Risk of harm to children from exposure to family violence: Looking at how it is understood and considered by the judiciary

Patricia Easteal AM[*] and Dimian Grey[†]

To date, there is a paucity of research that focuses on the extent to which witnessing or exposure to family violence is considered and weighted by the judiciary compared to other forms of violence, such as the direct abuse of a child. Children exposed to violence have similar long-term negative health and social outcomes to children who are a direct target of abuse. We look at how specifically the Family Law Act 1995, 2005 and 2012 amendments have defined and included exposure as a harm. We examine 60 judgments made since the 2006 amendments came into force in which the facts included alleged family violence, and exposure and/or child abuse. We find that unsupervised time was the determination in most (70%) of our sample but was less likely in matters which involved only allegations of direct child abuse. Having identified the complexities of the unacceptable risk test, judicial indeterminacy and a legislative emphasis on maintaining a meaningful relationship with both parents, we look at whether and how exposure to violence has been understood, considered and weighted and how judicial officers attempt to minimise potential risk of harm to the child. For a number of reasons — including the importance of corroborating expert evidence that we found in our analysis — we recommend that the Magellan List be expanded to include family violence matters in which there is the risk of exposure harms.

Introduction

Family violence has been known to be a serious issue within Australian families for many years.[1] Both measuring its incidence and the extent of children's exposure to it are problematic.[2] Research has shown fairly definitively though that 'violent households are significantly more likely to have children than non-violent households. . .and that violent households have a significantly higher proportion of children aged five years and under'.[3] A 2011 survey of 2077 children in New Zealand found that 63% of children had experienced violence during their life and that 36% of this violence was

* Professor Patricia Easteal AM, PhD, School of Law University of Canberra.
† Dimian Grey, Mazengarb Family Lawyers, Canberra ACT. We would like to thank the three anonymous reviewers for their most valuable insights and suggestions.

1 L Young & G Monahan, *Family Law in Australia*, 7th ed, LexisNexis Butterworths, Sydney, 2009, 747. In this paper we use the terms 'family violence' and 'domestic violence' interchangeably.

2 K Richards, Children's Exposure to Domestic Violence in Australia, Trends and Issues in Crime and Criminal Justice No 419, Australian Institute of Criminology, 2011, <http://www.aic.gov.au/publications/current%20series/tandi/401-420/tandi419.html> (accessed 4 May 2013).

3 Ibid.

reported to have occurred at home.[4] It is estimated that 10–20% of children in the United States are exposed to domestic violence each year.[5] Children who reside in homes in which family violence occurs are 40% more likely to be abused.[6] In Australia, the likelihood of the co-occurrence of experiencing *physical* abuse and being exposed to domestic violence is estimated at 55%.[7]

What exactly are we meaning by 'exposed to domestic violence'? It is now recognised both in Australia and overseas that exposure to violence is a broader category than witnessing violence and includes hearing, seeing and playing a role either at the time of the violence or in the aftermath.[8] Exposure is a form of child abuse.[9] This is shown by children exposed to violence having similar long-term outcomes to children who are a direct target of abuse.[10] The greater the seriousness and incidence of family violence, the more children are adversely affected,[11] suffering from higher rates of depression[12] and poorer physical health.[13] In fact, with the exception of sexual abuse, witnessing family violence has been found to have an even greater negative impact on children than being a victim of violence.[14] Exposure means living with the constant threat of violence being perpetrated against them.[15] Neither just passive observers of family violence nor endlessly

4 J Carroll-Lind, J Chapman, J Raskauskas, 'Children's Perceptions of Violence: The Nature, Extent and Impact of their Experiences' (2011) Ministry of Social Development Web Site, 5 <http://www.msd.govt.nz/about-msd-and-our-work/publications-resources/journals-and-magazines/social-policy-journal/spj37/37-childrens-perceptions-of-violence.html> (accessed 4 May 2013).

5 B Carlson, 'Children Exposed to Intimate Partner Violence: Research Findings and Implications for Intervention,' (2000) 1(4) *Trauma, Violence and Abuse* 321–342.

6 World Health Organisation, 'World Report On Violence And Health' (2002) World Health Organisation Web Site <http://www.who.int/violence_injury_ prevention/violence/world_report/en/index.html> (accessed 4 May 2013).

7 G Bedi and C Goddard, 'Intimate Partner Violence: What are the Impacts on Children?' (2007) 42(1) *Australian Psychologist* 67.

8 J Edleson, N Shin and K Amendariz, 'Measuring Children's Exposure to Domestic Violence: The Development and Testing of the Child Exposure to Domestic Violence (CEDV) Scale,' (2008) 30 *Children and Youth Services Review* 502–521; C Humphreys, *Domestic Violence and Child Protection: Challenging Directions for Practice Issues Paper 13*, Australian Domestic and Family Violence Clearinghouse, Sydney, 2007.

9 M Flood & L Fergus, *An Assault on Our Future: The Impact of Violence on Young People and their Relationships*, White Ribbon Foundation, 2008, 8.

10 C Humphreys, C Houghton & J Ellis, 'Literature Review: Better Outcomes for Children and Young People Experiencing Domestic Abuse — Directions for Good Practice' (2008) The Scottish Government Web Site <http://www.scotland.gov.uk/Publications/2008/08/04112614/0> (accessed 4 May 2013).

11 D Chapman, C Whitfield, V Felitti, S Dube, V Edwards & R Anda, 'Adverse Childhood Experiences and the Risk of Depressive Disorders in Adulthood' (2004) 82(2) *Journal of Affective Disorders* 217, 217–225.

12 S Pirkola, E Isometsa, H Aro, L Kestila, J Hamalainen, J Veijola, O Kiviruusu & J Lonnqvist, 'Childhood Adversities as Risk Factors for Adult Mental Disorders' (2005) 40(10) *Social Psychiatry and Psychiatric Epidemiology*, 769–777.

13 M Sawyer, F M Arney, P Baghurst, B Graetz, R Kosky and B Nurcombe, 'The Mental Health of Young People in Australia: Key Findings from the Child and Adolescent Component of the National Survey of Mental Health and Well-Being' (2001) 35(6) *Australian and New Zealand Journal of Psychiatry*, 806–814.

