



National Child  
Protection  
Clearinghouse

# CHILD ABUSE PREVENTION Newsletter

PUBLISHED BY THE AUSTRALIAN INSTITUTE OF FAMILY STUDIES

VOL.10 NO.1 WINTER 2002



*We need to protect the child from physical or psychological harm caused by being subjected or exposed to abuse, ill-treatment, violence or other behaviour.*

## *Domestic violence, children and family law in Australia and New Zealand*

**KATIE KOVACS** provides a brief overview of some of the recent changes to family law, enacted to protect children and their caregivers from violence, and to make court process more efficient, and outcomes more satisfactory.

Domestic violence is often raised as an issue in Family Court proceedings with respect to determining children's residence and contact arrangements.<sup>1</sup> This is likely to be related to the fact that compared with couples whose marriages are ongoing, couples whose marriages end are more likely to have experienced domestic violence<sup>2</sup> at some stage of their relationship or as a result of post-separation negotiations (Sheehan and Smyth 2000).

These findings, combined with an increased recognition of the harm caused by children's witnessing of domestic violence, and the potential for ongoing violent acts between estranged intimate partners, has resulted in a demand for courts to take greater account of domestic violence when determining these matters.

This issue has come to the fore in response to evidence, in both Australian and New Zealand Family Court matters, that despite concerns for the safety of the resident parent and the child, the courts have ruled to grant contact to violent non-resident parents where the children are the subject of residence and contact disputes (Kaye 1996).

This article aims to provide a brief overview of some of the changes to family law in Australia and New Zealand that have been enacted to protect children and their caregivers from violence, and to make court process more efficient, and outcomes more satisfactory. ➤

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**The National Child Protection Clearinghouse serves as an interchange point for information, research and initiatives supporting work in the field of child abuse/neglect prevention.**

The Clearinghouse is hosted by the Australian Institute of Family Studies and funded by the Commonwealth Department of Family and Community Services.

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Designed by Double Jay Graphic Design  
Printed by XL Printing

ISSN 1447-0039 (Print)  
ISSN 1447-0047 (Online)

Print Post Approved PP349181/00604

## Family Court of Australia: New directions

In June 1996, the existing Family Law Act (1975) of Australia was revised by the introduction of the Family Law Reform Act (1995). The Reform Act was developed partly in response to findings by the Australian Law Reform Commission (1994) that violence was not always being taken into account in residence and contact decisions.

The reforms mean that in any determination of the best interests of the child in residence or contact disputes, judges must consider a number of factors including:

- the need to protect the child from physical or psychological harm caused, or that may be caused, by being subjected or exposed to abuse, ill-treatment, violence or other behaviour, or being present while a third person is subjected or exposed to abuse, ill-treatment, violence or other behaviour;
- any family violence involving the child or a member of the child's family;
- any family violence order that applies to the child or a member of the child's family. (section 68F) (2) (G) (I) (J).

The reforms also broadened the definition of domestic violence to encompass not only physically violent acts or threats but also "other forms of abusive behaviour . . . [such as] fear and intimidation" (Sheehan and Smyth 2000: 108). Other non-legislative changes which occurred alongside the reforms included "the establishment of a register of state/territory protection orders to which judges . . . have access" (Behrens 1996: 36).

Much has been written about both the positive and negative impacts of this law reform (see Armstrong 2001: Behrens 1996: Hall 2000: Rhoades, Graycar and Harrison 2001). As Chisholm (2001: 12) states, "it has probably had a cascade of interacting consequences, some good, some bad" and we can't yet "say precisely what they are". While the Act clearly states that domestic violence is a relevant factor in residence and contact decisions, what has not been outlined is how it should be taken into account (Parkinson 1996).

Research by Rhoades, Graycar and Harrison (2001) found that despite being intended to provide better protection for children and their caregivers, the changes may have resulted in an increased reluctance by judges to refuse contact to a parent. It has been suggested that this occurs because "the violence provisions seem to have been outweighed in practice by the general statement of the child's right to contact" (Dewar and Parker 1999: 104). This apparent reluctance illustrates the conflict inherent in the Act which requires the court to ensure the rights of the child to contact with both parents and also to protect the child from child abuse both direct and witnessed (Nicholson 1999).

