

**FAMILY LAW LEGISLATION
AMENDMENT (FAMILY VIOLENCE AND
OTHER MEASURES) ACT 2011**

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29 March 2012

This Evening's Presentation

- Historical Background – 2006 amendments
- Impetus for change
- The 2011 amendments
- The complexity of family violence
- What social science tells us about family violence
- Implications for the preparation & presentation of a parenting case involving family violence after the 2011 amendments

Historical background

2006 amendments

- Significant amendments of the Act in 2006 - followed Hull Committee enquiry & public debate about whether a presumption of equal time parenting should be introduced into Aust law.
- No presumption of equal time parenting was introduced
- a cascading legislative scheme was introduced as well as mandatory pre-filing attendance at family dispute resolution (subject to limited exceptions)

2006 amendments cont'd

- Although no presumption of equal time introduced, in considering the 2006 amendments, the Full Court stated:

“It can be fairly said there is a legislative intent evinced in favour of substantial involvement of both parents in their children’s lives, both as to parental responsibility and as to time spent with children, subject to the need to protect children from harm, from abuse and family violence and provided it is in their best interests and reasonably practicable”

Goode v Goode, [2006] FamCA 1346 at [72]

2006 Amendments & Family Violence

- Defined in s 4(1) as:

“family violence means conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person’s family that causes that or any other member of the person’s family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.

Note: A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.”

2006 Amendments & Family Violence

- Family violence and the objects & principles of part VII - *protecting children from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence* (s 60B)(1)(b))
- Family Violence and family dispute resolution – exemption from filing s60I certificate (s 60I(9))

If relying on this exemption applicant must acknowledge receipt of information from counsellor/FDRP re services & options available in circumstances of abuse or violence (s 60J)

2006 Amendments & Family Violence

- Party's obligation to inform Court of any *family violence order* (FVO) applying to child or member of child's family (60CF) – both ADVO and APVO are family violence orders
- Court must, as far as possible & consistently with best interests being paramount, ensure any parenting order is consistent with FVO & does not expose a person to unacceptable risk of family violence (s 60CF)

2006 Amendments & Family Violence

- The need to protect children (s 60K) – places obligations on Court to take specified action in cases where allegations of family violence or risk of it raised – including any procedural/interim orders; orders under s 69ZW to obtain DOCS etc reports; whether injunction under s68B
- S 60K is triggered by party filing of Notice of Abuse or Family Violence

2006 Amendments & Family Violence

Family violence in considering child's best interest
(s 60CC) :

Primary considerations

Need to protect a child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence is 1 of the 2 primary considerations (s 60CC(2)(b))

2006 Amendments & Family Violence

Family violence in considering child's best interest:

Additional considerations include –

any family violence involving the child or a member of the child's family as well as any family violence order that applies to the child or a member of the child's family, provided that the order is a final order or its making was contested:
(S 60CC(3)(j) and (k))

2006 Amendments & Family Violence

Family violence in considering child's best interest:

Other additional considerations include –

- the child's relationship with the parents:
s.60CC(3)(b).
- the likely effect on the child of any change
in the child's care arrangements:
s.60CC(3)(d).

2006 Amendments & Family Violence

Family violence in considering child's best interest:

Other additional considerations include –

- the parent's parenting capacities: s.60CC(3)(f)
- the parents' attitudes to the child and the responsibilities of parenthood: s.60CC(3)(i).