14 Carroll-Lind et al, above n 4: With the exception of sexual abuse.

15 D Brown & Z Endekov, *Childhood Abused: The Pandemic Nature and Effects of Abuse and Domestic Violence on Children in Australia*, La Trobe University, Melbourne, 2005.

resilient, the child witnesses 'are actively involved in seeking to make meaning of their experiences and in dealing with the difficult and terrifying situations which confront them'[16] and, not surprisingly have poorer long term outcomes compared to other children.[17] In addition, children who see their mother being abused may learn to dominate interpersonal relationships using violence[18] and are at increased risk of becoming perpetuators of domestic violence.[19] Violence in the family can also undermine the relationship between the child and mother, which then leaves the former particularly vulnerable without any parental protective relationship.[20] Not surprisingly, half of the children in one sample reported feeling unsafe post parental separation.[21]

Turning to those matters that engage with the Australian family law pathway, one study found that about two-thirds of separated mothers and about one-half of separated fathers reported having experienced violence from the other parent, in the forms of emotional or physical abuse.[22] Post separation, 49% of parents reported being subjected to controlling behaviour by the other parent while 32% indicated that they had been physically hurt.[23] Separated parents, 21% of mothers and 17% of fathers, indicated they had ongoing safety concerns due to contact and shared parenting responsibility.[24] Further, 72% of mothers and 63% of fathers who reported they were victims of violence indicated that their children had witnessed the violence. It seems that some adults are separating because of family violence and are seeking assistance from services including the courts.[25]

Given the prevalence of family violence and evidence that growing up in a violent family and exposure to violence is as harmful to children as direct child abuse, having negative physical, emotional and social impacts, how does the Family Law Act 1975 (Cth) (FLA) protect children from these harms in

16 L Laing, 'Young People and Domestic Violence: Issues Paper No. 2', Australian Domestic and Family Violence Clearinghouse, Sydney, 2000, 1.

17 J Cerel, M Fristad, J Verducci, R Weller & E Weller, 'Childhood Bereavement: Psychopathology in the 2 years Post Parental Death' (2006) 45(6) *Journal of the American Academy of Child and Adolescent Psychiatry* 681.

18 J Fantuzzo & W Mohr, 'Prevalence and Effects of Child Exposure to Domestic Violence' (1999) 9(3) *The Future of Children: Domestic Violence and Children* 21.

19 D Indermaur, 'No 195: Young Australians and Domestic Violence', (2001) Australian Institute of Criminology website <http://www.aic.gov.au/documents/C/8/B/%7BC8BCD19C-D6D0-4268-984F-B6AF9505E5EA%7Dti195.pdf> (accessed 4 May 2013).

20 C Humphreys and N Stanley (eds) *Introduction to Domestic Violence and Child Protection*, Jessica Kingsley Publishers, London, 2006.

21 T Brown and D Bagshaw, *Family Violence and Family Law in Australia* (Commonwealth Attorney General, 2010) <http://apo.org.au/research/family-violence-and-family-law-australia> (accessed 4 May 2013).

22 R Kaspiew, M Gray, R Weston, L Moloney, K Hand & L Qu, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies website, E2, 2009) <http://www.aifs.gov.au/institute/pubs/fle/> (accessed 4 May 2013).

23 Ibid, at [27].

24 Ibid, at [28].

25 G Sheehan and B Smyth, 'Spousal Violence and Post-Separation Financial Outcomes' (2000) 14 *Australian Journal of Family Law* at 111; I Wolcott and J Hughes, *Towards Understanding the Reasons for Divorce, Working Paper No 20*, Australian Institute of Family Studies, 1999.

statute and how do those who interpret the legislative provisions assess the potential level of risk?

Exposure/witnessing and family law

In 1994, in *JG v BG*[26] it was recognised that exposure to family violence is highly relevant in children's matters.[27] This case held that violence was a relevant consideration in determining the best interests of the child, 'whether or not they were the direct recipient of abuse'.[28] This judgment seemed to be far from the norm though, with social research criticising courts for failing to recognise the harm suffered due to family violence.[29] For instance, in a 1976 judgment violence by a man against his wife was held to be irrelevant when considering how he might treat his children.

> . . .there is no suggestion that Mr H has ever mistreated his children with the violence with which he has treated his wife. . .. Mr H's affection for his children is evident, and in assessing his potential as a custodial parent I have largely disregarded his behaviour as a husband. . .[30]

The 1995 reforms to the FLA[31] introduced exposure to violence to the list of factors relevant to determining a child's best interests in sections 68F(2) (g) and (i).[32] This sub-section (g) became one of the two 'primary' best interest considerations via the Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth): protection from 'physical and psychological harm. . . [due] to abuse, neglect or family violence'.[33] The other primary consideration is 'the benefit to the child of having a meaningful relationship with both parents'. Labelled as the legislative 'twin pillars' by Chisholm,[34] there was a tension between these factors since neither primary factor was accorded more weight under the 2006 law. That tension, along with other 2006 changes, which emphasized shared parenting and possibly deterred people from reporting violence, have been assessed as promoting the importance of parent/child contact over a child's need for a loving and nurturing relationship.[35]

---

26 *In the Marriage of JG and BG* (1994) 18 Fam LR 255; 122 FLR 209; (1994) FLC 92-515.

27 H Rhoades, C Frew & S Swain, 'Recognition of Violence in the Australian Family Law System: A Long Journey' 2010 (24)(3) *Australian Journal of Family Law* 296.

28 *In the Marriage of JG and BG* (1994) 18 Fam LR 255; 122 FLR 209; (1994) FLC 92-515.

29 J Behrens, 'Domestic Violence and Property Adjustment: A Critique of "No Fault" Disclosure' (1993) 7 *AJFL* 9; R Graycar, 'The Relevance of Violence in Family Law Decision Making' (1995) 9 *AJFL* 58.

30 *Marriage of Heidt* (1976) 1 Fam LR 11, 576: (Per Murray J); *Chandler v Chandler* (1981) 6 Fam LR 736; (1981) FLC 91-008.

31 *Family Law Act 1975* (Cth).

32 (g) the need to protect the child from physical or psychological harm caused, or that may be caused, by: (i) being subjected or exposed to abuse, ill-treatment, violence or other behaviour; or (ii) being directly or indirectly exposed to abuse, ill-treatment, violence or other behaviour that is directed towards, or may affect, another person.

33 Ibid, s 60CC(2)(b).

34 R Chisholm, 'Family Courts Violence Review' (Commonwealth Attorney General, 2009) <http://apo.org.au/research/family-courts-violence-review> (accessed 4 May 2013).

35 As concluded by two of the Government initiated reviews of the 2006 amendments: Kaspiew et al, above n 22; Ibid, Chisholm.

