Judicial Conference of Australia Colloquium
9–11 October 2015

THE FAMILY COURTS AND FAMILY VIOLENCE[1]

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I INTRODUCTION

The *Family Law Act 1975* (Cth) ('the Family Law Act' or 'the Act') is replete with references to family violence and it is only necessary to look at the two primary considerations[2] which judges must take into account when assessing what is in the best interests of a child to understand the centrality of family violence in parenting cases.[3] Those primary considerations are contained in s 60CC(2) of the Act and are, in summary:

- the benefit to children of having a meaningful relationship with both of their parents; and
- the need to protect them from physical or psychological harm including being subjected or exposed to family violence.

Further, s 60CC(2A) explicitly confirms that the safety of children is to be prioritised over the benefits of a meaningful relationship where there is a clash.

The Australian Parliament has paid significant attention to family violence in parenting proceedings under the Act, particularly through the enactment of the *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth). However, without structural support to the courts, legislation alone is not of much assistance. Thus what might appear to be straightforward instructions from Parliament belies an array of difficult and challenging processes and decisions. These challenges are presented to all concerned — the parties, the lawyers, the mediators, the expert witnesses and the judges. There are many reasons for these complexities; I will mention them only in short form because the focus of my paper is on asserting the absolutely crucial role of the courts in addressing family violence and the need, somewhat neglected I would argue, to fund and resource the courts appropriately in this vital endeavour.

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[1] The family courts are those courts exercising jurisdiction under the *Family Law Act 1975* (Cth). They are the Family Court of Australia, the Federal Circuit Court of Australia and the Family Court of Western Australia. The latter is a state court. In this paper, reference to the family courts is generally a reference to the Family Court of Australia and the Federal Circuit Court of Australia.

[2] *Family Law Act 1975* (Cth) s 60CC(2).

[3] This paper will focus upon family violence in parenting proceedings. This is not to deny the relevance of family violence in property proceedings, which is simply outside the scope of this paper. For further commentary, see: Emma Smallwood, 'Stepping Stones: Legal Barriers to Economic Equality after Family Violence' (Report, Women's Legal Service Victoria, September 2015). I spoke at the September 2015 launch of this excellent report, and interested readers can find my speech on the website of the Women's Legal Service Victoria.

Before I turn to the challenges of dealing with parenting applications where family violence is an issue, I need to explain why I think there is so much pressure on family courts, which I am not sure is readily understood by those not in the system. Litigation involving parenting orders is not like any other litigation; it is dynamic, not static. It does not just look at facts that occurred in the past and provide a remedy. It involves looking at past facts, certainly, but parents continue to interact with each other and their children right up to the day a final judgment is delivered — and beyond.

Family Courts make orders that operate into the future. They establish regimes for contact and interaction between parents and children, and sometimes third parties as well, and they depend upon human relationships for their success. They are in a sense an imposed code for living. You need only state the proposition to understand its difficulties. Every interaction between a parent and child pursuant to an order, particularly an interim order, has the potential to, and often does, give rise to further applications to modify, suspend or enforce those interim orders. This arises because we are dealing with human relationships, but there is plenty of potential for abusing the system where it is difficult to determine what is bona fide and what is not. And every extra interim application has a correlative effect on when the case can finally be heard. Multiple applications also have an effect on the wellbeing of those involved, as well as imposing a financial burden.

Let me now state briefly some of the complex issues confronting the family courts where family violence is a feature. It is a feature in about 41 per cent of the matters filed in the family courts. The following list is not entirely comprehensive but it highlights the major issues — I have easily identified 16:

1. The intersection of family violence orders (apprehended violence orders /intervention orders), criminal sanctions and parenting orders made by family law courts.

2. The reality that a victim of family violence is unlikely to want to be involved in private litigation with their former partner at all following an acrimonious separation, particularly if there has been a long history of violence.

3. The need to make interim parenting orders which may have to last 12 months before a final hearing can be provided and where there are contentious issues about safety which cannot always be readily determined at an interim hearing.

