

**FAMILY AND SEXUAL VIOLENCE AND THE
DEVELOPMENT OF THE LAW IN QUEENSLAND
AND AUSTRALIA**

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Introduction

Australia is a federation of six states and two territories, brought together under our Constitution, enacted in 1901. The Australian Constitution divides the responsibility for making laws between the Commonwealth and the States. This has led to what some might see as a less than logical division of responsibility in the modern era. For example, the Commonwealth is responsible for the laws with respect to marriage, family breakdown and de facto relationships, whereas State law governs criminal law and domestic violence.

Australia is also the only developed nation without comprehensive constitutional or legislative protection of basic human rights at a national level. In 2010, after a national human rights consultation, the Commonwealth Attorney-General launched Australia's Human Rights Framework which aims, amongst other things, to improve human rights protections, particularly by scrutinising Commonwealth legislation to ensure compliance with Australia's international human rights obligations.

Australia has ratified most international treaties and covenants protecting human rights including the International Covenant on Civil and Political Rights, the International Covenant on Economic Social and Cultural Rights, the United Nations Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination against Women. But the statutory protection of many of the individual rights contained in such documents has been somewhat *ad hoc*.

¹ I acknowledge assistance in researching this paper from my 2012 associate, Lara Soldi.

This background means that there has not always been a consistent philosophy behind the various legislatures' approach to domestic, family and sexual violence. Laws can vary from State to State, and the State and Commonwealth jurisdictions can overlap, duplicate, and, occasionally conflict.

The National Response to Domestic Violence

In 2010 the Council of Australian Governments produced a *National Plan to Reduce Violence against Women and their Children* ("the National Plan").² The plan targets two main types of violence: domestic and family violence and sexual assault. It acknowledges that these crimes are gendered crimes – that is, they have an unequal impact on women.

The National Plan coordinates action across jurisdictions and focuses on prevention. It looks to the long term, and aims to build respectful relationships and to increase gender equality to prevent violence from occurring in the first place. It also aims to hold perpetrators accountable and encourage behaviour change.

All Australian states and territories have enacted legislation which makes violence within the family or within intimate relationships an offence. This is against a background in which one in three Australian women have experienced physical violence since the age of 15 and almost one in five have experienced sexual violence.³ Domestic violence and sexual assault perpetrated against women costs the nation \$13.6 billion each year. By 2021, it is estimated that the figure is likely to rise to \$15.6 billion if extra steps are not taken.⁴

Domestic violence is a particularly serious issue in indigenous communities, with indigenous females around 35 times more likely to be hospitalised as a result of family violence and ten times more likely to die from assault than non-indigenous females.⁵ Aboriginal women are 45 times more likely to experience domestic violence if they are living in rural and remote areas of Australia.⁶

Statistics also show that Aboriginal and Torres Strait Islander women experience severe levels of sexual assaults, with one in three women reporting this level of abuse and violence. The National Plan goes some way towards addressing the issue of family, domestic and sexual violence in communities and recognises the need for culturally-appropriate responses.⁷

² Available at <http://www.fahcsia.gov.au/our-responsibilities/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children/national-plan-to-reduce-violence-against-women-and-their-children>.

³ Australian Bureau of Statistics 2006, *Personal safety survey, Australia 2005*. ABS cat. no.4906.0. Canberra: ABS.

⁴ KPMG 2009, *The Cost of Violence against Women and their Children*. Safety Taskforce, Department of Families, Housing, Community Services and Indigenous Affairs, Australian Government.

⁵ Australian Institute of Health and Welfare 2006, *Family violence among Aboriginal and Torres Strait Islander peoples*. Cat. no. IHW 17. Canberra: AIHW.

⁶ Ferrante A, Morgan F, Indermaur D and Harding R. 1996. *Measuring the Extent of Domestic Violence*. Sydney: Hawkins Press.

⁷ National Women's Alliances 2012, *Non-Government Organisations Follow-up Report to the United Nations Committee on the Elimination of Discrimination Against Women*, available at <http://awava.org.au/2012/08/17/australian-ngos-follow-up-report-to-the-cedaw-committee/>.