> However, lawyers and relationship service professionals both expressed much greater confidence in the ability of the family law system to ensure that children had meaningful involvement with each parent than in its ability to ensure that children are protected from harm, family violence, child abuse and neglect.[36]

These reviews, commissioned by the Commonwealth Attorney General, cited too the social science research as provided above that emphasize that the harms to children of exposure to violence 'clearly jeopardise children's wellbeing'.[37]

In the 2006 legislation, the line between abuse and exposure was also blurred with one of the Objects in Pt VII of the FLA stating that 'children need to be protected not only from direct harm but also harm caused by being exposed to abuse or family violence that is directed towards, or affects, another person'.[38] In the 2012 amendments[39] the definition of family violence was extended and family violence is now defined as conduct that coerces or controls a family member, or causes them to be fearful; this could be considered to be a subjective definition having deleted the 2006 'objective' element to the definition 'that the fear or apprehension of violence must be reasonable'.[40] Further, these latest definitional changes may directly affect outcomes for children exposed to family violence because 'exposure' is now defined to include the provision of assistance,[41] cleaning up after the incident,[42] or being present while emergency services attend an incident involving an assault.[43] Due to these two definitional changes children should not, therefore, need to be present at the time of the violent conduct to be found to have been exposed to it. Courts must continue to consider the risk of family violence and not make orders that expose people to an unacceptable risk of family violence or make orders inconsistent with a family violence order.[44] The word 'person' has been used in the new legislation, not child, so this consideration may be extended to parents of children.

Although the most recent amendments appear to encapsulate a far broader range of family violence behaviour, the examples provided in the new s 4AB(2)[45] are predominantly related to physical acts.[46] Further, two of the three sub-sections[47] relating to controlling or coercive behaviour contain an element of 'unreasonableness', so this may be either a subjective or objective test. And, it is yet to be determined from whose point of view the behaviour must be unreasonable: victims, witnesses or judicial officers. Indeed, judicial

---

36 Ibid, Kaspiew et al at 3.9.
37 Ibid, at 3.10.
38 Section 60B(1)(b). Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), [36].
39 Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth).
40 Family Law Act 1975 (Cth) s 4AB(1). The definition of abuse was altered by the amendments in 2012 to include assaults, sexual activity, and serious psychological harm caused by exposure to family violence or serious neglect.
41 Ibid, s 4AB(4)(c).
42 Ibid, s 4AB(4)(d).
43 Ibid, s 4AB(4)(e).
44 Ibid, s 60CG.
45 Ibid.
46 Ibid, ss 4AB(2)(a)–(c), (e)–(f).
47 Ibid, ss 4AB(2)(g)–(h).

officers carry a heavy burden when considering allegations of violence and abuse because it is not 'easy to arrive at clarity on the extent, severity and nature of that violence, and then match that information with appropriate child-focused action'.[48]

It is important to note too that s 60CC(2A), as inserted in June 2012, requires greater weight to be given to the primary consideration of protection of children over the promotion of child/parent contact. The 2012 amendments only apply to cases where the application was filed on or after 7 June 2012.

Aims of the research

To date, there is a paucity of research that focuses on the extent to which witnessing or exposure to family violence is considered and weighted by the judiciary in Australia compared to other forms of violence, such as the direct abuse of a child. This paper will contribute to filling that gap. In the following article, we look at case law to examine how judicial officers have regarded children witnessing family violence since the 2006 amendments came into force. We also ponder — in a speculative fashion — whether the 2012 amendments are likely to affect any change in how judicial officers approach children's exposure to violence.[49]

When judicial officers make decisions, including those about violence, they consider the evidence and arguments in court in light of the legislation at the time and their 'own understanding of what is and is not good for children'.[50] According to Chisholm: 'exposure to parental conflict is always relevant to an assessment of the child's best interests, because of the damage it can cause. . .'[51] However he also notes elsewhere that allegations of child abuse are particularly difficult either to substantiate or refute because the alleged act usually 'happens in private, the evidence is typically circumstantial and often ambiguous'.[52] Primarily this is due to the significant difficulties in establishing that child abuse has occurred. In many instances, the child is the only witness and there is no corroborating evidence[53] although it is not strictly necessary to find that past violence occurred to show there is an 'unacceptable risk' of harm to a child in permitting parent/child contact.[54] In examining a number of cases

48 L Moloney, B Smyth, R Weston & E Hall, 'Different Types of Intimate Partner Violence? Reply to Wangmann's comments on the AIFS report' (2008) 22 *Australian Journal of Family Law* 279.

49 Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth). We can only 'speculate' since few of the cases in our sample were filed after the amendments took effect. See Methodology section.

50 P Parkinson, 'The Values of Parliament and the Best Interests of Children — A response to Professor Chisholm' (2007) 21 *Australian Journal of Family Law* 213.

51 R Chisholm, 'The Harmful Impact of Parental Conflict on Children (and the Harmful Impact of Legislative Complexity on People Trying to Help Children) — A Brief Reply to Max Wright' (2008) 22 *Australian Journal of Family Law* 152.

52 R Chisholm, 'Child Abuse Allegations in Family Law Cases: A Review of the Law' (2011) 25 *Australian Journal of Family Law* 1.

53 Ibid 6.

54 R Chisholm, 'Recent Cases: How to Treat Allegations of Violence and Abuse: *Amador v Amador'* 2010 (24)(2) *Australian Journal of Family Law* 276 looking at *Amador v Amador* (2009) 43 Fam LR 268; [2009] FamCAFC 196; BC200950937, at [96]: 'In parenting cases, judicial officers should not shrink from making findings of abuse and violence when those

in which the 'unacceptable risk' test was applied, Chisholm found that courts focused more on the general consequences of separating parents from children rather than on the specific circumstances of the particular case and whether there was an unacceptable risk to the child.[55]

The complexities of the unacceptable risk test[56] are only a part of the picture of decision-making in these types of matters. Research conducted over the past 15 years looking at the efficacy of legislative amendments designed to better protect children have found that there is a prevalent reluctance by the family law system to sever relationships between fathers and children, even against backgrounds of severe violence and ongoing manipulation and control'.[57] Post 1995, unsupervised contact became far more common for fathers, despite allegations of family violence; supervised contact was ordered for increasingly serious levels of violent and abusive conduct.[58] Unless there was strong corroborative evidence, overnight contact was most commonly ordered by the courts, 'irrespective of the apparent severity of the allegation and the apparent weight of evidence that supported these allegations'.[59] The importance of parent/child contact was promoted over a child's need for a loving and nurturing relationship and this has continued following the 2006 amendments.[60]

It is within this context of judicial indeterminacy and emphasis on parental ties that we are asking how exposure to violence is being considered and weighted.

---

findings are relevant and open on the evidence, while keeping in mind the need for a proper level of confidence and, normally, applying the rules of evidence in relation to the allegations'. The 'unacceptable risk' test was developed in *M v M* (1998) 197 CLR 250; 158 ALR 379; [1998] HCA 68; BC9805921 in the context of sexual abuse and essentially requires that where abuse of a child is a risk, the court not make an order that would expose a child to an 'unacceptable risk' of abuse or harm.

55 Chisholm, above n 52, states that in making decisions about child (sexual) abuse, courts determine the risk of the abuse occurring and the magnitude of that risk (*M v M* (1998) 197 CLR 250; 158 ALR 379; [1998] HCA 68; BC9805921 by applying the civil standard of proof set out in *Briginshaw v Briginshaw* (1938) 60 CLR 336; [1938] ALR 334; (1938) 12 ALJR 100; BC3800027.

