefits there have been in the past, and what there are likely to be in the future. This is an important change, but the continuation of reference to "meaningful relationships" at the same time as removing reference to "family violence" is concerning. While Professor Chisholm's intention is clearly not to reduce the attention paid to family violence (quite the opposite), it is not implausible that removing reference to "family violence" would have that effect. We already know that, under the current provisions, "lawyers and relationship service professionals both expressed much greater confidence in the ability of the family law system to ensure that children had meaningful involvement with each parent than in its ability to ensure that children are protected from harm, family violence, child abuse and neglect".[25] This amendment is likely to amplify that concern.

There are, in my view, four reasons additional to those identified by Professor Chisholm why family violence is relevant to decision-making about parenting orders, and why "family violence" should continue to be mentioned in the "best interests" considerations specifically and separately from considerations of safety. In my view, these are arguably under-played in the report.

First, the fact that a parent perpetrates controlling gender-based family violence will indicate something more than just that. This kind of violence stems from values and beliefs about gender roles and male entitlement which are likely to be reflected in other kinds of parenting behaviour. Children need not only the modelling of non-violent behaviour to which Professor Chisholm refers, but also the modelling and practice of appropriate attitudes and behaviour in relation to gender roles and respectful relationships.[26] Indeed, Professor Chisholm draws this link: "[c]hildren need respectful relationships".[27] Perpetrators of controlling violence are unlikely to provide these respectful relationships, nor to model them in their interactions with others. There is also evidence that violent fathers are often

[23] Chisholm, n 4, p 44.

[24] Kaspiew et al, n 2, p 23.

[25] Kaspiew et al, n 2, p 14.

[26] *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009-2021* (March 2009), defines "respectful relationships" in the following way: "[they are] relationships between all people in which men, women and children are equally valued, and in which violence plays no part. They are based on mutual respect, equality, trust and support. Respectful relationships acknowledge and embrace diversity" at p 191.

[27] Chisholm, n 4, p 10.

poor, egocentric parents,[28] and, as one child psychologist has pointed out, "spending time with a second-rate parent is a disadvantage if you already have a first-rate parent".[29] In light of this insight, it is concerning that the recent AIFS empirical data shows that: "[f]amilies where violence had occurred … were no less likely to have shared care time arrangements than those where violence had not occurred".[30]

Second, there is evidence that perpetrators of this kind of violence use the family law system as a way of attempting to maintain or reassert power and control. Thus, the Family Court's *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* in Part E contains a list adapted from social science literature of factors of potential relevance in cases involving family violence, and which judicial officers may wish to consider. A factor there is the motivation of the parent seeking a parenting order (including, whether the motivation is a means of "continuing a process of family violence against or intimidation or harassment of the other parent"). This aspect receives minimal attention in the Chisholm Report, although government is urged to consider any possible need to amend s 118 (the "vexatious litigant") provision to enable a court to itself initiate proceedings to have a person declared a vexatious litigant.[31]

Third, the fact that one parent is the victim of family violence at the hands of the other parent may well significantly affect their capacity to negotiate and resolve disputes with that other parent consistently with children's best interests. This has implications for both process and substantive decisions. For example, the exemption from compulsory family dispute resolution prior to filing in court for parenting orders recognises not just that such dispute resolution might endanger safety, but also that it could result in outcomes which, because of the bullying behaviour which often accompanies family violence, are not in children's best interests. In terms of substantive outcomes, this effect of family violence is part of the explanation for the fact that the presumption in favour of equal shared parental responsibility does not apply in cases of family violence.[32] This dynamic has implications for law reform as well, and is arguably (although Professor Chisholm does not articulate it this way) a major argument in favour of changes to the provisions which are misinterpreted as a presumption in favour of equal time. A parent disempowered as a result of family violence is likely to be less able to resist a presumptive outcome (or one which they believe or are persuaded to believe is a presumptive outcome) even if they rightly believe that such an outcome is contrary to their children's best interests.[33]

Fourth, and perhaps most controversially, I would argue that the Chisholm Report pays insufficient attention to the well-accepted principle that the best interests of children are the paramount, *but not the sole* consideration in parenting disputes,[34] and to the important role which the specific mention of family violence in the relevant provisions can have in empowering victims of controlling family violence.