4. The need to deal with disputed issues of fact, including disputes about family violence, where many family violence orders are made by consent without admission of the facts alleged to support them.

5. The need to make orders, both interim and final, where family violence orders are in place and include the children but are expressed to be subject to an order made by a court exercising jurisdiction under the Family Law Act.

6. The knowledge that, when making interim orders proximate to the alleged family violence and granting of family violence orders, this is a particularly dangerous time for the alleged victim and children.

7. Whereas a family violence order might be obtained by the police, meaning that the alleged victim does not require legal representation in those proceedings, they are a party in family law proceedings and will need to either pay for representation, obtain a grant of legal aid (which is difficult), or represent themselves in litigation with their former partner.

8. In interim proceedings, there is significant pressure on courts to deal with parenting issues in a short timeframe, particularly where the alleged perpetrator may have been restricted from seeing the children by family violence orders.

9. The crucial need for adequate risk assessment to assist in interim decision-making where there are difficult and contested issues of fact which cannot easily be resolved by evidence and the question of the extent to which disputed issues of fact can be relied upon.[4]

10. The limited capacity of both courts, particularly the Federal Circuit Court, to provide interim hearings, other than on the papers, so disputed facts can be tested, without significantly further delaying final hearings.[5]

11. The undermining of the courts' capacity to make orders for supervised contact at supervised contact centres due to lack of resourcing for these centres.[6]

12. The present incapacity of the courts to meet time limits imposed under s 68T of the Act. Where, in the making of an interim family violence order, a state court varies or suspends an order made under the Family Law Act, it can only do so for a period of 21 days. Family courts are usually unable to hear contested matters within that timeframe.[7]

13. There is little capacity for courts to be able to modify interim orders pending a final hearing and contravention proceedings, which are brought when orders have been breached, are complex and similarly compete for court time.

14. At a final hearing where orders will regulate a child's involvement with their parents for many years into the future, the need to make detailed findings about

[4] For more on this point, see Family Court of Australia and Federal Circuit Court, 'Submission to the Victorian Royal Commission into Family Violence' (6 August 2015) [31]. The submission is available on the Royal Commission's website: <http://www.rcfv.com.au/>.

[5] In some registries, the time litigants have to wait before getting on for final hearing in the Federal Circuit Court has pushed out to around 12 months.

[6] While the time it takes to obtain a placement varies between suburbs and states, the average wait time at federally-funded supervised contact centres is 4–6 months. There are a number of private contact centres emerging but they are obviously only available to those who can afford them.

[7] See Family Court of Australia and Federal Circuit Court, above n 4; Family Law Council, 'Interim Report to the Attorney-General: In response to the First Two Terms of Reference on Families with Complex Needs and the Intersection of the Family and Child Protection Systems' (Interim Report, June 2015).

the nature of the violence in order to assess whether it is of such a nature that, despite the relationship with the parent having some positive features, the risk to the child of emotional or physical abuse is so great that it would not be in the child's interests to have any contact with the parent.

15. Alternatively, whether, notwithstanding findings about family violence, the benefit of the relationship is such that the court should make orders so that the children can enjoy the benefit of a meaningful relationship with both parents, and if so what safeguards should be in place.

16. Where the alleged perpetrator cannot afford a lawyer, or chooses not to get one, and is ineligible for legal aid, there is a need for the court to ensure that each party is afforded procedural fairness in presenting their case and, where facts are in issue in parenting matters (beyond the question of whether or not violence has occurred), to deal with the issue of cross examination of the alleged victim by the alleged perpetrator.

An enormous amount of time could be spent on considering each of these particular problems but I'd like in the time available to highlight a couple.

First, the family courts are widely criticised for making orders which are inconsistent with family violence orders.[8] Such criticisms, I suggest, overlook the complexity of our task and the reason why sections 68R and 68T of the Family Law Act are drafted as they are.

