

## Critique of the Family Violence Best Practice Principles issued July 2011.

### The FLA definition is:

Family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety. (Section 4) Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.

The test has objective and subjective elements. In the decision of N & M (2006) FLC 93–296, the Family Court explained that a “reasonable person” is “a person of ordinary prudence and intelligence who would have fear or apprehension in the circumstances of the person who is alleged to have it in a particular case.”

Family violence covers a wide range of controlling or other behaviours, commonly of a physical, sexual and/or psychological nature, which involves fear, harm, intimidation and emotional deprivation.

It includes behaviour towards a family member that is physically or sexually abusive; is emotionally or psychologically abusive; is economically abusive; is coercive; or in any other way controls or dominates the family member and causes that family member to feel fear for the safety or wellbeing of a family member or another person.

The definition of family violence which is provided does not direct consideration to abuse of children but appears to refer principally to violence against adults. The research evidence is that family violence is itself an abuse of children because it exposes children to traumatising events and prevents their protective parent from being the parent they could be if they were not subject to violence. It also ignores the reality that domestic and family violence commonly co-occurs with physical, sexual and emotional child abuse. The definition should explicitly direct decision-makers to include child abuse within this definition.

## P 6. Different types of family violence

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

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

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

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

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

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

The categorisation of types of violence repeats the focus on violence towards and between adults and directs attention away from the subjective experience of violence. Does it matter if children are exposed to situational violence or controlling violence? Will they be less damaged by a situational assault or a controlling one? How will they know what category of violence they have experienced? The categorisation approach encourages and supports perpetrators to fit their violence to a less serious category which mutualises responsibility and diminishes severity. How would the court categorize family violence which involved child sexual abuse? What kind of violence is that? Or isn't it violence?

P12 Family and other expert reports can provide the Court with an independent forensic assessment of particular issues. Commonly these include the children's relationships with the parties, the children's views and the parties parenting capacity. It may include the emotional and psychological effects of exposure to family violence, the effect upon a child or partner victim of contact with the perpetrator and whether therapeutic intervention may assist a perpetrator to live without violence. The expert appointed should have specialised knowledge based on his or her training, study or experience. The expert's role is to assist the Court in an impartial way with matters within his or her knowledge and capability. [Rule 15.59 FLR, Part 15 FMCR]

The description 'specialised knowledge' is too broad and does not direct the expert to have formal research-based clinical knowledge of family violence, child abuse, child development, traumatisation and its impacts on adults and children. Such knowledge is necessary to make such determinations. Undergraduate psychology and social work degrees do not ordinarily include any components with regard to child development and minimal content on domestic violence and child abuse. Clinical psychologists and psychiatrists may have knowledge of trauma and mental illnesses but often have no formal education expertise in child development and family violence. Where experience is relied on as an index of expertise there are dangers that previous malpractices will be repeated into the future – and this is our experience. It is recommended that a specialist graduate qualification be developed which requires four years part-time or 2 years full-time postgraduate study encompassing family dynamics and impacts of domestic violence and child abuse and traumatisation on parents' capacity and on children's development.

#### P14 Part C: Primary perpetrator indicators: Who is the primary aggressor, if either?

1. Who provides a more clear, specific and plausible account of the violent incident(s)? Who denies, minimises, obfuscates, or rationalises the incident? (The victim more likely does the former; the perpetrator the latter).
2. What motives are used to explain why the incident(s) occurred? (Victims tend to use language that suggests they were trying to placate, protect, avoid, or stop the violence, whereas perpetrators describe their intent being to control or punish).
3. What is the size and physical strength of each party relative to the amount of damage and injury resulting from the incident(s)? Does either party have special training or skill in combat? (Perpetrators who are better equipped are able to cause the greater damage).
4. Are the types of any injuries or wounds suffered likely to be caused by aggressive acts (the perpetrators) or defensive acts (the victims)?
5. If the incident(s) involved mutual combat, were the violent acts/injuries by one party far in excess of those of the other? (Violent resisters tend to assert only enough force to defend and protect, when primary perpetrators retaliate, they are more likely to escalate the use of force aiming to control and punish).
6. Has either party had a prior protective order issued against them - whether in this or a this or a former relationship (indicating who was determined to be the primary aggressor in the past)?

