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# Family violence and family law: Where to now?

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*The Family Law Amendment (Family Violence and other Measures Act) 2011 (Cth) introduced a number of amendments to the Family Law Act 1975 (Cth) relating to the manner in which courts exercising jurisdiction under the Act should deal with cases involving family violence and child abuse. This article examines these reforms, including the context in which they took place. It then argues that while the reforms are significant and will go some way towards improving the family law system's response to victims of violence and abuse, further reform is required. In particular, it is argued that if the family law system is to respond adequately to the high incidence of violence and abuse within separated families, provisions in the Family Law Act which treat family violence as an exception to the norm must be amended.*

## INTRODUCTION

The *Family Law Amendment (Family Violence and other Measures Act) 2011* (Cth) (the Family Violence Act), which amended the *Family Law Act 1975* (Cth), came into operation on 7 June 2012. This legislation introduced a number of amendments to the *Family Law Act* relating to the manner in which courts exercising jurisdiction under the Act should deal with cases involving family violence and child abuse. The changes include expanding the definitions of family violence and child abuse. Importantly, they also contain provisions prioritising children's safety over other considerations including promoting a meaningful relationship with both parents. Instead, the courts' attention is focused on issues relating to safety and the legislation encourages the reporting of family violence and abuse. Significantly, provisions which were seen to discourage disclosure of violence and abuse have been repealed.

This article commences with an examination of the reforms, including the context in which they took place. It then argues that while the reforms are significant and will go some way towards improving the family law system's response to victims of violence and abuse, further reform is required if the Family Violence Act's aim "to provide better protection for children and families at risk of violence and abuse" is to be achieved.<sup>1</sup>

In particular, it is argued that if the family law system is to respond adequately to the high incidence of violence and abuse within separated families, provisions in the *Family Law Act* which treat family violence as an exception to the norm must be amended. The present treatment of cases involving violence as an exception to the mainstream family law pathway fails to recognise the prevalence and seriousness of violence permeating the family law system, resulting in unsuitable and unsafe parenting outcomes. Finally, this article proposes further reforms which, if implemented, would go some way toward improving the prospects of capturing and dealing with violence and abuse within the Australian family law system.

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<sup>1</sup> Explanatory Memorandum, *Family Law Legislation Amendment (Family Violence and Other Measures) Bill 2011* (Cth) p 2.

## CONTEXT OF THE REFORMS

The Family Violence Act was largely a result of continued agitation suggesting that while family violence is a relatively common occurrence in separated families, particularly those whose parenting disputes are dealt with by the courts, it was not well understood and dealt with within the legal system. Many commentators considered that this was leading to inappropriate outcomes in parenting disputes.<sup>2</sup>

Research indicates that family violence is a pervasive problem in the population of separated families.<sup>3</sup> Family violence may take various different forms and can encompass a wide range of behaviours. It can affect victims and children in a variety of different ways, many of which were not recognised or catered for by the legislation prior to its amendment.<sup>4</sup> The many serious detrimental effects on children of being subjected or exposed to family violence are well documented.<sup>5</sup> While both men and women may be the victims and perpetrators of family violence, it is a gendered phenomenon which disproportionately affects women. In addition, men and women experience family violence differently.<sup>6</sup>

In a study conducted by the Australian Institute of Family Studies (AIFS), one in four mothers and one in six fathers reported physical violence inflicted by their former partner (with or without emotional abuse), and 39% of mothers and 36% of fathers reported emotional abuse alone. Eight percent of mothers and 3% of fathers reported ongoing fear for themselves and their child, with 92% of the mothers and 68% of the fathers reporting fears predominantly about the other parent.<sup>7</sup> Other research has demonstrated that, in comparison with men, women who are violent are more likely to be driven by frustration and anger rather than by a specific objective, such as control. Furthermore, their violence is more likely to be committed in self defence, or in response to provocation.<sup>8</sup> The recognition of the complexities and gendered nature of violence has led the Council of Australian Governments to develop a National Plan to reduce violence against women and their children.<sup>9</sup> The National Plan aims to make a real and sustained reduction in the levels of violence against women by coordinating action across jurisdictions to prevent violence from occurring, to hold perpetrators accountable and to encourage behaviour change.<sup>10</sup> The AIFS together with the University of Western Sydney are currently engaged with The Domestic and Family Violence Prevention Review and Evaluation, which is aimed at prevention of and early intervention in family violence.<sup>11</sup>

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<sup>2</sup> See, for example, Alexander R, "Moving Forwards or Back to the Future? An Analysis of Case Law on Family Violence under the Family Law Act 1975 (Cth)" (2010) 16 UNSWLJ 63; Kaspiew R et al, "Family Violence: Key Findings from the Evaluation of the 2006 Family Law Reforms" (2010) 85 *Family Matters* 38.

<sup>3</sup> Kaspiew R et al, *Evaluation of the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2009) pp 78-79, <http://www.aifs.gov.au/institute/pubs/fle/evaluationreport.pdf> viewed 20 February 2014; Qu L and Weston R, *Parenting Dynamics After Separation: A Follow-up Study of Parents Who Separated After the 2006 Family Law Reforms* (Australian Institute of Family Studies, 2010).

<sup>4</sup> Jaffe P et al, "Custody Disputes Involving Allegations of Domestic Violence: The Need for Differentiated Approaches to Parenting Plans" (2008) 46 *Family Court Review* 500; Wangmann J, *Different Types Of Intimate Partner Violence – An Exploration Of The Literature* (Issues Paper, Australian Domestic & Family Violence Clearinghouse, 2011).

<sup>5</sup> See, for example, Bromfield L et al, *Issues for the Safety and Wellbeing of Children in Families with Multiple and Complex Problems: The Co-occurrence of Domestic Violence, Parental Substance Misuse, and Mental Health Problems* (Issues Paper, Australian Institute of Family Studies, 2010); Time for Action: The National Council's Plan for Australia to Reduce Violence Against Women and their Children, 2009-2021 (National Council to Reduce Violence against Women and their Children, March 2009).

<sup>6</sup> Wangmann, n 4.

<sup>7</sup> Kaspiew et al, n 2 at 39-40.

<sup>8</sup> Morgan A and Chadwick H, *Key Issues in Domestic Violence* (Summary Paper, Australian Institute of Criminology, December 2009) p 3.

<sup>9</sup> Council of Australian Governments, *National Plan to Reduce Violence against Women and their Children 2010-2022*, <http://www.fahcsia.gov.au/our-responsibilities/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children> viewed 20 February 2014.

<sup>10</sup> Council of Australian Governments, n 9, foreword.

<sup>11</sup> Domestic and Family Violence Prevention Review and Evaluation, <http://www.aifs.gov.au/vpr> viewed 20 February 2014.

## PROBLEMS WITH THE LEGISLATION PRIOR TO THE FAMILY VIOLENCE ACT

A large proportion of parenting cases dealt with by the family law courts involve allegations of violence and abuse.<sup>12</sup> Research undertaken by the AIFS revealed that allegations of family violence, child abuse or both were made in over 57% of litigated cases, with the figure rising to over 72% of those cases that were judicially determined.<sup>13</sup>

Notwithstanding the prevalence of violence among families accessing the family law system, prior to the passing of the Family Violence Act an issue of particular concern was the perceived inadequate treatment of family violence in parenting disputes.<sup>14</sup> It was suggested that the 2006 reforms to the *Family Law Act*,<sup>15</sup> which promoted shared parenting, had marginalised family violence.<sup>16</sup> Prior to the enactment of the Family Violence Act, when determining the best interests of a child and with whom a child was to live or spend time, there were no specific provisions in the legislation which prioritised protection from harm over the need for a child to have a meaningful relationship with both parents. This resulted in substantial criticism of the legislation, including expressions of concern that the *Family Law Act* had moved away from protecting the interests and safety of women and children in acceding to men's demands for increased time with their children.<sup>17</sup>

In addition, one of the most controversial provisions enacted in the 2006 reforms was the so-called "friendly parent" provision, which required a court, when making a parenting order, to take into account "the willingness and ability of each of a child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent".<sup>18</sup> This section attracted criticism as it ignored the reality that at times parents are required to take action to protect their children from harm. Moreover, this provision discouraged parents from disclosing violence by the other parent for fear of being regarded as an "unfriendly parent", thus potentially placing children in an unsafe environment.<sup>19</sup>

A related concern was the enactment of s 117AB, which required the court to make a costs order against a person who had made a false statement or allegation. This provision was criticised as a result of its potential to deter victims of abuse and violence from disclosing their experiences for fear of not being believed.<sup>20</sup> This was of particular concern given the private and underreported nature of family violence,<sup>21</sup> which means that there is frequently limited independent evidence of its occurrence.

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<sup>12</sup> Family Court of Australia, Submission to the House of Representatives Standing Committee on Family and Community Affairs, Parliament of Australia, Canberra, 14 October 2003; Alexander R, "Safer But Not Yet Safe: Reducing the Risks of Violence in Children's Matters" (2013) 87(3) *Law Inst J* 49 at 49.

<sup>13</sup> Moloney L et al, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (Australian Institute of Family Studies, 2007) p 67.

<sup>14</sup> See, for example, Kaspiew R, "Family Violence in Children's Cases under the Family Law Act 1975 (Cth): Past Practice and Future Challenges" (2008) 14 *Journal of Family Studies* 279.