II INCONSISTENT ORDERS

Division 11 of Part VII of the Family Law Act is designed to resolve inconsistencies between family violence orders made by state courts and orders made under the Family Law Act that provide for the child to spend time with a person against whom there is an applicable family violence order. Under federal legislation, a federal court may make orders for contact which are inconsistent with an existing family violence order. If they do so, the family violence order is invalid to the extent that it is inconsistent with the parenting order.[9] A declaration of inconsistency can be obtained by either party upon application.[10] If a parenting order is inconsistent with a family violence order, then s 68P imposes a number of obligations as to what must be contained in the judgment accompanying the parenting order, including provision of detailed explanations as to how contact is to take place and the reasons for making the order.[11]

[8] This was raised many times in the hearings before the Victorian Royal Commission into Family Violence, the transcripts of which are available online. Further, the Family Court was recently contacted by the South Australian Social Development Committee, which is currently conducting an inquiry into domestic violence, seeking comment on this issue.
[9] *Family Law Act 1975* (Cth) s 68Q.
[10] Ibid s 68Q(2).
[11] Ibid s 68P(2).

Section 68P(3) of the Family Law Act also requires, upon the making of an inconsistent order, that copies be provided to the applicant and the respondent; the person to whom the family violence order is directed (if that person is not the applicant or respondent); the person protected by the family violence order (again, if that person is not the applicant or respondent); the registrar, principal officer or other appropriate officer of the court that made the family violence order; the commissioner or head of the police force of the state or territory in which the order was made and a child welfare officer in the state or territory in which the person protected by the family violence order resides.

While s 68P is relied upon from time to time, family violence orders in the majority of cases that come to the family courts either do not include the children as affected family members or, more frequently, include an exception for any orders made by the family courts.

Similarly, however, courts making family violence orders may discharge or suspend existing orders made under the Family Law Act.[12] The court cannot interfere with an exist order made under the Family Law Act unless it is making a family violence order — save that, in interim family violence proceedings, the court can only vary or suspend, but cannot discharge, an order made under the Family Law Act.[13] Again there are considerations that the court must take into account before exercising this power.[14]

Although the subject of criticism, there are reasons for permitting courts to make inconsistent orders. The clue to this is in s 68R(3), which limits the power of a court making a family violence order to vary, discharge or suspend a family court order unless it has material before it that was not before the court that made that order or injunction. That is perfectly sensible — when a violent incident occurs involving a family which has had parenting orders in place, then the state court making the family violence orders is, of course, going to have information available to it that was not available to the judge when the original order was made.

Similarly, when family violence orders are made, often on an interim basis, the family courts subsequently considering making parenting orders may well have evidence that was not before the court making the family violence order. This would often be the case, for example, where there is an order made by consent without an admission of the allegations upon which it is based.

So, there is good sense in enabling both courts to made orders that are inconsistent in appropriate circumstances.

III SOME HISTORY

It is also important to remember the integral role of the Family Court of Australia in particular in the history of legal attempts to address family violence. Many complaints about the court are made on the basis that it is only state courts that play a protective role and that

[12] Ibid s 68R.
[13] Ibid.
[14] Ibid s 68R(5).

family court judges do not fully understand family violence. However, such views ignore the history of how family violence has been treated since 1975.

When I started practising exclusively in family law in 1976 and, really, throughout the remainder of the 1970s and the 1980s, the Family Court of Australia and the Family Court of Western Australia dealt with family violence and made protective orders. Indeed, they were the only courts (other than criminal courts) making protective orders in favour of separating parents who alleged family violence. The remedy lay in s 114 and s 68B of the Act, which deals with injunctions to prevent a party from assaulting, threatening, harassing, denigrating or interfering in any manner with another party, and those orders were made regularly. There were no state protective orders available outside criminal proceedings and orders were regularly and routinely made for the protection of parties and children under the Family Law Act.

