Professor Chisholm's "Family courts violence review"

Professor Chisholm's "Family courts violence review" report of November 2009 represents a determined attempt to roll back the objective of shared parenting established in the 2006 amendments to the Family Law Act.

To a large extent the analysis and conclusions in his report are not in accordance with his Terms of Reference, which were essentially to "review the current legislation and procedures supporting best practice for handling domestic violence matters", not to address shared parenting as such.

The material in the report indicates that Professor Chisholm, as a person intimately involved in the family law system over many decades, has difficulty in understanding the significance of the failure to redress the scandalous and highly damaging lack of balance between female and male parents in Australian law pre-2006. As a result of that lack of balance, 1,000,000 Australian children now live away from their biological fathers, with all the lifelong disadvantages suffered by those children as a result.

There is a fundamental failure in the report to appreciate the concerns that the community has about the long-standing failure of the judicial system to take into account the broader social implications of family law, as opposed to an exclusive and narrow concern with the application of short-term "solutions" to particular cases. One effect of the pre-2006 system was - and could again be under the Chisholm recommendations - to encourage the continued placement of children with abusive (often female) parents because they are envisaged to be, by default, the "primary carers".

Practice and procedures relating to domestic violence

The report deals with domestic violence as though there was just a single category of seriousness, and fails to properly address the way in which domestic violence is defined overall - as though there was no difference between a brutal murder, on the one hand , and a raised voice or a slammed door in an argument on the other. There is no discussion in the report about the crucial issue of what the law considers to be proper actions in self defence against an attacking partner. There is also no discussion about the severe child abuse which follows from the actions of some residential parents in denying court-ordered access, and the failure of family courts to enforce their own decisions in such cases.

The report recommends that risk assessments of domestic violence should be carried out by the courts. But it has little to say about the need to effectively test false allegations in relation to such matters. Such risk assessments should not be carried out by gender ideologues who believe - encouraged by misleading publicity campaigns - that domestic violence is overwhelmingly perpetrated by men.

The report claims that the present arrangements which provide for the filing of documents informing the courts about allegations of domestic violence and requiring the courts to take particular actions are not working. There is no substantial explanation as to why these arrangements are not working, or the steps which the courts have taken to seek to ensure that they do.

The recommendation put forward in the report that the Government should consider amending the Act relating to the confidentiality of information of agencies outside the court (including dispute resolution agencies) would lead to the subversion of the mediation process provided by the FRC's, etc. This is neither necessary nor desirable. The FRC approach, long recommended by the LFAA and other fathers groups, seeks to have parents resolve disputes outside the court system. The courts are well able to pursue allegations made during the court process, if and when necessary.

Legislation

The report recommends that a section of the Act should be replaced by a "simpler" provision in substance directing advisers to have regard to the principle stated in the Act about the best interests of children. This change would have the effect of downplaying the fundamental importance of shared parenting and make it less visible in the Act. As such, it would amount to a reversal of the changes made in 2006 with support from both major parties, and is not acceptable.

The report also recommends that a section of the Act be repealed and another section be amended to make a differently drafted reference to the giving of knowingly false evidence. There is the same problem with this suggestion as the previous one in that it would produce a reversal of the changes made in 2006, with the support of both major parties, designed to give greater visibility to the provision, and is not acceptable.

Professor Chisholm sees a connection between the "friendly parent" provisions in the 2006 amendments and a perceived tendency on the part of the courts to be suspicious of separating parents who allege domestic violence. It is asserted by some who take this view that women are reluctant to report cases of domestic violence on the grounds that that might go against them in decisions made by the courts. Such assertions are not considered by leading family law practitioners to be valid, and the Attorney General is right to be cautious about embracing legislative changes in response to such assertions.

Professor Chisholm is mistaken in claiming that there was never any intention on the 2006 amendments to encourage a parental expectation of shared parenting time. It is clear from an examination of what the Hull (Parliamentary) Committee recommended that there was an intention in the 2006 amendments to encourage a parental expectation of shared parenting time, and that such an expectation on the part of parents is therefore entirely legitimate.

As remarked by the Shared Parenting Council of Australia (SPCA):

> "The 2006 Shared Parenting Laws were intended to provide an opportunity and an expectation that in ordinary everyday cases, equal or substantially

> equal shared parenting time should be the outcome for ordinary family law matters.
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> "The 2003 House of Representatives Report, which formed the basis of the 2006 Family Law Amendments clearly stated that *'they (parents) should start with an expectation of equal care'* and further identifies *'wherever possible, an equal amount of parenting time should be the standard objective, taking into account individual circumstances...'*. Therefore any attempt by Professor Chisholm or others to claim that no such expectation should be held by the general public is an attempt to re-write history at best ...
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> "It is clear that further education of the judiciary, legal practitioners and other family professionals is required so that the intent of this legislation is upheld and an increase in shared parenting outcomes is promoted into the future. With only 16% of cases so far achieving 'loose' shared care outcomes and less than 7% of cases achieving substantially equal time outcomes, it is clear that the intention and cultural shift of the 2006 amendments have not yet fully filtered through the system. It is pleasing, however, that there has been a 22% reduction of family court applications for children's matters and this is consistent with the SPCA evidence provided to the House of Representatives Enquiry several years ago."

The comments in the Chisholm report on supposed "confusion" in the legislation are an obfuscation. The legislation is quite clear. Those who complain that the legislation is confused are indicating not confusion, but a dislike of the content of the legislation. The "one size fits all" concept referred to in the report relates more truly to the pre-2006 de facto presumption of 80/20 time shares than to the 2006 instruction to family courts to *consider* (not necessarily grant) equal shared parenting time.