<sup>15</sup> *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).

<sup>16</sup> See, for example, Rathus Z, "Shifting the Gaze: Will Past Violence be Silenced by a Further Shift of the Gaze to the Future under the New Family Law System?" (2007) 21 *AJFL* 87.

<sup>17</sup> For example, Shea Hart A and Bagshaw D, "The Idealised Post-separation Family in Australian Family Law: A Dangerous Paradigm in Cases of Domestic Violence" (2008) 14 *Journal of Family Studies* 291; Moloney L, "Violence Allegations in Parenting Disputes: Reflections on Court-based Decision Making Before and After the 2006 Australian Family Law Reforms" (2008) 14 *Journal of Family Studies* 254.

<sup>18</sup> This provision was contained in s 60CC(3)(c) of the *Family Law Act 1975* (Cth).

<sup>19</sup> For example, de Simone T, "The Friendly Parent Provisions in Australian Family Law: How Friendly Will You Need to Be?" (2008) 22 *AJFL* 56.

<sup>20</sup> For example, Rathus, n 16. See also Kaspiew et al, n 3, p 247.

<sup>21</sup> Australian Domestic & Family Violence Clearinghouse, *Family Law Act Reform: The Potential for Screening and Risk Assessment for Family Violence* (Discussion Paper, 2007) pp 1, 6.

A further criticism of the previous legislation was the definition of family violence, which included an objective requirement that a victim's fear or apprehension be reasonably held. The imposition of "reasonableness" as a requirement in relation to the subjective experience of fear was criticised for being difficult to measure and substantiate, for ignoring fear that is genuine but not objectively assessed as reasonable, and for failing to recognise the psychological impact of violence.<sup>22</sup>

## GOVERNMENT'S RESPONSE

In response to the increased recognition of issues relating to family violence in the family law system, the family law courts developed Family Violence Best Practice Principles.<sup>23</sup> These were intended to provide decision-makers with practical guidance when dealing with matters involving family violence and abuse. The Family Law Council and the Family Law Section of the Law Council of Australia also produced Best Practice Guidelines for Lawyers Doing Family Law Work.<sup>24</sup> Part 9 of the Guidelines deals with family violence and recognises family violence as a serious problem.

Notwithstanding these measures, it was increasingly recognised that issues relating to family violence were far more deep-rooted than judicial officers' and practitioners' responses. It was suggested that the legislation itself was providing inadequate protection for families and children who had experienced or were at risk of experiencing abuse and violence.<sup>25</sup> As a result the Commonwealth government commissioned a number of reports dealing directly with family violence.

The Family Law Council was commissioned to report on improving responses to violence in the family law system by reviewing the intersection of family violence and family law issues.<sup>26</sup> The Family Law Council's findings supported existing concerns about the legislation, including the difficulties arising from community misperceptions that the shared parenting legislation included mandatory or presumptive shared parenting time; and concerns about underreporting of violence and abuse as a result of fears of falling foul of the "friendly parent" provision.<sup>27</sup> The Council also identified a gap between the narrow definitions of family violence and abuse in the *Family Law Act* and the range of conduct generally considered (including in the legal, medical and social science fields) as constituting such behaviour.<sup>28</sup> The resulting report recommended, among other things, that the definition of family violence in the *Family Law Act* be broadened to include a wider range of threatening behaviour and that community education be implemented to correct widespread misperceptions about the law, including the belief relating to a presumption of equal shared parental responsibility and time regardless of other issues.<sup>29</sup>

Professor Richard Chisholm was commissioned to consider family violence and the family law courts. Professor Chisholm's report supported earlier findings of the prevalence of family violence, particularly among separated parents within the family law system, with more than half of the

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<sup>22</sup> Bagshaw D et al, *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families who Separated Post 1995 and Post 2006* (Attorney-General's Department, 2010) pp 14, 95; Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (December 2009), pp 24-26; Australian Law Reform Commission, *Family Violence – A National Legal Response*, Report 114 (2010), p 266.

<sup>23</sup> Family Court of Australia and Federal Circuit Court of Australia, *Family Violence Best Practice Principles*, [http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/fv\\_best\\_practice\\_for\\_flc](http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Publications/Family+Law+Courts+publications/fv_best_practice_for_flc) viewed 20 February 2014. These guidelines have been updated to reflect the Family Violence Act.

<sup>24</sup> See <http://www.familylawsection.org.au/resource/BestPracticeGuidelinesv8FINAL.pdf> viewed 20 February 2014.

<sup>25</sup> See, for example, Rhoades H, "Revising Australia's Parenting Laws: A Plea for a Relational Approach to Children's Best Interests" (2010) 22 *Child and Family Law Quarterly* 172.

<sup>26</sup> Family Law Council, n 22.

<sup>27</sup> Family Law Council, n 22, p 83.

<sup>28</sup> Family Law Council, n 22, pp 23-25.

<sup>29</sup> Family Law Council, n 22, pp 7-8.

parenting cases before the courts involving allegations of violence.<sup>30</sup> It also echoed existing concerns about family violence being underreported as a result of the “friendly parent” provision and the requirement for compulsory costs orders upon the making of false allegations, and misperceptions arising from the provisions in the legislation relating to equal shared parental responsibility and equal time.<sup>31</sup> Professor Chisholm recommended various amendments to the legislation to address these difficulties, including enhanced risk assessment procedures within the court system,<sup>32</sup> the repeal of s 117AB,<sup>33</sup> and generally the strengthening of the provisions of the *Family Law Act* relating to family violence.<sup>34</sup>

The Australian Law Reform Commission in association with the New South Wales Law Reform Commission was commissioned to review and propose improvements for legal frameworks regarding family violence in a number of jurisdictions, including family law. Among other recommendations, this report recommended that courts exercising jurisdiction under the *Family Law Act* in relation to parenting proceedings be directed to consider all family violence orders and evidence given, or findings made, in family violence proceedings.<sup>35</sup>

Monash University, the University of South Australia and James Cook University were commissioned to examine the impact of family violence on decision-making and the use of Family Dispute Resolution (FDR) services on separating adults and their children post separation. Participants surveyed for this report indicated that the experience of family violence affected decisions they made throughout their participation in litigation and dispute resolution,<sup>36</sup> and that the system did not adequately deal with these issues.<sup>37</sup> Although a substantial proportion of participants had experienced family violence, many of the participants reported disincentives to reporting it, including difficulties with being believed; or expressed a view that their safety concerns were not taken seriously.<sup>38</sup> The majority indicated that suitable and safe parenting arrangements were not achieved. The report revealed a high level of dissatisfaction with the system, particularly among parents with safety concerns or issues of violence and abuse.<sup>39</sup>

In 2009, the AIFS, as part of a longitudinal study on separating families, published an extensive evaluation of the first three years of the operation of the 2006 reforms. The evaluation, which had been commissioned by the Commonwealth government, was to be broad and comprehensive but was not intended to highlight the issue of family violence.

Nevertheless, the AIFS study found that 26% of mothers and 17% of fathers reported being physically hurt by their partners prior to separation. A further 36% of mothers and 39% of fathers reported emotional abuse defined in terms of humiliation, belittling insults, property damage and threats of harm before or during separation. Moreover, 72% of mothers and 63% of fathers who reported experiencing physical violence before separation reported that their children had witnessed violence or abuse.<sup>40</sup>

Of particular concern was the finding that many families with difficulties relating to violence and abuse had shared or substantially shared care arrangements. Sixteen to 20% of parents with shared care arrangements expressed safety concerns, and nearly one-quarter of mothers and 16-23% of

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<sup>30</sup> Chisholm R, *Family Courts Violence Review* (Attorney-General’s Department, 2009), p 4.

<sup>31</sup> Chisholm, n 30, pp 7-8.

<sup>32</sup> Chisholm, n 30, p 11.

<sup>33</sup> Chisholm, n 30, p 12.

<sup>34</sup> Chisholm, n 30, p 15.

<sup>35</sup> Australian Law Reform Commission, n 22, p 768.

<sup>36</sup> Bagshaw et al, n 22, p 2.

<sup>37</sup> Bagshaw et al, n 22, p 103.

<sup>38</sup> Bagshaw et al, n 22, p 81.

<sup>39</sup> Bagshaw et al, n 22, pp 2-7.

<sup>40</sup> Kaspiew et al, n 3, p 26.

fathers reported being physically hurt prior to separation.<sup>41</sup> A higher proportion of parents with shared care reported a history of pre-separation family violence than did those where the child or children saw their fathers during the daytime only.<sup>42</sup> The rate of shared care arrangements among parents with safety concerns was found to be “no different from that among parents without safety concerns”.<sup>43</sup> These findings were particularly worrying as they presented tangible evidence that in the face of the shared parenting culture, which the 2006 reforms emphasised, legislation ostensibly designed to protect children from the harmful effects of family violence was proving inadequate.

