

Chapter Six

Discussion and Conclusions

The study found that for most of the women interviewed, the end of the relationship had not meant an end to violence towards them. Much of this violence was linked in some way to the negotiation and exercise of child contact. We have found that the protection of women and children from domestic violence is frequently overlooked in the process of negotiating and implementing child contact arrangements. This oversight appears to stem from the fact that concerns about domestic violence are often overridden by views about the best interests of the child that assume that the best interests of the child always require contact with both parents, even in those cases where there is real cause to question that. Furthermore, there are problems making contact safe for women and children because of the general lack of access to contact centres. We found many instances of unsafe contact arrangements made both by private agreement and by court order.

1. Identifying Violence

The study found an absence of, or failures with screening violent relationships at various points in the system. There was also a mistaken presumption amongst professionals that women who are victims of violence can and will self identify.

The study found that separate Family Court counselling in cases of domestic violence was not uniformly supported or practiced by counsellors and that some of these cases are being mediated despite a general belief that cases involving domestic violence are not appropriate for mediation. We recommend that the Family Court Violence Committee review the policies and practices of counselling and mediation in cases of violence in the Family Court registries in their current Family Violence Consultation.¹

2. Protecting Women and Children

There is a real concern about whether the child's best interests are genuinely being protected in cases where child contact and domestic violence co-exist. For example, it is now widely recognised that witnessing domestic violence perpetrated on one of their parents generally influences children's behavior detrimentally. Given the high levels of violence during contact and contact changeover found in the study, much of which was witnessed by children, it must be questioned whether that contact was in the children's best interests. Furthermore most of the professionals that we interviewed saw violence against a parent as irrelevant to or separable from children's interests.

It is also of concern that the safety of the women themselves (even separate from the children's best interests) was not seen as a major factor when negotiating contact arrangements. Our research found a presumption held by many professionals that certain changeover arrangements such as in public places or with third party

¹ For more details about the consultation see <http://www.familycourt.gov.au/html/fvc.html> [last accessed 16/10/02]

assistance were sufficient to ensure women's safety. However, it was also clear from the interviews with women that this presumption is ill founded.

Pressures on the women to consent to contact and even to become non-resident parents were enormous and led to women consenting to arrangements that compromised either their own personal safety or were not in the best interests of the children. Additionally, court orders such as 'contact as agreed between the parties' provided even greater opportunities for abuse than no order at all.

There was a suggestion by several women and many of the professionals that the outcome of their cases were influenced by some notion of standard, or minimum, orders. This notion of standard contact orders means that women are constrained from arguing for what they really feel is safe and appropriate because they are led to believe that any such argument would be futile. If it is the case that the outcomes of matters in which domestic violence has occurred do not differ from those where there is no history of domestic violence then it must be asked to what extent domestic violence is being given consideration in determining a child's best interests in decision-making about contact.²

These problems may be ameliorated by reform to the *Family Law Act 1975* so that where there is a history of domestic violence for contact to occur a case must be made that it would be in the best interests of the children. This would be similar to the position in New Zealand where section 16B *Guardianship Act 1968* requires a court not to give the violent party custody or access – other than supervised access – unless satisfied that the child will be safe. Additionally, the New Zealand *Domestic Violence Act 1995* provides that, when there is a Protection Order in place, the respondent may not contact any child of the applicant's family, unless contact is permitted under any order or written agreement.

A change to the *Family Law Act 1975* introducing a presumption against contact where there has been violence would not only direct the Court to prioritise the safety of children, but would also provide a backdrop for negotiations in such cases. Previous researchers have recommended that:

*The Federal Attorney-General's Department and/ or the Family Law Council investigate reform of the Family Law Act 1975 to implement similar provisions to the New Zealand Guardianship Act that prioritises the safety of children.*³

We endorse that recommendation and note the New Zealand research which found that the 1995 changes to the *Guardianship Act* together with the *Domestic Violence Act 1975* have empowered custodial parents to resist pressure to make access arrangements that they felt would place their children at risk.⁴ However, it should be noted that introduction of similar provisions would not provide solutions for those

² This would be despite clear Full Court of the Family Court decisions that violent behaviour towards a parent is relevant to residence and contact outcomes.

³ Rendell et al (2000), Recommendation 7.3, p 111. It should also be noted that although the Children Act sub-committee decided to introduce good practice guidelines rather than amend the Children Act (UK) in line with the New Zealand legislation, they stated that they "believe[d] the Government should revisit the question of legislative reform once there has been a proper opportunity to monitor the Guidelines": Children Act Sub-Committee (2000), p26.

⁴ Chetwin, et al (1999), p81.

families where the woman is so scared of her ex-partner that she is too frightened to apply for an ADVO or to take family law proceedings. The introduction of this legislation would also not address the problems that we found in relation to supervised contact or the ADVO system.

3. Multiple Jurisdictions

Australia's Constitution means that neither the Commonwealth nor the States have exclusive competence in areas of law that may be considered "Family Law" in other systems.⁵ The impact of this for women in our study was that child protection and protection from family violence by obtaining an ADVO were matters generally dealt with by State law, whilst parenting orders were matters for Commonwealth law. Many of the women therefore had been involved in matters in two or more courts. This led to frustration and confusion in many cases.⁶

Division 11 of the *FLA 1975* was introduced in 1995 to deal with inconsistencies between *FLA* contact orders and State and Territory family violence orders. However, we found that many of the women received ADVOs that were "subject to Family Court contact orders" so that there was no actual inconsistency between the ADVO and a subsequent contact order. Several of these women then experienced problems in obtaining police action when potential breaches of the ADVO were reported to the police due to apparent difficulties in establishing whether a breach had occurred. We agree with the comment made by a judge to previous researchers which was that the use of pro-forma family violence orders with exceptions for court ordered contact is "a cop-out" which "avoids the real problem of women's safety".⁷ We recommend that Magistrates be educated about domestic violence, child abuse and their inter-relationship.⁸

Division 11 also introduced a power for Magistrates to "make, vary, discharge or suspend" a contact order made under the *Family Law Act* when making or varying an ADVO.⁹ However, our research showed a number of instances where Magistrates had not used this power even where it would have been the most appropriate action and also that professionals interviewed were generally unaware of or hesitant to consider the use of the power. This is consistent with earlier research.¹⁰ We recommend that Magistrates, police prosecutors and solicitors be educated about the existence and use of this power.¹¹

⁵ Kelly and Fehlberg (2002), pp 38-70.