It is evident that there are strong links between Aboriginal and Torres Strait Islander women's experiences with family, domestic and sexual violence and their interactions with the justice system. It is not uncommon for women victims of violence to become involved in the judicial process as offenders when they respond to violence directed towards them with violence themselves.

The Law Relating to Domestic Violence in Queensland

Domestic violence was first recognised in Queensland as a separate issue distinct from criminal law and family law in 1989, when legislation came into force providing for both the police and *Aggrieved Spouses* to apply to a court for an order to protect them from acts of domestic violence by a *Respondent Spouse*.

In 1989 *domestic violence* was defined as actual or threatened wilful injury to the person or damage to property; intimidation or serious harassment of, or indecent behaviour towards, the aggrieved spouse.

In September 2012 a new Domestic and Family Violence Protection Act ("the new Act") came into force in Queensland. This legislation greatly expands the definition of domestic violence from that in the original Act, and the relationships the law covers.

The preamble to the new Act recognises that –

- *Living free from violence is a human right and fundamental social value.*
- *Domestic violence is a violation of human rights that is not acceptable in any community or culture and traditional or cultural practices can not be relied upon to minimise or excuse domestic violence.*
- *Domestic violence is often an overt or subtle expression of a power imbalance, resulting in one person living in fear of another, and usually involves an ongoing pattern of abuse over a period of time.*
- *Domestic violence can have serious impacts on people who experience it, including physical, emotional and psychological harm, and can result in death.*
- *Perpetrators of domestic violence are solely responsible for their use of violence and its impacts on other people.*
- *Domestic violence is most often perpetrated by men against women with whom they are in an intimate partner relationship and their children; however, anyone can be a victim or perpetrator of domestic violence.*
- *Domestic violence is a leading cause of homelessness for women and children.*
- *Children who are exposed to domestic violence can experience serious physical, psychological and emotional harm.*
- *Behaviour that constitutes domestic violence can also constitute a criminal offence.*

Under the new Act *domestic violence* is defined as conduct that is abusive, threatening, coercive or in any other way controls or dominates another person and causes that person to fear for their safety or wellbeing. Behaviour can be abusive in a variety of ways: physically, sexually, emotionally, psychologically or economically, and can include threatening to commit suicide or self-harm.⁸

Such conduct is only categorised as *domestic violence* if the two parties are, or were, in an intimate personal relationship, a family relationship (including people who are in a family relationship mutually recognised under cultural practice) or an informal care relationship. Domestic violence can therefore take place between an engaged couple, a same sex couple, former spouses, and where one person is an unpaid carer for another (this covers *elder abuse*).⁹

The main objects of the new Act are:

- to maximise the safety, protection and wellbeing of people who fear or experience domestic violence, and to minimise disruption to their lives;
- to prevent or reduce domestic violence and the exposure of children to domestic violence;
- to ensure that people who commit domestic violence are held accountable for their actions.¹⁰

The new Act makes it mandatory for a police officer to investigate domestic violence and take action to protect the aggrieved.¹¹

In addition to orders made by Magistrates, the new Act provides for Police Protection Notices – temporary orders that can be issued by a police officer who reasonably believes that the respondent has committed domestic violence and where it is not appropriate for the respondent to be taken into custody.¹²

Such notices operate as an application to the court for a protection order which must be heard within 28 days.¹³

Domestic violence orders provide that the respondent be of good behaviour towards the aggrieved and not commit domestic violence against him/her.¹⁴ Other particular conditions are often added and can include a requirement for the respondent to leave the family home. Orders generally are in force for two years.¹⁵

Provided the respondent agrees, the court can also make an order requiring him to undergo counselling or an intervention program.¹⁶

⁸ *Domestic and Family Violence Protection Act 2012* (Qld) s 8.

⁹ *Domestic and Family Violence Protection Act 2012* (Qld) s 13.

¹⁰ *Domestic and Family Violence Protection Act 2012* (Qld) s 3(1).

¹¹ *Domestic and Family Violence Protection Act 2012* (Qld) s 100.

¹² *Domestic and Family Violence Protection Act 2012* (Qld) s 101.