In 2010 the AIFS released the second wave of its longitudinal study into separating families.<sup>44</sup> Results of this study indicated that although reports of both physical and emotional abuse were lower for the period reported in the second wave (the previous 12 months, rather than the period before or during separation), recent experiences of emotional abuse seemed to be common among families who had either equal time or shared time with more time being spent with the mother.<sup>45</sup> The report noted that this was unsurprising given that shared care time is likely to provide greater opportunities for such abuse to occur.<sup>46</sup>

The overwhelming message from these reports was that the family law system had a long way to go in achieving an effective response to cases involving family violence and child abuse. The reports revealed that this problem had become worse in many respects since the enactment of the 2006 reforms. In theory the legislation placed equal importance on the balancing of a meaningful relationship between parents and children and protecting children from harm. In reality these reforms had shifted the emphasis from promoting safety to sharing care. Cumulatively, the reports coupled with empirical evidence suggested that since the 2006 reforms there had been a considerable number of instances in which violence, abuse or safety concerns were not adequately dealt with, and relevantly in many cases, these issues co-existed with substantially shared parenting arrangements.

The reports and empirical evidence also indicated that the definitions of violence and abuse in the *Family Law Act* were not broad enough to capture the full range of violent and abusive conduct. Furthermore, some victims of violence and parents with safety concerns were not reporting these concerns for fear of adverse consequences including unfavourable findings and costs orders.

Although the Commonwealth government failed to implement all of the recommendations of these reports and studies (not all of which were unanimous),<sup>47</sup> the Family Violence Act was a direct response to some of the glaring issues requiring legislative intervention, as identified in these reports.<sup>48</sup>

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<sup>41</sup> Kaspiew et al, n 3, p 169.

<sup>42</sup> Kaspiew et al, n 3, p 169.

<sup>43</sup> Kaspiew et al, n 3, p 253. Other research shows that shared care arrangements are increasing in prevalence across all age groups of children: Katz I et al, *Shared Care Parenting Arrangements Since the 2006 Family Law Reforms*, Social Policy Research Centre (University of New South Wales, 2010) p 18.

<sup>44</sup> Qu and Weston, n 3.

<sup>45</sup> Qu and Weston, n 3, pp 98-99.

<sup>46</sup> Qu and Weston, n 3, p 98.

<sup>47</sup> For example, Professor Chisholm’s report made recommendations relating to matters such as limiting the confidentiality of information held by non-court agencies to enable relevant information to be more readily made available to the courts and removing the words “equal shared” from the legislative presumption in favour of parental responsibility, which were not adopted in the other reports: Chisholm, n 30, pp 11-12.

<sup>48</sup> Replacement Explanatory Memorandum, *Family Law Legislation Amendment (Family Violence And Other Measures) Bill 2011*.

## WHAT DOES THE LEGISLATION DO?

The Family Violence Act has made a number of changes to the *Family Law Act*, specifically in relation to issues of family violence and child abuse. In anticipation of the passing of this legislation amendments were also made to the *Family Law Rules 2004* (Cth) and the *Federal Circuit Rules 2001* (Cth).<sup>49</sup> The three major areas of change are examined below.

### Expanded definition of family violence and abuse

First, the Family Violence Act has introduced new definitions of family violence, exposure to family violence and child abuse into the *Family Law Act*.<sup>50</sup> The definition of “family violence” has been widened to include a range of threatening behaviours, such as stalking, repeated derogatory taunts and intentionally causing death or injury to an animal. Importantly, the objective element contained in the former definition, which required the fear or apprehension of violence to be “reasonable”, has been removed. However, the new definition includes reference to “coercion”, “control” and “fear”, one of which must be present in order to constitute actual family violence rather than simply abusive behaviour.<sup>51</sup> These overarching considerations caused Rathus to comment that the evidentiary difficulties of proving any one of these requirements may result in an inability to prove family violence per se.<sup>52</sup>

The Family Violence Act also expands the application of the various protective provisions in the legislation to include circumstances that were not previously covered. The definition of abuse has been expanded to include serious psychological harm, including harm resulting from exposure to family violence, and serious neglect. However, Professor Parkinson has expressed concern that these provisions may be open to subjective opinion and value judgments. For example, what constitutes serious neglect in one situation may not necessarily be serious neglect in another.<sup>53</sup> An additional definition has been introduced to cater for situations when children, although not the direct victims, are exposed to family violence. This includes overhearing threats of death or personal injury,<sup>54</sup> and seeing or hearing an assault.<sup>55</sup>

These changes are welcome, particularly to the extent that they enable harmful conduct that was not previously recognised as violence or abuse to be so regarded. The legislation unequivocally recognises that family violence goes far beyond pure physical manifestations and includes a wide range of physical and non-physical conduct. The expanded definitions of family violence and child abuse will undoubtedly have far-reaching consequences. All conduct falling within the definition must be taken into account when deciding whether FDR is appropriate and determining whether parental responsibility should be shared or sole, as well as determining parenting arrangements.

In an extra-curial study assessing from a judicial perspective the effects of the Family Violence Act 12 months after its commencement, Justice Strickland pleasingly notes that “the expanded definitions are having an effect on the way in which judicial officers are treating allegations of violence”.<sup>56</sup> Thus, clearly, the expanded definitions of family violence and abuse are having a ripple effect in the wave of decision-making.

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<sup>49</sup> *Family Law Rules 2004* (Cth), r 10.15A and *Federal Circuit Rules 2001* (Cth), r 13.04A. The *Federal Circuit Rules* were formerly known as the *Federal Magistrates Court Rules 2001* (Cth).

<sup>50</sup> *Family Law Act 1975* (Cth), ss 4 and 4AB.

<sup>51</sup> Parkinson P, “The 2011 Family Violence Amendments: What Difference Will They Make?” (2012) 22 *Australian Family Lawyer* 1 at 5.

<sup>52</sup> Rathus Z, “Shifting Language and Meanings between Social Science and the Law” (2013) 36 *UNSWLJ* 359 at 373.

<sup>53</sup> Parkinson, n 51 at 15.

<sup>54</sup> *Family Law Act 1975* (Cth), s 4AB(4)(a).

<sup>55</sup> *Family Law Act 1975* (Cth), s 4AB(4)(b).

<sup>56</sup> Strickland S, “A Judicial Perspective on the Australian Family Violence Reforms 12 Months On” (Paper presented at the AFCC 50th Annual Conference, Los Angeles, 29 May - 1 June 2013) p 30, copy on file with the author.

## Emphasis on harm

Second, the legislation has been amended to provide that where a court is considering the two primary considerations for determining parenting orders, being the benefit to a child of having a meaningful relationship with both of their parents and the need to protect the child from harm and abuse, s 60CC(2A) of the *Family Law Act* clearly directs that “greater weight” be placed on the need to protect the child from harm. This amendment is directly linked to the expanded definitions of family violence and abuse, as all forms of conduct falling within these definitions will fall within this section.

The legislation now also specifically states that when a court is considering making a parenting order it must ensure that the order does not expose the child to “an unacceptable risk of family violence”.<sup>57</sup> To achieve this the court may impose conditions and safeguards that it considers necessary.<sup>58</sup> What exactly constitutes an “acceptable risk” of family violence remains to be seen, but the combined effect of these two amendments is to prioritise the risk of harm to a child over any benefit that a child may reap through a meaningful relationship with both parents. Such amendments were designed to alleviate concerns that the shared parenting focus of the 2006 reforms came at the expense of the protection of children from violence and abuse.

## Repeal of the “friendly parent” provision

Directly related to the renewed emphasis on the protection of children from harm, the third major reform which the Family Violence Act achieved was the repeal of the controversial so-called “friendly parent” provision, formerly contained in the additional considerations in s 60CC(3)(c). While the court is still required to take into account the extent to which each party has fulfilled the responsibilities of parenthood, including participation in decision-making, spending time with, and communicating with the child and maintaining the child,<sup>59</sup> there is no longer a requirement that the must court consider the extent to which a party has facilitated the other party’s relationship with the child. A related amendment was the removal of s 117AB, which provided for mandatory costs orders against persons who make false statements or allegations, although the court still retains its general power to make costs orders in such circumstances.<sup>60</sup> Together, these amendments are aimed at removing disincentives to disclosure of safety concerns, such as those arising from child abuse and family violence, so that the risk of inappropriate and unsafe outcomes in parenting cases may be reduced.

## Other amendments

In addition to these three major changes, the Family Violence Act introduced various other amendments designed to improve the system’s response to cases involving violence and abuse. For example, the additional considerations in s 60CC(3) were amended to direct that a court assessing a child’s best interests must have regard to any State or Territory family violence order applying to the child or a member of the child’s family and to give appropriate weight to the existence and background of such an order, including taking into account the circumstances, findings and evidence admitted when making a parenting order.<sup>61</sup> This is an expansion of the previous, more limited requirement to consider such orders only where they were final or contested. This amendment is controversial given that many interim family violence orders are made on an ex parte basis, and that many final orders are made by consent without admission of guilt by either party, thus diluting their evidentiary value. Furthermore, there is some belief that State family violence orders may be obtained for tactical reasons with a view to influencing the outcome of family court litigation. However, the

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<sup>57</sup> *Family Law Act 1975* (Cth), s 60CG.

<sup>58</sup> *Family Law Act 1975* (Cth), s 60CG.

<sup>59</sup> *Family Law Act 1975* (Cth), s 60CC(3)(c) and (ca).

<sup>60</sup> *Family Law Act 1975* (Cth), s 117(2).