2006 Amendments & Family Violence

Relevance to the presumption of equal shared parental responsibility (ESPR) (s 61DA):

- The rebuttable presumption of ESPR does not apply if there are reasonable grounds to believe that a parent, or person who lives with a parent, has engaged in family violence : s 61DA(2)

(Even if presumption rebutted, Court can still make order for ESPR if in child's best interest)

2006 Amendments & Family Violence

Relevance to Independent Children's Lawyer:

- Court may appoint an ICL if it appears to Court that child's interest should be independently represented (s 68L)
- Court has wide discretion re appointment of ICL but guided by Full Court guidelines in *Re K* (1994) 17 Fam LR 537 at 556-7 re “*background of serious family violence*”

2006 Amendments & Family Violence

Court can requiring prescribed State agencies (DOCS & NSW Police) to provide information about family violence being documents or information about:

- Any notification of suspected child abuse/ family violence
- Any assessments by the agency of investigations of notifications or findings or outcomes
- Any reports commissioned by the agency in the course of investigating : s 69ZW(3) & (4)

2006 Amendments & Family Violence

Other relevant provisions include:

- Family violence and injunctions - s 68B & 68C
- Division 12A – special provisions for *child-related proceedings* (defined s 69ZM)
- States principles courts must give effect to in conducting (hearing & deciding) child-related proceedings including-

2006 Amendments & Family Violence

Division 12A -

“The third principle is that the proceedings are to be conducted in a way that will safeguard:

- (a) the child concerned against family violence, child abuse and child neglect; and*
- (b) the parties to the proceedings against family violence.” s 69 ZN (5)*

2006 Amendments & Family Violence

Division 12A –

Some provisions of the Cth Evidence Act

do not apply to child-related proceedings eg:

- provisions in relation to hearsay & opinion: s69ZT
- But otherwise inadmissible evidence rendered admissible under this provision is to be given such weight as the court thinks fit: s 69ZT(2)

2006 Amendments & Family Violence

Division 12 A –

The court may nevertheless apply one or more of the provisions of the Evidence Act that do not apply in child related proceedings , if-

- (a) The court is satisfied that the circumstances are exceptional; and*
- (b) the court has taken into account (in addition to any other matters the court thinks relevant):*
 - *(i) the importance of the evidence in the proceedings; and*

2006 Amendments & Family Violence

(ii) the nature of the subject matter of the proceedings; and

(iii) the probative value of the evidence; and

(iv) the powers of the court (if any) to adjourn the hearing, to make another order or to give a direction in relation to the evidence : s.69ZT(3).

[Note: In most circumstances where allegations of serious criminal offences are made, trial judges will choose to have all the provisions of the Evidence Act apply to determine the issue.]

2006 Amendments & Family Violence

Special costs provisions: s 117AB

- requirement that the court must order a party to pay some or all of the costs of another party if the court is satisfied the first party “*knowingly made a false allegation or statement in the proceedings*”.

Impetus for change

- Continued debate re whether 2006 amendments over-emphasise substantial involvement of both parents in child's life at the cost of exposing child to family violence & inherent
- Criticism of 2006 introduction of “friendly parent” provision and mandatory costs order if false allegation or statement made
- Criticism of mandatory pre-filing FDR

Impetus for change cont'd

Government commissioned 3 reports into the 2006 amendments (released Jan 2010)

- *Evaluation of the 2006 Family Law Reforms* by Australian Institute of Family Studies (Dec 2009)
- *Family Courts Violence Review* by Hon Professor Richard Chisholm AM (Nov 2009)
- *Improving responses to family violence in the family law system: an advice on the intersection of family violence and family law issues* by Family Law Council (Dec 2009)

Impetus for change cont'd

- Report commissioned by Cth Attorney General's Department (released Apr 2010)

Family Violence and Family Law in Australia by Bageshaw et al (Apr 2010) -

This report surveyed parents and children after breakdown of relationship, with and without violence and found:

Findings of Bagshaw Report

“For most respondents (68.7% of women and 52.2% of men) the consequence of family violence was that suitable and safe arrangements for themselves and their children were not achieved after separation”.

Findings of Bagshaw Report

- The post- 2006 respondents reported:
“being coerced by the combined pressure from legal advisers and family dispute resolution practitioners to agree to arrangements that were unsafe or inadequate for their children, including shared parenting, overnight or unsupervised contact, or any contact. For some 54% of women and 4% of men in the post-2006 group, the co-existence of family violence, mental illness and substance abuse presented especially challenging problems that they said were not recognised.”

