The 2011 Family Law Amendments & Family Violence: Has the Australian Parliament Finally Got it Right?

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This Evening’s Presentation
[with thanks to Peter Jaffe, Janet Johnston & Lisa Crooks]

- Trends in Family Life & Family Law
- The Challenge of Parenting Decisions
- The Complexity of Family Violence
- Australia: Context & Developments
- Suggestions for Decision-Making in Family Violence Cases

Cautionary Note: A quick survey of a range of broad and complex issues by a Canadian law professor with expertise in family violence and child-related legal issues, but only a perspective “from afar” about family justice in Australia.
Themes in Family Life & Law & The Challenge of Parenting Decisions

Themes of Family Law in Western World
(Parkinson 2011)

• Changing gender roles over past 50 years
  – women much more likely to be employed
  – men having greater role in child care
• In most families, women still primary caregivers,
  – especially for younger children
• Rise in divorce rate
• “Indissolubility of parenthood”
• Decline of fault in family law, especially adultery
• Growing use non-adversarial dispute resolution
• Gradual recognition of harms of spousal abuse
  – only in Australian family cases in 1990’s (Alexander, 2010)
Child care decisions
— very different from other legal disputes

• What is “best for a child”?
  — professional’s experiences & values inevitably affect views

• Future-oriented
  — inherent predictive element & uncertainty

• Circumstances will inevitably change
  — likelihood of variation, review or enforcement issues

• Primary focus on restructuring parental relationship, and often changing their behaviour
  — relationship as co-parents will continue & evolve

VALUE OF PARENTAL AGREEMENT

Nature & Complexity of Spouse Abuse:
A differentiated phenomenon
“Discovery” of Spousal Abuse in 1970s: Wheel of Violence, Power & Control

Development of “Power Wheel” approach to DV was very important and it remains very significant

But it is Limited

Moving Beyond the Wheel!
Controversy & New Approaches

• The “power & control wheel” and early research on domestic violence developed based on experiences of women in shelters
  — Male uses violence to intimate & control his partner

• Domestic violence more recently studied in diverse settings:
  — police & criminal court samples
  — large community samples
  — mediation samples
  — batterer treatment groups
  — nationally representative samples
  — inconsistent use of terms: “abuse,” “violence,” “batterer”

• Data and analysis from different populations created controversy between advocates, family justice practitioners, and researchers

• Attempts to forge a consensus (Wingspread, 2007)

NATURE of SPOUSAL ABUSE

• Spousal abuse is a differentiated phenomenon
  — dynamics and effects vary
  — legal & social responses must be differentiated

• Spousal abuse often has elements of physical, sexual, financial and emotional abuse, especially if coercive controlling violence
  • exacerbates physical abuse
  • insults & degradation -> loss of self-esteem
  • social isolation

• Most cases of severe or controlling violence involve male perpetrators, but women can also be violent
Frequency, Incidence & Timing of Violence

• Women victims of domestic assault (ABS, 2004; Stats Can 1996)
  – 50% of women reported only 1 assault
  – 30% of women victims reported 2 to 10 assaults
  – 20% of women reported 10+ assaults

• For most relationships violence ends after separation, but in a significant minority, violence begins or increases after separation
  – Post-separation violence reflects loss of control (esp. by male)
    -> heightened risk
  – Harassment & stalking takes emotional toll

Incidence

• 1 in 4 women report in intact families report at least 1 assault by an intimate partner during relationship (ABS, 1996, 2001)
  – 1 in 4 children witness abuse of mother or step-mother
• Among separated parents, 65% of women and 55% of men reported at least one act of violence against them in relationship (AIFS, 2000)
• In Australian family court cases (AIFS, 2008)
  – 26% of women & 18% of men report physical abuse
  – 47% of men & 39% of women report emotional abuse
Gendered nature of spousal abuse:

- Interactive violence is common
- Women can be violent & abuse occurs in same-sex relationships

**BUT**

- Men are much more likely to seriously injure female partners (eg hospitalization)
- Women are much more likely to report fear for life due to spousal violence
- Men are much more likely to continue (or escalate) abuse after separation
- Post-separation homicides are almost always male perpetrated