<sup>61</sup> *Family Law Act 1975* (Cth), s 60CC(3)(k).

wording of the amendment allows parties to adduce evidence regarding the circumstances surrounding the making of a family violence order. There is also some concern that this will increase the already prohibitively high cost of family court litigation.<sup>62</sup>

The Family Violence Act also enhanced the obligations of advisers (including lawyers and family dispute resolution practitioners) to focus on safety issues,<sup>63</sup> and introduced new obligations on various players within the system to bring issues of violence and abuse to the attention of the courts. These include new obligations to inform the court of child welfare matters,<sup>64</sup> and expanded obligations in relation to filing notices with the court when making allegations of child abuse or family violence.<sup>65</sup> There is also an enhanced obligation on the courts to take prompt action in such matters.<sup>66</sup>

## WHAT THE LEGISLATION DOES NOT DO

Two main areas exist which were referred to in the various reports but which were not directly the subject of amendment. The first area is that, subject to exceptions primarily relating to protection from harm, the legislation demands that, prior to the initiating of proceedings, it is compulsory for parties to attend FDR services. The second is the legislative requirement that, when making parenting orders, subject to exceptions relating to violence and abuse, the courts must apply a presumption that it is in the best interests of children for the child's parents to have equal shared parental responsibility. This presumption, together with the consequent path to parenting which follows, remains unchanged.

## Compulsory attendance at family dispute resolution

Following the 2006 reforms, a court may not hear an application in relation to a children's matter unless the application is accompanied by a "certificate" from an FDR practitioner certifying either attendance or that one of the exceptions excusing parties from attendance applies.<sup>67</sup> In essence, unless parties fall within one of the stated exceptions they must attend FDR prior to initiating proceedings. Significantly, the exceptions include where the court is satisfied that there are "reasonable grounds to believe" that there has been or there is a risk of family violence or child abuse by one of the parties to the proceedings.<sup>68</sup>

While the definition of family violence no longer contains the requirement of "reasonableness", the provision relating to grounds on which the court may excuse the attendance at FDR, s 60I(9)(b), still mandates the establishment of "reasonable grounds".<sup>69</sup> This requirement may place too great an onus on victims of family violence, particularly given that family violence is notoriously underreported and frequently occurs "behind closed doors".<sup>70</sup> As Kaspiew et al point out, most family violence occurs without witnesses and may cause a parent to be too frightened of their ex-partner to tell anyone about the violence, let alone a court.<sup>71</sup>

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<sup>62</sup> Parkinson, n 51 at 20.

<sup>63</sup> *Family Law Act 1975* (Cth), s 60D.

<sup>64</sup> *Family Law Act 1975* (Cth), ss 60CH and 60CI.

<sup>65</sup> *Family Law Act* (Cth), ss 67Z and 67ZBB.

<sup>66</sup> *Family Law Act* (Cth), s 67ZBB. Justice Strickland observed that post the family violence reforms there was an increase in the number of Form 4 "Notice of Child Abuse and Family Violence" filings. Form 4 acts as a trigger for the "prompt action" requirements. Strickland, n 56, pp 36-37.

<sup>67</sup> *Family Law Act 1975* (Cth), s 60I. Section 60I(8) provides for five different types of certificates that may be issued, including, relevantly, a certificate to the effect that the family dispute resolution service considers that it would not be appropriate to conduct or continue family dispute resolution.

<sup>68</sup> *Family Law Act 1975* (Cth), s 60I(9)(b).

<sup>69</sup> Kirkwood D and McKenzie M, "Family Dispute Resolution and Family Violence in the New Family Law System" (2008) 19 ADRJ 170 at 171; Domestic Violence and Incest Resource Centre, "Behind Closed Doors: Family Dispute Resolution and Family Violence" (Discussion Paper, 2007), p 5.

<sup>70</sup> Australian Domestic & Family Violence Clearinghouse, n 21, pp 1, 6.

<sup>71</sup> Kaspiew et al, n 2 at 38.

However, screening issues have also been recognised as a concern. Screening practices and the level of comprehensiveness vary between FDR practitioners, and many existing processes focus on physical violence and give limited attention to other forms of violence such as verbal and emotional abuse.<sup>72</sup>

Notwithstanding that the presence of or risk of family violence and child abuse clearly excuses parties from compulsory attendance at FDR, the process has been the subject of substantial criticism. It has been suggested that post-separation women are more economically, socially and psychologically vulnerable than men.<sup>73</sup> As a result, and especially in instances of family violence, there may be a significant power imbalance between parties and women may be coerced into accepting unjust, unfair or unsafe agreements.<sup>74</sup> For example, the Domestic Violence and Incest Resource Centre has expressed concerns about the compulsory FDR system because victims of family violence may experience risks to their safety and wellbeing in the FDR process.<sup>75</sup> These criticisms exist despite the Commonwealth Attorney-General's Department's provision of guidelines for carrying out an assessment as to the appropriateness of FDR, and an Operational Framework for Family Relationship Centres,<sup>76</sup> and despite the recent introduction of the DOORS (Detection of Overall Risk Screen) program.

There is considerable evidence to suggest that, despite the exemptions, FDR is being undertaken in inappropriate cases, including cases involving violence, child abuse and safety concerns.<sup>77</sup> The AIFS report, for example, revealed that Family Relationship Centres had become an early point of entry for a significant number of parents whose capacity to mediate is compromised to a greater or lesser extent by their past or present experience of violence, and/or other dysfunctional behaviours.<sup>78</sup>

Concerns pertaining to the use of FDR in cases involving family violence were considered in detail in the Monash University report, which found that the responses of FDR services to the issue of family violence were "a cause for concern".<sup>79</sup> Respondents in that study believed that family violence concerns were not being addressed properly in FDR. Only 10% of respondents had been exempted from FDR, and others believed that they should have been, or that the FDR practitioner should have done more to counteract power imbalances.<sup>80</sup> Forty percent of survey respondents with histories of family violence did not disclose it, and some believed that it should nonetheless have been detected.<sup>81</sup> The report recommended universal screening by professionals with appropriate education and training.<sup>82</sup> Despite the introduction of the DOORS program, issues with screening and appropriate education and training remain.

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<sup>72</sup> Henry P and Hamilton K, "FDR Practitioners Working in the FRC System: Issues and Challenges" (2011) 22 ADJR 103 at 106; Rice S et al, "An Analysis of Domestic Violence Presenting to FRCs at Intake and Assessment" (2012) 23 ADJR 89 at 89, 96-97.

<sup>73</sup> Field R, "Federal Family Law Reform in 2005: The Problems and Pitfalls for Women and Children of an Increased Emphasis on Post-Separation Informal Dispute Resolution" (2005) 5 *Queensland University of Technology Law and Justice Journal* 28 at 30; Field R and Crowe J, "The Construction of Rationality in Australian Family Dispute Resolution: A Feminist Analysis" (2007) 27 *Australian Feminist Law Journal* 97 at 117.

<sup>74</sup> Field, n 73; Kelly J, "Power Imbalance in Divorce and Interpersonal Mediation: Assessment and Intervention" (1995) 13 *Mediation Quarterly* 85 at 87-88.

<sup>75</sup> Domestic Violence and Incest Resource Centre, n 69, p 5.

<sup>76</sup> See [http://www.fahcsia.gov.au/sites/default/files/documents/frcs\\_operational\\_framework.pdf](http://www.fahcsia.gov.au/sites/default/files/documents/frcs_operational_framework.pdf) and [http://www.fahcsia.gov.au/sites/default/files/documents/screening\\_assessment\\_practice\\_framework.pdf](http://www.fahcsia.gov.au/sites/default/files/documents/screening_assessment_practice_framework.pdf) viewed 20 February 2014.

<sup>77</sup> See eg Kaspiew et al, n 3, pp E3, 94, 106, 110; Rhoades H et al, "Enhancing Inter-professional Relationships in a Changing Family Law System" (Report, University of Melbourne, May 2008), p 52.

<sup>78</sup> Kaspiew et al, n 3, p 110.

<sup>79</sup> Bagshaw et al, n 22, p 98.

<sup>80</sup> Bagshaw et al, n 22, pp 5-6.

<sup>81</sup> Bagshaw et al, n 22, p 6.

<sup>82</sup> Bagshaw et al, n 22, p 101.

Concerns in relation to FDR were also given particular consideration in the Australian Law Reform Commission report, which referred to factors including FDR being used as an opportunity for violence and intimidation, power imbalances undermining the fairness of negotiations, and unfair burdens being placed on victims.<sup>83</sup> The report recommended improvements to screening processes, training for FDR practitioners, education for lawyers,<sup>84</sup> and information for potential FDR participants as to their options in circumstances of family violence.<sup>85</sup>

Cognisant of the issues involved with the conducting of FDR against a backdrop of family violence, in 2009 the Commonwealth government announced funding to pilot a program to assist families with post-separation parenting arrangements where family violence had occurred in the relationship: Coordinated Family Dispute Resolution (CFDR). Specialised risk assessment and management took place throughout the process and involved a number of personnel not usually involved in the mediation process.<sup>86</sup> The results of this study suggested that successful mediation is possible in situations of family violence with 48% of cases reaching partial agreement and 37% full agreement.<sup>87</sup> However, such achievements are hugely resource intensive and the practice of CFDR extremely complex. In addition, “[r]isk management is an active and time consuming process, with risks escalating and abating as clients move through the process, for varying reasons and varying triggers”.<sup>88</sup>

The importance of risk assessment is recognised as one of the key issues in the dispute resolution process. The development of the DOORS program is designed to assist family law professionals including court staff, family law lawyers, legal services staff, FDR practitioners, Family Relationships Centre staff, child contact service staff, parenting orders program staff and private practitioners to detect and respond to risks of family violence and abuse. However, problems remain with the identification of family violence and the use of FDR in cases involving family violence and child abuse.<sup>89</sup>

### Path to parenting time

The other problematic area is the designated legislative pathway required to be followed by courts exercising their discretion and imposing parenting arrangements on separated parents. These arrangements may include who will have parental responsibility and make decisions relating to a child’s long-term future. They may also include where a child will live and with whom they will spend time.