¹³ *Domestic and Family Violence Protection Act 2012* (Qld) s 112.

¹⁴ *Domestic and Family Violence Protection Act 2012* (Qld) s 56.

¹⁵ *Domestic and Family Violence Protection Act 2012* (Qld) s 97.

¹⁶ *Domestic and Family Violence Protection Act 2012* (Qld) Part 3 Div 6.

The contravention of a domestic violence order is a criminal offence which has a maximum penalty of 2 years imprisonment.¹⁷

Elder Abuse

Elder abuse is any act which causes harm to an older person and is often carried out by someone in a relationship of trust, such as families and friends. It may involve taking someone's money or possessions, not providing necessary care, making threats or stopping an older person's social contacts, as well as physical or sexual abuse.

Queensland does not have legislation dealing specifically and exclusively with elder abuse. However, the Queensland Criminal Code provides that the assault of a person who is sixty years or more amounts to a "serious assault", deserving of a greater maximum penalty than the assault of someone of a younger age (7 years imprisonment rather than 3 years).¹⁸

The extended definition of "family relationship" in the new Queensland domestic violence legislation includes a relationship between two people where one is or was a relative of the other, and where one is the informal and unrelated carer of the other.¹⁹ Older victims of domestic violence are therefore accorded protection under the new Act.

Recognition of Family and Sexual Violence in Commonwealth Legislation

Amendments to the Commonwealth Family Law Act addressing family violence came into effect on 7 June 2012. These provisions are intended to prioritise the safety of children in parenting disputes by giving greater weight to their protection from harm when determining what is in the child's best interests (the guiding principle when dealing with matters involving children).

Family violence is defined as 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. Examples of such behaviour include repeated derogatory taunts; intentionally damaging or destroying property; intentionally causing death or injury to an animal; unreasonably denying the family member the financial autonomy that he or she would otherwise have had; unreasonably withholding financial support needed to meet the reasonable living expenses of the family member, or his or her child; and preventing the family member from making or keeping connections with his or her family, friends or culture.²⁰

Abuse, in relation to a child, means an assault (including a sexual assault) of the child; or a person involving the child in a sexual activity in which the child is used, directly or indirectly, as a sexual object; causing the child to suffer serious psychological

¹⁷ *Domestic and Family Violence Protection Act 2012* (Qld) s 177.

¹⁸ *Criminal Code 1899* (Qld) s 340.

¹⁹ *Domestic and Family Violence Protection Act 2012* (Qld) ss 13, 19, 20.

²⁰ *Family Law Act 1975* (Cth) s 4AB.

harm, including when that harm is caused by the child being subjected to, or exposed to, family violence; or serious neglect of the child.²¹

These amendments also have an effect on negotiated parenting arrangements (as distinct from litigated matters) so that such arrangements should be in children's best interests, allow them to have a meaningful relationship with each parent and protect them from harm.²²

Courts are now obliged to ask about a history of family violence and any concerns about child safety.²³

Cases that come to the Family Court of Australia that involve allegations of sexual abuse and/or serious physical abuse of a child go into the Court's Magellan program. The program is specifically designed for cases involving the most vulnerable children and it aims to deal with these cases as effectively and efficiently as possible.

A Magellan team is made up of judges, registrars and family consultants who manage the cases. The same team endeavours to work on each case from start to finish.

Magellan is based on the following principles:

- it is an inter-organisational approach to cases involving allegations of serious physical, and sexual abuse;
- it focuses on the children in the dispute;
- it is judge-led and managed from the start, with a tightly managed and time limited approach;
- the Court orders expert investigations and assessments from the respective state/territory child protection agency and/or the Court family consultant, and
- there is a Court-ordered independent children's lawyer for every child, funded by Legal Aid.

Generally, the aim is to complete Magellan cases within six months from the case being listed into the Magellan program.

Early steps in a Magellan case will usually include the preparation of a detailed family report, analysing the family dynamics and the needs of the children, and early information from the respective state/territory child protection agency.