[28] Bancroft L and Silverman J, *The Batterer as Parent: Addressing the Impact of Domestic Violence on Family Dynamics* (Sage Publications, 2002).

[29] Rodgers B in "A Post-Symposium Email Discussion: Time and Relationships" in Behrens J, Smyth B and Kaspiew R (eds), *Symposium Proceedings Relocation Disputes in Australia: What do we know, and what are the implications for family law and policy?* (Canberra, 2008).

[30] Kaspiew et al, n 2, p 23.

[31] Chisholm, n 4, p 173.

[32] Current s 61DA(2) of the *Family Law Act*.

[33] Professor Chisholm refers to the fact that settled cases may not reflect "a reasonable and child-focused compromise" for reasons including this one (p 86). He refers to the Family Court's *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged* (2009), which contain a list of possible courses of action where a court is asked to make consent orders and there are allegations of family violence. While he indicates their usefulness, he recommends against making them mandatory by, for example, incorporating them in the court rules.

[34] *S v F* (1999) 199 CLR 160 at 207-208; 73 ALJR 927; 163 ALR 501; 24 Fam LR 756; [1999] FLC 92-852; [1999] HCA 26 (Kirby J), adopted by the Full Court of the Family Court in subsequent cases, including *A v A* (2000) 26 Fam LR 382; [2000] FLC 93-035; [2000] FamCA 751.

Even if such an outcome could be regarded in a child's best interests, the *fairness* of allowing a parent who has abused another to, for example, then use the court system to restrain that parent's relocation (or perhaps even to argue for such a restraint) is a matter which it may not be fashionable to mention, but which is surely relevant in any public policy discussion. In my view, a gender analysis is critical to understanding the public policy implications of processes and decisions which provide for such outcomes. Such analysis contemplates the gendered lives we continue to live, and the implications of our gender for the power and choices which we have, as well as the tendency for there to be different expectations of self-sacrifice and so on for men and women. Such an analysis must contemplate controlling family violence in this context (that is, as enabled by gender-based inequalities of power and performing a role in perpetuating them). In this sense I do not agree with Professor Chisholm when he writes that: "it is not necessary that this Report be based on any particular view about the connection between gender and family violence".[35] Although family violence may not always be about gender, it very often is. And it is important to know this both at the level of law and policy making, and at the level of individual decision-making (even though, as Professor Chisholm stresses, one must be careful not to pre-judge based on stereotypes).

The potential role of law in empowering victims of family violence is one of the arguments I have made in favour of a presumption against contact in cases of controlling violence.[36] Such empowering is important in part because, as I point out above, a disempowered parent is less able to negotiate an outcome in their children's best interests. Professor Chisholm recommends against provisions like these on the basis that they contribute to the bifurcation of the system in which shared care is assumed unless safety considerations are established.[37] This would, however, not be the case if the other aspects of the legislation which contribute to this bifurcation were removed, as he recommends. A presumption against contact would not mean that a perpetrator of controlling violence can never see their children, but rather that the presumptive outcome against which they would have to argue would be that. To convince a court that the presumption should be displaced they would need to demonstrate that they accept responsibility for their behaviour, that they have taken steps to ensure change, and so on. This is consistent with children's best interests and would also empower adult victims of violence (important in itself, but also in children's best interests). I would argue that a presumption against contact in cases of controlling family violence is an option which deserves further consideration.

