

Just how safe are victim-survivors when they enter the family law system?

Pip Davis, Principal Solicitor, WLS NSW

Presentation to the Legal Studies Assoc of NSW

17 March 2023



A note on language

This presentation uses gendered language to discuss domestic violence and sexual assault.

This reflects the reality that most victims/survivors of domestic violence and sexual assault are women, and most perpetrators are men.

It also reflects that it is necessary to place domestic violence and sexual assault within their broader contexts in order to understand and combat them, and those social contexts are inherently gendered.

However, domestic violence and sexual assault can happen to anyone, including men, and in any kind of relationship, including LGBTQI relationships

More info and statistics: ourwatch.org.au

Women's Legal Service NSW

- Statewide specialist Community Legal Centre for women
- Non-profit, non-government
- Free legal advice and representation
- Law reform and community education
- Prioritise women disadvantaged by cultural, social and economic circumstance
- Specialist legal services relating to domestic and family violence, sexual assault, family law, discrimination, victims support, care and protection, human rights and access to justice.
- More detail and our publications: wlsnsw.org.au

Domestic & family violence in the family courts

2015 Australian Institute of Family Studies (AIFS) research into family law cases found that family violence or child abuse was present in:

- 70% of matters resolved by judicial determination;
- 60% of matters resolved by consent after proceedings were initiated but prior to trial; and
- 38% of cases had 4 or more risk factors.

NSW Law & Justice Foundation research found that victims of domestic & family violence are **16 times** more likely (than those who are not victims of DFV) to turn to the family courts to protect their children and themselves

NSW Law & Justice Foundation “Quantifying the legal and broader life impacts of domestic and family violence victims (2019)”

What does recent court data tell us?

2021 data obtained through the Lighthouse Pilot Project showed:

- Approximately 80% of family law cases filed involve family violence; and
- Around 50% of high risk matters screened as part of the Lighthouse Project , contain four or more major risk factors:
 - 54% of parties allege a child has been abused or is at risk of abuse
 - 64% of parties allege they have experienced family violence
 - 57% of parties allege a child has experienced family violence
 - 39% of parties allege that drug, alcohol or substance misuse has caused harm or poses a risk of harm to a child
 - 40% of parties allege that the mental ill-health of a party has caused harm or poses a risk of harm to a child

These family violence figures are significantly higher than previously reported, but are likely to still be under-reported figures

Family law system does not operate in a vacuum

The family law system interacts with and intersects with numbers of other legal systems:

- the care and protection system
- AVO matters
- criminal law matters

Delays, outcomes, processes and decisions in one matter can impact the delays, outcomes, processes and decisions in another eg AVO and Family Law

It can also affect access to justice in terms of eligibility for legal aid grants

How does the family law system approach DFV?

The Act provides that a child's right to be protected from physical or psychological harm or being exposed to abuse, neglect or family violence will prevail over the child's right to a meaningful relationship with a parent.

But is it always the case that the court takes a protective stance?

Court approaches to safety and risk

- Expansive definitions – family violence, exposure of a child to family violence and child abuse
- Objects & Purpose of the Act
- Exemptions to compulsory FDR
- Best Interest factors, including primary considerations
- Notice of risk
- Unacceptable risk
- Ban on personal cross examination
- Lighthouse Project and Evatt List
- Use of Legal Aid Early Intervention and non-legal support services
- Specialist Lists

Family violence

Section 4AB of FLA gives the following examples of behaviour that may constitute family violence:

- a. an assault; or
- b. a sexual assault or other sexually abusive behaviour; or
- c. stalking; or
- d. repeated derogatory taunts; or
- e. intentionally damaging or destroying property; or
- f. intentionally causing death or injury to an animal; or
- g. unreasonably denying the family member the financial autonomy that he or she would otherwise have had; or
- h. unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child, at a time when the family member is entirely or predominantly dependent on the person for financial support; or
- i. preventing the family member from making or keeping connections with his or her family, friends or culture; or
- j. unlawfully depriving the family member, or any member of the family member's family, of his or her liberty."