In 1998, in a further bid to improve the Family Court's response to child residence and contact disputes where there were allegations of child abuse, the Melbourne Family Court introduced the Magellan Pilot Project. The project aimed to "improve outcomes and reduce delays in the children's matters, particularly those in which children may be at risk" (Nicholson and Harrison 2000). It involved 100 cases filed in either the Melbourne or Dandenong registries where "serious sexual or physical abuse allegations have been raised".

Since the Pilot only involved cases where the allegations of abuse have arisen in an affidavit, in a statement to the court, in an interview, or by a staff member who was mandated to report, cases where children had witnessed domestic violence between their parents (commonly defined as emotional abuse or psychological harm) did not meet the criteria for inclusion. Further, since abuse is not defined in the Family Law Act 1975, there is no statutory obligation for court officials to make a report although they may choose to make a notification to child protection services without risking liability or breaching professional ethics.<sup>3</sup>

Brown, Sheehan, Frederico and Hewitt (2001) recently evaluated this project and found it to be an “outstanding success” (p. v). The authors state that: “Project Magellan’s pilot program provided more rapid, less costly and longer lasting resolutions of disputes in the cases that were selected into the program. There were fewer changes in residence and contact for the children and fewer children suffered extreme emotional distress. The program attracted wide support from the legal practitioners, from professional staff in the participating organisations and from the parents.” (p. 89)

Due, in part, to these positive findings, the Family Court of Western Australia introduced a sister project in late 2001, one which explicitly addresses the issue of children’s witnessing of domestic violence. Based on the Magellan Project, the Columbus Pilot Project is an early intervention approach for cases in the Family Court where allegations of child abuse or domestic violence have been made and there are concerns for the safety of the child. Unlike Magellan project, the Columbus project ensures that “children who have witnessed domestic violence between their parents and [where] that violence has been assessed as posing a significant emotional and physical risk” were specifically catered for and addressed as a separate issue for intervention and case management (Draft of the Columbus Project Pilot, Family Court of Western Australia, unpublished).

### ***New Zealand law reforms***

Like Australia, New Zealand has also introduced innovative legislative reform in residence and contact disputes in response to concerns for the safety of children who live with domestic violence. The reforms mean that in residence and contact disputes where a parent has used violence against a child or spouse, residence or unsupervised contact with the child will not be given to the violent parent unless the court can be satisfied that the child would be safe during contact periods.

Originally recommended in 1990, the reforms were not introduced until 1995 in response to a Ministerial Inquiry into the murder of three young Wanganui girls by their father. The father had been given interim residence of the children even

though the Family Court had previously granted the mother a protection order<sup>4</sup> and a current application for a further protection order was before the Court.

In response to the Ministerial Inquiry, a new Domestic Violence Act was introduced and amendments were made to several other Acts (Guardianship Act, Family Proceedings Act, and the Legal Services Act). One key change brought about by the law reform process was the broadening of the definition of “domestic violence” so that it encompassed both the variety of intimate relationships common in western society, and the many forms of violence that may occur in relationships. Thus, the Act incorporated violent behaviour occurring



in gay and lesbian relationships, by members of extended families, biological parents who have not lived together, along with other culturally-recognised family groupings and close personal relationships.

Under this legislation, “domestic violence” refers not only to physical violence but also sexual violence, psychological abuse – including threats, intimidation, harassment, damage to property, and causing or allowing a child to witness physical, sexual or psychological abuse of a family member. The adoption of this broader definition was seen as a means of ensuring that the range of behaviours often used by violent

## RECOGNISING THE EARLY SIGNS OF CHILD SEXUAL ABUSE

The Safety House Association of Tasmania has released two pamphlets to help children and their families deal with child sexual abuse. The printing of these pamphlets was made possible by a grant from the Tasmanian Department of Education.

The brochures are entitled:

- *Please Help Me*  
A true story about a child devastated by child abuse
- *Please Help Me*  
A true story about a child and her mother devastated by child abuse

Both pamphlets are designed to help children and their parents recognise the early warning signs of child sexual abuse.