The Victim’s Dilemmas

Why Many Victims Don’t Disclose or Leave

- Fear, shame, guilt results in non-disclosure
  – reporting is more likely if more serious physical injury
- Women often don’t leave because
  – economic pressure
  – social pressure from family, community etc.
  – self-esteem destroyed by abuse
  – normalization if dv in home when during childhood
  – threats

Need for social & material supports for victims
Types of Violent Relationships

Types of abusive relationships
(Jaffe, Johnston, Crooks & Bala, 2008; Michael Johnson)
Family Court of Australia, *Family Violence Best Practice Principles* (revised 2011)

• Taxonomies
  – *Episodic battering* (coercive controlling violence)
    • Violent resistance
  – Common Couple Violence
  – Separation-engendered violence
  – Mental illness

• Taxonomies – useful but limits
  – Useful as they recognize differentiation
  – Limited as many cases do not fit taxonomy
  – Need for individualized assessments & plans
Coercive Controlling Violence

- **Episodic Battering** (aka intimate terrorism)
  - Controlling, repeated violence by domineering partner
    - Almost exclusively perpetrated by men to abuse & control partners
    - Cycle of violence
    - May be violent only in home, or elsewhere
  - High risk of escalation after separation
  - Almost exclusively damaging to woman and children
    - Often direct physical +/- or emotional abuse of children
    - Or children (esp. sons) may join in abuse
  - Most common in Criminal Court

- **Violent Resistance**
  - Abused woman sometimes respond & even kill partners
  - Possibility of “self-defence,” but may be “over-reaction”

Common Couple Violence

**Common Couple Violence or Mutual Abuse**

- Use of violence during arguments
  - Violence reflects loss of (self)control
  - Violence may cause injury & fear, but does not result in emotional control of partner
  - Either or both may be violent
- Most common type in community samples
- 1 or both may be violent elsewhere, but not always
- Violence tends to de-escalate after separation
- Children can be very disturbed if much exposure, but may have little effect
Separation-engendered Violence

- **Separation-engendered Violence**
  - incidents only about separation
    - e.g. discovery of adultery
  - violence is uncharacteristic of relationship
    - may be emotionally disturbing due to lack of experience
  - unlikely to reoccur after separation
  - children less likely to suffer long term effects

Mental illness

- **Mental illness: psychotic or paranoid, depression**
  - in these cases violence is true mental health issue
  - not as common as other types
  - serious risk to children, but if properly diagnosed and treated may be controllable by drugs
Effects on Children of Exposure to Spouse Abuse

Effect of Spousal Abuse on Child

• Effect of spousal abuse on child depends on:
  – frequency & nature of spousal abuse
  – child’s awareness/exposure to spousal abuse
  – capacities (or deficits) of abused parent
  – child’s access to counselling services
  – direct child abuse or neglect

• Even if no direct abuse of children, spouse abuse has indirect effects on children, including
  – lowered self esteem, greater risk of drug abuse
  – more aggression in boys
  – more depression in girls
  – in infants developmental delays & attachment difficulties
  – more likely to enter abusive relationships as adults (boys as abusers, girls as victims)

• Some children identify with the abusive parent
  – Alienation by abuser, children reject victim Mom

• Individual child’s vulnerability or resilience
Assessing Risk & Lethality
Separation is the most dangerous period for abused women

Lethality Risk Factors – “RED FLAGS”
- Recent life loss: eg actual or threatened separation
- Prior police involvement
- Threats of homicide or suicide
- Violence towards partner
  - Attempts to choke / strangulate
  - Sexual abuse in relationship
- Access to weapons or threats to use
- Obsessiveness about partner or family
  - Stalking behavior
- Drug or alcohol abuse
- Escalation of violent behavior after separation
- Non-compliance with court orders
- Depression or mental illness

False & exaggerated claims
- While false allegations of spousal abuse by women are a concern, most claims of women are true
  - Johnston (2005); Shaffer & Bala, 2003
- Why are claims exaggerated/false?
  - Access to services (eg shelter/legal aid)
  - Tactical gain (possession of home)
    - Police policies of arrest & charge
    - Psychological needs/perceptions/social supports
- More false denials/minimization by abusers than false claims/exaggeration by spouse abuse victims
- “Recanting” by true victims more common than lying
  - False withdrawal of true allegations by victim due to threats, guilt, economic concerns, restoration of relationship
Reliability of family litigants?
(Johnston, 2005; Bala et al 2007)

