

FAMILY LAW AND FAMILY VIOLENCE: RESEARCH TO PRACTICE

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KEY POINTS

- Children's wellbeing depends, among other things, on them being protected from harm, including the harm of exposure to domestic violence or exposure to triggers of trauma arising from previous abuse.
- The safety and wellbeing of a protective parent is also linked to children's recovery and healing from a history of living with domestic violence.
- Research shows that engagement with family law systems has at times undermined pathways to recovery and wellbeing for victims of domestic violence and their children.
- Family law system responses to domestic violence can be improved by focusing on three key elements from the 'Chisholm Report': disclosure, understanding and action (Chisholm 2009). Practice pointers will be structured to address these three elements.
- Better integration of the work of domestic violence and family law system professionals will contribute to practice improvement across these three areas.

INTRODUCTION

The last ten years have seen a growth in the knowledge base around children's need for safe, stable and secure environments. There is a deepening understanding of the harm and damage that occurs when safety and security are compromised, and children are exposed to threats and fear. Yet, responses to families experiencing violence and abuse have not always kept pace with these advances in research. The laws, systems and services with which families engage can fail to provide or support the factors necessary to enable children to thrive. They may instead undermine the work of protective and safe parents who are attempting to create such environments. At their worst, bureaucratic and legal interventions can become the catalysts that lead to increased or ongoing harm or trauma. It is in the interests of all practitioners and professionals whose work has an impact on families, therefore, to ensure that they do not exacerbate the damage faced by children exposed to violence, instead that their work supports the circumstances that enable children to heal, thrive and grow.

This Research into Practice Brief considers how practitioners can use the evidence base to better

understand and improve the experiences of children and their protective parents when they engage with family law systems, post-separation from the abuser. The paper aims to provide discussion points and practice reflections for family law sector professionals working at the intersection of these two fields, and to better equip domestic violence sector workers to engage with this sector around their shared concerns.ⁱ

BACKGROUND

In 2006, major changes primarily focused on custody arrangements were introduced to Australia's *Family Law Act 1975* (Cth). These cemented a growing social and legal trend to prioritise contact with non-resident parents over preservation of the 'pre-separation parenting status quo' or pre-separation care arrangements (Fehlberg *et al.* 2011, p. 10). Whilst the new Act acknowledges the impact of family violence as a factor in determining children's best interests, it also ensures a focus on the promotion of meaningful relationships between children and parents. In addition, there is a presumption of shared responsibility, following which the Act directs courts to

consider custody arrangements for children with equal or substantial time with both parents.

As a result of the 2006 changes, the determination of parenting arrangements (and children's 'best interests') has rested upon what has been labelled 'twin pillars' of safety and the promotion of parent/child relationships (Chisholm 2009, p. 127). However, when applied to the individual circumstances of families, in many cases the family law system has failed to address the potentially conflicting aims of these two concerns. Studies of judicial determinations show that courts will often prioritise the relationship over the safety when dealing with parenting arrangements where violence is an issue (Alexander 2010; Moloney *et al.* 2007; Naraq 2008).

In response to concerns expressed by practitioners about these potentially contradictory and problematic directions for determining children's best interests, in 2008 the Commonwealth Government commissioned research to investigate the impacts of these reforms. The reports from this research, summarised in the adjunct Clearinghouse Thematic Review, provide part of the evidence validating practitioner concerns and subsequently a foundation for the practice issues considered below.

One of the key reports which specifically examined family violence, the 'Chisholm Report', (Chisholm 2009), identified the need to enhance practice through three stages of work with families. These stages are adapted for this paper (see Figure 1).

These three elements provide a useful framework for developing practice pointers from the research, as well as the summaries and commentary in this paper.

DISCLOSURES OF FAMILY VIOLENCE

Domestic violence practitioners acknowledge the many difficulties that may prevent women from talking about or disclosing their experiences of domestic violence. Shame, the anticipation of negative judgment, cynicism or disbelief by the practitioner and the consequences of living with abuse combine to provide real and understandable disincentives to disclosure (Australian Bureau of Statistics 2006; Laing 2010; Mouzos & Makkai 2004). It takes time, trust and safety before many victims of family violence will reveal their experiences to professionals.

