

## FOREWORD

RICHARD CHISHOLM\*

The thing about clichés is that they are so often true. The invitation to write this Foreword was a pleasure (because I spent a wonderful 23 years at the UNSW Law School) and a privilege (because it is such a great place, and the *UNSW Law Journal* is such a great journal). More significantly, family violence is a profoundly important problem, and our laws and services could handle it much better than they do. There has been a great deal of activity in the area: new research and reports, recent legal changes to evaluate, and signs of government interest. And so there is much to discuss, much to learn. The *Journal* has done well to devote a Forum to the topic. It is very much in the tradition of the Law School as I have always known it: concerned with the way the law actually works, especially in relation to the most vulnerable members of the community, and bringing to bear insights not only from legal principles but from relevant work in other disciplines.

What is family violence, and what are its characteristics? Like much in family law, the answer is controversial. Jane Wangmann's article provides a useful point of entry. It is one thing to make a simple record of particular incidents, but quite a different thing to understand what is happening in a relationship, and what role violence might play. Wangmann tells us that 'feminist researchers have found that women are the predominant victims of domestic violence (a view supported by official statistics), and that women's use of violence is qualitatively and quantitatively different to that of men's. She expresses concern about reliance on typologies, lest they 'inadvertently reinforce myths' rather than help us understand what is going on in each case.<sup>1</sup> I share those concerns.<sup>2</sup> Her research on cross-applications in domestic violence cases shows that the particular incidents that formed the basis of the proceedings 'failed to capture the multiple and varied experience of violence by either men or women'. The research emphasises the importance of considering behaviour in context. But achieving this in family violence cases requires a lot of fresh thinking and hard work. Only a few years ago an important study by the Australian Institute of Family Studies found that many allegations of family

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\* BA, LLB, BCL, AM; Visiting Fellow, ANU College of Law; Hon Professor, University of Sydney Law School; formerly a Judge of the Family Court of Australia.

1 Jane Wangmann, 'Gender and Intimate Partner Violence: A Case Study from NSW' (2010) 33 *University of New South Wales Law Journal* 945, 954.

2 Richard Chisholm, *Family Courts Violence Review* (Attorney-General's Department (Cth), 2009) 38–41.

violence in family law proceedings lacked both specificity and evidentiary support; not surprisingly, it proved difficult for the court to act on generalised and unsupported allegations where these were denied.<sup>3</sup> Solving this problem will require many things: family law practitioners need to understand the nature of family violence and develop techniques for identifying it and presenting it; family courts and other agencies need the time and resources to examine cases in detail; the legislation needs to facilitate the investigation of family violence. A range of proposals to address these issues have been made in recent reports, and many of them are considered in the contributions to this Forum.

One problem has to do with fragmentation of services, a topic explored in the articles by Karen Wilcox, and Hilary Astor and Rosalind Croucher. Family violence is now recognised as a public matter,<sup>4</sup> and numerous public agencies are involved: most obviously, police and the criminal justice system, child protection, specialist domestic violence courts and systems, and the ‘family law’ system, dealing with what used to be called custody and guardianship disputes, mainly but not only between parents. Other agencies might be involved too: family violence has consequences for housing, health, and education. These different systems and agencies have different ways of doing things, and their personnel have different priorities, different resources, and different qualifications and training. But violence in a single family can involve many and even all of these services and agencies,<sup>5</sup> and the challenge is to provide a helping system that is coherent and easily understood.<sup>6</sup> We need to do more, since there is solid evidence of how difficult it is for many people, including victims of family violence, to know where to go, and how to get the help they need.<sup>7</sup>

Although many countries have to grapple with the problem of co-ordination, Australia’s federal system poses additional difficulties: broadly speaking ‘family law’ is controlled by federal laws and federal bodies, while everything else is controlled by the states and territories. Achieving coherence and coordination, therefore, requires not only what Wilcox calls ‘horizontal’ joining-up (within each state and territory) but also ‘vertical’ joining-up (between each state or territory and the federal system). These problems are illuminatingly discussed in the two articles.