56 See also J Fogarty AM, 'Unacceptable Risk — A Return to Basics' (2006) 20 *Australian Journal of Family Law* 249; P Parkinson, 'Family Law and Parent-Child Contact: Assessing the Risk of Sexual Abuse' (1999) 23 *Melbourne University Law Review* 345–371.

57 R Kaspiew, 'Violence in Contested Children's Cases: An Empirical Exploration' (2005) 19 *AJFL* 112 at 138. Kaspiew concludes that the 1995 inclusion of the child having a right to know both parents (s 60B(2)(b) appeared to create a rebuttable presumption favouring contact.

58 H Rhoades, R Graycar & M Harrison, 'The Family Law Reform Act 1995: The first three years' (2000) Family Court of Australia Web Site <http://www.familycourt.gov.au/wps/wcm/resources/file/ebab0a49e079ac3/famlaw.pdf> (accessed 4 May 2013).

59 L Moloney, B Smyth, R Weston, N Richardson, L Qu & M Gray, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings. A Pre-reform Exploratory Study* (Australian Institute of Family Studies, 2012) <http://www.aifs.gov.au/institute/pubs/resreport15/main.html> (accessed 4 May 2013).

60 R Chisholm, 'The *Family Law Amendment (Shared Parental Responsibility) Bill 2006*: Putting Children at Centre Stage?' in R Kaspiew, 'Empirical Insights into Parental Attitudes and Children's Interests in Family Court Litigation' [2007] 29 *Sydney Law Review* 130, 152.

Methodology

The 60 most recent first instance matters from mid-September 2012 that involved family violence and children's exposure and/or experiencing child abuse were identified from the Australasian Legal Information Institute (AUSTLII)[61] online database. We restricted our analysis to these judgments rather than drawing a random sample in order to minimise the time difference between the matters being examined, thereby reducing the confounding effects of variables that may change over time. Seventy two per cent of the judgments were from the Federal Magistrates Courts while 28% came from the Family Court of Australia with the bulk of the matters coming from registries in New South Wales. The majority of the judgements (82%) involved women making allegations of family violence or abuse and in 83% the alleged perpetrators were male.

Factors that were recorded, considered and cross-tabulated in an initial analysis of the judgments included the following: background variables that might potentially affect outcome; the type of family violence or abuse alleged; whether the Order was no time, supervised time with alleged perpetrator or unsupervised time with alleged perpetrator; and how the judicial officer discussed (and seemed to weight) the alleged exposure and/or abuse when going through the best interest list. We used a thematic analysis with both authors independently examining the cases. Having identified the important theme of unacceptable risk, we undertook a second analysis of the judgment material in which we identified and explored the facts and variables that appeared to influence judicial officers' assessment of risk of harm. Any relevant comments were recorded.

Caveats

We neither claim nor aim to produce a comprehensive overview of judicial officers' decision-making and measurement of harm in exposure to violence and direct child abuse matters. Judgment material is limited in providing the full picture of judicial reasoning; findings should be seen as indicative but not as definitive.

AUSTLII does not contain all first instance judgments. The 60 cases may be reflective of particular registries due to the large number of registries relative to the number of cases and because of differences in how registries report cases to AUSTLII over time. The outcomes of the 30 child abuse cases might not reflect determination of child abuse matters in general since it happens that none of the 30 was on the Magellan list, which handles the more serious cases of physical and sexual abuse.[62]

The sampling timeframe/model was created to provide a yardstick for comparison between pre-June 2012 reform and post-June 2012. However of

---

61 Australasian Legal Information Institute, *AUSTLII* (12 September 2012) Australasian Legal Information Institute Web Site <http://www.austlii.edu.au/>. A full list of the cases sampled is available on request.

62 J George, *The Magellan Project- a Case Study Management Pathway involving Child Abuse* (2010) <http://www.thefamilylawdirectory.com.au/article/the-magellan-project-child-abuse-allegations-family-court.html> (accessed 4 May 2013). The Magellan program is discussed again in the concluding remarks of this paper.

the 60 matters, only four were identified in which the judicial officer applied the FLA as amended in June 2012[63] — not a large enough sample with which to make a valid comparison. Where relevant, their facts, outcomes and judicial reasoning are referred to below. Note that our findings, minus these four cases, could provide a baseline for future comparison of the effects of the June 2012 legislation.

Perception of risk of harm

The question of whether children will spend unsupervised, supervised, or no time with the alleged violent parent appears to be correlated with whether judicial officers find there is an acceptable or unacceptable risk of harm to children.[64]

If the allegations of abuse and family violence are rejected by the court, then it is obvious that little or no risk of harm is identified. *Ogden v Ogden* is an example: a mother throwing objects at a father was held not to be family violence as the father was not fearful.[65] Similarly in *Geston v Geston*[66] a father's allegation of abuse was discounted due to insufficient evidence and a failure to put allegations to the mother in cross-examination.[67] Allegations in *Carr v Carr* that a mother abused a child were not substantiated, as the child was found to be likely the victim of parental alienation.[68]

Unsupervised time might be the determination too if the responsibility for the violent behaviour was attributed to both parents.[69] For instance, in *Henty v Sullivan* the evidence of the abuse alleged was held not to present an unacceptable risk to the child, as the allegations were made in an atmosphere of ongoing parental mistrust. Justice Dessau stated that she hoped the parents appreciated that 'they have a beautiful daughter, an innocent in the midst of their conflict, and one who cannot blossom. . .if their hostility continues to override her needs'.[70]

Other matters turned on the specific circumstances of the case. For example, in *Hashim v Hashim* the level of risk was found to be acceptable and unsupervised contact was ordered due to a parent obtaining professional assistance with anger management. In that case, there was also judicial recognition that abuse had occurred only during separation. This appeared to

63 *Carra v Schultz* [2012] FMCAfam 930; BC201206732; *Francis v Imaikop* [2012] FMCAfam 873; BC201206419; *Langley v Camp* [2012] FMCAfam 778; BC201205710; *Wyatt v Wyatt* [2012] FMCAfam 907; BC201206727. The amendments took effect on 7 June 2012 and, according to the Family Court of Australia apply only 'to proceedings issued on or after that date' <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/fv_best_practice_for_c> (accessed 4 May 2013).

64 Judicial officers must determine the best interests of the child by considering the risk of harm in light of statutory provisions.

65 [2012] FMCAfam 616; BC201205148 at [102].

66 [2012] FMCAfam 460; BC201204329 at [102].

67 Ibid, at [107].

68 [2012] FMCAfam at [206] [209]; *Kempsey v Wilson* [2012] FamCA 362; BC201250478.

69 *Morgan v Morgan* [2012] FamCA 394; BC201250518.