Migration Law

Migration legislation requires that an applicant for a permanent partner visa must be in a genuine, continuing and exclusive relationship with their sponsoring spouse²⁴ or

²¹ *Family Law Act 1975* (Cth) s 4.

²² Dr R Kaspiew 2012. *Family violence and family law parenting matters: the 2012 family law reforms*. CDFVRe@der 11(1): 3 – 4 (available at <http://issuu.com/cdfvr/docs/readersep2012>).

²³ Dr R Kaspiew 2012. *Family violence and family law parenting matters: the 2012 family law reforms*. CDFVRe@der 11(1): 3 – 4 (available at <http://issuu.com/cdfvr/docs/readersep2012>).

²⁴ *Migration Act 1994* (Cth) s 5F(2). The aspects of the relationship that may be assessed are described in the *Migration Regulations 1994* (Cth) r 1.15A(3).

de facto,²⁵ both when the application is made and when a decision on a visa is made. If a relationship breaks down before the application is decided, the visa will be refused except in certain circumstances. The *Migration Regulations* provide that such circumstances include the situation where the sponsoring partner has perpetrated family violence against the applicant or, in some cases, a member of her family.²⁶

Social Security

The *Social Security Act 1991* provides exemptions from certain work requirements for recipients who are the carers of children and have been subjected to domestic violence in the previous six months.²⁷ A crisis payment may be made if an eligible claimant has been subjected to domestic or family violence by a family member who has left the home, leaving the claimant in severe financial hardship.²⁸

Recent Changes to the Criminal Law and Procedure in Queensland relating to Sexual Violence

In 1989 the Queensland *Criminal Code* was amended to include a new offence of *Maintaining a sexual relationship with a child*.²⁹ This offence was created to cover situations where an adult engages in more than one unlawful sexual act with a child and maintains, or continues, a sexual relationship with the child over a period of time even though it may not be possible to particularise all of the sexual acts between the adult and the child. This is similar to the offence created by s 229D (Persistent Sexual Abuse of a Child) of the Papua New Guinea Criminal Code; although in Queensland the maximum penalty is life imprisonment.

Other amendments to the law introduced in 1989 removed the exemption from prosecution for rape of a man who forced his wife to have sexual intercourse.

In 2000 the Queensland *Criminal Code* was amended to extend the definition of rape to include non-consensual penetration of the vulva, vagina or anus of another person to any extent with a thing or a part of a body that is not a penis or penetration of the mouth of another person with a penis.³⁰

In 2003 the *Criminal Code* a new provision was introduced which states that a child under 12 years of age is incapable of consenting to carnal knowledge or any other sexual act.³¹

It is now an offence to use the internet to procure, or obtain or get, a child to engage in a sexual act.³² This is aimed at adults who use chat rooms, and internet social networks to contact and meet children with a view to having sex with them. These

²⁵ *Migration Act 1994* (Cth) s 5CB(2). The aspects of the relationship that may be assessed are described in the *Migration Regulations 1994* (Cth) r 1.09A(3).

²⁶ *Migration Regulations 1994* (Cth) Div 1.5.

²⁷ *Social Security Act 1991* (Cth) ss 502C, 542F, 731DA, 602B.

²⁸ *Social Security Act 1991* (Cth) s 1061JH.

²⁹ *Criminal Code 1899* (Qld) s 229B.

³⁰ *Criminal Code 1899* (Qld) s 349

³¹ *Criminal Code 1899* (Qld) s 349(3).

³² *Criminal Code 1899* (Qld) s 218A

people are often caught when they engage in online conversations with people they believe to be children but who are in fact, Queensland police officers.

It is also offence to visually record another person and in particular a person's genital or anal region when that person could expect privacy.³³ An example of this would be to use a mobile phone to record women in shop or at swimming pool changing rooms. The distribution, for example by email or posting on the internet or on You Tube of such recordings is also an offence.³⁴

It is an offence to make, distribute or possess *child exploitation material*.³⁵ This is material that depicts children under the age of 16 apparently engaged in sexual, violent or abusive acts. Unfortunately this sort of material is very accessible on the internet and can be downloaded for free.