A child's exposure to family violence = Abuse

Section 4AB(3) and (4) - Exposure to family violence defines a child seeing or hearing or otherwise experiencing the effects of family violence. Includes a non-exhaustive list of examples of exposure:

- a. overhearing threats of death or personal injury by a member of the child's family towards another member of the child's family; or
- b. seeing or hearing an assault of a member of the child's family by another member of the child's family;
- c. comforting or providing assistance to a member of the child's family who has been assaulted by another member of the child's family; or
- d. cleaning up a site after a member of the child's family has intentionally damaged property of another member of the child's family; or
- e. being present when police or ambulance officers attend an incident involving the assault of a member of the child's family by another member of the child's family.

Abuse of a child

Section 4 - Abuse in relation to a child, means:

- a. an assault, including a sexual assault, of the child; or
- b. a person (the first *person*) involving the child in a sexual activity with the first person or another person in which the child is used, directly or indirectly, as a sexual object by the first person or the other person, and where there is unequal power in the relationship between the child and the first person; or
- c. causing the child to suffer serious psychological harm, including (but not limited to) when that harm is caused by the child being subjected to, or exposed to, family violence; or
- d. serious neglect of the child.

Objects & principles

Objects & Principles focus on:

- Ensuring children have the benefit of meaningful involvement by both parents to the extent it is consistent with best interests
- Protecting children from physical and psychological harm and being exposed to violence and abuse
- Ensuring children receive adequate parenting and parents fulfil their responsibilities
- Ensuring children have a right to enjoy their culture

Compulsory FDR and exemptions

Parties must participate in Family Dispute Resolution (FDR) before applying to court

Exemptions:

- Consent orders
- Abuse or family violence
- Some contravention applications
- Urgent applications
- A party is unable to participate in FDR (eg disability or remote location)

Best interests of children

All decisions made must be in the best interests of the child

Primary considerations:

- Need to protect child from physical or psychological harm or exposure to abuse, neglect or family violence
- Benefit to the child of having a meaningful relationship with both parents

When applying the primary considerations, the court **must prioritise** the safety of children

Best interests of children

Additional considerations include:

- Views of the child
- Nature of the child's relationship with parents or caregivers
- Effort made by parents to be involved
- Practical difficulties of spending time with and communicating with the child
- Parent capacity to meet child's needs
- Parent attitude to child and parenting
- Family violence involving child or a member of their family
- Maturity, sex, lifestyle and background of child and parents
- Whether parent is meeting their obligations to maintain child

Notice of Risk

Mandatory form lodged with an Initiating Application or Response

Notice of Risk gets sent to DCJ

Purpose:

- to better identify a wide range of risks to children in parenting proceedings
- to enable notification to child protection authorities
- facilitate early identification of risk and ensure early intervention

Unacceptable risk

Section 60CG - Court is to consider risk of family violence

In considering what order to make, the court must, to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration, ensure that the order:

- a. is consistent with any family violence order; and
- b. does not expose a person to an unacceptable risk of family violence.

A court can make orders to safeguard a person affected by the orders from risk

Risk of Violence

Unacceptable risk

- A court will not make orders for a parent to spend time with a child if the child would be exposed to an unacceptable risk of harm.

Dealing with risk

- Supervised time with a parent
- Drug and alcohol restrictions

What if there are already parenting orders?

- Urgent application to court to vary parenting order
- Contravention of parenting order

Ban on personal cross-examination

Section 102NA

- Took effect from 10 September 2019
- Prohibits personal cross-examination in family law proceedings where there is an allegation of family violence between two parties
- Personal cross-examination is where a party asks questions of another party or witness directly, rather than having questions asked by a lawyer.

Why is it important?