70 *Henty v Sullivan* [2012] FamCA 470; BC201250563 at [165].

contribute to a finding that there was a reasonably low level of risk to the child.[71]

Risk of harm and type of violence

Unsupervised contact was the determination in 70% of the judgments; this is a trend which has been evident for at least the last 15 years.[72] Orders for no time or for supervised time (both indicative of judicial concern about the caring capacity of that parent) were less likely with exposure (33%) than with direct abuse (57%). However, as Table 1 shows, an order of no time was the determination in *only* eight of the 60 matters;[73] three of these included a determination of *serious* assaults and/or child (sexual) abuse. In three of the other five, the child(ren) expressed strong views about not seeing the parent;[74] in another the judge was concerned about the father's exhibitionism and the negative impact that even supervised contact would have on the mother which he found could have 'vicariously unfortunate effects on [the child]'.[75] In the other matter with a no time order, the judge appeared to be most influenced by the Family Consultant who considered the child had an 'ambivalent attachment' with the mother.[76]

Table 1: Number of cases of type of violence alleged by Order

Type of Violence	Type of Order		
	Unsupervised	Supervised	No Time
Violence between adults	15	2	2
Child exposure	10	3	2
Exposure and direct child abuse	14	2	3
Child Abuse	3	3	1
Total	42	10	8

'Couples violence' appears to be seen as less harmful to children and constituting the lowest level of unacceptable risk to children. Judicial officers accordingly discussed the primary considerations differently in cases that involve children (potentially) witnessing family violence as compared to cases with allegations of direct child abuse.[77] For instance, in *Henty v Sullivan*, in which the relationship between the parents was extremely conflicted, Dessau J commented that a meaningful relationship needed to be weighed equally

71 *Hashim v Hashim* [2012] FamCA 135; BC201250172 at [212], [206], [226].

72 Rhoades et al, above n 58.

73 Note that when the age, gender and number of children in the household were cross-tabulated with the outcomes ordered for children, there was no statistically significant effect. The serious abuse cases were: *Corlis v Pepy* [2012] FamCA 247; BC201250323; *Field v Bowers* [2012] FamCA 189; BC201250224; *Sheenan v Sheenan* [2012] FamCA 383; BC201250398.

74 *Bower v Bower* [2012] FMCAfam 515; BC201204727; *Daplyn v Ness* [2012] FMCAfam 959; BC201206793; *Francis v Imaikop* [2012] FMCAfam 873; BC201206419. The facts of these cases are discussed further below.

75 *Marsden v Winch* [2012] FamCA 557 at 117; BC201250491.

76 *Lolley v Lolley* [2012] FamCA 380; BC201250493.

77 Family Law Act 1975 (Cth) ss 60CC(2)(a)–(b).

with the need to protect the child from harm or abuse. In ordering sole parental responsibility for the mother but time spent with the father, the judge noted:

> The reality for the child is that, although her parents love her, they have only negative views of each other. I hope that with the conclusion to these proceedings, the parents might find the mental and emotional space, and the insight, to appreciate that they have a beautiful daughter, an innocent in the midst of their conflict, and one who cannot blossom into the healthy, happy adult that both would wish for, if their hostility continues to override her needs.[78]

In contrast, in matters that involved child abuse allegations, the weight attributed to the primary consideration of maintaining a meaningful relationship may be diminished as illustrated by the matter of *Corlis v Pepy* in which the father had been charged with indecent assault on his youngest child who was only five years old at time of the offence. Three years later, while still serving a prison sentence, the father sought orders to reinitiate contact with his two children. As observed by Cleary J:

> It is important in my view for the father to understand that the most important thing he can do for his children is to respectfully stay away from them. His presence in their lives would be disruptive and adverse, even if there was no risk of further offending.[79]

Thus, the protection of the children best interests 'pillar' is emphasised when child abuse has been determined to have occurred. For example, in *Jenkins v McInnes*, a father who had sexually assaulted his daughter was prevented from having contact with his son, even though he was at a lower risk of sexual assault.[80] In that matter, Altobelli FM applied the unacceptable risk test and made an order that put the son at 'least risk'.[81]

Only five of the 34 judgments that included allegations of exposure resulted in no time being ordered. The violence in these five generally involved very serious assaults. For instance, in *Sheenan v Sheenan*, the judge was 'satisfied that he was a violent man,' — that the father had seriously assaulted the mother with an axe in front of his six-year-old child. Given this incident, it was held there was an unacceptable risk of harm to the children and no time with the father was ordered.[82] Supervised contact was held to be inappropriate due to exposing the 'wife to heightened anxiety, which was a concern for her parenting capacity'.[83]

Francis v Imaikop involved a father's violent conduct towards the mother causing their twelve-year-old child to be so fearful of contact as to say, 'I hate myself. I hate everything. I want to kill myself'.[84] The father's reaction was simply to state, 'She'll be right. She will come or I'll make her come. She's a kid and she'll do what I say'.[85] In the words of Scarlett FM:

---

78 *Henty v Sullivan* [2012] FamCA 470; BC201250563 at [165].
79 *Corlis v Pepy* [2012] FamCA 247; BC201250323 at [62].
80 *Jenkins v McInnes* [2012] FMCAfam 477; BC201204846.
81 Ibid, at [54].
82 *Sheenan v Sheenan* [2012] FamCA 383; BC201250398.
83 Ibid, at [104]–[105].
84 *Francis v Imaikop* [2012] FMCAfam 873; BC201206419 at [23].
85 Ibid, at [100].

> At this time in her life, X's best interests will not be served by remaining in contact with a father who has a history of violence against women, including her mother. X is female, and she needs to live in an environment where violence by men towards women will not be tolerated by society.[86]

In *Bower v Bower*, five children aged 11 to 16 years of age had become fearful of their mother who was alleged to have abused them. The court did not determine whether the allegations were founded since the 'children do not wish to see her and should not be made to do so'.[87] The report prepared by the Family Consultant explained why supervised contact was not appropriate:

> . . . compelling [the children] to spend time with the mother is not in their best interest. In fact, to do so at this time is likely to cause them distress and further emotionally alienate them from their mother.[88]

The father in *Marsden v Winch* habitually masturbated, which his ten-year-old daughter had witnessed.[89] No contact was ordered as he was unable to control this behaviour, was unlikely to do so in the presence of teenage girls,[90] and the mother had developed post-traumatic stress disorder.[91] In relation to the mother, Watts J stated that:

> the real problem however with the father denying what the mother says she witnessed. . .. is that it feeds into and exacerbates the mother's fears that the father's treatment has been based on a flawed history and has been insufficient to protect the child from being exposed to the consequences of a recurrence of that behaviour by the father.[92]

Although such relatively infrequent determinations of no time in matters that include exposure suggest that witnessing may not be considered to represent the same degree of harm to children, individual judicial officers do appear to understand its gravity (at least in theory). In *Lauder v Doran*[93] for example, Murphy J, discussing family violence, described the potential effect on children as insidious, 'affecting both parenting and outcomes for children'.[94]