The first point is unreferenced in its description and carries serious dangers for victims. As we have noted elsewhere, victims are often unable to provide clear, specific and plausible accounts of the violence because of the impacts of the violence which can affect memory and narrative. Perpetrators are often plausible and well prepared in their accounts. Victims' accounts may be disjointed and they may be unable to provide a clear sequence of events due to dissociation or 'blocking memories' 'losing consciousness' 'current fear and re-traumatisation triggers'.

#### P18 Jaffe and Johnston comment:

For the majority of victims, separation from the perpetrator of domestic violence may provide an opportunity for improvement in both general functioning and parenting capacities. However, those who have been victimized by prolonged abuse and control are likely to suffer sustained difficulties - like anxiety, depression, substance abuse, and posttraumatic stress disorder - all of which can compromise their parenting for some time. During the court process, these parents may present more negatively than they will in the future once the stress of the proceedings and life changes have attenuated. (Does this mean that judges can find that victims won't be as good at parenting as perps?)

At the final hearing, the decision makers would ordinarily consider the following matters:

- (i) Whether the rules of evidence should apply to the issue of family violence. (Briginshaw is commonly used to require the highest standard of evidence in cases of child abuse)

[Section 69ZT(3)]

(ii) Is it possible to make findings of fact on the balance of probabilities regarding the nature and degree of family violence between the parties and its effect on the child and the parent with whom the child is living?

(iii) If the Court determines that it cannot or should not make a positive finding that there has been violence or abuse, the Court must determine whether there is an unacceptable risk of it.

(iv) If it was found that one party has perpetrated family violence on the other party, consider the extent to which the violence features:

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

Does the violence include:

- the use of coercion and threats
- intimidation
- emotional abuse
- financial control
- the use of children as means of controlling one party
- the use of tactics to isolate one party, or
- has the perpetrator attempted to minimise or deny the violence, which has occurred, or blame the other party for the violent behaviour?

Findings on these questions will assist the Court to identify violence that represents a real threat to the wellbeing of children, including in relation to appropriate role modeling. This may require specific attention in the design of orders which will keep the victim and child safe.

Note that in the research by Bagshaw et al 2010, men were overwhelmingly more likely to describe 'women's violence' to them in terms of the indices which have been highlighted. It is worth noting that actual acts of aggression and sexual abuse are not included in the list. Men commonly nominate women as being violent to them by controlling their access to their children. This section sets up judges to label women violent if they resist children's contact with the other parent due to safety concerns which are unrecognised or rejected by the court.

Bagshaw, D., Brown, T., Wendt, S., Campbell, A., McInnes, E., Tinning, B., Batagol, B., Sifris, A., Tyson, D., Baker, J., Fernandez Arias, P. 2010 *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006*, Attorney-General's Department, Canberra.

## P20 FAMILY VIOLENCE BEST PRACTICE PRINCIPLES

The following factors<sup>26</sup> are likely to be central to the determination of whether the Court should order that a child does or does not spend time with a parent against whom a specific finding has been made of family violence or abuse (or the Court considers poses a risk to the child of future exposure to family violence or abuse):

(i) The effect of the family violence or abuse on the child.

(ii) The effect of the family violence or abuse on the parent with whom the child is living.

(iii) The degree of insight or motivation of the parent against whom a finding of family violence or abuse has been made. In particular, is that parent motivated by the child's best interest or a desire to either intimidate or control the other parent?

(iv) Where a parent who has been found to have exposed a child to family violence and wishes an order to be made to spend time with that child:

- the degree of acknowledgement by that parent that family violence has occurred
  - whether that parent has accepted some or all of the responsibility for the violence
  - the extent to which that parent accepts that family violence was inappropriate and the degree of insight exhibited of the likely ill effects on the child of such behaviour
  - has the parent concerned expressed regret or remorse for his or her behaviour
  - does the parent concerned recognise that he or she has been an inappropriate role model for the child concerned
  - has the parent concerned participated, or are they willing to participate, in any program or course of treatment designed to prevent a recurrence of family violence by him or her in future
  - does the parent concerned have the capacity to sustain an ongoing arrangement to spend time with the child and is he or she genuinely interested in the child's welfare
  - does the parent have any understanding of the impact of his or her behaviour on the other parent concerned, both in the past and currently
  - the capacity of the parent found to have been the perpetrator of family violence to provide adequate care for the child, and
  - the nature of the relationship between the child and the parent found to have been the perpetrator of family violence.
- (v) In cases where the Court is considering that the child have limited or no time with the parent concerned:
- what will be the effects on the child of a deprivation of relationship with that parent
  - what will be the consequences for the child of losing the opportunity to know that parent at first hand