Several issues identified in recent research demonstrate ways in which disclosure of domestic violence can, in fact, be hampered by the family law system. One of these is overt discouragement of victims from bringing up issues of violence. At times, lawyers may deter women from raising issues of family violence (Chisholm 2009, p. 166; Kaspiew *et al.* 2009, ch. 10; Laing 2010, p. 65). It is not yet clear whether this is because of their own prejudices about the truthfulness of women's claims (Laing 2010, p. 65), concern for the additional costs to clients associated with preparing the court formsⁱⁱ or their reasonably held predictions about negative outcomes for clients based on previous experience with particular magistrates.

The reticence to disclose may, in part, be a result of the 'friendly parent' provision (s 60CC (3) (c)) in the Act, which requires the court to consider the extent to which parents encourage relationships between children and the other parent (Bagshaw *et al.* 2011, p. 72; Chisholm 2009, p. 27; Kaspiew *et al.* 2009, p. 250; Laing 2010, p. 10). The courts have given 'encouraging a relationship' a surprisingly wide interpretation.ⁱⁱⁱ This has created what Professor Chisholm (2009, p. 27) has labelled the 'victim's dilemma', whereby victims of domestic violence have been deterred from raising

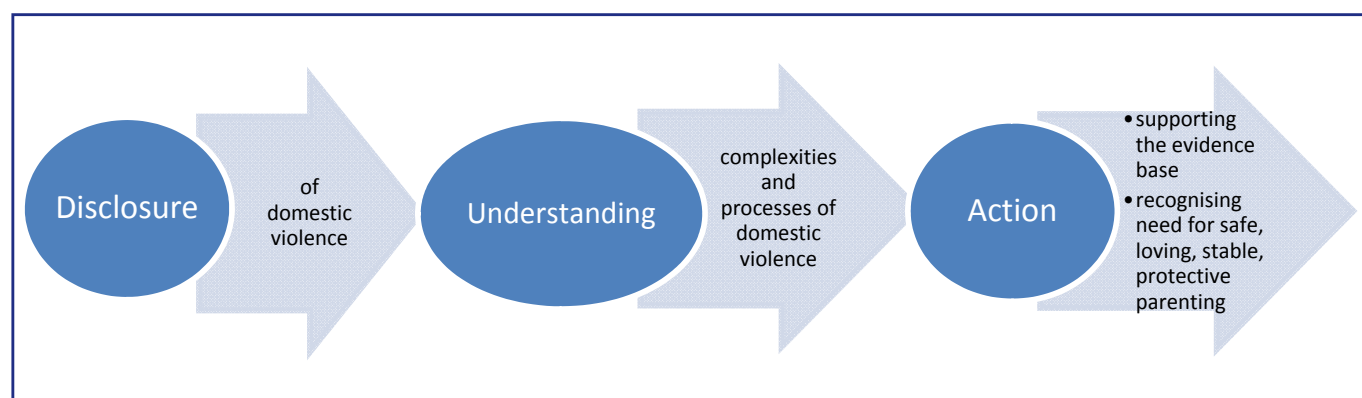


Figure 1: Disclosure + Understanding + Action

the abuse for fear of being seen as unsupportive of the child's relationship with the other parent (Bagshaw *et al.* 2010; Laing 2010). Victims may feel unable to ask for reduced contact or no-contact orders, even though such orders may be the only means by which they and their children can be protected from abuse (Laing 2010, p. 55). The Family Law Legislation Amendment (Family Violence and Other Measures) Bill, passed by Federal Parliament in 2011, will address this issue.

Another issue to emerge from the research is the discrepancy between practitioners' confidence about their capacity to identify domestic violence and encourage disclosure in comparison to women's actual experiences of the family law system (Kaspiew *et al.* 2009, p. 238; Keys Young 1999; Kirkwood 2007; Parkinson *et al.* 2010a, p. 935). Many lawyers are falsely confident that they can accurately establish the existence of domestic violence solely by the appearance or demeanour of their male and female clients (Parkinson *et al.* 2010a).

Lack of a supportive and validating reception of their experiences also inhibits victims from disclosing. A recent study showed the ways in which efforts by victims to raise the topic of domestic violence can be glossed over, dismissed or ignored during sessions with a family law system practitioner (Trinder *et al.* 2010). There is a 'climate of disbelief' (Laing 2010, p. 92) that diminishes the capacity of the system to support disclosure (Bagshaw *et al.* 2010, p. 81). A concern of some commentators and professionals is the possibility of false or malignant claims of abuse for strategic purposes (Chisholm 2009, p. 48; Maloney *et al.* 2007; Parkinson *et al.* 2010b). Despite the fact that false claims are not a gender specific behavior, this concern is usually only directed at women. More importantly, inappropriate claims of abuse have been linked with *perpetrator* behaviours, particularly in the context of falsifying their own claims of victimisation (Bancroft, Silverman & Ritchie 2011; Wangmann 2010).