The courts are seeing a lot of otherwise respectable people, mostly men, being found in possession of such material. Often the profile of such offenders is that they are otherwise law abiding and respectable citizens who have not been in trouble with the law before and who seem to be able to convince themselves that no-one is being harmed if they look at this material. Of course, in order to produce this sort of material some child somewhere in the world is being abused, hurt and damaged.

Other crimes recently created reflect modern social and multicultural conditions - for example, it is an offence to spike another person's drink,³⁶ and it is an offence to torture another person.³⁷ *Torture* means the intentional infliction of severe pain or suffering. Torture is a relatively recent crime. In the past such offending would have been covered by offences such as causing another person actual bodily harm or grievous bodily harm or unlawful wounding. It is the psychological aspect of the offending that is particularly captured in the new offence of torture. Performing female genital mutilation on another person in Queensland is illegal.³⁸

Procedure

In 2004 a new procedure for taking evidence from children in certain criminal proceedings came into force.³⁹ The criminal proceeding must involve an offence of a sexual nature, or a violent offence where the child is in some way related to the defendant.⁴⁰ Nowadays children generally give their evidence from a remote witness room within the courthouse. They have with them a support worker (usually volunteers from an NGO called PACT: Protect All Children Today) and their evidence is pre-recorded with the recording being played for the jury during the ultimate trial. In theory at least, children give their evidence soon after the indictment is presented in the higher courts and can usually leave the court house with the knowledge that, although the rest of the trial before a jury may be some months off, they will not be called upon again.

³³ *Criminal Code 1899* (Qld) s 227A.

³⁴ *Criminal Code 1899* (Qld) s 227B.

³⁵ *Criminal Code 1899* (Qld) ss 228A – D.

³⁶ *Criminal Code 1899* (Qld) s 316A.

³⁷ *Criminal Code 1899* (Qld) s 320A.

³⁸ *Criminal Code 1899* (Qld) s 323A.

³⁹ *Evidence Act 1977* (Qld) Part 2 Div 4A.

⁴⁰ *Evidence Act 1977* (Qld) s 21AC.

The Queensland *Evidence Act* sets out principles for dealing with a child witness:

- the child is to be treated with dignity, respect and compassion;
- measures should be taken to limit, to the greatest practical extent, the distress or trauma suffered by the child when giving evidence;
- the child should not be intimidated in cross-examination;
- the proceeding should be resolved as quickly as possible.⁴¹

The court is closed while children give their evidence⁴² and an unrepresented defendant is not permitted to cross-examine the child (legal aid will normally be provided for that purpose).⁴³

A jury must be directed that the method of giving evidence is *a routine practice of the court* and that they should not draw any inference as to the defendant's guilt from the use of the measure; that the probative value of the evidence is not increased or decreased, and that the evidence is not to be given any greater or lesser weight. These directions are generally given to the jury in the judge's introductory remarks, or prior to the playing of the evidence, and in the judge's final summing up.

Sentencing

The principles of sentencing found in Queensland's *Penalties and Sentences Act*⁴⁴ were amended in 1997 and 2003 respectively to remove the presumption that imprisonment is a sentence of last resort for a violent offence⁴⁵ and for a sexual offence committed against a child.⁴⁶

In 2010 the Act was amended to provide that persons convicted of sexual offences towards children under 16 years must serve actual imprisonment unless there are exceptional circumstances,⁴⁷ and in 2012 a new mandatory sentencing provision of life imprisonment was introduced, with a 20 year non-parole period for certain repeat child sex offenders. The sentence cannot be mitigated or varied.⁴⁸

When an offender is to be sentenced for an offence committed against the person of another, the victim may provide to the prosecutor details of the harm caused and the impact of the offence on the victim.⁴⁹ In practice, such details are set out in writing and in most cases a prosecutor will tender such statements to the court during the sentencing proceedings.

The Queensland government has created a scheme of financial assistance to certain victims of acts of violence. The maximum amount payable under the scheme is

⁴¹ *Evidence Act 1997* (Qld) s.9E.

⁴² *Evidence Act 1997* (Qld) s 21AU.

⁴³ *Evidence Act 1997* (Qld) ss 21N, 21O.