- Personal cross examination by an alleged perpetrator can re-traumatise victims of family violence and affect their ability to give clear evidence

Ban on personal cross-examination

Applies when:

1. either party has been convicted of, or is charged with, an offence involving violence, or a threat of violence, to the other party
2. a family violence order (other than an interim order) applies to both parties
3. an injunction under sections 68B or 114 for the personal protection of either party is directed against the other party, or
4. the court makes an order that the mandatory requirements apply to the cross-examination.

Legal representation under the scheme is available for the hearing (generally the final hearing), including preparing for that hearing and for late-stage legally assisted family dispute resolution, if appropriate.

Legal Aid Commissions have funding to appoint lawyers under the Scheme.

- not merits and means tested.
- Is used by some perpetrators to obtain free legal representation (disengage from their lawyers just prior to the hearing)

Lighthouse Project & Evatt List

Pilot December 2020

Rolled out to all Family Court Registries in November 2022

Purpose: To screen for and manage risk and improve outcomes for families involved in the family law system.

Lighthouse model:

- 1. Risk Screening** – DOORS risk assessment tool
- 2. Triage** - based on screening results, triage of matters and identification of parties who may require additional support, referrals and safety measures
- 3. Case Management** – highest risk cases diverted to the Evatt list
 - Focus on early information gathering
 - Dedicated judges, senior judicial registrars and judicial registrars
 - Aim is to finalise matters within 12 months

Evatt List

High risk cases identified as a result of screening go into the Evatt list

Evatt list cases must include allegations of:

- a. serious abuse or risk of serious abuse of a child of the proceedings whether it be physical, psychological or neglect;
- b. serious family violence or risk of serious family violence by a party to the proceedings, whether this is physical, emotional/psychological or financial;
- c. exposure or risk of exposure to serious family violence by a party or a child;
- d. serious drug, alcohol or substance misuse which has caused harm or poses a serious risk of harm to a child or party;
- e. a party's mental health issues which has caused harm or poses a serious risk of harm to themselves or others, including a child;
- f. a party who poses a potential risk of self-harm;
- g. recent threats or attempts to abduct a child; or
- h. recent threats to harm a child or another person relevant to the proceedings, such as a new partner.

Early intervention legal & non-legal support services

- Legal Aid Early intervention Service
- Domestic Violence Units
- Family Advocacy and Support Services
- Lawyers in FDR – at FRCs, in legal aid conferences and private FDR

Specialist lists

- Evatt List
- Magellan List
- Indigenous List
- Contravention List
- Critical Incident List
- COVID List (no longer operational)

So, what needs to change?

The prevalence of violence in the cases before the Court, means that the Court needs to accept and recognise itself as essentially, a ‘family violence court’.

It must provide a greater focus on safety at every level and process, but especially in decision-making.

How does the family law system approach DFV?

The Act provides that a child's right to be protected from physical or psychological harm or being exposed to abuse, neglect or family violence will prevail over the child's right to a meaningful relationship with a parent.

But is it always the case that the court takes a protective stance?

Lets talk about Sarah.....

What are the problems when it comes to safety and risk in Family Law?

- Presumption of ESPR and framework of decision-making regarding time
- Pre-Action procedures with costs risks for non-compliance
- Lighthouse intake
- Extensive court delays, protracted litigation
- Availability of grants of Legal Aid
- Lack of funding for legal services and support services
- Independent Children's Lawyers must be mandated to meet with the child
- Hague Convention cases
- Lack competency re DFV amongst professionals working in FL