The claim in the report that the present legislation leads to an artificial concentration on domestic violence is contradicted by another recommendation in the same report to the effect that references to domestic violence in the Act should be further strengthened.

The notion that the Court must not assume that any particular parenting arrangement is more likely than others to be in the child's best interests is plausible on the face of it. However, the 2006 legislative amendments emphasised the importance of shared parenting and shared parenting time precisely because legislators were not convinced that judges were making the best decisions in terms of the best interests of children. There can be no turning back to the pre-2006 days. The community and the law must continue to move forward.

The report suggests that there should be explicit reference in the Act to consideration of any likely advantages to the child of each parent spending time with the child on weekdays as well as weekends and holidays. There should be no specific requirement to prove this, as it may in the vast majority of cases be assumed to be the case.

The report raises the issue of whether it might in some cases be preferable to make the order that would be least likely to lead to the institution of further proceedings in relation to the child. This might be a good idea, as long as it does not mean that

where one party is at a disadvantage compared to the other party, because of having less financial resources to fight in court, judgment should be made against that party because they will be less likely to come back with further proceedings to correct a poor judgement.

Reference is made in the report to whether a party has taken or failed to take the opportunity to participate in making decisions about major long-term issues in relation to the child and to spend time and communicate with the child. This is obviously one-sided. It should also cover the cases where one party has failed to contribute financially to support the child pre-separation. The obligation to maintain the child is not one that should be laid only at the door of the male parent. Also, the suggestion in the report would give rise to a competition between mutually hostile assessments of the parenting ability, capacity, and performance of the other parent.

The suggestion is made that in the definition of domestic violence and related matters Victorian legislation should be adopted. It should, however, be noted that the Victorian Government has complained about the fact that a large and increasing proportion of the Victorian public now believes that many women as well as men are violent in family situations. The Victorian public is right and Victorian government is wrong on that issue. This does not inspire much confidence in the Victorian legislation relating to domestic violence.

The recommendation is made in the report that the Government should undertake a "technical revision" of Part VII of the Family Law Act and related provisions with a view to clarifying and simplifying the law. This supposedly technical revision looks distinctly like a cover for changing the law back to the way it was prior to the 2006 amendments, and as such would not be acceptable. The plan is to do considerably more than just change the bathwater; the plan appears to be to throw the baby out as well. There is certainly nothing particularly wrong with the way in which the Act is currently drafted. There are primary principles and secondary principles in identifying and structuring the best interest of the child, and this arrangement works satisfactorily.

The arrangements described in the 2006 amendments are not confusing or troublesome, except to those who oppose the spirit of the amendments. Any misunderstanding about what the legislation provides can be overcome by an appropriate educational program, in which AG's should participate.

Education and staff appointments

The recommendation is made in the report that the Government should consider the desirability of providing additional funding in relation to the family law system, including funding that would support the work of contact centres, family dispute resolution agencies, legal aid, and family consultants in reducing the risks of family violence. There is a longstanding problem in the equitable distribution of such assistance. $150 million or more per annum is provided to support women's refuges and women's legal services, while virtually nothing along these lines is provided for men. Much more assistance needs to be given to fathers and men's organisations such as the LFAA which have "borne the heat of the day" for decades in helping fathers, mothers, and their children (and grandparents) while receiving minimal support.

There is a need for fine tuning of domestic violence assessments, but the overall system should not encourage separations which are likely to increase the risk of violence. A proper understanding of the gender distribution of domestic violence might well require that a large proportion of all “residence” in separation cases could be granted to fathers.

The report recommends that the Government, the Family Court, and other agencies and bodies forming part of the family law system consider ways in which those working in the family law system might be better educated in relation to issues of family violence. This is a good idea in principle, as long as the activity is not run by gender ideologues such as are likely to be found running Government initiatives in relation to such matters as "respectful relationships" - which apparently is taken to mean boys being respectful of girls without reference to the need for girls to be respectful of boys.

The report recommends that experience and knowledge of family violence should be taken into account when considering the appointment of persons to significant positions and organisations forming part of the system. Again this is desirable in principle, as long as it is not to be a cover for the appointment of gender ideologues.

The recommendation is made that organisations, lawyers, and bodies responsible for legal education give due weight to the important including programs about issues relating to family violence including its effect on children. For this not to be counter-productive, there has to be a proper understanding of the extent and nature (including gender distribution) of domestic violence. The report has not adequately addressed this factual issue. The 2008 Wingspread Conference (US), whose findings were influential in the writing of the Chisholm report, is far from being a “gold standard” in relation to understanding domestic violence issues. The conference was heavily biased towards the views of people and organisations, such as women's refuge services and lawyers, who have a vested interest in a feminist approach to such matters, and the report on the conference was compiled by two feminist (and female) academics.

The recommendation was made in the Chisholm report that the family law courts should review the extent to which judicial officers in the Family Court of Australia and the Federal Magistrates Court use and benefit from “best practice principles’ intended to be used in parenting disputes where family violence or abuse is alleged. These principles need reviewing in their own right.

In summary, the Chisholm recommendations relating to shared parenting are not appropriate and should not be adopted, and the recommendations relating to handling of domestic violence issues should not be proceeded with unless and until there is a close Parliamentary examination and confirmation of their appropriateness.

LFAA

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