⁴⁴ *Penalties and Sentences Act 1992* (Qld) s 9.

⁴⁵ *Penalties and Sentences Act 1992* (Qld) s 9(3).

⁴⁶ *Penalties and Sentences Act 1992* (Qld) s 9(5).

⁴⁷ *Penalties and Sentences Act 1992* (Qld) s 9(5)(b).

⁴⁸ *Penalties and Sentences Act 1992* (Qld) s 161E

⁴⁹ *Victims of Crime Assistance Act 2009* (Qld) s 15.

\$75,000 and can cover counselling expenses, medical expenses, incidental travel expenses and loss of earnings.

Conclusion

Over the past two decades or more, legislators in Australia have increasingly taken the issues of domestic, family and sexual violence seriously. The impact such violence has on victims, who are overwhelmingly women and children, has been recognised as well as the difficulties victims have in giving evidence of such matters in court. Judicial officers too have become more aware of these matters. On-going judicial education is taking place and generally courts are becoming more sensitive to the appropriate way in which such cases should be handled. In the end though, laws are only as effective as those who enforce and apply them. Judges and magistrates must embrace the philosophy and research which informs such laws and ensure that their own courtrooms are places where women and children are respectfully heard and such violence clearly not tolerated.

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References and Resources

<http://www.ag.gov.au/Families/Currentissuesinthefamilylawsystem/Pages/Familyviolence.aspx> - Australian Government Attorney-General's website page on Family Violence in the context of the Family Law Act.

<http://www.supportlink.com.au/> - SupportLink manages a referral framework that allows Police and Government and non Government agencies to work together for the benefit people requiring assistance including in situations involving domestic violence.

<http://www.austdvclearinghouse.unsw.edu.au/home.html> - a national organisation, providing high quality information about domestic and family violence issues and practice.

<http://www.noviolence.com.au/> - Queensland Centre for Domestic and Family Violence Research. The Centre's primary purpose is to create and disseminate knowledge to influence, and enhance, policy, programs and practice in the field of domestic and family violence prevention across Queensland.

<http://www.whiteribbon.org.au/> - White Ribbon organisation is a male-led campaign to prevent male violence against women.

<http://www.iwcadv.org.au/> - Ipswich Women's Centre Against Domestic Violence

http://www.fahcsia.gov.au/sites/default/files/documents/05_2012/national_plan.pdf - the National Plan to Reduce Violence against Women and their Children 2010-2022.

<http://www.aifs.gov.au/acssa/> - Australian Centre for the Study of Sexual Assault

<http://www.cypcg.qld.gov.au/index.aspx> - The Commission for Children and Young People and Child Guardian promotes and protect the rights, interests and wellbeing of children and young people in Queensland.

<http://www.communities.qld.gov.au/communityservices/act-as-1/> - Queensland Government website covering Family Violence and Elder Abuse

<http://awava.org.au/> - Australian Women Against Violence Alliance

<http://www.natsiwa.org.au/> - National Aboriginal and Torres Strait Islander Women's Alliance

<http://www.oneinthree.com.au/> - research about and support for male victims of family violence.

<http://www.pact.org.au/> - **Protect All Children Today Inc (PACT)** is committed to protecting and advocating for children. PACT offers a voice to speak up on behalf of those who are most vulnerable in our communities. Each year, PACT helps hundreds of children and their families as they deal with the consequences of abuse, assaults and neglect. PACT seeks to enhance child protection by reducing the trauma experienced by children and young people (aged 3-17 years) who are required to give evidence within the criminal justice system as victims or witnesses.

<http://www.actforkids.com.au/> - an Australian charity which works to prevent and treat child abuse

<http://www.napcan.org.au/> - seeks to prevent child abuse and neglect and to ensure the safety and wellbeing of all of Australia's children.

<http://www.aifs.gov.au/> - Australian Institute of Family Studies - is an Australian Government statutory agency which conducts research and communicate findings that affect family wellbeing to policy makers; service providers; and the broader community.

<http://www.childhood.org.au/home/> - the Australian Childhood Foundation works to put a stop to child abuse and give children a life free from violence and trauma