It is interesting that the role of federal agencies in family law is relatively recent: it started in the 1960s and since then has expanded so that it has now

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3 Lawrie Moloney et al, ‘Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings. A Pre-reform Exploratory Study’ (Research Report No 15, Australian Institute of Family Studies, 2007) (‘the AIFS violence study’).

4 Hilary Astor and Rosalind Croucher, ‘Fractured Families, Fragmented Responsibilities – Responding to Family Violence in a Federal System’ (2010) 33 *University of New South Wales Law Journal* 854, 855.

5 As explained by Astor and Croucher, *ibid* 857.

6 See, eg Hester’s comments on the UK experience, quoted in Astor and Croucher, *ibid* 860.

7 See Karen Wilcox ‘Connecting Systems, Protecting Victims: Towards a Vertical Coordination of Australia’s Response to Domestic Family Violence’ (2010) 33 *University of New South Wales Law Journal* 1013, citing, for example, Lesley Laing, *No Way to Live* (University of Sydney & Benevolent Society, 2010)

effectively taken over ‘family law’.<sup>8</sup> In principle, it might have been arguable that the states and territories, having unlimited legislative power and providing most of the relevant services, would have provided a more suitable site for a coherent response to family problems, especially if they could manage to have uniform laws. The federal system, by contrast, started with a concern about marriage and questions of *status*; issues that have become relatively peripheral in family law, because marriage has almost completely ceased to be the peg on which family law jurisdiction is hung.<sup>9</sup> However the overall Australian development has been persistently centralist, and these days the arguments are to the effect that the system would be more coherent if the Commonwealth increased its role, for example by having federal child protection laws,<sup>10</sup> or giving the family court increased investigative powers.<sup>11</sup> The two articles provide a well-informed, thoughtful and constructive discussion of what can be done to improve coherence within our constitutional framework

Renata Alexander reports on a detailed examination of cases in the family courts, and characterises their approach (which, she says, mirrors the approach before 2006) as follows:

Although recognising the deleterious effects of exposing children to adult family violence, such violence is of limited relevance in children’s matters except in cases of extreme physical abuse where the abuse is particularised and there is strong corroborating evidence.<sup>12</sup>

Alexander goes on to agree with a number of recent proposals for reform, including the repeal of section 117AB (costs) of the *Family Law Act 1975* (Cth) and the modification or removal of the ‘friendly parent’ provision. She takes issue, however, with what she characterises as my ‘recommendation that family violence be removed as both a primary and an additional consideration in section 60CC.’ Understanding the issues here requires a little more detail, however. Recommendation 3.4 is intended to give the law a clearer focus on the best interests of children, by downplaying the current legislative emphasis on *both* of the two factors often referred to as the ‘twin pillars’, namely parental involvement and violence. If the ‘twin pillars’ are to be retained, the Report

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8 See in particular the *Matrimonial Causes Act 1959* and the *Marriage Act 1961*; and now the *Family Law Act 1975* (Cth).

9 Essentially because legislative power over custody, maintenance and guardianship of children was referred to the Commonwealth by all the states except WA in the late 1980’s, and legislative power to deal with financial issues between de facto couples by several states in 2009: see *Family Law Act 1975* (Cth) pt VIIIAB.

10 The Hon Alastair Nicholson, ‘Children and Young People: The Law and Human Rights’ (Sixteenth Sir Richard Blackburn Lecture Centre for International and Public Law Faculty of Law, Australian National University, 14 May 2002). See also Alastair Nicholson, ‘Australia’s Children: Does the Law Offer Them Sufficient Protection?’ (the 21<sup>st</sup> Lionel Murphy Memorial Lecture, Parliament House, Sydney, 28 November 2007).

11 Family Law Council, *Family Law and Child Protection* (Final Report September 2002) (recommending the creation of a federal Child Protection Service).