• As a general rule, women and men involved in family litigation seem equally likely to have limited recall, exaggerate, distort and lie
• But they tend to be unreliable on different issues
  — e.g. Moms more accurate about being assaulted by Dad, but less reliable sexual abuse of children
• Lying (knowing deception) is less common than selective recall or distorted understanding.
• In individual cases, either or both may be highly reliable about some or all matters -> challenge of credibility assessment

Australian Legal Context & Developments
Australia: world leader in family law

- Intensity of political advocacy by both women’s & men’s lobby groups
  - Appropriate and exist everywhere, but most intense in Oz.
    - Some scholars in many countries are doing “advocacy research” for both men’s and women’s groups
- Complexity & frequency of amendment of *Family Law Act*
  - Statutory objectives, primary considerations, additional considerations etc.
- Government funding of services
  - Family Relationship Centres, ICL, Family Consultants etc.
- Quality of judicial appointments to family bench
- Research
  - AIFS – best quality & most funding for family research
  - Parkinson, Chisholm, McIntosh, Cashmore, Smyth etc
  - Judges writing articles; Altobelli, Bryant etc..

2006 Legislation & Evaluation

- 2006 Reforms (*Shared Parental Responsibility*)
  - support for non-judicial dispute resolution
  - preference for shared parental responsibility
    - Response of Liberal Howard government to fathers’ groups
    - misunderstood by many as preference for *shared care*?
  - added to complexity of detailed 1995 statute
- AIFS Evaluation of 2006 Reforms
  - more settlements
    - Concerns about qualifications & supervision of mediators
  - family violence concerns
    - high rate of cases with family violence settled by ADR
    - high incidence of cases with family violence result in shared parental responsibility or even shared care
    - negative outcomes when there is post-separation conflict
Developments in 2009-10

- High profile tragic deaths
  - Darcey Freeman thrown from Melbourne bridge by Dad
- AIFS, Family Law Council, ALRC, Best Practices
- Chisholm Report (2009)
  - recognized seriousness & complexity of family violence
  - modify friendly parent provision & remove costs provision
  - did not recommend giving statutory priority to family violence
    - >should not be given ‘undue prominence’ compared to mental illness, substance abuse etc.
- Pressure of women’s groups on Labor gov’t to reverse Liberal reforms of 2006

2011 Family Law Act Amendments
(Family Violence and Other Measures)

- broader definition of ‘family violence’ & increased obligations on mediators consultants, lawyers etc. to prioritize safety of children
- facilitate presenting of evidence of abuse & violence
- eliminates possibility of costs against parent knowingly making a false allegation
  - seldom if ever used, but important symbolic message
- priority to safety of children from family violence over value of relationship to both parents
Broadens definition of family violence

4AB (1) family violence means violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family, or causes the family member to be fearful.

(2) Examples of behaviour that may constitute family violence include (but are not limited to):

(a) an assault... [or]
(d) repeated derogatory taunts [or]
(g) unreasonably denying the family member the financial autonomy that he or she would otherwise have had....

Parts of this definition are vague, broad and subjective, and may result in more litigation that does not serve to protect children

Priority to family violence: 60CC

(1) Subject to subsection (5), in determining what is in the child’s best interests, the court must consider the matters set out in subsections (2) and (3).

(2) The primary considerations are:

(a) the benefit to the child of having a meaningful relationship with both of the child’s parents and
(b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.

(2A) In applying the considerations set out in subsection (2), the court is to give greater weight to the consideration set out in paragraph (2)(b).
Implications of new s.60CC(2A)?

• Given the high incidence of allegations of family violence and in Family Court files will disputes over nature & extent of “family violence” become the central issue in many cases?
• How much room does giving “greater weight” to safety leave for considerations of relationship to both parents? How are factors to be balanced?