Children may also face disbelief when attempting to disclose family violence. Studies have highlighted a strong need among children to be heard and believed regarding their experiences (Bagshaw *et al.* 2010, p. 13, p179; Cashmore *et al.* 2010, ch. 5; Lodge & Alexander 2010). In addition, 'parental alienation syndrome' ('PAS') continues to be referred to, despite no medical evidence for this as a syndrome and significant evidence disproving the theory (Bagshaw *et al.* 2010, p. 80).^{iv} Failure to validate and prioritise children's concerns about their safety and wellbeing will impact significantly on the likelihood and effectiveness of their disclosure about family violence.

UNDERSTANDING FAMILY VIOLENCE

The evidence base indicates that in order to support victims of abuse adequately, practitioners need a critical understanding of the complexities of domestic violence. This involves understanding:

- the serious and damaging impact of exposure to family violence on children that *in itself* constitutes harm
- the ways in which exposure to violence may affect the way women are perceived or understood within the family law system
- the ways in which perpetrators attempt to engage practitioners in colluding with them
- the complex and historical nature of abusive relationships
- the related danger in short-cutting risk assessment through application of diagnostic typologies of abuse.

Understanding the need for children to be protected from exposure to abusers

Research shows the many ways in which children are affected by family violence, including harm that is caused directly to children, trauma caused by exposure to violence, and stress and trauma experienced and relived where there is ongoing contact with situations or persons who have caused the initial fear. Practitioners have not always shown sufficient awareness of the importance of safety and security to children's best interests (Chisholm 2009, p. 12).

Forms of exposure

Children's exposure to violence can take a number of forms. It can include witnessing violence against a primary carer, listening fearfully to incidents of abuse or dealing with the effects of violence, such as cleaning up a mess or comforting an injured or distressed parent or sibling.^v It can also involve direct abuse of children, as well as threats or actual actions to harm, abduct or kill them. The co-occurrence of domestic violence, child abuse and child sexual assault is well documented (Bancroft, Silverman & Ritchie 2011; Edleson 1999; Ford 2008; Hamby *et al.* 2010; Humphreys *et al.* 2008; Potito *et al.* 2009). Women experience these forms of violence as part of the perpetrator's relationship dynamic (Laing 2010, p. 34). Thus, (Silverman 2003, p. 233)

... if you ask the right questions, you will find that where there's children involved, there are bad things going on for those children. The same characteristics

of an individual that lead them to desire or use force to control their partner, absolutely lead them to desire that same control and to be likely to perpetrate that same neglect or abuse of their children.

In addition, abusers often damage the relationship between children and their mothers (Buchanan 2008; Bancroft & Silverman 2002; Lapierre 2010; Morris 2009). The stress of living with violence can disrupt attachment between children and their primary caregiver (McIntosh 2003; Lapierre 2010) and, additionally, the relationship can be deliberately undermined (Buchanan 2008; Bancroft, Silverman & Ritchie 2011; Lapierre 2010). Children are also impacted by their mother's diminished wellbeing and parenting capacity, which results from the abuse and what Laing (2010, p. 75) has called 'mothering under adverse conditions'. She notes,

They were coping with financial pressures, in many cases with ongoing harassment, with the emotional impact of their experiences of abuse and with the losses they had suffered in order to be safer, such as their homes. Managing parenting arrangements was a further source of stress.

Where there is ongoing contact with abusers post-separation (through parenting arrangements), mothers can feel and be powerless or unable to protect their children from harm, and this causes them additional stress and feelings of responsibility (Lapierre 2010; Laing 2010). If mothers are not allowed to protect their children from abuse or ongoing stressful contact, this can also have a negative effect on the mother/child relationship (Laing 2010).

Effects of ongoing exposure

Experiences of elevated, prolonged stress or trauma rock the very core of children and young people. In these circumstances, children are overwhelmed with the internal reactions that race through their brains and bodies. They do anything to survive, not because they want to but because they need to. They shut down their feelings. They push away memories of pain. They stop relying on relationships around them to protect them. They stop trusting and believing in others. Even after the stressful or traumatic situation has passed, children's brains and bodies continue to react as if the stress is continuing... (Australian Childhood Foundation 2011).