12 Renata Alexander, ‘Moving Forwards or Back to the Future? An Analysis of Case Law on Family Violence under the *Family Law Act 1975* (Cth)’ (2010) 33 *University of New South Wales Law Journal* 907, 925.

recommends that the family violence provisions should be strengthened.<sup>13</sup> Safety would be made more central to the determination of children's best interests, as in the proposed guideline referring to the willingness and capacity of parents and others 'to provide for the child's safety, welfare and wellbeing'.<sup>14</sup> Protecting children from violence or abuse would remain as an object in section 60B(1),<sup>15</sup> and there is no suggestion of changing section 43(1)(ca) ('the need to ensure safety from family violence'). Nevertheless, further consideration might show that more explicit legislative attention to violence is desirable in section 60CC.<sup>16</sup> Constructive debate on this important topic will be further assisted by the fair and thoughtful critique of the report by Juliet Behrens (who shares some of Alexander's concerns).<sup>17</sup>

Heather Nancarrow's article provides a detailed and succinct account of the work of the National Council to Reduce Violence against Women and their Children, indicating the wide range of issues involved, the suggested strategies for improvement, and the very significant government response. The work of the National Council also underlines the need to reform the *Family Law Act 1975* (Cth).<sup>18</sup>

Nevertheless, for the moment at least we must work with what we've got, and John Faulks' article provides important insights into the way the Family Court of Australia operates (including the valuable *Family Violence Best Practice Principles*), as well as a plea for understanding for those involved in the family law system:

It behoves us all to build the society that we want for ourselves and our children from the ground up. 'Condemn the fault' – the sin – but let us not spend our time futilely pointing accusatorial fingers 'at the actor': at each other, at the government, the courts or any other relevant institution.<sup>19</sup>

Julie Stubbs' article on restorative justice poses an important and difficult question, namely how restorative justice approaches work when dealing with 'gendered violence' in the area of domestic violence and sexual assault. Stubbs praises restorative justice's aims to promote victims' needs and interests, but raises important questions about its capacity to meet them in practice. For example, while apologies tend to be valued in restorative justice generally,

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13 Chisholm, above n 2, Recommendation 3.5.

14 Paragraph (d) of the proposed revision of s 60CC in Recommendation 3.4; *ibid*.

15 *Ibid* 142.

16 Recommendation 3.4 was deliberately expressed somewhat tentatively ('That the government give consideration to amending...').

17 Juliet Behrens, 'Family violence and its relevance beyond safety: Some reflections on the Chisholm Report' (2010) 1 *Family Law Review* 31.

18 See Heather Nancarrow, 'Time is of the Essence: Progress on the National Council's Plan for Australia to Reduce Violence Against Women and their Children' (2010) 33 *University of New South Wales Law Journal* 836 ('reforms in recent years to the domestic and family violence and sexual assault laws have led to good laws, overall and in most jurisdictions, with the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth)..., being the most notable exception': at 843).

19 "'Condemn the Fault & Not the Actor?' Family Violence: How the Family Court of Australia can Deal with the Fault and the Perpetrators' (2010) 33 *University of New South Wales Law Journal* 818, 835.

Apology and forgiveness are themselves highly gendered with strong expectations on women to accept apologies. But domestic violence offenders are typically practiced at offering apologies as a means of buying favour only to re-offend. There is no a priori reason for confidence that a 'new story' derived in the restorative justice process will necessarily reflect a progressive understanding of victimisation or gendered violence.<sup>20</sup>

Stubbs says, arrestingly, that a restorative justice process 'may permit a range of possible outcomes, including tyranny', and discusses studies that give cause for concern, for example, that 'informal processes can revictimise when offenders (or their supporters) do not take responsibility for the violence, minimise the harm, or cause distress to victims'.<sup>21</sup> Stubbs presents a persuasive argument that generic models of restorative justice fail to attend to the specific characteristics of gendered violence.<sup>22</sup> We may need hybrid models, different from restorative justice and from conventional criminal justice:

New responses to gendered violence are more likely to be effective, safe and responsive to difference where the design and practice is guided by the principle of anti-subordination and draws on the expertise of women's advocates in the communities that they serve.<sup>23</sup>

John Pascoe's thoughtful and compassionate article focuses on the connections between family violence, litigation, and homelessness. Research indicates that over half of the women and children who seek assistance from specialist homelessness services do so to escape violence.<sup>24</sup> As Pascoe points out, fleeing from violence can create a situation in which it is difficult for the victim to provide for the children. His article includes a harrowing example, in which, however, the court made orders sought by the mother allowing her to relocate with the children to a city where she was safe.<sup>25</sup>

One of the problems with family violence is that it can undermine many things in the victim, including parenting capacity. Another case quoted by Pascoe illustrates how a sensitive judicial officer can understand and deal with this:

I think there are important mitigating factors, and that the circumstances that existed at the time for the mother and the children, no longer exist today. At the time the mother was clearly unwell, and probably depressed. She was the survivor of family violence which, the evidence indicates, continued even after this event. She had been living in a refuge, with the children, for a period of time before this

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20 Julie Stubbs, 'Relations of Domination and Subordination: Challenges for Restorative Justice in Responding to Domestic Violence' (2010) 33 *University of New South Wales Law Journal* 970, 982. I have omitted footnotes and spelled out Stubbs's abbreviation "RJ".

21 Ibid 983, quoting Kathleen Daly and Heather Nancarrow, 'Restorative Justice and Youth Violence Against Parents' in James Ptacek (ed), *Restorative Justice and Violence Against Women* (Oxford University Press, 2010) 170.

22 Ibid 985. The need for caution has been recognised by the National Council to Reduce Violence against Women and their Children; see Nancarrow, above n 18.

23 Stubbs, above n 20, 986.

24 John Pascoe, 'Family Violence, Homelessness and the *Family Law Act 1975* (Cth)' (2010) 33 *University of New South Wales Law Journal* 895, 896, referring to Department of Families, Housing, Community Services and Indigenous Affairs (Cth), *The Road Home: A National Approach to Reducing Homelessness* (2008).

25 *M v M* [2006] FMCAfam 419 (16 August 2006).

event. The totality of the evidence in fact leads me to accept her evidence that the father had been persistent in his communication with her prior to this event. But none of these factors are still present in the mother's life today. She is far better supported today, than she was in 2005. She presents as the survivor of family violence who has an appreciation and insight into what has happened in her life, and the impacts on her children, and is determined to move on.<sup>26</sup>

Pascoe uses the issue of homelessness to show that family violence is a complex issue that profoundly affects many parts of family life. He emphasises the differences between cases, and the need to keep an open mind. No single tactic will work for all:

Instead we know from practice and research that affected parties are best assisted through proper communication and cooperation between agencies that are both within the court system and in the government and non-government sectors.<sup>27</sup>

The article by Patrick Parkinson, Atlanta Webster and Judy Cashmore is of considerable importance. Only a slight majority of the lawyers they surveyed routinely interviewed clients about violence issues; some relied on 'intuition, assumptions about their clients based upon socioeconomic status or appearance, or cues within the interview'. Some approached the topic from a stereotyped point of view, as when some asked questions to male clients only about whether they were perpetrators of violence. A more subtle problem was that some lawyers appeared to assume that one party must be the perpetrator and the other the victim. That works for some types of violence, especially what has been called coercive controlling violence. (This is how domestic violence is often understood – and not surprisingly, because it is the one that puts people in fear of their lives, out of their homes, and into hospitals.) But other forms of violence, such as 'violence driven by conflict', may involve both parties, and may be important, especially for children. As the authors say, '[a]ssuming a victim-perpetrator dichotomisation is likely to lead to an impaired identification and understanding of situational couple violence and its implications for family law problems'.<sup>28</sup> The paper includes a valuable review of the literature, and highlights the need for lawyers to improve their handling of violence in their interviews with clients, and, perhaps, the need for a common assessment framework.