The problems with a regime that covered only part of the community — namely those who were separating — started to become apparent, as did other serious shortcomings of having a federal court provide these protections. A particular problem was that state police were reluctant to act because they saw the injunctions as pertaining to a 'private matter in federal proceedings', and they routinely told the victims when breaches occurred that they would have to approach the court for assistance. Thus victims were left to pursue breaches as contraventions, at their own expense. There was no immediate role for the police at all and there were no criminal penalties for breach. The only remedies available were those provided for by the Act, meaning that there were large numbers of ineffectual orders which could be breached with relative impunity.

In time, recognition of these problems led to the realisation that the system needed to be state based rather than housed within a federal statute and needed to involve a responsive state police force.

Today, the protective role is appropriately played by state courts and many of the applications for family violence orders are brought by the police themselves.

The part the Family Court played in the evolution of family violence protective orders should, however, not be forgotten.

IV FUNDING THE COURTS

I have explained some of the complexities of the role of the family courts and the crucial nature of their role to reflect on the fact that I am somewhat bemused to see that the federal government's recent focus on family violence has not to date included any reference to the courts which are crucial to the provision of justice in this area. It is very pleasing to see that the federal government has announced a $100 million package aimed at addressing family violence and I do not wish to take anything away from this intelligent and compassionate policy shift. Nonetheless, I cannot but be concerned that the crucial role of the courts (and the corresponding necessity of resourcing them properly) has not to date been recognised as part

of addressing family violence. As Fiona McCormack, CEO of Domestic Violence Victoria, and her colleague Prue Cameron wrote in an opinion piece on *The Drum* in the wake of the government's announcement,

> this funding, welcome as it is, will not come close to filling the significant budgetary shortfall across the family violence system which has left specialist women and children's services, legal services and the court system struggling to meet the demand which is growing exponentially.[15]

Of course, education, early intervention and the like are absolutely critical investments in our fight to eliminate family violence. But while we as a society are creating the tomorrow we want, the courts must face the today we have.

The government has been active in amending the Act, particularly in 2011, to provide better protections and to broaden the definition of family violence, but that is of little comfort when the courts are struggling to deal with the workload and their capacity to provide timely hearings and well informed outcomes is compromised by lack of resources.

There have recently been a number inquiries into family violence (some of which are ongoing),[16] and state governments have moved in recent years to fund courts, which is seen as a crucial part of addressing family violence. For example, South Australia has established a dedicated Family Violence Court[17] and the Magistrates' Court of Victoria has included a Family Violence Court Division since 2005.[18]

It is not difficult to envisage the difficulties being faced by the courts, particularly the Federal Circuit Court, which is dealing with 85 per cent of all first instance family law applications. Inevitably, there is considerable pressure on each of the parents to approach the courts if a family violence order has suspended or varied an existing family court order for a limited time. If there are no parenting orders in force and there is a family violence order which restrains contact with children, but subject to any family court order, then there is an imperative for the alleged perpetrator to approach the court as quickly as possible to obtain an order. So, in almost any scenario under the current law, there will inevitably be pressure for federal courts to deal with these matters urgently. As I hope I have indicated, that is not an easy task, given the complexities — particularly the number of cases wherein there will be contested facts, coupled with our struggle to provide parties with the kind of hearing which

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[15] Fiona McCormack and Prue Cameron, 'Domestic Violence Package: A Great Start, But It Will Only Get Us So Far', *The Drum* (25 September 2015) <http://www.abc.net.au/news/2015-09-25/mccormack-domestic-violence-package/6803846>.

[16] For example, the Victorian Royal Commission into Family Violence and the South Australian Social Development Committee's Inquiry into Domestic Violence. In addition, the Senate Finance and Public Administration References Committee recently tabled the report from their national inquiry into Domestic Violence: see <http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Finance_and_Public_Administration/Domestic_Violence/Report>.

[17] See Legal Services Commission of South Australia, *Family Violence Court* (21 May 2012) <http://www.lsc.sa.gov.au/dsh/ch04s09.php>.

[18] Magistrates' Court of Victoria, *Family Violence Court Programs* (13 December 2012) <https://www.magistratescourt.vic.gov.au/jurisdictions/intervention-orders/family-violence-court-programs>.

would enable those facts to be tested and findings made. This is exactly the same pressure that is on the Magistrates' Courts which results in so many matters being resolved by consent without admission.