Family violence has a substantial impact on children's emotional, cognitive, developmental and behavioural wellbeing. Over the past decade, developmental and

neuro-scientists have documented the disturbing impact that exposure to trauma, such as domestic violence, has on children's brain development.^{vi} Domestic violence can impair brain development in children, even in-utero, and the literature now demonstrates that infants and toddlers who are exposed to domestic violence will develop fewer neural connections and impaired development in the higher-functioning brain centres (Perry 2004 & 2009; ACF 2011). The violence does not have to be directly experienced or witnessed, as children's attunement to their primary carer's emotional state means that they experience elevated cortisol levels and significant damage when their primary carer is threatened (Perry 2009).

Sety's (2011, p. 4) review of the research literature finds convincing evidence that children exposed to family violence 'are more likely to experience higher rates of depression and anxiety, trauma symptoms and behavioural and cognitive problems'. This can affect a wide range of outcomes or areas of functioning in children, including learning, social and relationship capacity, attention, and personality development, as the cellular and neural impacts become cemented and incorporated into brain structures, and 'states' become 'traits' (Kendell-Tackett 2005; Perry 2009). These effects are ongoing (Perry 2009). Laing (2010, p. 4) notes that,

Increasingly, children's exposure to domestic violence is being conceptualised within a complex trauma framework...the traumatic event is recognised as only the beginning of a chain of events that may reverberate across the course of a child's development.

Each time the child is exposed to either the abuser or situations which remind the child of previous stressful experiences (such as witnessing ongoing parental conflict or violence), the trauma response can be triggered (Perry 2004; Zerk *et al.* 2009). In this way, the effects of domestic violence are exacerbated if children are not protected from ongoing trauma or trauma triggers (Perry 2009). Perry (2004, p. 3) adds that a child who has been traumatised lives in an 'aroused state, ill-prepared to learn from social, emotional, and other life experiences'. Children have described their own experiences of exposure to family violence as feelings of confusion, fear (often an ongoing fear of their father) and anger (Bagshaw 2007).

These effects are played out in children's lives, particularly in shared parenting arrangements, as the recent studies of the 2006 family law amendments demonstrate. One study concludes that children in rigid shared care, where mothers felt threatened by their partners or where fathers were hostile or

acrimonious, experienced worse mental health outcomes compared with other children post-separation (McIntosh *et al.* 2010). The Australian Institute of Family Studies (AIFS) evaluation of the 2006 family law reforms similarly shows that children in shared care-time arrangements where there had been abuse experienced worse mental health outcomes and lower wellbeing, than did other children (Kaspiew *et al.* 2009).

The effect of domestic violence on individual children often varies and may not be easy to detect (Zerk *et al.* 2009). This makes it particularly difficult to effectively identify family violence during brief family law system assessments when making parenting determinations.

Many myths prevail which prevent the appropriate understanding of the need to protect children from exposure to trauma triggers. These include the myth that children's fears or distress are the result of coaching by their mothers or the myth that maintaining contact with fathers who are abusive is more important to children's wellbeing than ensuring their emotional or physical safety from the abuser (Dallam & Silberg 2006). The evidence suggests that increased time does *not* enhance father/child relationships – rather, it is the *quality* of the relationship prior to separation which assists in children achieving a meaningful relationship with their fathers (Fehlberg *et al.* 2011, p. 6; McIntosh *et al.* 2009, p. 203).

Understanding victims of violence

A history of domestic violence can negatively affect the presentation and demeanour of victims, particularly when they are in the stressful environment of court and legal settings (Herman 2005; Hunter 2008). The stresses and challenges of exposure to abusers may impair a victim's legal 'performance'. Women who have experienced domestic violence can make poor legal witnesses (Hunter 2008; Jaffe & Gefner 1998; Jaffe *et al.* 2008; Laing 2010), often because of their heightened anxiety, aroused emotional states, increased cortisol levels (impacting on energy, focus and cognitive recall) and other negative impacts of abuse and trauma (Lapierre 2010, p. 1444). Such presentations can lead to outcomes that jeopardise their safety and the safety of their children, particularly if they are misunderstood or their demeanour is misinterpreted as symptomatic of mental instability or poor credibility.

In their attempts to protect their children, victims of violence can also appear inflexible in family law negotiations because of their unwavering commitment to outcomes which provide safety (Bagshaw *et al.* 2010; Bancroft, Silverman & Ritchie 2011; Chisholm 2009; Harrison 2008; Laing 2010; Lapierre 2010). This

behaviour is both a normal and desirable component of protective parenting in situations of family violence.