Shortly after the *Family Law (Shared Parental Responsibility) Act 2006* (Cth) (the Shared Parenting Act) came into operation, in the matter of *Goode v Goode* (2006) 206 FLR 212; [2006] FLC 93-286; [2006] FamCA 1346, the Full Court of the Family Court handed down a guiding decision regarding the legislative pathway to be followed by courts exercising jurisdiction under the *Family Law Act* in parenting cases (the *Goode* path).

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<sup>83</sup> Australian Law Reform Commission, n 22, p 991.

<sup>84</sup> Australian Law Reform Commission, n 22, p 33.

<sup>85</sup> Australian Law Reform Commission, n 22, p 62.

<sup>86</sup> A case manager/family dispute resolution practitioner, a specialist family violence professional, a men’s support professional, a legal advisor for each party and second family dispute practitioner. Kaspiew R et al, *Evaluation of a Pilot of Legally-assisted and Supported Family Dispute Resolution in Family Violence Cases, Final Report* (Australian Institute of Family Studies, December 2012), <http://www.ag.gov.au/FamiliesAndMarriage/Families/FamilyLawSystem/Pages/Familylawpublications.aspx> viewed 20 February 2014.

<sup>87</sup> Kaspiew et al, n 86, p 56. Of 126 pilot cases that were collected, 27 reached mediation and, of these, 13 cases were partially resolved and 10 fully resolved. The rest of the cases exited at various points of the process.

<sup>88</sup> Kaspiew et al, n 86, p 11.

<sup>89</sup> “The DOORS [Detection of Overall Risk Screen] framework aims to support a shared understanding across all disciplines in the family law system of factors that operate together to create a climate of elevated risk for families. The framework addresses how these factors can be better identified, and offers pathways of effective, coordinated response.”: see <http://www.familylawdoors.com.au/about/the-family-law-doors> viewed 20 February 2014.

To achieve its objective of promoting shared parenting, the Shared Parenting Act enacted a presumption “that it is in the best interests of the child for the child’s parents to have equal shared parental responsibility for the child”.<sup>90</sup> This presumption is subject to certain qualifications including an exemption in instances where there are “reasonable grounds to believe” there has been violence and abuse. The making of an order for equal shared parental responsibility creates an obligation on the court “to consider” making an order for the child to spend equal time with both parents. If equal time is not in the child’s best interests and reasonably practicable, the court must consider whether “substantial and significant time” with both parents is reasonably practicable and in the child’s best interests.<sup>91</sup> Substantial and significant time includes weekdays, days on the weekend and holidays so that the parent may be involved in the child’s daily routine.<sup>92</sup> The presumption of equal shared parental responsibility (and the follow-on requirement to consider equal or substantial and significant time) does not apply if there are reasonable grounds to believe that a parent of the child (or a person who lives with a parent of the child) has engaged in child abuse or family violence.<sup>93</sup> Even if the presumption does not apply, the court may still consider equal or substantial and significant time.<sup>94</sup> The *Goode* path can be represented as follows:<sup>95</sup>

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<sup>90</sup> *Family Law Act 1975* (Cth), s 61DA.

<sup>91</sup> In the subsequent High Court decision of *MRR v GR* (2010) 240 CLR 461; [2010] HCA 4, it was held that the determination of reasonable practicability required by s 65DAA is a separate step from the determination of the child’s best interests, and that it requires a practical assessment of whether the proposed arrangement (in this case, equal time) is feasible, having regard to the reality of the situation of the parents and the child, not the desirability of the arrangement in question. *MRR v GR* (2010) 240 CLR 461; [2010] HCA 4 at [13]-[15].

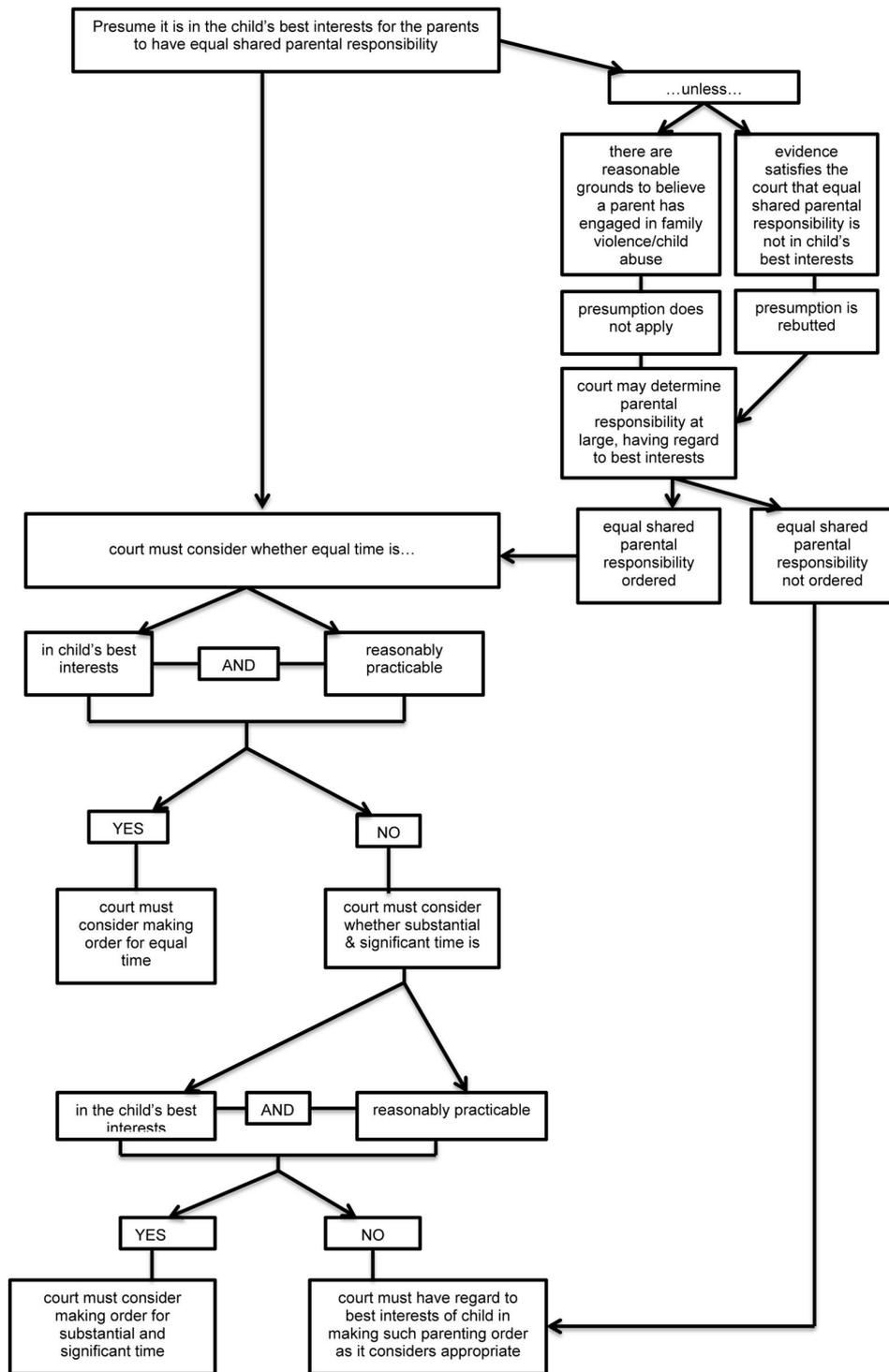
<sup>92</sup> *Family Law Act 1975* (Cth), s 65DAA.

<sup>93</sup> *Family Law Act 1975* (Cth), s 61DA(2).

<sup>94</sup> *Goode v Goode* (2006) 206 FLR 212; [2006] FLC 93-286; [2006] FamCA 1346 at [65].

<sup>95</sup> This flowchart has been adapted from the chart in *Australian Family Law Guide* (6th ed, CCH, 2013) at [4-040].

Flowchart A: Goode path



Given the emphasis on shared parenting and the extent to which it has resulted in inappropriate parenting arrangements, the legislation has been criticised for favouring shared parenting over other considerations.<sup>96</sup> As Rathus has argued, the drafting of these provisions reveals a strong policy intent to encourage shared parenting and their structure draws the decision-maker towards shared-care time.<sup>97</sup>

While clearly the legislation does not create a presumption relating to the time children must spend with their parents, the presumption in favour of equal shared parental responsibility and the resultant *Goode* path for determining parenting arrangements have created two significant problems.