How then can the courts deal with interim proceedings, given the shortcomings of the present system? Some things which, I suggest, we can focus on are the sharing of information between federal courts and state authorities[19] and the need to conduct risk assessments.

Concerning the latter, this can be done in two ways. In the Family Court of Australia, because the number of filings is fewer, the risk assessment is usually carried out by a family consultant appointed by the court, who will meet the parties as part of an early case management event and then prepare for the court a memorandum listing the issues in the case and the risks associated therewith. In the Federal Circuit Court, where the numbers are significantly greater, it is mandatory to complete a Notice of Risk in all cases where parties are asked to identify whether or not there has been family violence.[20] Where family violence is identified, the Notice of Risk is then sent on to the relevant Department of Human Services. These matters are triaged by the Departments but, with the greatest of respect to them, their consideration of these matters is based upon the question of whether or not the state should intervene in a given case. Thus, their criteria are quite different from those which the courts must take into account, and there remains a large cohort of cases in which there are allegations of family violence, but these are not sufficiently severe to warrant investigation by the Departments. In my view, the courts need to be better resourced so that at that crucial initial listing, where fact-finding is very difficult, the judicial officer will have some indication of the risks involved in the case and what programs might be required or what orders might be appropriate.

It goes without saying that there must be enough judicial officers to hear these matters. Even casual reflection reveals that, despite funding a world class system of pre-filing mediation, for the most part, family violence matters are not caught by it — first, because family violence is an exception to the requirement for pre-filing mediation; and secondly, because many cases involving family violence (particularly where there is coercive, controlling violence and an imbalance of power), mediation is in any event entirely inappropriate.[21]

Urgent matters are also excepted from the requirement for pre-filing mediation and, of course, many of these cases will involve urgency. Therefore, it is reasonable to postulate that most matters involving family violence — particularly those where parties have been to a state court to obtain family violence orders — will not have been to mediation and will require court determination.

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[19] See *Family Law Act 1975* (Cth) s 69ZW. Also, there are protocols in place between the state authorities and federal courts for the sharing of information; for example, collaboration between the courts and the Victorian Department of Human Services has led to innovations such as the co-location of a departmental officer at each of the Melbourne and Dandenong registries. This has dramatically improved the ability of the courts to receive and provide information about family violence to courts exercising jurisdiction under the Act.

[20] See Federal Circuit Court Rules 2001 (Cth) r 22A.02.

[21] For insightful commentary on this point, see Parkinson, below n 23, 22.

For the same reason, many of these cases should not be settled, particularly where the alleged victim is unrepresented and cannot rely upon the limited assistance of an independent children's lawyer, as they are rarely available for interim hearings.

V WHAT MORE DO WE NEED?

There are many aspects of the system which are important and require funding. These include funding for women's legal services and community legal centres and, most crucially, the funding of legal aid so that it is more available, particularly to victims of family violence and also to those parties who might wish to cross examine alleged victims where this might create significant difficulties for the other parent. My focus here, though, is on the needs of the courts because it seems to me that this area has not received much publicity or attention when it comes to the need for funding in relation to family violence.

The courts are demonstrably being pressed with parenting matters which involve allegations of family violence and all the issues associated with that pressure that arise.

I have been a head of jurisdiction for 15 years now and I well understand that governments do not generally see enlarging the size of the judiciary as the answer to these problems. We have to accept that paradigm, but there are other things which can, and in my view should, be done to assist the courts in addressing family violence. I suggest four.

First, it is crucial that timely appointments to the courts are made upon the retirement of a judge. There has been considerable media attention in recent times on the failure to appoint a judge to Newcastle following the retirement of Judge Coakes on 30 June 2015. However, there actually six outstanding appointments that need to be made to the Federal Circuit Court and one to the Family Court. I understand from speaking with the Attorney-General that we can expect shortly to see some appointments and this news is to be welcomed. However, damage is done every time there is a significant delay in replacing judges because it simply means that the waiting time for a case to be heard also increases,[22] despite the need to bring these matters to a conclusion as soon as possible.