Understanding perpetrator tactics

Perpetrators may use sophisticated and subtle tactics to build allegiance with professionals (Bancroft 2006; Bancroft, Silverman & Ritchie 2011; Stosny 2008). These behaviours, not always conscious to the perpetrators themselves, can include minimisation and denial, narratives of their own victimisation ('I just miss my kids') or of the 'craziness' of their ex-partner, as well as manipulation of dynamics within mediation, through subtle exercises of control. A study by Bagshaw *et al.* (2011, p. 79) found that while some men claimed to be 'victims', experiencing 'fear', this fear was not based on fear of harm or concern for their safety but, rather, fear that their ex-partner would impact on the way they were perceived by authorities.

In addition, constant use of legal action, refusal to mediate and refusal to comply with agreements can be a form of abuse in the context of domestic violence. As one report notes, '...abusers can play out their need for control in long and painful custody disputes. Abusive men are highly litigious and significantly more likely to contest custody than non-abusive men' (Domestic Violence Advisory Council 2009, p. 64). However, this is often poorly understood by practitioners. Wangmann (2010, p. 97) notes that,

The use of the law against victims of IPV (intimate partner violence) is rarely depicted as part of their continuing experience of violence, yet it is seen that way by victims and clearly evidences a type of act that is directed at exerting control.

Legal abuse also increases potential for financial abuse and many women 'give up' defending parenting applications because of the financial and emotional strain (Jaffe *et al.* 2008; Laing 2010). Ongoing litigation to increase parenting time can also be a mechanism through which financial abuse occurs, given that child support and property determinations are linked with parenting time.^{vii} Interestingly, most shared-care arrangements do not endure (Kaspiew *et al.* 2009, p. 126; McIntosh *et al.* 2009; Smyth *et al.* 2008) but by the time they collapse, the economic security of the victim may already have been undermined.

Understanding the complexities of domestic abuse

Not all violent incidents that occur within family relationships are domestic violence. The focus of much of the law relating to domestic violence is on

incidents and events, rather than processes and power. This means that acts of self-defence or protective defence in relation to children might be viewed as discrete incidents of domestic violence. Hence, some commentators have proposed that schemes for differentiating violence be used as a kind of triage mechanism to assess risk and danger (Jaffe *et al.* 2008; Wangmann 2011).^{viii}

However, assessing risk through the use of violence ‘typologies’ undermines practitioner understanding of the complexities of domestic violence (Wangmann 2008). It is very difficult to ‘diagnose’ which of the types a particular perpetrator fits, with the possible exception of self-defence where there has been a long history of abuse (Tinning 2010; Wangmann 2011). Coercive-controlling violence (CCV) often looks like ‘couple conflict’ to those without the experience to identify complex and individualised mechanisms of control. Further, in a family law hearing, mediation or family consultant interview, time constraints can limit worker capacity to elicit sufficient evidence that incidents of violence are part of a pattern of coercive control or that abuse dynamics are present even when there is not a strong history of discrete physical acts. Domestic violence is as much about process and patterns as incidents, yet this point can be obscured in the quest for short-cuts to risk assessment (Wangmann 2011).

In addition, serious risk of domestic violence can be overlooked if the relationship is ‘diagnosed’ as ‘post-separation’ violence or ‘couple conflict’ (Wangmann 2008). Because of its conflict-management paradigm, family law sector professionals can mistakenly attribute patterns of domestic violence as ‘high conflict’, thereby implying that power between the parties is equal (Laing 2010). Conflict and domestic violence can co-exist but they are two different things. What might appear as ‘normal’ conflict between partners may be a result of the negative impact that abusers have on family dynamics, producing increased levels of conflict between various family members (Bancroft, Silverman & Ritchie 2011, p. 69), and the escalated conflict created by their negativity towards their ex-partners (Wallach & Sela 2008).

Moreover, typology theories are still in their infancy and contested, with no single theory emerging as a definitive means of differentiating types of violence or perpetrators. The use of typology frameworks to assess risk can be potentially dangerous, as the post-separation period can be a period of great danger for victims of domestic violence, including children (Wangmann 2011, p. 15).^{ix} As Wangmann (2010, p. 90) cautions, the notion that typologies can be applied by a third party investigator such as a family

law professional, with pseudo-scientific validity, is of particular concern given the subjectivity of experience around domestic violence and the meaning that perpetrators and victims give to acts in the context of their individual relationships.