Presumption of ESPR and Equal Time

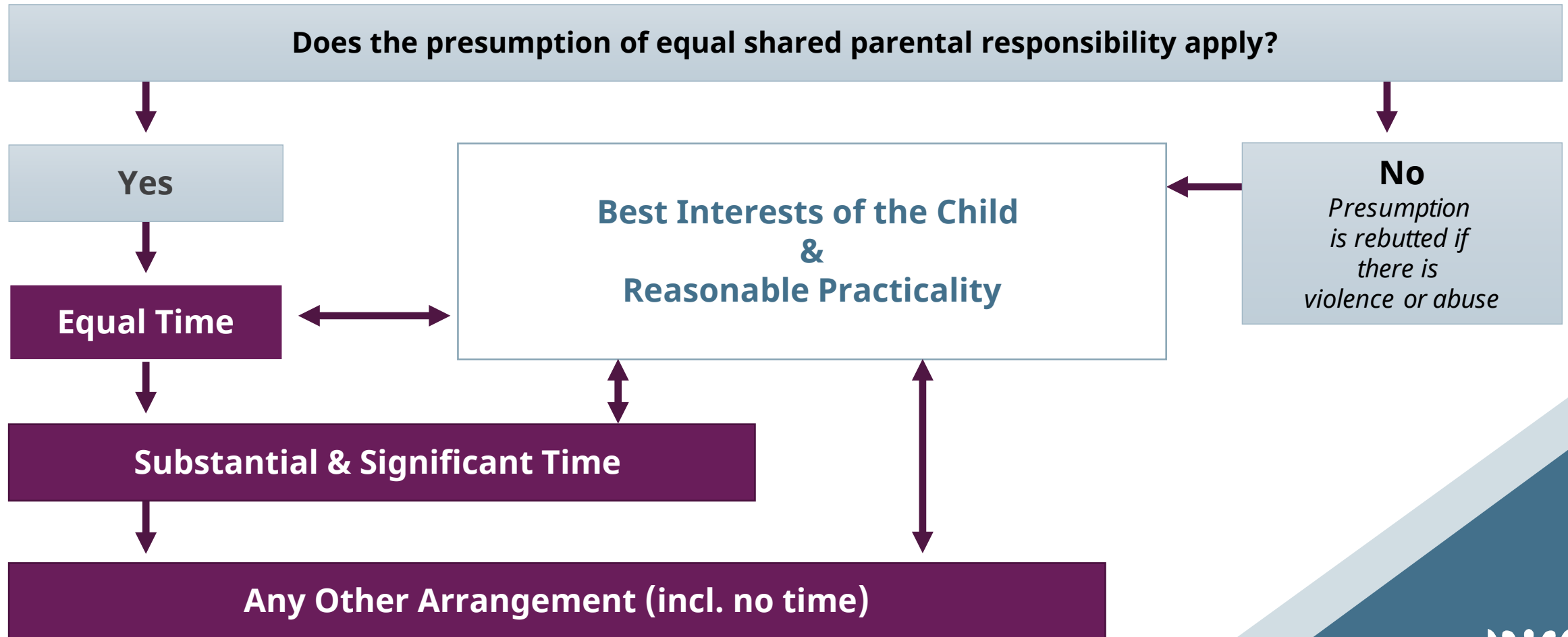
Creates a complex legislative pathway:

- often misconstrued as providing a presumption for equal time
- shifts focus away from care agreements that are in best interests of the child to a more process focussed outcome
- leads to the making of unsafe agreements reached “in the shadow of the law”
- contributes to protracted and harmful litigation

Its links to equal time is not only confusing in its messaging but also endangers victims by:

- increasing the time children spend with perpetrators, including unsupervised time
- provides multiple opportunities for perpetrators to engage in coercive control
- locks victims into living in the same geographical zone as perpetrators
- makes it very difficult for victims to move away from perpetrators for safety reasons
- has detrimental financial impacts for children
- incentivises perpetrators to litigate and promotes systems abuse

Court decisions about children



Pre-action procedures and costs risks

Failure to comply with the PAPs can lead to a costs risk

- Obligation on parties to write to the other party noting their intention to file and seek a response within 14 days
- Obligation to participate in FDR – notwithstanding the exemptions, the refusal to participate can lead to a costs order