- what will be the consequences for the child of losing the opportunity to know grandparents and other relatives on that parent's side of the family
  - what will be the consequences for the child of losing the opportunity to interact with a parent who loves him or her and is able to provide some benefits for the child concerned
  - what will be the consequences for the child and parent concerned of being deprived of the opportunity to repair their relationship and undo the harm done as a result of the parent's violent behaviour
  - will such an outcome diminish the prospect of the parent and child reconnecting when the child is older and more able to make a mature and personal decision about whether he or she wishes to have a relationship with that parent in future.
- (vi) What are the views of any child concerned in respect of spending time with a parent who has been found to be violent and what weight should be given to those views?

In cases where mothers report their children's disclosures of child sexual abuse by the father or other family members, the normal process is for one of the following outcomes:

- a) A form 4 report will never be filed, the allegations will be 'unsubstantiated': In such a case mothers who persist with allegations face being labelled as 'delusional', 'enmeshed' or 'vengeful'. They will be assessed as presenting a danger to their children by promoting untrue allegations about the father and may lose residence/ contact and parental responsibility. Children's disclosures are explained as 'coaching' or a desire to please the alleging parent.
- b) A form 4 is filed, the allegations are not investigated and the matter is reported back to the court as unsubstantiated: In such a case mothers who persist with allegations face being labelled as 'delusional', 'enmeshed' or 'vengeful'. They will be assessed as presenting a danger to their children by promoting untrue allegations about the father and may lose residence/ contact and parental responsibility. Children's disclosures are explained as 'coaching' or a desire to please the alleging parent.
- c) A form 4 is filed, an investigation is held, the finding is inconclusive and therefore 'unsubstantiated': In such a case mothers who persist with allegations face being labelled as 'delusional', 'enmeshed' or 'vengeful'. They will be assessed as presenting a danger to their children by promoting untrue allegations about the father and may lose residence/ contact and parental responsibility. Children's disclosures are explained as 'coaching' or a desire to please the alleging parent.
- d) A form 4 is filed, an investigation is held, the allegations are substantiated, but do not meet the Briginshaw test and the substantiation is rejected: In such a case mothers who persist with allegations face being labelled as 'delusional', 'enmeshed' or 'vengeful'. They will be assessed as presenting a danger to their children by promoting untrue allegations about the father and may lose residence/ contact and parental responsibility. Children's disclosures are explained as 'coaching' or a desire to please the alleging parent.
- e) The alleged perpetrator of sexual abuse of a child has a conviction for child abuse or has made admissions of child abuse: The court finds an 'unacceptable risk of abuse' In such a case the court can find that the child will benefit from time with the child sex offender: a

finding of 'unacceptable risk' may result only in supervision provisions and continue to require the child to spend time with their sex offender.

There is considerable research evidence that the family court system has no capacity to make scientifically valid forensic assessments of child sex offenders' impacts on their children. There is ample research evidence that child sexual abuse is one of the most reliable predictors of serious mental health, learning and behavioural problems. There is ample research that child sex offending is often repeated behaviour. There is no research into the parenting practices of child sex offenders to assess whether a child sex offender can provide appropriate parenting in between grooming their victim for sex because no research facility on the planet would be able to conduct ethical research into the question. There is only evidence that child sex offenders harm children.

Foote, Wendy Lee, 2006, *Child Sexual Abuse Allegations in the Family Court*, Thesis Collection, University of Sydney Faculty of Education and Social Work.

Shea-Hart, A. ( 2006) *Children Exposed to Domestic Violence: Whose 'Best Interests' in the Family Court?*, Adelaide: Thesis for University of South Australia School of Social Work and Social Policy.

There is considerable evidence in family law judgements that child sexual abuse is routinely denied and thus tacitly supported.

These guidelines give no hope that this will change.