ACTION THAT SUPPORTS SAFETY AND WELLBEING

Victims of family violence require system responses that offer safety, protection and promotion of healing; for children this requires an environment which secures emotional *and* physical safety (Humphries 2008). Recovery from domestic violence is assisted by family law system interventions that do not undermine these outcomes and, indeed, work with such goals in mind. This is consistent with the underlying principles of family law and family relationship work: that children and families be supported and enabled to have secure, healthy futures.

However, victims who leave an abusive relationship can encounter quite a different experience. Family law system processes (and outcomes) often require victims to engage repeatedly with perpetrators of violence (Bancroft, Silverman & Ritchie 2011; Bagshaw *et al.* 2010; Laing 2010; Lapierre 2010; McIntosh & Chisholm 2008). In addition, victims of family violence report that perpetrators of violence can and do use the contact and handover environment to continue to intimidate, harass or abuse in various ways. Thus, whilst state and territory systems responding to family violence have focussed on developing responses that aim to protect victims and children from harm, family law processes and outcomes may inadvertently undermine these protective measures (Australian Law Reform Commission & NSW Law Reform Commission 2010; Astor & Croucher 2010; Wilcox 2010). In this way, the actions of the family law system can cause ongoing harm and secondary, system-generated victimisation for families already struggling to recover from the effects of living with violence.

Protecting children from ongoing contact with abusers

Recognising the trauma of domestic violence clarifies that healing and recovery will be significantly undermined by ongoing exposure to the perpetrator of the abuse or other trauma triggers (Hester 2010; McIntosh 2009; Perry 2001, 2004; Silverman 2003; Tucci *et al.* 2010). Bancroft (2002b, p. 6) has argued that even in cases where children feel strong affection for an abusive parent, their need for ‘a sense of safety in

order to heal' suggests that there should be caution in leaving them in unsupervised care with someone whose 'violent tendencies they have witnessed'.

Yet, in spite of the evidence that re-exposure to abusers or incidents which trigger fear or stress is damaging to children (McIntosh & Chisholm 2008, Bagshaw *et al.* 2010; Laing 2010; Humphreys 2008), parenting arrangements have shown a distinct trend in favour of ongoing contact with (and hence re-exposure to) abusers (Kaspiew *et al.* 2009; Moloney *et al.* 2007; Shea Hart 2004). Since the changes to the *Family Law Act 1975* in 2006, there has been a *decline* in no-contact orders, with only 6% of court orders during 2007-2008 for no-contact with fathers (Family Court of Australia 2009; Moloney *et al.* 2007). This is true even where there is a disclosed history of domestic violence (Bagshaw *et al.* 2010, p. 96). Moloney *et al.* (2007, p. 56) note that, it is unusual for contact to be denied, '(r)egardless of the apparent severity or probative weight of allegations'. Research suggests that lawyers and advisers have some role to play in this decline, in that they infrequently ask for no-contact orders (Laing 2010; Chisholm 2009).

Sharing care and decision making with an abuser

Children who have lived with domestic violence or abuse are not only likely to be compelled to have contact but are often involved in arrangements where such contact with an abuser is substantial (Bagshaw *et al.* 2010; Cashmore *et al.* 2010; Kaspiew *et al.* 2009; Laing 2010). Often these arrangements involve shared care-time. This means that women who have been in abusive relationships, characterised by disparities of power and control, are expected to *negotiate* care and other arrangements with the perpetrator, often on a regular basis (Laing 2010). This is not only impractical, but also provides multiple arenas for increased and ongoing intimidation, as regular issues arise.

The emphasis on shared care in current Australian family law reflects a view that children do better, and develop better quality relationships, when they have increased time with the 'non-custodial' parent (usually the father). Current research shows that neither of these assumptions are accurate (APA 2011; Fehlberg *et al.* 2011; McIntosh 2009). Shared care is uniquely legislated in Australia (Australian Psychological Society (APA) 2011).^x Shared care-time is associated with harmful outcomes for children where there is family violence (Bagshaw *et al.* 2010; Cashmore *et al.* 2010; McIntosh *et al.* 2010). Family violence does not always, or even generally, lead to rebuttal of the shared-parental responsibility presumption, in spite of provisions in the Act (Alexander 2010; Naraqi 2008). McIntosh *et al.* (2010, p. 104) note that in these

cases, 'continuing abuse of power by coercive and controlling ex-spouses can be amplified in shared care arrangements'. The collaborative decision making which is necessary to make shared parenting 'work' (Faulks 2009) is impossible in relationships which have been characterised by domestic violence (Bancroft *et al.* 2011).