⁶ See also Australian Law Reform Commission (1997), para 15.17; Dessau, (1998). We note that the Family Law Council is currently investigating the interaction between the Family Law Act and State and Territory child and family services legislation and await their conclusions with interest: Family Law Council (2000).

⁷ Rhoades, et al (1999) p51. Again it should be considered whether legislation similar to the New Zealand *Domestic Violence Act 1995* should be introduced across State and Territory legislation.

⁸ We note that the Family Law Pathways Advisory Group (2001) makes a similar recommendation (Recommendation 18.6), p 67.

⁹ S68T *Family Law Act 1975*.

¹⁰ Kearney McKenzie and Associates (1998)

¹¹ We note that the Violence Committee of the Family Law Council is currently preparing a letter of advice to the Attorney-General regarding options to reform Division 11 of the Family Law Act. See <http://www.ag.gov.au/flc/newsletter/flcn33.htm> [last accessed 22/10/02].

In cases involving child abuse allegations the major concerns raised from the overlapping jurisdictions included the perceived failures by DOCS to take action, particularly when the Family Court was already involved, and the complexities of having matters in two or more different courts. A streamlined system for dealing with such cases, together with better coordination between DOCS and the Family Court, is long overdue in NSW.¹² Pilot programs to deal with these cases in an integrated and multidisciplinary way currently exist in Victoria (Magellan) and Western Australia (Columbus).¹³ The Magellan project has been evaluated as an “outstanding success”.¹⁴ We note that the definition of ‘child abuse’ used in the West Australian Columbus Project includes physical and sexual abuse, substance abuse, psychiatric illness, domestic violence and the witnessing of domestic violence. The Magellan definition does not include this final category. We await the results of the external evaluation of the Columbus project with interest.

An additional important benefit of a Magellan/ Columbus style project would be that the project would involve the use of the same team for the entire legal proceedings of a case. This would ensure continuity of case management for each case and the development of expertise in the details and dynamics as it progressed.¹⁵ This would be extremely beneficial given comments by some of the women about the advantages of continuity with professionals, particularly those women whose ex-partners were extremely litigious.

We support the recommendation of the Family Law Pathways Advisory Group:

That the Council of Australian Governments, as a matter of urgency, consider ways to improve coordination between levels of government in order that:

- a family law, violence and child abuse matters can be dealt with in the same place at the same time;*
- b processes for handling these cases are streamlined;*
- c assessment and resolution of such cases is expedited; and*
- d cooperation is improved and promoted between professionals and services working with at-risk families who are involved with the family law system.¹⁶*

4. Supervised contact

There was a high level of unsupervised contact arrangements in our study despite the fact that the father of the children had a past record of violence towards the mother of the children (often witnessed by the children), and in a significant number of instances towards the children themselves. Where contact had been supervised, such supervision was often informally by the mother herself or by family or friends. Those supervision arrangements had all proved problematic.

¹² The Family Law Pathways Advisory Group (2001), p68, also recommended that “the principles and practices underlying the Magellan Project should be extended to other locations”.

¹³ The Family Court has also set up a similar project in Brisbane.

¹⁴ Brown et al (2001), p v.

¹⁵ Brown (2001), p 11.

¹⁶ Family Law Pathways Advisory Group (2001), Recommendation 28, p84.

There was substantial support from both the women and professionals interviewed for formal supervised contact centres. However, few of the women interviewed had been able to use a centre for changeover or contact because there was not one available in their area, and even those who had used a centre found that it was only available for a short period due to the high level of demand for the centres' services.

There has been an increase in funding by the Commonwealth Government to increase the number of centres, but it was clear from the research that there are still insufficient centres at least in the Sydney metropolitan area. The Australian Children's Contact Services Association (ACCSA) has developed standards that take account of issues of domestic violence and child abuse. Any funding of further centres should include a requirement that they meet the ACCSA standards.¹⁷

Not all centres are able to offer a highly vigilant level of supervision. Solicitors and judges should be encouraged to acquaint themselves with the services available at their local supervised contact centre and should not assume that a centre is able to deal with all levels of supervision.

The existence of supervised contact centres should not be seen as a 'panacea' to deal with all difficult contact cases. In some cases, no contact may be the most appropriate outcome.¹⁸ As noted above, however, we found that it was extremely rare for a 'no-contact' order to be made even in cases of severe domestic violence.

If supervised contact *is* appropriate on the facts of a particular case, then it is important to also consider whether longer-term supervised contact might be preferable to short-term supervision in the circumstances.

5. Conclusion

The high levels of violence found in this study during the negotiation and the exercise of contact are of extreme concern. The system is obviously not responding effectively to the needs of women and children where there has been domestic violence. We hope that this research provides useful information to guide policy, practice and law reform to improve the system.

¹⁷ See the similar recommendation by Rendell, et al (2000) at 98.

¹⁸ We note that research into supervised contact centres is currently being undertaken by Sheehan et al (forthcoming) and also in the United Kingdom by Aris, et al (forthcoming). We look forward to the results of that research.