A number of decisions did reflect a broad understanding of violence. For instance, as stated by Brown FM, violence can range from:

> [I]mpulsive behaviour that arises as a result of a stressful situation such as a relationship breakdown and is instantly regretted or it can be more systematic and deliberate arising from a clear power imbalance between the parties concerned.[95]

Other federal magistrates agree that family violence does not necessarily

---

86 Ibid, at [104].
87 *Bower v Bower* [2012] FMCAfam 515; BC201204727 at [133].
88 Ibid, at [78].
89 *Marsden v Winch* [2012] FamCA 557; BC201250491 at [73]–[91]. The father's behaviour was attributed to mental health issues.
90 Ibid, at [82].
91 Ibid, at [117].
92 Ibid, at [91].
93 [2012] FamCA 452; BC201250552.
94 Ibid, at [1].
95 *Alley v Alley* [2012] FMCAfam 895; BC201206723 at [100].

involve physical aggression. In *Marcus v Jeffries*,[96] Bender FM noted that the father had failed to recognise that 'arguing and continuous acrimony is a form of family violence'.[97]

Barnett v Ackerman also shows judicial understanding of family violence. The children were ordered to spend two hours supervised contact with their father on four occasions a year. Even though the mother was not a good witness,[98] Terry FM accepted that behaviour contradictory to allegations of violence is common for victims of violence.[99] The father was viewed as 'simply not credible'[100] due to inconsistent accounts of violent incidents.[101] He had attempted to mitigate his violent acts by defining them as 'couple violence', which the federal magistrate did not accept.[102] This was also true in a decision made under the June 2012 law: in *Francis v Imaikop* Federal Magistrate Scarlett found the father not to be a credible witness due to down-playing his violent behaviour.[103]

However, exposure to *physical* violence does seem to be perceived as more harmful than exposure to verbal or emotional abuses. As stated by Coakes FM, where children are exposed to verbal abuse *and* physical assaults, the protection of children from psychological harm is paramount.[104] Thus, unsupervised time was ordered in all three cases in which the adult violence was controlling behaviour and in six of the seven with verbal abuse between the adults; this suggests that witnessing non-physical violence is seen as representing the least risk to children. When the alleged violence that the child witnessed included physical violence, unsupervised time orders were less common. For example, in one of the four cases heard after the June 2012 amendment took effect, Scarlett FM indicated that courts were not only interested in the immediate protection of children but also in preventing them from being exposed to 'frightening episodes' of family violence.[105] In this matter, the order required any time with the violent father to be supervised.[106]

Quality of corroborative evidence and assessment of risk of harm

The quality of corroborative evidence appears to be a crucial deciding factor in making an order of no time or supervised time. In particular, as found in

96 *Marcus v Jeffries* [2012] FMCAfam 273; BC201204190.
97 Ibid, at [25] per Bender FM.
98 *Barnett v Ackerman* [2012] FMCAfam 286; BC201201804 at [23].
99 Ibid, at [44]. This meant that the mother was not a good witness but the Magistrate understood her poor performance was due to the violence she had suffered.
100 Ibid, at [27].
101 Ibid, at [33].
102 Ibid, at [106] per Terry FM: 'The violence was perpetrated by the father, it was serious and it was accompanied by accusations of unfaithfulness and attempts to control the mother's movements'.
103 *Francis v Imaikop* [2012] FMCAfam 873; BC201206419 at [111]. The violent father was not allowed to have contact with his daughter, primarily because of a family violence order protecting the mother and child, at [65].
104 *Cavill v Jessop* [2012] FMCAfam 784; BC201206107 at [282].
105 *Wyatt v Wyatt* [2012] FMCAfam 907; BC201206727, at [10].
106 Maintaining a meaningful relationship remained an important consideration despite s 60CC(2A).

earlier research,[107] expert opinion from the Family Consultant and by medical specialists such child psychiatrists[108] seems important in influencing judicial officers. For instance, the Family Report evidence in one of the exposure cases with the atypical order of no time, emphasized the harm of exposure:

> Each of the parties needs to be cognizant of the research that suggests that children exposed to on-going family conflict and violence are prone to suffer adverse consequences in their emotional and cognitive development. Depression, anxiety, as well as other cognitive and temperament problems are commonly seen in such children. X is already showing signs of mental health distress especially anxiety, self harm and hypervigilance which will only exacerbate if she becomes further implicated in the adult dispute or is exposed to further conflict between her parents.[109]

In another example, *Sheenan v Sheenan*, strong corroborating evidence included remarks by a judge in sentencing the father for assault of his ex-wife. Further, the father stated to a psychologist that '[referring to the mother] I wish I'd shot her in the head'.[110] The evidence provided by the Family Consultant indicated that the father had limited parenting capacity, which Cronin J found to be 'powerful and persuasive'.[111]

Indeed such expert evidence concerning the effects of exposure can be very important. *Field v Bowers* involved the father repeatedly making unfounded allegations of sexual abuse by the mother, including the children kissing her pregnant stomach.[112] A psychiatrist assessed the father's behaviour and stated that his allegations truly represented a desire to re-partner with the mother.[113] Three psychologists discussed the father's negative impact upon the children resulting in the discounting of the father's contradictory assertions.[114] Justice Cronin ordered the father to have no contact, otherwise than agreed by the wife, because 'the husband's obsession, appalling negative behaviour and lack of insight' would prevent the children from having the opportunity to become well-rounded adults.[115]

Medical evidence was also relied upon in *Daplyn v Nessa*. A father was ordered to have no contact with his ten-year-old child due to on-going litigation and parental conflict to which the child had been exposed. A deciding factor in the judge's reasoning seemed to be the evidence of two medical practitioners that the child was 'acutely aware of the dysfunctional

---

107 T Brown, L Hewitt, R Sheehan, M Frederico, *Violence in Families: Report No 1: The Management of Child Abuse Allegations in Custody & Access Disputes before the Family Court of Australia*, Department Social Work, Monash University, Melbourne, 1998. Note that this research used a purposive non-probability sample and cannot therefore depend upon the rationale of probability theory.

108 See for example *Gaylard v Cain* [2012] FMCAfam 501; BC201203671 at [9] in which Federal Magistrate Altobelli accepted the child and family psychiatrist's expert's opinion that there was, in his opinion, no unacceptable risk of sexual abuse by the father, the mother had alienated the children from the father but that she would provide the better care.

109 *Francis v Imaikop* [2012] FMCAfam 873; BC201206419 at [45].

110 *Sheenan v Sheenan* [2012] FamCA 383; BC201250398 at [49].