In recommending that s 117AB (the specific costs provision) be repealed,[38] Professor Chisholm is alert to the ways in which a provision like this can be interpreted in the communities of users of the family law system, despite judicial practices and interpretations.[39] In short, although "orders under s 117 AB are in practice rarely sought and rarely made", Chisholm recognised that "it is possible that the fear of a costs order (whether well founded or not) may influence litigants in the way they present evidence".[40] In essence, such a provision can contribute to "the victim's dilemma".

This insight – that provisions may be interpreted among communities of users in a way which does not reflect their actual operation at the judicial decision-making level – arguably does not, however, pervade Chisholm's discussion of the definition of "family violence" in s 4 of the *Family Law Act*. A number of issues are raised, and there is a very thoughtful and important discussion about the need to tailor the definition of violence to the purpose for which it is needed. However, Chisholm does not share many commentators' concern about the inclusion in that definition in 2006 of the requirement that a person *reasonably* fear for their well-being or safety in order for conduct to be classified as family violence. His view is that this requirement would be interpreted in such a way as

[35] Chisholm, n 4, p 46.

[36] Behrens J, "The Form and Substance of Australian Legislation on Parenting Orders: A case for the principles of care and diversity and presumptions based on them" (2002) 24(4) *Journal of Social Welfare and Family Law* 401 at 414-415.

[37] Chisholm, n 4, pp 128-129.

[38] Chisholm, n 4, p 118.

[39] This is an insight from John Dewar and Stephen Parker's empirical work assessing the 1995 reforms to Pt VII, Dewar J and Parker S, "The Impact of the New Part VII Family Law Act 1975" (1999) 13 AJFL 1 at 20.

[40] Chisholm, n 4, p 116.

to require account to be taken in assessing reasonableness of the circumstances and history of the violence in the particular case. While Chisholm is probably right about the likely judicial interpretation of this provision, this fact may not be understood by users of the system. In contrast, the Family Law Council in its report recommended a new definition of "family violence" which would encompass a broader range of conduct and would not contain the "objective" element in the current definition.[41]

KEY RECOMMENDATIONS: PROCESS

In addition to recommendations for changes to the substantive provisions, the Chisholm Report makes significant recommendations for changes to processes. One of the most significant of these recommendations is that "in each parenting case the court must conduct a risk identification and assessment, rather than providing for the filing of a document that will require the courts to take particular actions".[42]

In contrast, the Family Law Council has recommended that a risk assessment process be one of the options available to courts under s 60K of the *Family Law Act*. The Council recommends that, in addition to the requirement under s 67Z to file a Form 4 in cases of allegations of child abuse, there be a requirement to file a "Notification of Family Violence" form in "all cases in which a party claims family violence is a factor to which the court should have regard in determining a parenting case".[43]

The recommendation in the Chisholm Report that the process be changed from one of notification to one of risk assessment again might be seen to suggest that the focus is to be on safety, rather than on the broader range of ways in which family violence is relevant to a parenting dispute.

Key to Professor Chisholm's recommendations is that courts have access to a broader range of information in carrying out this risk assessment. In particular, he recommends consideration be given to amending provisions of the Act "relating to the confidentiality of information held by agencies outside the court, including dispute resolution agencies". As Chisholm points out:

> A great deal of relevant information will often be available, held by police, child protection departments, other agencies and, in particular, family relationships centres and other agencies providing dispute resolution services. If that information could be available at an early stage, the court would be better placed to assess any risk, and deal appropriate [sic] with it.[44]

The Family Law Council makes recommendations for access to information of a more general sort. In particular, it recommends that the Attorney-General facilitate a "family violence common knowledge base for those involved in the family relationship and family law system".[45] Judicial officers would then be enabled to take judicial notice of this common knowledge base.[46]

RESOURCES, RESOURCES, RESOURCES...