### **Misunderstanding of the law**

One such problem is widespread misconception and misunderstanding of the operation of the law. Many separating parents fail to distinguish between the presumption of equal shared parental responsibility and a presumption of equal time. This has resulted in the belief that equal shared parental responsibility means that they are entitled to equal time, ie 50-50 shared care arrangements for their children. Richard Chisholm encapsulates the general confusion regarding the law: “[M]any people continue to misunderstand the 2006 provisions as creating a right to equal time, or a presumption favouring equal time”.<sup>98</sup>

This misunderstanding of the law has created unrealistic expectations regarding shared parenting arrangements which, regrettably, the most recent amendments have failed to address. Justice Strickland of the Family Court of Australia regards the misunderstanding of the law as having created “an observable tendency in matters that came before the Court to be characterised by disputation over amounts or blocks of time rather than quality of time”.<sup>99</sup>

The effect of this is that many parents may be demanding inappropriate arrangements in the incorrect belief that they are entitled to them, or may be agreeing to such arrangements under the misapprehension that the law requires them to do so. This is particularly problematic in cases involving abuse or violence, where such arrangements may expose children to the risk of serious harm, and where power imbalances exacerbate the risk of victims of violence submitting to inappropriate demands for arrangements that do not meet the best interests of children.<sup>100</sup> This issue is directly relevant to those situations where parties reach agreement regarding parenting arrangements.

### **Domino effect**

The issues relating to the presumption in favour of shared parenting are not limited to circumstances where parties are brokering an agreement, but are further exposed where parties are unable to reach agreement and find themselves embroiled in a dispute. In such circumstances, following the *Goode* path once an order for equal shared parental responsibility is made, the court is obligated to consider shared care arrangements. This domino effect thus increases the possibility of orders for shared care arrangements.<sup>101</sup> Concerns arising from the designated legislative pathway in parenting disputes were identified as problematic in the Chisholm and Family Law Council reports in particular.<sup>102</sup>

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<sup>96</sup> See eg Rhoades H, “The Dangers of Shared Care Legislation: Why Australia Needs (Yet More) Family Law Reform” (2008) 36 *Federal Law Review* 279.

<sup>97</sup> Rathus Z, “Social Science or ‘Legoscience’? Presumptions, Politics, Parenting and the New Family Law” (2010) 10 *Law and Justice Journal* 164 at 170.

<sup>98</sup> Chisholm, n 30, p 125.

<sup>99</sup> Strickland S, “Attachment Theory and Family Violence: A Judicial Perspective” (Paper presented at the AFCC 49th Annual Conference, Chicago, 6-9 July 2012) p 15, copy on file with the author.

<sup>100</sup> Kaspiew et al, n 3, pp 24, 169, 210-212, 222, 235, 245; Bagshaw et al, n 22, pp 98-99, 102; Family Law Council, n 22, p 83; Chisholm, n 30, pp 90-91.

<sup>101</sup> Family Law Council, n 22, p 31; Chisholm, n 30, pp 126, 129.

<sup>102</sup> Chisholm, n 30, pp 91, 120-136; Family Law Council, n 22, pp 16-17, 84, 88.

Justice Strickland notes in his study that the continued association between the consideration of equal shared parental responsibility and time “creates the potential for the normative messages arising from the family violence reforms – namely the primacy of the children’s safety and best interests – to be confused”.<sup>103</sup>

This domino effect is particularly concerning in light of findings in the AIFS report that lawyers and litigants commonly accept that equal shared parental responsibility should apply, even in cases where there is evidence that it should not, and focus instead on issues relating to time arrangements. This point is further amplified by the comments of a then Federal Magistrate who participated in that study, to the effect that it was only in severe cases of violence that the presumption was not applied and care-time arrangements were restricted.<sup>104</sup> The study also found that equal shared parental responsibility had been provided for in 56% of judicially determined cases examined and, worryingly, this included cases involving allegations of family violence and child abuse.<sup>105</sup>

### **PRACTICAL IMPLICATIONS OF THE UNRESOLVED ISSUES**

Studies conducted by the AIFS confirm that violence and abuse are present in a variety of forms and often continue post separation.<sup>106</sup> The 2009 AIFS report found that of parents who used counselling, mediation or FDR to resolve their parenting arrangements, 32.9% reported having been physically hurt and 45.6% reported emotional abuse alone, with a total of 78.5% of participants having experienced either physical hurt, emotional abuse, or both.<sup>107</sup> The figures were even higher among the group of separated parents who had used the courts to resolve their parenting arrangements, with 49.9% reporting having been physically hurt and 43.6% reporting emotional abuse alone, bringing the total to 90.5% reporting conduct now recognised by the legislation as constituting family violence.<sup>108</sup>

The results of the second wave of AIFS studies published in 2010 indicate that the prevalence of both physical and emotional abuse had decreased post separation with only 4% (a decrease from 22% in wave 1) of parents reporting physical violence and 45% (a decrease from 64%) of parents reporting emotional abuse.<sup>109</sup> Interestingly, nearly half of all mothers and fathers reported that emotional abuse had continued to occur post separation, particularly in the form of humiliating insults.<sup>110</sup>

From a positive perspective, the introduction of the expanded definitions of family violence and abuse means that the myriad of forms in which violence and abuse present should be captured within the *Family Law Act*. Theoretically, many more families who have shared parenting arrangements will, following the enactment of the Family Violence Act, be considered among those who have experienced violence or abuse and are thus exempt from participating in FDR and from the application of the *Goode* path. However, as the section that follows demonstrates, there remain significant impediments to the amendments having their full intended effect.

### **Family violence underreported**

One such difficulty is the fact that family violence remains substantially underreported, with many survivors remaining reluctant to disclose the existence of conduct that constitutes family violence. As set out above, family violence is often not disclosed to FDR practitioners or courts, often as a result of fear of the perpetrator. Notwithstanding the removal of the “friendly parent” provision, non-disclosure may also result from fear of losing the children if a parent is seen to be challenging the inevitability of

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<sup>103</sup> Strickland, n 99, p 28.

<sup>104</sup> Kaspiew et al, n 3, pp 209-210.

<sup>105</sup> Kaspiew et al, n 3, pp 184-189.

<sup>106</sup> A first wave after the study of parents who separated after the reforms was conducted in late 2008 and fed into the 2009 evaluation. A second wave of the survey was conducted 12 months later about 28 months after parents had separated.

<sup>107</sup> Kaspiew et al, n 3, p 78.

<sup>108</sup> Kaspiew et al, n 3, p 78.

<sup>109</sup> Qu and Weston, n 3, p vii.

<sup>110</sup> Qu and Weston, n 3, pp 21-22.

an ongoing relationship between the children and their other parent.<sup>111</sup> Clearly, the fact that conduct experienced by a family falls within the expanded definitions of violence and abuse will be of limited assistance in formulating appropriate outcomes if judicial officers and others applying the legislative definitions are unaware of the existence of such conduct. The introduction of DOORS will also be of limited assistance and clearly a more holistic course of action needs to be implemented.

### **Misapplication of the Goode Path**

Justice Strickland's preliminary study indicates that since the enactment of the family violence reforms there is "less of a tendency" to make orders for parental responsibility. However, worryingly, he adds that "there has not necessarily been a reduction in orders requiring a child to spend equal time or substantial and significant time with a parent who is alleged to have behaved violently".<sup>112</sup> Thus, despite the legislative exemptions, orders for equal shared parental responsibility and substantially shared time continue to be made in inappropriate situations.<sup>113</sup>

Moreover, while neither FDR processes nor the presumption of equal shared parental responsibility and the consequent *Goode* path are designed to apply in circumstances where violence and abuse prevail, it is clear from the findings referred to above that these exemptions are not achieving their intended effect. The focus of the existing legislation, which assumes that "standard" family law cases do not involve violence and thus characterises violence as exceptional, gives inappropriate recognition to the prevalence of violence among separated families, particularly those who have engaged with the family law system. As Rathus has identified, the provisions that make up the *Goode* path are inclusionary in nature. Families are presumed in, unless they are identified as an exception, which may lead to families being included in the shared parenting scheme without the appropriateness of this inclusion being properly checked.<sup>114</sup> Thus, despite the progress made by the Family Violence Act, families who have experienced family violence or child abuse continue to face significant difficulties in a system that remains focused on ideals of cooperative decision-making and shared parental time.

### **STRATEGIES AND PROPOSALS**

At first glance it would seem as if the Family Violence Act has made significant and beneficial changes to the conduct of disputes regarding children, particularly in cases of violence and abuse. However, in reality it has merely tinkered around the edges. In particular, it has failed to directly address two of the most significant and concerning issues relating to the manner in which parenting disputes are dealt with. It is thus suggested that, unless this situation is rectified, the recently introduced amendments requiring the prioritisation of children's safety over meaningful relationships will remain largely impotent.<sup>115</sup> So long as the shared parenting focus of the 2006 reforms remains, victims of violence will continue to agree to shared parenting arrangements and the courts will continue to make such orders. With this emphasis comes the ongoing risk that the favoured co-parenting model will be imposed on many families for whom it is inappropriate or dangerous. At the very least the legislative framework must accommodate processes and procedures capable of identifying violent and abusive behaviour and prevent victims from slipping through the legal net into harm's way.

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<sup>111</sup> Laing L, *No Way to Live: Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence* (University of Sydney and Benevolent Society, 2010) p 11.

