

# Does Children Out of Sight Mean Children Out of Mind in the Australian Family Law System?

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## I Introduction

Human rights are inalienable and universal, and children are not excluded. This article discusses children's rights under the United Nations *Convention on the Rights of the Child* ('CRC')<sup>1</sup> within the context of the Australian family law system. Specifically, this article focuses on an issue that potentially hinders a child's right to express their views, or to be an active agent in their own protection, where they are experiencing post-separation family violence—multiple jurisdictions.

Within the *CRC*, which Australia is a signatory to, a 'child who is separated from one or both parents [has the right] to maintain personal relations and direct contact with both parents ...' and governments must take all appropriate measures to 'protect the child from all forms of ... violence, injury or abuse, neglect or negligent treatment ... while in the care of parent(s) ... or any other person who has the care of the child'.<sup>2</sup> The key legislation in Australian family law, the *Family Law Act 1975* (Cth) ('FLA'),<sup>3</sup> reflects the relevant articles of the *CRC* in relation to making family law orders.<sup>4</sup> In particular, ss 60CA and 65AA set out that the court must give paramount consideration to what is in a child's best interests.<sup>5</sup> How the court determines a child's best interests is set out in s 60CC and includes consideration of the benefit to the child of maintaining a meaningful relationship with both parents and the need to protect the child from harms including family violence.<sup>6</sup>

Following parental separation, children have a right to participate in decisions relevant to their care, and to make their views known in administrative and judicial proceedings.<sup>7</sup> Whilst the Family Court in Australia was never designed to be a child protection system, contemporary research evidences dealing with family violence matters to be its 'core business'.<sup>8</sup> The 2015–16 Family Violence Data Set reported that 76.12% of matters before the Federal Circuit Court of Australia involved allegations of family violence.<sup>9</sup> Kaspiew et al reported that just over a quarter of parents nominating family dispute resolution/mediation as the main pathway had reported experiencing physical violence, compared with nearly four in ten who used lawyers, and more than five in ten using courts.<sup>10</sup> Courts had the greatest proportion of parents with four or more problems in 2014 (38%), compared with lawyers (27%), and family dispute resolution/mediation (21%), with reports of emotional abuse even higher.<sup>11</sup> In 2014, nearly half of court users reported having current safety concerns, compared with one-third of parents who used lawyers, and one-quarter of parents who used family dispute resolution/mediation.<sup>12</sup>

Although family violence is often an issue that is present, research suggests that family law professionals remain inadequately trained in responding to family violence.<sup>13</sup> James and Ross surveyed 119 lawyers and conducted subsequent interviews with 32 lawyers.<sup>14</sup> Within this sample, lawyers believed that more formal training in

- 1 *Convention on the Rights of the Child*, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) ('*CRC*').
- 2 *Ibid* arts 9(3), 19(1).
- 3 *Family Law Act 1975* (Cth) ('*FLA*').
- 4 Within the objects and principles of pt VII of the *FLA*, s 60B(4) states that an additional object of pt VII is to give effect to the *CRC*.
- 5 *Ibid* ss 60CA, 65AA.
- 6 *Ibid* ss 60CC(2)(a)–(b).
- 7 *CRC* (n 1) arts 9, 12.
- 8 Freda Briggs and Elspeth McInnes, 'Can Family Law Protect Young Children?' (2012) 37(2) *Children Australia* 54, 55; Patricia Easta, Lisa Young and Anna Carlina, 'Domestic Violence, Property, and Family Law in Australia' (2018) 32(2) *International Journal of Law, Policy and the Family* 204, 205, quoting Thea Brown et al, *Violence in Families: The Management of Child Abuse Allegations in Custody and Access Disputes before the Family Court of Australia* (Report No 1, 1998).
- 9 Joe Harman, 'The Prevalence of Allegations of Family Violence in Proceedings before the Federal Circuit Court of Australia' (2017) 7(1) *Family Law Review* 3, 8.
- 10 Rae Kaspiew et al, *Evaluation of the 2012 Family Violence Amendments* (Synthesis Report, October 2015) 17 ('*Family Violence Amendments Evaluation*').
- 11 *Ibid*.
- 12 *Ibid*.
- 13 See generally Australian Law Reform Commission, *Family Law for the Future: An Inquiry into the Family Law System* (Final Report No 135, March 2019) ('*An Inquiry into the Family Law System*'); Kaspiew et al, *Family Violence Amendments Evaluation* (n 10).