> As Professor Patrick Parkinson, then President of the International Society of Family Law, writes, '[w]hen there are long delays in getting a hearing, or the cost of doing so is more than a person could possibly afford, then the safety of people — and in particular women and children — is put at risk'.[23] It is clear from much of the evidence given to the Victorian Royal Commission and to other inquiries that it is not in the interests of children or parties — especially the victims of family violence — to be involved in drawn out proceedings which cannot be concluded in a timely way because of a lack of judicial officers to hear cases. The result of pressures, both on interim duty lists and on lengthy delays to hearings, is often that cases are settled — and, as I have intimated, they are not always settled appropriately. It is understandable

[22] See above n 5.
[23] Patrick Parkinson, 'The Challenge of Affordable Family Law' (Paper presented at the World Conference of the International Society of Family Law, Brazil, August 2014) 22.

that people will wish to settle their disputes (and in many cases it is desirable that they do so) but, particularly in this vexed area, they should not have to do so simply because the capacity of the courts to hear them is compromised.

Secondly, as a result of changed administrative arrangements for the courts, the previously shared administration of the Family Court and the Federal Circuit Court will be dismantled, requiring the courts to operate separately. This will involve a modest cost which I hope will be met by the government so that the tentative agreement reached by the courts about how the funds should be split can be implemented. This will enable the courts to provide existing services and I have grave concerns about capacity to maintain services if the shortfall in funding identified isn't met. In the case of the Federal Circuit Court, this may require the reduction in services to regional and rural areas, which would, in my view, be a crucial limitation on access to justice — as we all know, family violence occurs everywhere, and the infrastructural deficit often faced by rural and regional communities should be something we are attempting to eliminate, not allowing to become more significant. I am hopeful however, given the Prime Minister's obvious concern about family violence within the community, that we will be able to build upon the initiatives he has announced to provide courts with the ongoing funding they require, simply to continue their existing operations.

Thirdly, given the unlikelihood of getting extra judicial officers, an injection of funding to provide both courts with more family consultants and registrars would be of valuable assistance in managing duty lists and in giving the Federal Circuit Court in particular the capacity to undertake risk assessment prior to interim hearings for those matters which have not been identified for further action by Departments of Human Services following their assessment of the Notice of Risk.

Fourthly, although this is not about the family courts, it is directly associated and relates to funding for supervised contact centres. In cases where there is a genuine dispute about whether or not a parent poses a risk to the children, supervised contact is an essential tool in maintaining a relationship (where appropriate) between the children and that parent. Supervised contact centres have been operating in this capacity for many years and are useful as more than just a conduit for enabling contact to take place. They can assist by observing the relationship between the parent and the children and assessing the parent's commitment to, and ability to care for, the children under supervision, as well as noting both parents' capacity to comply with orders. Under the present funding arrangements, a number supervised contact centres are unable to open even five days a week and many cannot open on Sundays. This obviously poses a significant problem for families which require supervised time or changeovers on weekends.

But the lack of available supervision is a serious problem at the present time and has the potential to enflame already difficult situations. It is understandably frustrating for, say, a father who is disputing the facts as alleged by the mother and asserting that it is in the children's best interests to have contact with him, to be provided with an order for supervised contact supposedly to start immediately when there is no capacity for the service to admit the

family for at least six months. This situation causes frustration and anger and probably puts everyone at a great risk.

VI COSTINGS

I have costed my wish list. From my discussions with the Attorney-General, I am convinced that the government is concerned to address these issues and I am hopeful that the role of the courts will be understood and recognised as crucial for the provision of access to justice in this difficult area and that some arrangement for their resourcing can be a priority to assist in the challenge of dealing with family violence and providing the safest and best outcomes for children. We have sophisticated legislation and one of the widest definitions of family violence to be found in any statute but that is of little use if we don't have the capacity to provide access to justice to those who need it most.