Lighthouse & Evatt List

- Relies on a party / parties actually screening
- Screening is only in English language
- Screening relies on reasonable literacy skills
- Screening relies on computer literacy and access to internet
- Large proportion of parties are unrepresented
- Large proportion of cases settle

Delays and protracted litigation

- There are long delays in matters progressing to final hearings
- Litigation is often protracted – hearings taking 5 days is not uncommon
- Legal costs are significant and often prohibitive
- Delays and costs lead to increased risk in many cases involving DFV, including the risk of settling with unsafe arrangements
- Ultimately, this leads to people settling and making decisions in the shadow of the law

Eligibility for legal aid

Eligibility is dependent on the means and merits test

Means test:

- Have to be “poor enough” to get a grant of legal aid
- This leaves a large “missing middle”
 - too poor to afford a lawyer and too “rich” for legal aid
- Means test must be for the duration of the case

Merits test:

- Is the “legal problem” one worthy of public funds?
- Is the case “good enough”?

Eligibility for legal aid

Grant can be terminated at any time

Legal Aid isn't free:

- Contribution
- Charges over property

Need for increased funding for legal services

Develop and fund specialised family violence and legally assisted family dispute resolution (mediation) program

In addition:

Needs to be a huge injection of funds for legal service providers which work in this space and litigate the most complex of cases

- Women's Legal Services
- Aboriginal Legal Services
- Legal Aid Commissions (but not at the expense of the above)

Independent Children's Lawyers

Frequently ICLs do not meet with children, or only meet briefly once

AIFS Independent Children's Lawyer Study found

- that the approach adopted by some ICLs was to proceed cautiously about directly meeting with children.
- preference of some ICLs was for evidence of a child's views be sought via a report prepared by a court child expert or single expert witness.

It is vital an ICL has meaningful interactions with a child and meet with a child at the beginning of proceedings and prior to and after each major court event.

Children must have the opportunity to SAFELY express views

Hague cases

Need for funded representation for the "left behind" parent as well as the "taking parent."

Often parent who leaves with a child is fleeing DFV

In Australia, the application for return of a child is made by the Commonwealth government, which foots the legal costs for the application under the Hague Convention

"There is a huge inequality in legal representation for taking mothers and left-behind fathers, which adds to the imbalance in these matters. Funding for both parents is required. This is a matter of equity but would also reduce trauma for children and could prevent inappropriate returns.

The effect of the operation of the current arrangement is state-sanction systems abuse, where the motivations of the taking parent are rendered irrelevant, and the often abusive motivations of the left behind parent are ignored." (Hague Mothers)

Need for DFV competence

Competence is imperative for ALL persons working in the FL system

Training must be:

- developed and delivered by DFV specialists
- ongoing and meaningful

At a minimum:

- Understanding of all forms of DFV and its dynamics and impacts
- Understanding of the trauma and the different ways it can manifest
- Understanding of trauma and its impacts on parenting

Exposure Draft Family Law Amendment Bill 2023

Key proposed amendments include:

- Removal presumption ESPR
- Removal requirement to consider equal time and substantial and significant time
- BIC into single list **BUT** the exposure draft did not explicitly state that safety must be prioritised over the other factors as it is in the current Act

Resources

Cross Examination Scheme

- https://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0005/55445/Cross-Examination-Scheme-Information-Sheet-Jun-2022.pdf

Family Violence Best Practice Principles

- <https://www.fcfcoa.gov.au/pubs/fl/fvbpp>

Lighthouse Project

- <https://www.fcfcoa.gov.au/fl/fv/lighthouse>

Evatt List Guide for the parties

- <https://www.fcfcoa.gov.au/fl/pubs/guide-parties-evatt-list>

Kaspiew, R. Carson, R. Moore, S. De Maio, J. Deblaquiere, J & Horsfall, B (2014)
Independent Children's Lawyers Study Final Report, Second Edition, p38 (50)