Suggested Principles & Guidelines

for child-related cases with dv issues – the 5 P’s

(Jaffe, Johnston, Crooks & Bala, 2008; Johnston, Roseby & Kuehnle, 2009)
Suggested **Principles** for Parenting Arrangements:

**Priority for protection of child safety**

1. **Protect children from violence & abuse.**
2. Provide for the safety for primary care parent;
3. Parents who are victims are empowered to make their own decisions, but if victim Mom won’t protect (ie lives with abusive partner -> child protection intervention;
4. Perpetrators to recognize harm of their actions
   i.e., in family proceedings to acknowledge the problem and take measures to correct abusive behavior and
   - possibility (bot not necessity) of criminal accountability;
5. Promote parent-child access that benefits the child.
   • Possible in some cases to achieve all objectives, but if conflict in priorities, abandon lower priorities for higher

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**P$^5$ Screening**

*What dimensions of spousal violence are relevant to custody-access planning?*

1. Potency of Violence
2. Primary Perpetrator
3. Pattern of Violence
4. Parenting Problems
5. Perspectives & Preferences of Child
Risk Assessment Already Recognized by Australian Courts
Lindsay & Baker, [2007] FamCA 1273, Bryant C.J.

“The relevant exercise is not a strictly legal one. It requires an assessment of the factors which might indicate the risk of any relevant harm to the child in the future.

Risks consist of chances and consequences. The more serious the consequences the higher the risk even if the odds of the happening of the relevant event are comparatively low. Conversely, it may be perfectly reasonable to take a risk on something in circumstances where, even though it is likely to occur, the consequences are comparatively insignificant and the potential benefits are worth it.”
New Zealand – a better statute?
(Care of Children Act, 2011 amendments)

60) In considering whether a child will be safe if a violent party provides day-to-day care for, or has contact (other than supervised contact) with, the child, the court must, so far as is practicable, have regard to the following matters:
   (a) the nature and seriousness of the violence used:
   (b) how recently the violence occurred:
   (c) the frequency of the violence:
   (d) the likelihood of further violence occurring:
   (e) the physical or emotional harm caused to the child by the violence:
   (f) whether the other party to the proceedings—
      (i) considers that the child will be safe while the violent party provides day-to-day care for, or has contact with, the child; and
      (ii) consents to the violent party providing day-to-day care for, or having contact (other than supervised contact) with, the child:
   (g) any views the child expresses on the matter
   (h) any steps taken by the violent party to prevent further violence occurring:
   (i) all other matters the court considers relevant.

Concluding Thoughts & Questions

• Family violence is a complex, differentiated problem.
• While most Australian judges already prioritize safety, the new law is an important signal to mediators, lawyers, consultants and parents
  – Mediators need to identify high conflict cases with family violence or alienation issues to the courts
• Prioritizing child safety is appropriate, but new law fails to give clear guidance on how to assess risk and balance factors:
  - Will it result in more litigation?
  - Less shared responsibility & care even where not abusive partners?
  - Law can educate, but greatest needs are for appropriate investigation and support services, including legal aid, professional training, sharing of information (esp. of risk)
• Politicians need to appreciate the limits of statutory reform and the family justice system.
• Need for research to evaluate reforms and new approaches
Some References


Jaffe, Johnston, Crooks & Bala, " Custody Disputes Involving Allegations of Domestic Violence: The Need for Differentiated Approaches to Parenting Plans” (2008) 46 Family Court Review 500-522


Parkinson, Cashmore & Single, “Post-Separation Conflict and the Use of Family Violence Orders” (2011) 33 Sydney LR 1

The 2011 Family Law Amendments & Family Violence: Has the Australian Parliament Finally Got it Right?

Nicholas Bala

**Summary:** Australia’s post-separation parenting legislation is perhaps the most complex and frequently amended law of its kind in the world. The 2011 amendments to the Family Law Act (in force June 2012), while welcome in some respects, also have significant limitations. The new law emphasizes the importance of family violence, and should result in fewer settlements and mediated agreements that might endanger children. However, the amendments fail to provide clear guidance for decision-makers. While Australian judges can generally be expected to continue to exercise their discretion and take a balanced, protective approach to these challenging cases, the new law may have unintended negative consequences. Enacting this law reflects an international trend of politicians to place too much emphasis on statutory reform and create unrealistic expectations for family justice, while failing to devote adequate resources to address problems. More effective responses to domestic violence require more resources for better, early assessment and investigation, and a better understanding by legislators of the complexity and heterogeneity of spousal violence. The recent reform of family legislation in New Zealand, which directs courts about the factors to be taken into account in assessing risk, is a preferable model for statutory reform.