Matters settled at court are more likely than those settled at mediation to have high levels of shared care (Family Court of Australia 2009; McIntosh and Chisholm 2008, p. 6; McIntosh 2009, p. 393). These findings suggest that exemptions from mediation, though intended as a safety measure, may in fact be exposing victims and their children to greater potential harm than if they had engaged in alternative dispute resolution processes (see Astor 1999; Kirkwood 2007). For many women, the cost of court processes, limited access to legal aid (Chisholm 2009) or the high levels of shared care arising from court determinations can make mediation a preferable option. Several strategies have been proposed to enhance non-court processes for victims of domestic violence (Field 2006). Recent developments recognise the possibility for addressing abuse dynamics within mediation, to enable access to these alternative pathways where this may be safer or more accessible. Several models have been proposed and include legally-assisted mediation and risk-aware practice (Field 2006; Moloney *et al.* 2011; Winkworth & Mc Arthur 2008). The government is currently trialling a coordinated family dispute resolution model for families with a history of domestic violence and some Family Relationship Services have successfully utilised the legal relationships they have developed under the Legal Partnerships program to enable lawyer-assisted mediation, where there has been domestic violence (Moloney *et al.* 2011).

Inconsistencies between family law outcomes and protection order arrangements are frequent (ALRC & NSWLRC 2010) and, while courts are directed to have regard to protection orders, they are *not* required to make orders that support these protective arrangements (s 60C(g)(1)). Some states and territories have attempted to address this issue by encouraging their courts to consider using the Act's '68R' power to amend, vary or suspend family court orders during the protection order process. Victoria's law requires the magistrates' courts to do this or make orders in relation to contact as part of the protection order, where there are no family law orders in place.^{xi}

Changes to the law proposed in the recently passed Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011 (Cth) may have some impact on the issue of contact with perpetrators of violence. Protection from harm will now be prioritised

where there is conflict between the ‘twin pillars’ of safety and promotion of parent/child relationships in determining the best interests of the children (s 60CC (2A)). However, research suggests that there are other factors that have not been addressed by these reforms. This includes the presumption of shared parental responsibility (s 61DA), which can be difficult to rebut (Alexander 2010; Chisholm 2009; Family Law Council 2009; Naraqi 2008), and the linking of this with equal or substantial and significant time (s 65DAA) will continue to expose children to ongoing contact with abusers.

Safe mother, safe child

The safety and wellbeing of children depends upon the safety and wellbeing of their protective parent: while this is an accepted tenet in child safety work (Department of Child Safety 2006; Hester 2011; Perry 2001; Sety 2011), there have been obstacles impeding its recognition within some sections of the family law system (Laing 2010; Kaspiew *et al.* 2009). Ensuring the safety and wellbeing of the protective parent (not only the children) and supporting preservation of the mothering relationship underpin children’s post-trauma recovery and enables creation of environments of safety (Hester 2010; Humphreys 2010). Victims’ experiences of the systems with which they engage can determine their resilience and capacity to provide stable and secure lives for their children, facilitating recovery, security, safety and wellbeing (Bagshaw 2011; Laing 2010; McIntosh *et al.* 2009). This suggests that family law system professionals share the responsibility of other service sectors to recognise the protection needs of women themselves, as essential to addressing the safety needs of children. Women’s needs must be addressed first in order to support them as parents who can respond effectively and sensitively to their child and, therefore, reduce the child’s experience of trauma.

PRACTICE IMPLICATIONS: FACILITATING DISCLOSURE, UNDERSTANDING AND ACTION

The evidence points to a number of possible strategies that can be adopted by professionals working with victims of domestic violence who have children in the family law system. Underpinning each of these is the goal of enhanced collaboration across the domestic violence and family law sectors, so that the practice wisdom of domestic violence professionals can be used advantageously in family law decision making. The Chisholm Report recommends at 4.4, ‘That experience and knowledge of family violence be taken into account when considering the appointment of persons to significant positions in organisations forming part of the family law system’ (Chisholm 2009, p. 168).