The story told in the pamphlets is factual, and was originally seen as a way of “off-loading” the trauma of experiencing child sexual abuse in a family. It was considered such a powerful story that it had the potential to help others recognise and report incidents of child sexual abuse and unwanted attention.

Copies can be obtained by contacting: The Safety House Association of Tasmania, PO BOX 542, Glenorchy, Tasmania 7010. Phone: (03) 6272 2606.

perpetrators, particularly power and control tactics, were acknowledged as domestic violence. The Act has subsequently formed the basis of attempts to educate the judiciary about domestic violence. Judges are now required to explicitly consider controlling behaviours and other “non-violent” acts within the context of a continuum of violence, whereas previously such behaviour may have been trivialised or minimised as what may have been seen as “minor incidents”.

The reforms have also attempted to address problems associated with violence related to parental separation by acknowledging that: “The end of a relationship all too often does not mean the end of violence between parents. In the short term it frequently marks an escalation in the violence” (Freckelton 1995: 141). The new legislation also offers protection for the new partners of previously abused adult victims.

Further, the new legislation also increased penalties for perpetrators who breach protection orders. Those who make three breaches within three years are liable for two years in prison. The breaches do not have to be all against the same person for the penalties to apply. Another important change was the introduction of firearm confiscation and firearm license suspension as standard conditions of protection orders.

With regard to child residence and contact disputes, the legislative changes prioritise the safety of the children as the primary consideration. The law clearly states that the court should not give residence or unsupervised access to a parent who has used violence against the child in question, another child in the family, or against the other parent in the proceedings unless it can be satisfied that the child will be safe while the violent party has residence or contact with the child. Section 16B(5) of the Guardianship Act sets out the criteria that are to be used in determining child safety issues. These criteria include: the nature and seriousness of violence; recency and frequency of the violence; likelihood of further violence; the physical and emotional harm caused to the child; the other parent’s opinion of the safety of the child; and the child’s wishes. The Act also stipulates that the court imposes conditions that will protect the other parent if parent-child contact is given to the violent partner. The period surrounding a child being picked up for contact and/or being returned to the resident parent,

times where the opportunity for violence is high, is explicitly incorporated into the Act.

### *Impact of the law reform*

Busch and Robertson (2000) provided the first assessment of the impact of the changes on court practice. Positive impacts of the legislative changes included that many judges had moved to using a broader definition of domestic violence and were considering the experience and impact of psychological violence when determining the safety of children. It was noted that many judges were also looking at violent perpetrators’ control tactics within the context of power and violence. Thus, as the authors’ note, previous conceptions of domestic violence appeared to have “given way to an analysis which more closely reflects women’s realities” (p. 276). Other positive impacts of the legislation included an increase in the range and number of supervised contact services being available and the formation of the New Zealand Association of Children’s Supervised Access. Currently, however, there is no direct government funding of supervised access in New Zealand.

As with any legislative change, there appear to have been some teething problems. While it was found that progress had been made, a number of concerns have been raised. First, Busch and Robertson (2000) found evidence suggesting that some judges continued to trivialise acts of violence and engaged in “victim blaming”. Second, there has been a lack of clarity regarding supervised contact (Chetwin, Knaggs and Young 1999). In some cases it has been found that “supervised” contact has been actually supervised by the resident parent herself, posing a threat to the safety of that parent and the child. Further, supervised contact was found to be unpopular with Maori families in particular, who were less likely to use this option. It has been suggested that this was because such families were alienated by supervised contact in unfamiliar and culturally-inappropriate locations that excluded other family and community members.

Third, highlighting the balancing act confronted by judges and others faced with ensuring the protection of children, Freckelton (1995: 139) has argued that the reforms may not be in the “best interests” of the children, as predictions of dangerousness “in the legal process has been distinguished by error and

## A NEW NATIONAL BODY

# Families Australia

**F***families Australia* is a newly established national peak body, funded through the Commonwealth Department of Family and Community Services, that aims to represent the interests of families, young people and children in Australia.