The 2011 Amendments

- Royal Assent on 7 December 2011
- Amendments to FLA that relate to family violence (as set out in schedule 1 of the legislation) will take effect from 7 June 2012
- Minister's second reading speech made in-
House of representatives on 24 March 2011
Senate on 14 June 2011

2011 Amendments - Overview

- New and expanded definition of “abuse” in s 4(1)
- Broader definition of “family Violence” in s 4AB
- Increased obligations on “advisers” including FDRPs, consultants, lawyers to prioritise safety of child – obligations contained in s 60D & s 63DA in addition to s12E (lawyers) & 12G (FDRPs etc)
- Principles to be applied by Courts s 43 (ca)– need to ensure “protection” (c/f safety) from family violence
- Additional object to give effect to CRC (s 60B(4))

2011 Amendments – Overview cont'd

s 60C table changes to items:

1 - best interests of the child: court proceedings

- best interests of the child: adviser's obligations

8- reporting of allegations - family violence added

- Subdivision BA - new heading “Best interests of the child: court proceedings (SIGNIFICANT changes to ss 60CC(2); s 60CC(3) (c); 60CC(3)(k); s 60CC(4) & (4A) repealed & s 60CH & CI added)
- New subdivision BB- “Best interests of the child: adviser's obligations (s 60D inserted - significant)

2011 Amendments – Overview cont'd

- s 60K repealed (Court to take prompt action when allegation of family violence) - now in s 67ZBB
- Changes to Subdivision D of Division 8 facilitates presenting of evidence of child abuse & *family violence*
- *Also an “interested person” (defined in s 67Z(4) as party, ICL & other prescribed person) can make allegation of abuse/ risk of abuse (s 67Z) OR that, as a relevant consideration to a order under Part V11, there has been family violence or a risk of family violence by one of the parties (s 67ZBA) & if make allegation, must file notice of abuse/risk & serve notice on alleged abuser – s 67Z(2) & also s 67ZBA (2)*
- Filing of notice of abuse/risk triggers s 67ZBB (similar to way s 60K currently operates)

2011 Amendments – Overview cont'd

- Principles for conducting child-related proceedings - new 69ZN(5)(a) –
“the child concerned from being subjected to, or exposed to, abuse, neglect or family violence; and”

[Note: currently s 69ZN(5)(a) does not include “subjected to” or “exposed to” ie. *“...child concerned against family violence, child abuse and child neglect; and”*]

2011 Amendments – Overview cont'd

- Section 69ZQ – deals with Court's general duties in child related proceedings - New s 69ZQ(1) (aa) – Court must

“(aa) ask each party to the proceedings:

- (i) whether the party considers that the child concerned has been, or is at risk of being, subjected to, or exposed to, abuse, neglect or family violence; and*
- (ii) whether the party considers that he or she, or another party to the proceedings, has been, or is at risk of being, subjected to family violence; and”*

2011 Amendments – Overview cont'd

- S 117AB repealed therefore eliminates possibility of costs against parent knowingly making a false allegation

NOTE: most of the amendments in schedule 1 apply to proceedings instituted on or after commencement on 7 June 2012.

Amendments in schedule 1 are NOT taken to constitute changed circumstances that would justify making an order to discharge or vary, or to suspend or revive change to parenting order that was made before commencement.

New definition of “abuse”

“(a) *an assault, including a sexual assault, of the child; 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.”

[Note removal of reference to offence under State law etc in (a); no substantive amendment to (b) and (c) and (d) are new. For meaning of “*exposed*” to see s 4AB(3) & (4)]

New definition of “family violence”

4AB Definition of *family violence* etc.

“(1) For the purposes of this Act, *family violence* means violent, threatening or other behaviour by a person that coerces or controls a member of the person’s family (the *family member*), or causes the family member to be fearful.