Practice enhancement across the family law sector can be developed by facilitating *disclosure* of family violence by victims; deepening professionals’ *understanding* of the dynamics of domestic violence; and enhancing their *actions* to reflect safety needs. Practice suggestions are provided in Figure 2; while these focus on family law system practice, domestic violence system workers may also find that they assist them in developing more productive and collaborative engagement across the two sectors.

Figure 2: Practice Recommendations

CONCLUDING COMMENTS

The research shows that improving practice in working with children and protective parents post-separation requires greater alignment of family law outcomes with those in other service sectors, recognising that children can be harmed by ongoing trauma through contact with someone who has abused them and their mothers.

As has been noted above, one of the most valuable ways in which family law professionals might enhance their understanding of domestic violence and their response to its disclosure is to develop effective practice collaboration with domestic violence professionals. Collaborative practice can assist upskilling across sectors and enhance the capacity of the family law system to obtain the full and detailed information required for adequate risk assessment. Responding to family violence in ways that assist rebuilding of positive and secure home environments with the protective parent will ensure that family law professionals are able to support the work of other professionals and state and territory systems, and enable children to be safe and thrive.

HELPFUL RESOURCES

AVERT Family Violence and Family Law Multi-Disciplinary Package:

<http://www.avertfamilyviolence.com.au/>

Australian Psychological Society:

<http://www.psychology.org.au/Assets/Files/APS-submission-Family-Law-Amendment-14012011.pdf>,

Bancroft, Silverman & Ritchie 2011, *The batterer as parent: addressing the impact of domestic violence on family dynamics*, Sage Publications Thousand Oaks

Family Relationships Services guidelines:

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(CFD7369FCAE9B8F32F341DBE097801FF\)~Screening+and+Assessment+Framework++July+2008.PDF/\\$file/Screening+and+Assessment+Framework++July+2008.PDF](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(CFD7369FCAE9B8F32F341DBE097801FF)~Screening+and+Assessment+Framework++July+2008.PDF/$file/Screening+and+Assessment+Framework++July+2008.PDF)

Family Courts of Australia guidelines:

http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/fv_best_practice_for_flc

Legal Aid Queensland:

<http://www.legalaid.qld.gov.au/publications/Practitioners-service-providers/best-practice-guidelines/Pages/Best-practice-guidelines-for-lawyers.aspx>

Women's Legal Services Australia website:

<http://putsafetyfirst.com.au>

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ENDNOTES

- i The terms 'domestic' and 'family' violence are used interchangeably in this paper, recognising their mixed use across Australian jurisdictions. The definition adopted by the author does not focus on lists of behaviours: the author prefers process-based definitions such as the APS's: 'an ongoing pattern of violent, abusive and controlling behaviours by one family member toward another family member or members, with men more likely to be the perpetrators of family violence, while women and children are most commonly the victims. Family violence consists of behaviours which are designed by the perpetrator to control the actions of the victim against their will, including the victim's resistance to the violence and results in varying degrees of fear and intimidation' (APS 2011, p. 5).
- ii 'Notice of Child Abuse and Family Violence' (Form 4), under the *Family Law Rules 2004*
- iii Irish & Michelle (2009) FamCA 66 (Benjamin J)
- iv For a discussion of 'PAS', see Hoult (2006)
- v See s 5 *Family Violence Protection Act 2008* (Vic)
- vi For an overview, see Perry (2004) or McIntosh (2003)
- vii Based on the current formula for determining child support (maintenance) obligations. See <http://www.csa.gov.au/child_support_formula/>
- viii The categories used most commonly in the family law system derive from Michael Johnson, and

include 'coercive controlling violence (CCV), which accords with what service sector professionals might call domestic violence self-defence and one-off separation instigated violence (Tinning 2010). See FCA (2011)

- ix See, for example, *R v Freeman* [2011] VSC 139 (11 April 2011), *R v Acar* [2011] VSC 310 (1 July 2011), *R v Farquharson* [2010] VSC 462 (15 October 2010)
- x This is not to say that shared care does not work for children; where it is part of a non-litigated, cooperative arrangement, where there is equitable division of economic resources, where

there is no abuse/control, where it is flexible and where it accords with children's views, it can be valuable for some, older, children (Cashmore *et al.* 2010; McIntosh *et al.* 2010; Qu & Weston 2010). Nonetheless even in cooperative families, children can be disadvantaged by having their lives 'split' between two homes, particularly at key developmental transition periods, such as infancy, pre-school and adolescence (McIntosh & Chisholm 2008, McIntosh 2009).

- xi *Family Violence Protection Act 2008* (Vic) ss 90-93

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