<sup>112</sup> Strickland, n 56, p 19.

<sup>113</sup> Rathus, n 97 at 166, 169.

<sup>114</sup> Rathus, n 97 at 175.

<sup>115</sup> *Family Law Act 1975* (Cth), s 60C(2A).

It is clear that the existing federal government has little intention of retreating from a philosophy of shared parenting. Thus, without proposing radical reform and within the confines of the existing legislation, the following sections advocate proposals which to some extent reconcile the twin objects of the legislation, establishing a meaningful relationship with both parents and the protection of children from harm. It is not suggested that this is the ideal position but the authors are of the opinion that it contains a workable compromise.

### Participation in family dispute resolution

The findings set out above indicate that many families who have experienced violence are slipping through the cracks and the Family Violence Act has failed to address this issue. Thus, as a first priority, amendments to the legislation must close the gaps and ensure that the net is cast sufficiently widely to trap all forms of violence and abuse at the earliest possible juncture. A failure to identify and deal appropriately with family violence can lead to parties agreeing to inappropriate arrangements or floating down the *Goode* path with inappropriate and unsafe parenting arrangements as the end result. It is thus recommended that four fundamental changes be made to the FDR process.

First, the processes for screening for family violence must be further improved and coordinated. The screening process may be modelled on or used in conjunction with the recently developed comprehensive Family Law DOORS tool.<sup>116</sup> It is recognised that prior to the commencement of family dispute resolution many FDR practitioners undertake screening processes. Moreover, the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) provide for a comprehensive list of factors and checklists that must be considered in an assessment of whether FDR is appropriate, many of which involve the use of comprehensive checklists.<sup>117</sup>

However, these screening procedures are not legislatively mandated. Sections 10H, 10J and 60I of the *Family Law Act* and the FDR Practitioners Regulations should be amended to provide for a consistent, mandatory and reportable screening process to be undertaken in relation to every family *prior* to FDR being undertaken. This should specifically take into account the expanded definitions of violence and abuse as introduced by the Family Violence Act. It is thus recommended that the mandatory screening process include, in addition to any other screening procedures chosen by the relevant FDR practitioner or relevant body, the compulsory completion by *both* parties of a prescribed checklist addressing each of the elements which are now recognised as constituting child abuse and family violence; and a requirement that the FDR practitioner certify that each of the factors has been considered as part of the screening process and which, if any, of the factors apply or potentially apply in each case. This may be utilised as a starting point to implement a reliable, effective and consistent screening process throughout all relationship centres.

The use of a similar checklist may also be appropriate where parties are being interviewed by a family consultant or family report writer in the context of court proceedings. This would provide an additional screening point and facilitate a further opportunity for disclosure in cases where parties had been reluctant to disclose violence or abuse early in the process or had not attended FDR for reasons unrelated to violence, such as circumstances of urgency. It would also further emphasise to parties that concerns about the types of behaviours that constitute violence and abuse are taken seriously and that shared parenting outcomes are not automatic.

Second, the word “reasonable” must be removed from s 60I(9) of the *Family Law Act* so that when exempting parties from FDR it is unnecessary that “the court is satisfied that there are *reasonable* grounds to believe” that family violence or abuse has been perpetrated or there is a risk that such conduct will be perpetrated.<sup>118</sup> Such an amendment would be consistent with the Family Violence Act’s removal of the objective “reasonableness” requirement from the definition of family

<sup>116</sup> See <http://www.familylawdoors.com.au> viewed 20 February 2014.

<sup>117</sup> *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth), reg 25. See, for example, Australian Government Attorney-General’s Department, *Screening and Assessment in the Family Relationship Centres and The Family Relationship Advice Line: Practice Framework and Guidelines* (2006).

<sup>118</sup> *Family Law Act 1975* (Cth), s 60I(9), emphasis added. See the earlier discussion.

violence.<sup>119</sup> It would also address the concerns raised in various studies as to the difficulty and inappropriateness of undertaking an objective assessment of an issue as complex and subjective as the effects of family violence<sup>120</sup> and, moreover, it would address the issue of the burden of proof being placed on the victim.<sup>121</sup> While it is recognised that there is a distinct difference between assessing whether fear is reasonable, and a judgment call as to whether it is reasonable to conclude that violence or abuse has occurred, it is suggested that in relation to violence and abuse any requirement of “reasonableness” must be expunged from the *Family Law Act*.

Third, subject to exceptions relating to violence and abuse, the negotiations that take place during the FDR process are confidential and inadmissible in court proceedings. Information obtained at intake sessions should be subject to similar rules and, in circumstances where issues of violence and abuse arise, such information should not be confidential and should be admissible in court proceedings.<sup>122</sup> Intake processes are arguably already excluded from the operation of the confidentiality provisions contained in ss 10H(1) and 10J(1)(a) of the *Family Law Act* which provide that communications “while the practitioner is conducting family dispute resolution” are confidential and inadmissible.<sup>123</sup> However, to ensure that the family law courts are alerted to issues of violence and abuse that are detected during the intake session, the legislation should explicitly state that the FDR practitioner should alert the family law courts to incidences of or the risk of family violence and abuse. With this information to hand the courts will have no difficulty in granting an exemption that parties attend FDR prior to making application to court.<sup>124</sup> Moreover, as the courts will be aware of the issues relating to violence and abuse, the presumption of equal shared parental responsibility will not apply, rendering the *Goode* path nugatory.

Finally, in order to tie in the definitions of family violence and abuse as contained in the *Family Law Act* with the FDR process, a note should be included at the end of s 60I(9)(b) of the *Family Law Act* reminding the reader of the relevant definitions of family violence and child abuse. These definitions should also be contained within the pro forma Affidavit of Non-Filing FDR Certificate.<sup>125</sup> Furthermore, a requirement should be introduced to ensure that registrars and judicial officers specifically consider each element of the new definitions before refusing to grant an application for an exemption from the requirement to attend FDR.

It is suggested that these four amendments, although relatively simple, would facilitate meaningful changes “on the ground” arising from the reformed definitions of family violence and abuse contained in the *Family Law Act*. It is unlikely that any legislative measures will adequately address the endemic reluctance of victims of violence and abuse to disclose such behaviour. However, the proposed screening requirements may go some way towards encouraging disclosure by providing a clear message to participants of the types of conduct that constitute violence and abuse. Furthermore,

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<sup>119</sup> See earlier discussion.

<sup>120</sup> Bagshaw et al, n 22, p 95.

<sup>121</sup> Kaspiew et al, n 3, p 250.

<sup>122</sup> See *Family Law Act 1975* (Cth), ss 10H and 10J in relation to the confidentiality and inadmissibility of communications in family dispute resolution. For a discussion of the barriers to the courts’ determination of children’s best interests arising from the requirements of confidentiality in non-court processes (in the context of family counselling), see *Harkiss v Beamish* (2011) 251 FLR 412; [2011] FMCAfam 527 and *Unitingcare Unifam Counselling Mediation v Harkiss* (2011) 252 FLR 309; [2011] FamCAFC 159.

<sup>123</sup> Harman J, “Confidentiality in Family Dispute Resolution and Family Counselling: Recent Cases and Why They Matter” (2011) 17 *Journal of Family Studies* 204 at 205-207, 209-212; *Rastall v Bull* (2010) 44 Fam LR 256; [2010] FMCAfam 1290.

<sup>124</sup> *Family Law Act 1975* (Cth), s 60I(9).

<sup>125</sup> This is filed by parties who have not attended upon a family dispute resolution practitioner and have not obtained a certificate and who seek to be excused by the court from doing so.

they will emphasise the importance of identifying such behaviours and the necessity for taking appropriate safety measures within the system. A combination of these amendments should go some way towards ensuring that the number of parties who have been exposed to family violence or abuse and who are subject to the FDR process is kept to a minimum. Additionally, the family law courts will be given a “heads up” on these issues.

### Adjustments to the Goode path

Even with rigorous screening processes it is recognised that families will continue to slip through the cracks and appear before the family law courts with family violence and abuse remaining undetected. Additional amendments to the *Family Law Act* are required to address the domino effect of such parties floating down the *Goode* path and to assist with the prevention of shared care arrangements from being ordered in inappropriate cases. The thrust of these amendments must be to shift the initial enquiry away from shared parenting to one of whether there has been violence or abuse. These amendments are required notwithstanding the undercurrent of rumblings which suggest that, given the frequency of violence, the *Family Law Act* places too much emphasis on the history of family violence rather than the current situation “making it difficult to deal with all relevant cases”.<sup>126</sup> This issue may be relevant to s 67ZBB of the *Family Law Act*, which requires the court to deal with matters of violence and abuse as “expeditiously as possible”.

A potential method of achieving this shift would be to amend s 61DA of the *Family Law Act*, which contains the presumption in favour of equal shared parental responsibility so that the court’s first enquiry is a determination of whether it is satisfied that there is no history or substantial risk of family violence or child abuse. If the court determines that there is no such history or risk, the *Goode* path, as presently set out in the legislation, including the rebuttable presumption in favour of equal shared parental responsibility, can continue to apply.