111 Ibid, at [82].

112 Ibid, at [108].

113 Ibid, at [94].

114 Ibid, at [107].

115 Ibid, at [146]–[147].

dynamic and conflict between the parties which has adversely affected him'. The child had expressed his view to the doctor that he would be 'unsafe if he spent time with the father'.[116]

In *Langley v Camp*, a matter that used the new June 2012 provisions also heard by Scarlett FM, a mentally ill father was given supervised contact with his son even though he (the father) had a number of psychotic episodes[117] and an apprehended violence order had been in place protecting the mother.[118] The Family Consultant indicated that the father was '. . . attentive, gentle and affectionate'.[119] This expert opinion, combined with a community treatment order,[120] may have contributed to Scarlett FM's decision:

> I am satisfied that there is a benefit to the child in having a meaningful relationship with his father, but the avoidance of risk of harm to the child must take priority'.[121]

Minimising potential risk with unsupervised time orders

The analysis of the judgments shows that some orders for unsupervised time contained specific stipulations. For instance, *Scott v Ross* involved an order that the children live with their maternal grandparents and both parents only have supervised time with their children. These orders were made despite there being concerns that the grandfather abused alcohol and had assaulted the father in front of the children.[122] Justice Ryan made orders requiring the grandfather to attend alcohol counselling as well as to keep within a 0.05 blood alcohol level while looking after the children.[123] This judgment illustrates the use of court orders to mitigate the risk of harm to children by attempting to control potentially risky behaviour.

Abstinence from alcohol featured in other matters with one father allowed to have unsupervised time so long as he complied with court orders to limit his alcohol consumption.[124] And, in *Cavill v Jessop*, the over-consumption of alcohol and the use of drugs were closely linked with the escalation of violence where controlling behaviour and verbal and physical abuse were alleged:

> Each parent is restrained from consuming alcohol or illicit substances for the period 12 hours prior to and during the time [X] is in the care respectively of either parent.[125]

---

116 *Daplyn v Nessa* [2012] FMCAfam 959; BC201206793 at [80]–[82].
117 *Langley v Camp* [2012] FMCAfam 778; BC201205710 at [20].
118 Ibid, at [39].
119 Ibid, at [40].
120 Ibid, at [22].
121 Ibid, at [41].
122 *Scott v Ross* [2012] FamCA 193; BC201250271 at [41].
123 Ibid, at [75]. While attendance at a program can be monitored, one might question whether it is realistic to regularly confirm a blood alcohol limit, other than through self-reporting.
124 *Kennedy v Masuyo* [2012] FamCA 471; BC201250562.
125 *Cavill v Jessop* [2012] FMCAfam 784; BC201206107 at [11]. Similarly in *Watt v Nelson* [2012] FMCAfam 751; BC201205870 at [8]: 'By consent each party be restrained, without admission, from consuming illicit substances, or being under the influence of illicit substances, twelve (12) hours prior to and whilst any time the children are in that parties care'. In that case, the child, whose mother had been in a series of violent relationships,

Risk to children in some cases was controlled by the court too in other ways such as not allowing children to travel overseas with the father.[126]

In *Matson v Matson* Federal Magistrate Coakes decreased the chance of physical abuse by ordering that:

> Each parent is restrained from physically punishing Y by any physical means including but not limited to smacking, slapping, pushing, grabbing, holding, using a slipper, or spoon or any other instrument, including the threatened use of any such instrument, and each parent is further restrained from causing or permitting any other person to administer such form of punishment or threaten to use such form of punishment to Y.

The harms of exposure were also mitigated by the Federal Magistrate with each parent ordered not to denigrate the other, including making rude comments, making insulting comments, swearing at, shouting at and making obscene gestures. . .'.[127]

Conclusion

Orders of no time or even for only supervised time are not the norm in cases involving allegations of *either* child abuse or exposure. Those parents who were ordered to have no time with their children were either extremely violent towards their partners, had abused their children, or were mentally unwell. It appears that these parents' behaviour was so extreme that judges considered that court orders prohibiting the behaviour would have been ineffectual and so posed an unacceptable risk. Supervised time with the child(ren) appears to be ordered if the parent appears to accept responsibility for their actions and seeks treatment, thereby showing the risk of harm to their children has been mitigated.[128]

Indeed as these cases have shown, the critical question that the judicial officers are responding to is whether there is an unacceptable risk of harm to the child in seeing the parent. As recently stated by Deputy Chief Justice Faulks, 'children cannot be an experiment'.[129] Orders cannot be made on the basis of 'let's see what happens'.[130] Chisholm agrees with such a sentiment: that determinations about unacceptable risk are 'based on a whole set of factual findings about the child and much else; those findings would have to be based on evidence, or agreed facts'.[131] In our sample, 'facts' were provided by Family Consultants, police investigations and subsequent criminal charges, expert testimony or facts agreed between the parties. This illustrates the importance of corroborating evidence in the assessment of allegations and the

---

stated 'Mr R was punching holes in the wall he scares us he said he was going to kill mum and us Mr R threw all the phones into the toilet Mr R likes to push mum around. . .'.

126 *Fredericks v Carrigan* [2012] FMCAfam 663; BC201205231.

127 *Matson v Matson* [2012] FMCAfam 790; BC201206197 at [331] and [215].

128 *Langley v Camp* [2012] FMCAfam 778; BC201205710.

129 Deputy Chief Justice John Faulks, 'Children's Matters in the Family Court: LAT, Div 12A & Response to Violence', Lecture delivered at the University of Canberra, Australian Capital Territory, 18 October 2012.

130 Ibid.

131 Chisholm, above n 52, 21.

risk of harm the alleged behaviour presents to a child.[132]

However, when judicial officers make findings of fact and weigh those findings in the exercise of their discretion within the FLA framework: 'ultimately, the weight attached to each factor as set out at s 60CC is a matter of discretion'.[133] In the recent matter of *Lauder v Doran*, Murphy J agreed, stating that 'best interests are values not facts'[134] in deciding that there was potential for an emotional relationship despite the father's criminal behaviour. His decision to order supervised contact even though one of the medical reports indicated that 'the mother's problems diminish her ability to buffer [the child from] the father's issues'[135] highlights the importance of individual judicial officers' discretion. Thus to some extent their individual understanding and views about the harms of family violence may act as a filter in assessing the 'facts' — even those provided by the experts.

Exposure to family violence, or its after effects, does not seem to be attributed the same level of potential harm to children as direct abuse, especially sexual interference with a child. In two thirds of the 15 matters with child exposure, unsupervised time was ordered as compared to 43% of the matters involving child abuse alone. This is despite research clearly showing that exposure to family violence is extremely harmful to children and that family violence is correlated with a heightened risk of child abuse. The latter is illustrated in our sample with about one third of child abuse allegations also including allegations of exposure or violence occurring between adults.