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

Legislative examples of “family violence” – s 4AB(2)

- (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

Legislative examples of “family violence” – s 4AB(2) cont’d

- (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

Legislative examples of “family violence” – s 4AB(2) cont’d

- (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.

When is a child “exposed” to family violence? See s 4AB(3) and (4)

*(3) For the purposes of this Act, a child is **exposed** to family violence if the child sees or hears family violence or otherwise experiences the effects of family violence.*

(4) Examples of situations that may constitute a child being exposed to family violence include (but are not limited to) the child:

Legislative examples of situations in which child exposed to family violence include:

- (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; or
- (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

Legislative examples of situations in which child exposed to family violence cont'd

- (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.

Subdivision BA – Best interest of the child: court proceedings – s 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).

Best interest of the child: court proceedings – s 60CC cont'd

Additional considerations – s 60 CC(3)
friendly parent provision repealed & new
s60CC(3)(c) substituted–

Current

(c) the willingness and ability of each of
the child's parents to facilitate, and encourage, a close and
continuing relationship between the child and the
other parent;

News 60CC(3)(c) &(ca)

“(c) the extent to which each of the child’s parents has taken, or failed to take, the opportunity:

(i) to participate in making decisions about major long-term issues in relation to the child; and

(ii) to spend time with the child; and

(iii) to communicate with the child;

(ca) the extent to which each of the child’s parents has fulfilled, or failed to fulfil, the parent’s obligations to maintain the child;”

Changes to additional considerations in s 60CC(3) cont'd

- s60 CC(3) (k) re family violence order repealed & new s60CC(3)(k) substituted—

Current

- (k) any family violence order that applies to the child or a member of the child's family, if:
- (i) the order is a final order; or
 - (ii) the making of the order was contested by a person;

News 60CC(3)(k)

“(k) if a family violence order applies, or has applied, to the child or a member of the child’s family—any relevant inferences that can be drawn from the order, taking into account the following

(i) the nature of the order;

(ii) the circumstances in which the order was made;

(iii) any evidence admitted in proceedings for the order;

(iv) any findings made by the court in, or in proceedings for, the order;

(v) any other relevant matter;”

Changes to additional considerations in s 60CC cont'd

- S 60CC(4) and (4A) repealed and no substitution
- s60CC(4) deals with extent of parent's participation & facilitation of other parent in decision making etc
- s60CC(4A) requires Court, in applying subsec(4) to have regard to post-separation events and circumstances

News 60CH

60CH Informing court of care arrangements under child welfare laws

- (1) If a party to the proceedings is aware that the child, or another child who is a member of the child's family, is under the care (however described) of a person under a child welfare law, that party must inform the court of the matter.
- (2) If non-party ...that person may inform the court of the matter.
- (3) Failure to inform the court of the matter does not affect the validity of any order made by the court nor limit
However, this subsection does not limit the operation of section 69ZK (child welfare laws not affected).

News 60CI

- **60CI Informing court of notifications to, and investigations by, prescribed State or Territory agencies**

(1) If:

(a) a party ...is aware that the child, or another child ..., is or has been the subject of:

(i) a notification or report... to a prescribed State or Territory agency; or

(ii) an investigation, inquiry or assessment ...by a prescribed State or Territory agency; and

(b) the notification, report, investigation, inquiry or assessment relates to abuse, or an allegation, suspicion or risk of abuse;

- *that party must inform the court of the matter.*

New subdivision BB – Best interest of the child: adviser's obligations – new s 60D

60D Adviser's obligations in relation to best interests of the child

- (1) If an adviser gives advice or assistance to a person about matters concerning a child and this Part, the adviser must:*
- (a) inform the person that the person should regard the best interests of the child as the paramount consideration; and*
 - (b) encourage the person to act on the basis that the child's best interests are best met:*
 - (i) by the child having a meaningful relationship with both of the child's parents; and*

New subdivision BB – Best interest of the child: adviser's obligations –s 60D cont'd

(ii) by the child being protected from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence; and

(iii) in applying the considerations set out in subparagraphs (i) and (ii)—by giving greater weight to the consideration set out in subparagraph (ii).