The Law Council's new Best Practice Guidelines (published since the submission of the Parkinson, Webster and Cashmore article) will play a constructive part in this area.<sup>29</sup> The guidelines include some valuable and detailed material on violence:

2.2 The role of lawyers is to:

1. recognise that family violence is a serious problem (see Appendix 3 for suggested questions to clients)

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26 *Carlton and Carlton* [2008] FMCAfam 440 (10 June 2008)(Altobelli FM).

27 Pascoe, above n 24, 905.

28 Patrick Parkinson, Atlanta Webster and Judy Cashmore, 'Lawyers' Interviews with Clients About Family Violence' (2010) 33 *University of New South Wales Law Journal* 929, 944.

29 Family Law Council and Family Law Section of the Law Council of Australia, *Best Practice Guidelines for Lawyers Doing Family Law Work* (2<sup>nd</sup> ed, October 2010).

2. be sensitive to different needs and experiences of clients from different backgrounds and cultures
  3. provide the client with an opportunity to talk about violence issue if they wish
  4. not be judgmental
  5. have information about other sources of help and support available within the local area...
- 2.3 Even where family violence does not emerge as an issue at the initial interview, the possibility of violence should be kept under review at all times. Many forms of family violence are hidden by clients may not be openly discussed by clients or may not be recognised by clients as being relevant.
- 2.4 Lawyers should be conscious of the possibility that clients may be reluctant to divulge a history of abuse, violence or waste. While lawyers must not 'put words into the client's mouth', they should develop skills that will help them to facilitate a full and frank disclosure. Lawyers should be on the lookout for instructions that do not make sense or appear to be contradictory. Some acts or abuse by a perpetrator upon the client may be highly significant in a child-related case, but may be seen by the client as humiliating or degrading. Lawyers should develop techniques and attend courses if necessary, that will equip them to assist clients to overcome self-imposed inhibitions.

The article by Rebecca Newton et al on the child death review processes is a remarkably detailed treatment of a topic that will be unfamiliar to many lawyers. Their systematic review of various aspects of the legislation led them to identify a number of deficiencies. They conclude with a set of recommendations that would, if accepted, make the process more uniform, extensive, thorough and transparent, and more likely to lead to constructive outcomes. Although Australian governments spend millions of dollars annually on child death reviews, the authors conclude that child death review teams 'can at present do little if anything to prevent future occurrences of child death or serious injury from family violence, abuse or neglect; by omission, the legislation prevents it'.<sup>30</sup>

Henegan and Ballantyne present a fascinating and at times passionate review of a range of legal responses to violence in New Zealand, making robust comments about what they see as the strengths and weakness of various aspects of the system. Australian readers will be struck by the similarities and differences between New Zealand and Australia. One theme emphasised by the authors, which could perhaps receive greater attention in Australia, is the link between inequality and social problems, including family violence:

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30 Rebecca Newton, John Frederick, Eugenia Wilson, Mark Dibben and Chris Goddard, 'Legislation and Child Death Review Processes in Australia: Understanding our Failure to Prevent Child Death' (2010) 33 *University of New South Wales Law Journal* 987, 1012.

Amongst the developed countries studied by Wilkinson and Pickett, New Zealand had the fifth highest income inequality and the fifth highest rate of social and health problems. A more egalitarian society, with less economic difference, and more opportunity for an equal start in life is the best long-term solution to reduce family violence in New Zealand. Family violence is not just a gender issue, it is inextricably linked to larger issues of deprivation and class.<sup>31</sup>

The problem of family violence is important, pervasive and complex. I congratulate the *UNSW Law Journal* for this timely valuable collection of articles, which will help us assess the strengths and weaknesses of our family violence laws and processes, and should make a real contribution to much-needed improvement.

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31 Mark Henagahan and Ruth Ballantyne, 'Legal response to Violence in the Home in New Zealand' (2010) 33 *University of New South Wales Law Journal* 870, 894.