The Chisholm Report makes clear that more resources must be provided to the system if it is to more effectively deal with cases involving allegations of family violence. These additional resources are needed for the current system to operate more effectively, and are even more necessary if the recommendations for process changes which Professor Chisholm makes (in particular for risk identification and assessment in each parenting case) are adopted. And there may be other programs which could be developed and resourced to provide better support to those who have experienced family violence, including, for example, funding for lay support people who are experienced in assisting victims of family violence at court. The availability of such support alongside, for example, effective use of safety plans, may help victims to feel safer and less disempowered at court.

[41] Family Law Council, n 18, Recommendation 1.

[42] Chisholm, n 4, Recommendation 2.3.

[43] Family Law Council, n 18, Recommendation 10.

[44] Chisholm, n 4, p 76.

[45] Family Law Council, n 18, p 10.

[46] Family Law Council, n 18, p 10.

CONCLUDING THOUGHTS

The Chisholm Report contains many important insights, with a particular emphasis on how to improve safety for victims of family violence. Its recommendations for amendments to three specific provisions are to be welcomed, and are likely to improve outcomes in cases involving allegations of family violence, in particular by reducing the "victim's dilemma". I am, however, concerned that any amendments not downplay the ways in which family violence is relevant *beyond* safety considerations. The Family Court's own *Best Practice Principles* provide quite a comprehensive list of these, and, in my view, consideration should be given to incorporating these in some form into the legislation or relevant court rules. Professor Chisholm recommends the government first consider simplifying the general provisions, removing the link between parental responsibility and time, and removing specific reference to family violence in the best interests considerations. It may be that these changes will, by reorienting parents and decision-makers to focus on children's best interests, enable greater attention to be paid, in decisions about how much time a child spends with a parent, to the *quality* of relationships between parent and child and the *quality* of parenting provided to the child. It may be easier to get expert evidence as to these matters than it is to prove family violence. It may then be that children will spend less time with a violent, authoritarian and egocentric parent than they otherwise would and that is self-evidently a good outcome. I worry, however, about removing the reference to "family violence" from the best interests considerations, in part because of the messages this may send to communities of users. It is not clear to me why Professor Chisholm's second option, namely "strengthening the family violence provisions" is an alternative to his preferred position, and why the simplification he recommends cannot be accompanied by such strengthening.[47]

Concerns expressed by Professor Chisholm about the current legislation buying into "gender wars"[48] and thereby creating a sense of parental entitlement rather than a focus on children's best interests, are important. However, in my view, such concerns should not mean that we ignore the gendered contexts within which family violence occurs (I do not suggest Professor Chisholm does this), and the important role which law and the legal system can play in empowering victims consistently with children's best interests. As all three recently-released reports have shown, the family law system does not respond as effectively as it could and should to family violence. The fact that this has significant implications for women's substantive equality is an additional argument for acting (including resourcing) urgently.

Government will no doubt examine all three reports, as well as the Australian Law Reform Commission's report on its Family Violence Inquiry due in July 2010,[49] with a view to reform both of the relevant substantive provisions of the *Family Law Act*, and of associated processes. Many of the problems identified as resulting from the 2006 reforms were predicted before they became law; it is extremely unfortunate that the previous federal government proceeded with those reforms nonetheless, and that further reform is now clearly necessary. Chisholm's call for more resources for "the system" should not go unanswered. The current federal government demonstrated its commitment to responding more effectively to family violence in our community through its establishment of the National Council to Reduce Violence against Women and their Children. Appropriate family law responses are important in themselves, but also as a key part of any broader strategy towards that Council's vision that "women and their children live free from violence, within respectful relationships, and in safe communities".[50]

[47] Chisholm, n 4, p 130.

[48] Chisholm, n 4, p 9.

[49] At the time of writing the Australian Law Reform Commission was about to release a Consultation Paper on its Family Violence Inquiry: http://www.alrc.gov.au viewed 27 April 2010.

[50] *Time for Action: The National Council's Plan for Australia to Reduce Violence Against Women and their Children, 2009-2021* (March 2009), Recommendation 1.