*(2) In this section: **adviser** means a person who is:*

(a) a legal practitioner; or

(b) a family counsellor; or

(c) a family dispute resolution practitioner; or

(d) a family consultant.

New subdivision BB – Best interest of the child: adviser's obligations –s 63DA

(1A) The obligations of an adviser under this section are in addition to the adviser's obligations under s 60D

NB:Current s 63DA deals with mandatory obligations of advisers in relation to parenting plans (PP) continues -

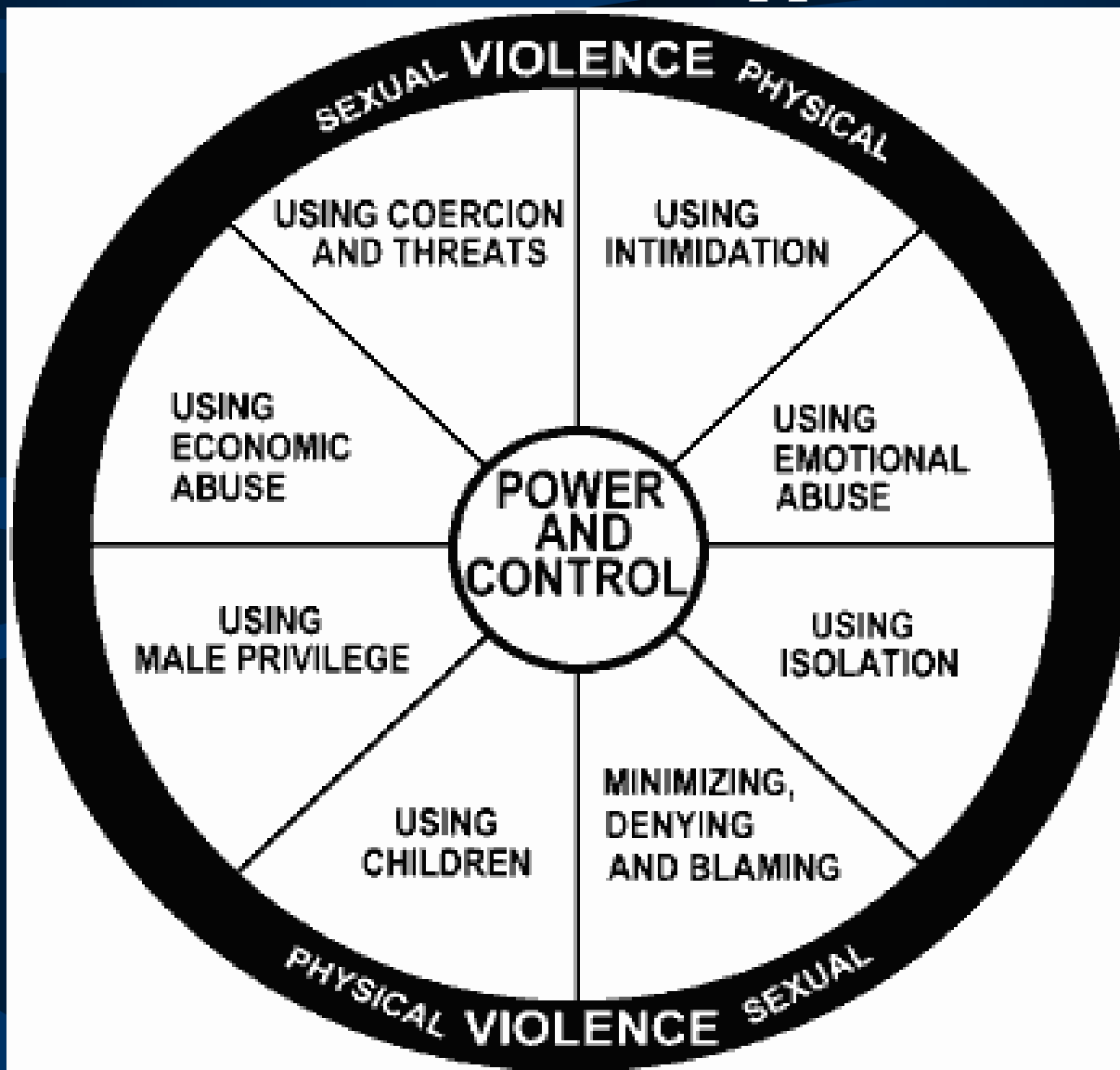
- consider entering PP; where can get assistance to develop PP & content of PP
- consider an arrangement for equal time if reasonably practicable (RP) & in best interests of child (BIC)
- If not, then substantial & significant time if RP & BIC
- If share parental responsibility under PP then desirability of consultation re PP; resolving disputes re PP; changing PP to reflect changing circumstances ; programs to assist etc.