The founding members of *Families Australia* are the Association of Services Supporting Australia’s Families, Australian Foster Care Association, and Child and Family Welfare Association of Australia. With the first board consisting of representatives from these organisations, as well as the Secretariat for National Aboriginal and Islander Child Care (SNAICC), *Families Australia* has exciting potential to pursue issues such as child abuse prevention on a national level. A Working Group was established from the three founding members and SNAICC which now form an interim Board

that will operate until the first Annual General Meeting (due to take place in the later half of 2002).

*Families Australia* is keen to be representative of the sector, and to this end general and associate membership will be open to organisations and people interested in the field of family policy. It is hoped that at the first Annual General Meeting of *Families Australia*, the new Board will be elected from people nominated by a wide-ranging membership of organisations with an interest in the impact of policy, services and practices on families and children.

*Families Australia* is committed to ensuring that its policy focus is as broad as possible and includes policies which impact on families, young people and children nationally. Its focus will

an increasing tendency . . . toward overprediction". That is, while acknowledging that it is certainly not in the interest of a child to have contact with a parent who is likely to become violent, Freckleton contends that the judiciary has become too focused on the potential for violence, resulting in the unnecessary denial of parent-child contact.

Freckleton (1995: 150) notes that there should be recognition that "by and large it is in a child's best interest to have meaningful contact with both parents", and suggests that the prediction of dangerousness should be based upon "realistic and contextually relevant factors". Freckleton sees the New Zealand legislation as dangerous as it places on the violent partner the onus of proving that the child will be safe in his (or her) care and questions whether this "is an onus that realistically the parent will ever be in a position to discharge". On this issue, Freckleton points out that the word of a violent partner who claims to have changed is unlikely to be believed, and the impossibility for the perpetrator to prove that a rehabilitation program attended has been successful.

While it may be that in some cases, judges will err on the side of caution and prevent parent-child contact in order to ensure a child's safety, it should be reiterated that the law reform was undertaken because the judiciary was *failing* to protect children and custodial parents.

## Conclusion

The changes made to both Australian and New Zealand Family Law are positive steps in ensuring that courts consider the safety of children and their caregivers when determining whether parents with a history of violence should be given residence or contact.

While the New Zealand legislation clearly talks about how the existence of domestic violence should be handled in such matters, Australian law is less clear and there is some evidence to suggest that reforms designed to offer increased protection are actually having the opposite effect. In light of these problems, the introduction of the Magellan and Columbus projects provide great opportunities to enhance future Family Court matters and provide better outcomes for abused parents and their children.

also include policies related to non-government organisations that support families and/or children and young people. This broad focus is perceived to be very important given the diversity of family forms in Australia today, the significance of extended families to the health and well being of families, and the complexities of the current split of responsibilities between Commonwealth and State/Territory Governments.

The main objectives of *Families Australia* are:

- to be a leading organisation in the field of family policy by working in collaboration with other stakeholders;
- to work towards recognition of, and support for, the needs of families, young people and children;
- to provide a strong national voice and advice to government on issues that impact upon families, as well as facilitate the voices of families regarding family policy;

- to improve policy, programs and service delivery with a particular focus on the interface between Commonwealth and State/Territory responsibilities;
- to advocate for adequate resources and ensure that family policy reflects the diversity of family forms, addresses disadvantaged circumstances experienced by many families, and has a primary emphasis on the best interests of children and young people; and
- to initiate or undertake research that contributes to improved knowledge, policy, programs, and service delivery practice.

Any individual or organisation interested in becoming a member of *Families Australia* or who would like to obtain further information, can contact *Families Australia* Executive Officer, Anne Marie Mioche on (02) 6262 5705 or 0408 64 5443; or email: [amioche@familiesaustralia.org.au](mailto:amioche@familiesaustralia.org.au)

## Where to get more information

The relevant Australian Acts are the Family Law Act 1975 and The Family Law Reform Act 1995. These can be accessed from <http://www.austlii.edu.au/>

The relevant New Zealand Acts are the Domestic Violence Act 1995, and the amended Guardianship Act, Family Proceedings Act and the Legal Services Act. New Zealand Legislation can be accessed from: <http://rangi.knowledge-basket.co.nz/gpacts/actlists.html>

For a full discussion of the Bristol Murder case and the Ministerial Inquiry that followed, see Busch and Robertson (1994), "I didn't know just how far you could fight: Contextualising the Bristol Inquiry", *Waikato Law Review*, vol. 41.