However, if the court is not satisfied of the absence of a history or substantial risk of child abuse or family violence, a presumption should be enacted to the effect that it is not in the best interests of the child for the parents to have equal shared parental responsibility, and there should be no requirement for the court to consider any type of shared care arrangement. The introduction of a presumption against shared responsibility in cases of violence or abuse was made by the House of Representatives Standing Committee on Family and Community Affairs in the context of the 2003 Inquiry, which led to the introduction of the 2006 shared parenting reforms, but was not implemented.<sup>127</sup>

It is recognised that based simply on the best interests of the child, and without reference to the presumption of equal shared parental responsibility, there will be instances where, notwithstanding the existence or the risk of family violence and abuse, the court will make orders for shared parental responsibility. Worryingly, one of those circumstances may be where orders for equal shared parental responsibility are made with the consent of the parties. Presently, once such orders are in place and irrespective of any history or risk of family violence or abuse, s 65DAA comes into play and the court is obliged to consider whether equal or substantial and significant time are in the child’s best interests and reasonably practicable. To avoid this scenario, s 65DAA should be amended to reflect that the court is only obliged to consider these options if it has determined that there is no history or substantial risk of family violence. Of course this does not preclude a court from ordering equal or substantial and significant time, but this will only occur based purely on best interests considerations and not through mandatory consideration of such arrangements. The corollary of such an amendment

<sup>126</sup> Parkinson P, “Violence, Abuse and the Limits of Shared Parental Responsibility” (2013) 92 *Family Matters* 7 at 12.

<sup>127</sup> House of Representatives Standing Committee on Family and Community Affairs, Parliament of the Commonwealth of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003), p xxi.

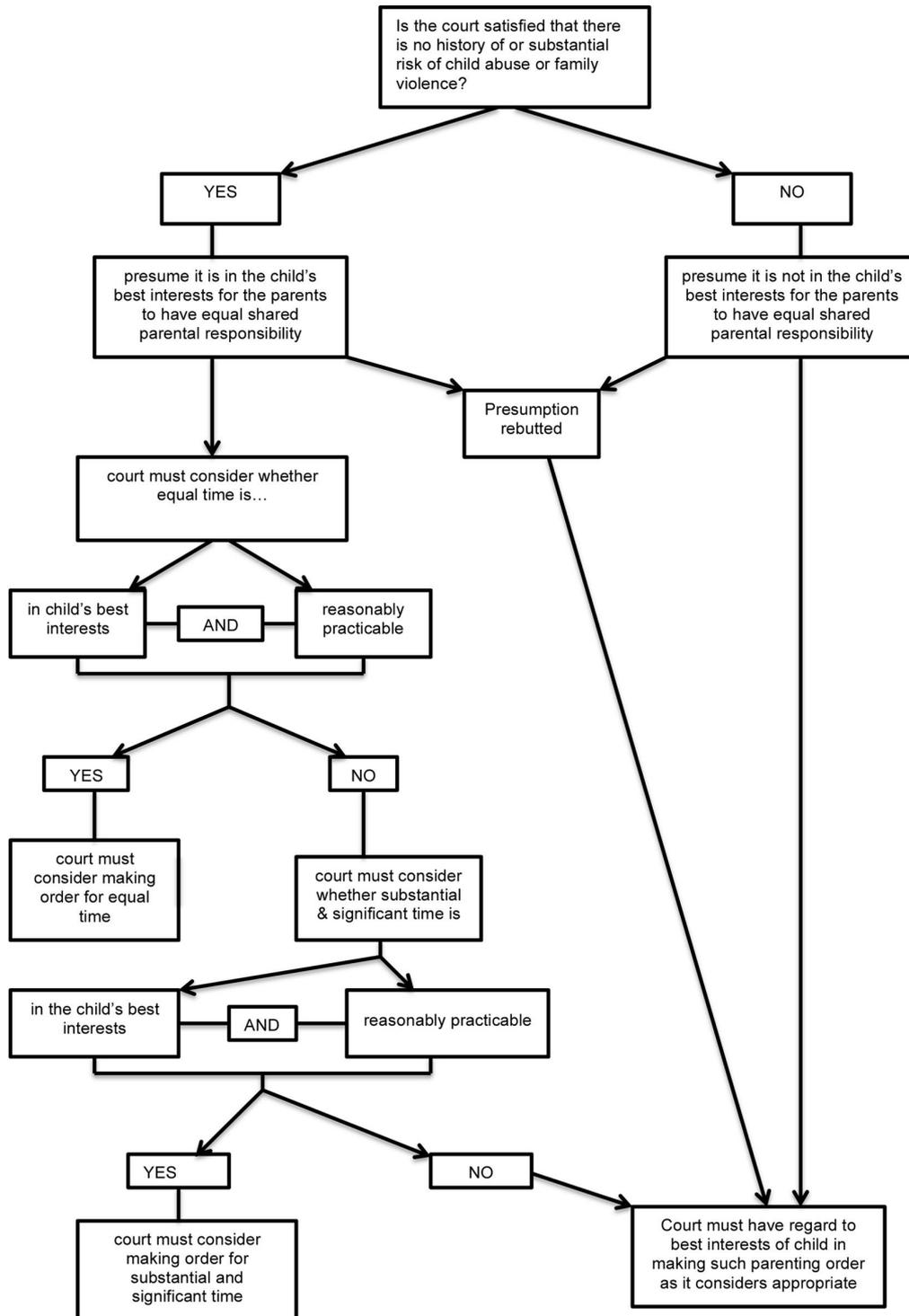
will be that the family law courts will only be legislatively mandated to consider equal or substantial and significant time where the presumption of equal shared parental responsibility applies *and* the court has considered the issues and made a negative determination as to the existence or substantial risk of family violence and abuse.

The final issue that needs to be discussed is the occurrence of once-off situational violence which clearly falls within the definition of family violence. For an example, a woman discovers messages on her partner's phone indicating that he is having an affair. In a totally uncharacteristic fit of temper she smashes his phone, swears obscenities at him and threatens to murder him such that he fears for his safety. If the suggested amendments are enacted the presumption of equal shared parental responsibility will not apply and the court will not follow the *Goode* path. The matter will be determined purely on the basis of the best interests of the child. This does not mean that a court cannot make orders for equal shared parental responsibility or for equal or substantial or significant time but it is not mandated to consider such orders.

These amendments will give true meaning to the emphasis that the Family Violence Act places on protection from harm. In circumstances where the court is considering issues of parental responsibility and the time a child is to spend with a parent, the primacy of the protection from harm over the establishment of a meaningful relationship with parents demands that all family violence and abuse, irrespective of currency, be taken seriously and that the ubiquitous best interests principle provide the compass for making parenting orders. Hence these issues must be determined solely on the basis of the best interests of the child and the *Goode* path must be avoided. The relevance of the currency of the allegations can be determined when assessing what orders are in the child's best interests.

Following such changes, the *Goode* path could then be represented as follows:

**Flowchart B: Proposed reformed Goode path**



The combined effect of these changes would be that the *Goode* path will take a very different road, with the emphasis on issues of violence and abuse rather than shared parenting. The primacy of issues relating to family violence and abuse means that when considering parenting orders the court commences its determination with an investigation into the existence of violence and abuse rather than whether a presumption of equal shared parental responsibility is applicable or should be rebutted.

Only once the initial enquiry into the existence or risk of violence and abuse is complete does the court commence its deliberations into the issue of equal shared parental responsibility. As a result, cases involving violence and abuse would no longer be an exception to the main pathway. The presumption of equal shared parental responsibility will be secondary to the enquiry into violence and abuse. The family law courts will not be obligated to consider shared care arrangements unless the court has specifically determined that it is satisfied that there is no history or substantial risk of abuse or family violence. Where the enquiry into violence and abuse is not satisfied, this would give rise to an active presumption against equal shared parental responsibility and thus the *Goode* path would not be triggered. It is suggested that this shift in emphasis would assist in preventing cases in which shared parenting arrangements are inappropriate and risky from drifting down the *Goode* path by default, and would focus the minds of decision-makers, legal practitioners and litigants on the importance and prominence of violence and abuse in family law parenting cases.

## CONCLUSION

The Commonwealth Attorney-General's Department has recently commissioned the AIFS to evaluate the impact of the Family Violence Act. Part of this evaluation will include a national online survey which will examine the approaches and experiences of the key stakeholders in the family law system, including FDR practitioners and clients who have used family relationship centres. It will also examine whether and to what extent the Family Violence Act has influenced the professional practice of family law. This evaluation is timely, worthwhile and important.

The Family Violence Act has introduced important reforms to the *Family Law Act* which will undoubtedly go some way to improving the response of the family law system to parties and children who have experienced family violence and child abuse. If the response of the family law system to families who have experienced violence or abuse is to be improved, further reforms are required to recognise that families who have experienced or are experiencing family violence and abuse are not a small minority that can be catered for by providing exemptions to the primary approach to post-separation parenting disputes. Family violence and child abuse are prevalent among the population of separated parents who engage with the family law system, and their consequences are far-reaching and serious. If these issues are to be dealt with appropriately, focusing on them must become the rule rather than the exception and responses tailored to dealing with issues of family violence and abuse must become part of the primary pathway taken, both in the family law courts and in associated services.

While the authors of this article recognise that only more substantial reform will further address the difficulties faced by victims of violence and abuse, the proposed amendments would go some way toward assisting such families without shaking the existing legislation at its foundations. Small steps can sometimes lead to major reform.