As discussed earlier, the 2012 amendment prioritised the primary consideration of protection of the child over the promotion of child/parent contact and broadened the definition of exposure. Is legislative change enough though? The outcomes in the four post amendment cases were varied. One resulted in an order of no time until the child turned 13 and then she could see her father if she wished to.[136] In both *Wyatt* and *Langley and Camp* discussed earlier Scarlett FM ordered supervised time, stating that, 'The Family Law Act has recently been amended to give greater weight to concerns about family violence'.[137] In the fourth, the Federal Magistrate decided that the father could not file a Notice of Child Abuse, Family Violence or Risk of Family Violence since the father would need to be coerced, controlled or in fear when the mother kept the child from him for such an act to constitute family violence.[138]

The small number of cases is of course too limited to allow for any conclusions about the effect of legislative prioritising of child protection. It does allow us though to conclude that decision-making in these types of cases continues to involve judicial assessment of coercion, control, fear, violence

132 Moloney et al, above n 56, at 102. This study found that unless allegations of violence were accompanied by strong corroborating evidence, outcomes for children were not affected.

133 *Watt v Neilson* [2012] FMCAfam 751; BC201205870, at [157].

134 *Lauder v Doran* [2012] FamCA 452; BC201250552: Approving of the quote from *CDJ v VAJ* (1998) 197 CLR 172 at 219; 157 ALR 686; [1998] HCA 67; BC9805442.

135 *Lauder v Doran* [2012] FamCA 452; BC201250552 at [37].

136 *Francis v Imaikop* [2012] FMCAfam 873; BC201206419.

137 *Wyatt v Wyatt* [2012] FMCAfam 907; BC201206727 at [7] and *Langley v Camp* [2012] FMCAfam 778; BC201205710.

138 *Carra v Schultz* [2012] FMCAfam 930; BC201206732.

and measurement of harm and risk. Therefore, the crucial question is how do judicial officers define and gradate harm and how do they understand the dynamics and manifestation of family violence? Chisholm has recommended:

> That whatever steps are taken in relation to the future of the Family Court of Australia and the Federal Magistrates Court, the Government should ensure that the federal court or courts administering family law have judicial officers with an understanding of family law and a desire to work in that field, and procedures and resources specifically adapted to the requirements of family law, and particularly to the requirements of cases involving issues of family violence.[139]

Engendering discussion amongst judicial officers about subjectively held definitions of harm and risk might help to bring about practical changes in outcomes for children. It is likely that there is variation in understanding of the realities of family violence. Judicial officers could no doubt benefit from learning more about the seriousness of exposure to violence; that exposure is far broader than witnessing;[140] and the correlation of abuse with adult violence. They could learn about the potential risk to the child if unsupervised time is ordered since the couple violence may persist in various ways after separation[141] and/or a violent partner may repeat such behaviour with a new partner.[142]

'Programmes involving a consistent coordination of police, court staff and human service providers. . .' could play an important role in changing attitudes.[143] To this end, it is likely that policy directions such as the Family Violence Best Practice Principles and initiatives such as the Magellan Program work in conjunction with legislation to better protect children. It is interesting though that none of the 30 child abuse cases in our sample were on the Magellan list. Evidently the abuse was not deemed as serious enough or the party or lawyer did not facilitate the process by completing the requisite Form 4.[144] With Magellan, 'the Court orders expert investigations and assessments from the respective state/territory child protection agency and/or

---

139 Chisholm, above n 34.

140 For instance, in 2011 case of *Palmer v Palmer* [2010] FMCAfam 999; (2010) 244 FLR 121; BC201007281, Federal Magistrate Brewster did not believe that the father's violence towards the mother posed a significant impact on the children: 'I am satisfied that the violence which I found was perpetrated by the husband had a specific impact on the wife. I do not believe that there is an unacceptable risk that the children will be directly exposed to violence' at [10].

141 See for example L Laing, 'Domestic Violence and Family Law', Australian Domestic and Family Violence Clearinghouse, 2003, < http://www.adfvc.unsw.edu.au/PDF%20files/family_law.pdf> (accessed 4 May 2013).

142 As discussed by D Saunders, *Child Custody and Visitation Decisions in Domestic Violence Cases: Legal Trends, Research Findings and Recommendations,* National Online Resource Center on Domestic Violence, Harrisburg, PA, 1998, <http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=371> (accessed 4 May 2013). He concludes that 'Judges who consider the remarriage of a man to be a sign of stability and maturity should instead consider it as a possible sign that the children will once again be emotionally harmed'.

143 P Easteal, 'Violence Against Women in the Home: Kaleidoscopes on a Collision Course' (2003) (3)(1) *Queensland University of Technology Law and Justice Journal* 250, at 273.

144 Notice of Child Abuse, Family Violence, or Risk of Family Violence.

the Court family consultant'.[145] Perhaps seriousness of physical abuse is a measurement or assessment best left to Family Counsellors and child protection workers who would be better able to investigate thoroughly allegations if these matters were routinely put on the Magellan List without the lodgement of a form 4.

The guidelines for Magellan also do not consider exposure as an injury that qualifies the matter for inclusion on the List:

> The parameters of the Magellan project are quite clear. Emotional abuse is not included, nor is the child being a witness to domestic violence. There must be a clear allegation that a child has been sexually abused or seriously physically abused.[146]

Yet as we write above, the psychological research has shown that 'with the exception of sexual abuse, witnessing family violence has been found to have an even greater negative impact on children than being a victim of violence'. Witnessing is mentioned in the recommendations of the *National Council's Plan for Australia to Reduce Violence against Women and their Children*, suggesting that Commonwealth and State and Territory governments need to work together to ensure that the National Framework for Protecting Australia's Children meets the needs of children who witness and/or experience domestic and family violence.[147] This includes State and Territory child protection agencies working with Commonwealth agencies or Courts.

Therefore, we recommend that in addition to the word 'serious' being deleted, that the Magellan program should be expanded to include family violence matters in which the harms of exposure are an issue. A uniform integrated response would better ensure that informed investigation of individual cases would take place, translating into more in-depth and uniform child welfare expert evidence to better inform judicial perceptions of risk of harm. There are resource issues for the State, Territory and Commonwealth Governments in implementing this recommendation; however we believe such a multi-disciplinary response would be a most worthwhile investment in promoting family law processes and reasoning that are in harmony with the National Child Protection Framework's aim to ensure that 'Australia's children and young people are safe and well'.[148]

---

145 Family Law Courts Magellan <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/About+Going+to+Court/Family+Court+of+Australia+pathways/FCoA+pathways+magellan> (accessed 4 May 2013).

146 George, above n 62.

147 National Council to Reduce Violence Against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021*. Commonwealth of Australia, 2009, 27.

148 Ibid; B Babington 'National Framework for Protecting Australia's Children: Perspectives on Progress and Challenges', (2011) 89 *Family Matters* <http://www.aifs.gov.au/institute/pubs/fm2011/fm89/fm89b.html> (accessed 4 May 2013).