The full report of recommendations made prior to the Bristol Inquiry see Busch, R., Robertson, N. and Lapsley, H. (1992), *Protection from family violence: A study of protection orders under the Domestic Protection Act*, Victims Task Force, Wellington.

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## Endnotes

- 1 Prior to June 1996, the Family Law Act 1975 (Commonwealth of Australia) used the terms "custody" and "access" rather than "residence" and "contact". New Zealand, on the other hand, still uses this terminology. A residence order is made in favour of the person with whom the child will live (formerly "custody") while a contact order is made in favour of a person with whom the child is to have contact (formerly "access"). The Australian terminology is used throughout this paper.
- 2 In this paper (unless otherwise specified) "domestic violence" refers to the violence occurring between persons who are, or who have been, in an intimate relationship. It is generally acknowledged that domestic violence includes physical and sexual violence, threats and intimidation, emotional and social abuse and economic deprivation (Laing 2000). For more detailed discussions about the types of domestic violence see Sheehan and Smyth (2000) and Johnson (1995).
- 3 The cases that were selected for the pilot were then handled by a team of two judges, with a registrar and two counsellors. These cases were placed in a special mention list within a fortnight of their identification and at the first mention before a judge: a legal representative for the child is appointed, an order is made for the prompt production of a thorough report by the investigating child welfare authority, and the investigating authority's file is subpoenaed to arrive at court several days before the next mention in six weeks time. At the second mention the court makes sure that the parties have complied with the previous orders and requests a Court Counsellor to prepare a family report, which must be available within seven weeks to allow three weeks consideration before the pre-hearing conference. This conference (10 weeks after the second mention) is conducted by the registrar and the counsellor and allows a further settlement opportunity, if no resolution occurs directions are made for the hearing between 6-20 weeks later (Nicholson 1999: 1).
- 4 A protection order is granted by the court when it is satisfied that the offender has used domestic violence against the applicant and the provision of the order is necessary for their protection. Under the order the offender can not abuse, threaten, loiter near, follow or make any other contact with the victim.

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## SEARCH BEGINS FOR AUSTRALIAN FATHER OF THE YEAR

The Australian Fathers Day Council, proudly supported by NIVEA, has begun the search for "Australia's Favourite Dad". The Council is inviting nominations from the public for a famous Australian who deserves recognition for his dedication to his own children or children in the community. According to the Chairman of the Council, Maurice Newman AC: "The aim of the search is to increase awareness of the importance of the father in the family and recognise their unique contribution to a child's development and wellbeing."

The 2001 Australian Father of the Year, Jim Rafter, was chosen for his efforts in raising his nine children with his wife Jocelyn. "Recognising the importance of fathers is more important in today's society than ever before," he said. "We live in a world with changing values and I believe a healthy society is dependant on a solid family tradition."

The Australian Father of the Year Award is a fundraising event for the Shepherd Centre. In 1991, Dr Bruce Shepherd AM, was named Father of the Year in recognition of his role in raising two profoundly deaf children and his subsequent founding of the Shepherd Centre in 1971. Today, with limited government funding,

the Centre provides its world class Early Intervention Program free of charge for families with deaf and hearing impaired children.

Again in 2002 the Australian Father's Day Council is delighted to be working in partnership with NIVEA, a brand well known for its support and encouragement of traditional family values. As the award is a celebration of the important role of fathers in children's lives, NIVEA also believes this deserves prominent recognition in our society for the benefit of the whole community.

Nominations close on Monday 5 August, and the announcement of the 2002 Australian Father of the Year will be made at the annual Fathers Day Luncheon on 23 August 2002 at Darling Harbour in Sydney.

Past Fathers of the Year have included: Dr Bruce Shepherd, Sir James Hardy, Mark Taylor, John Howard, Khamal, Slim Dusty, Steve Biddulph, and Jim Rafter.

*Send nominations to Australian Father of the Year, PO Box 871, Strawberry Hills, NSW 2012. For more information contact Karly Robinson, Special Events Coordinator at the Shepherd Centre. Phone: (02) 9351 7905. Fax: (02) 9351 7880.*