Complexity of Family Violence:

ACKNOWLEDGMENT

The following 7 slides are based on a presentation by Prof. Nicholas Bala, Faculty of Law, Queen's University, Canada at the Distinguished Speakers Program Faculty of Law University of Sydney February 22, 2012

“Power Wheel” approach



Moving beyond the power wheel approach

Prof Bala recognises that “Power Wheel” approach to DV was very important and it remains very significant, but suggests it is limited because it was developed based on early DV research from experiences of women in shelters

- Male uses violence to intimate & control his partner

DV - A differentiated phenomenon

- DV more recently studied in diverse settings including (police; criminal justice; mediations; general population; and across populations created controversy between advocates, family justice practitioners, and researchers
- Attempts to forge a consensus (Wingspread, 2007)

DV - A differentiated phenomenon

Gendered nature of spousal abuse must be recognised

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 require 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

INTIMATE PARTNER VIOLENCE

- **Spousal abuse is a differentiated phenomenon**
 - dynamics and effects vary
 - legal & social responses must be differentiated
 - Cultural context important - CALD less likely to report DV (Lorana Bartels , Aust Inst of Crim – 4/10)
- 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

What social science tells us about family violence

- There are different types of intimate partner violence see: Kelly & Johnson (Jul 2008) and Jaffe & Bala (July 2008)
- Important to differentiate these patterns/types when addressing child's best interest
- See also Family Court of Australia, *Family Violence Best Practice Principles* (revised 2011)

Categories of family violence

- Coercive Controlling Violence
- Violent resistant
- Situational Couple Violence
- Separation-instigated Violence
- Violence as a result of mental health/substance abuse

Bala suggests need careful assessment as can overlap

PPP Screening Tool

See Jaffe et al “Custody Disputes involving Allegations of Domestic violence: Towards a Differentiated Approach to parenting plans” (2008) 46 Family Court Review 500:

- Potency of violence (level of severity, dangerousness or risk of lethality)
- Pattern of violence or coercive control
- Primary perpetrator indicators: who is the primary aggressor, if either?

Note: Family Court of Australia, *Family Violence Best Practice Principles* (revised 2011) sets out various factors to consider when using PPP screening tool (see pg16&17)

Implications for case presentation

- Differentiation should inform case preparation so need careful instructions
- Victims may be reluctant to disclose
- Victims (including child) may need support
- In affidavits be clear and specific about allegations – sometimes quite difficult in CCV
- Adverse impact on victim's presentation in Court - may need expert evidence

Implications for case presentation cont'd

- May need to overcome client entering previous consent orders – so address in affidavit
- Also address if delayed/no previous disclosure of family violence
- Ensure safety and protection of client in Court - either appear by CCTV or video or in a different location
- Court has joint family violence police – use it.