- 14 Colin James and Nicola Ross, 'Did He Ever Hit You? Exploring the Attitudes of Lawyers in the Assessment of the Seriousness of Threats and Violent Histories in Domestic Violence Cases' (2016) 30(3) *Australian Journal of Family Law* 205, 231.
- 15 *Ibid.*
- 16 Kaspiew et al, *Family Violence Amendments Evaluation* (n 10) 76.
- 17 *Ibid* xiii.
- 18 See *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).
- 19 Rae Kaspiew et al, *Evaluation of the 2006 Family Law Reforms* (Summary Report, December 2009) 2.
- 20 *Goode v Goode* (2006) 206 FLR 212.
- 21 *Family Law Amendment (Family Violence and Cross-Examination of Parties) Act 2018* (Cth); *Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011* (Cth); *FLA* (n 3) s 67ZBB.
- 22 See, eg, *An Inquiry into the Family Law System* (n 13); Kaspiew et al, *Family Violence Amendments Evaluation* (n 10); Lesley Laing, 'Secondary Victimization: Domestic Violence Survivors Navigating the Family Law System' (2017) 23(11) *Violence Against Women* 1314; Renata Alexander, 'Family Violence in Parenting Cases in Australia under the Family Law Act 1975 (Cth): The Journey So Far' (2015) 29(3) *International Journal of Law, Policy and the Family* 313.
- 23 Kaspiew et al, *Family Violence Amendments Evaluation* (n 10) xii.
- 24 House of Representatives Standing Committee on Family and Community Affairs, Parliament of Australia, *Every Picture Tells a Story: Inquiry into Child Custody Arrangements in the Event of Family Separation* (Report, December 2003) 71; See also *An Inquiry into the Family Law System* (n 13); Australian Law Reform Commission, *Family Violence: A National Legal Response* (Final Report No 114, October 2010); Family Law Council, *Families with Complex Needs and the Intersection of the Family and Child Protection System* (Final Report, June 2016); Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (Report, July 2001); House of Representatives Standing Committee on Social Policy and Legal Affairs, Parliament of Australia *A Better Family Law System to Support and Protect Those Affected by Family Violence* (Report, December 2017); Productivity Commission, *Access to Justice Arrangements* (Inquiry Report No 72, 5 September 2014).
- 25 Richard Chisholm, *Information-Sharing in Family Law and Child Protection: Enhancing Collaboration* (Report, March 2013) 64, 114.
- 26 Justice Robert Benjamin, 'Public Law Issues in a Private Law System: Child Protection and Family Law' (2015) 5 *Family Law Review* 102, 103. See also Queensland Child Protection Commission of Inquiry, *Taking Responsibility: A Roadmap for Queensland Child Protection* (Report, June 2013).
- 27 Leanne Francia, Prudence Milleard and Rachael Sharman, 'Addressing Family Violence Post Separation: Mothers and Fathers' Experiences from Australia' (2019) 16(3) *Journal of Child Custody* 211, 222. See also Leanne Francia, Prudence Milleard and Rachael Sharman, 'Mothering: A Mode of Protecting Rather than Parenting in the Aftermath of Post Separation Family Violence in Australia' (2020) 45(2) *Children Australia* 109; Australia's National Research Organisation for Women's Safety Limited, *Domestic and Family Violence and Parenting: Mixed Method Insights into Impact and Support Needs* (Final Report, June 2017).

risk assessment for family violence would be helpful, with some lawyers indicating that they needed a better understanding of best practice in family violence.<sup>15</sup> As for parents reporting safety concerns, Kaspiew et al reported that parents in their sample tended to be less satisfied with professionals' responses to safety concerns than family violence.<sup>16</sup> Accordingly, reforms may not have translated into more parents considering that their concerns were dealt with appropriately.<sup>17</sup>

## II Policy and Legislative Tensions

There has existed a protracted state of tension in Australian family law since major reforms were introduced in 2006 to the child support and family law systems.<sup>18</sup> The overall policy objectives of the 2006 changes were to build strong healthy relationships, to encourage greater involvement of both parents in children's lives, to protect children from abuse, to help parents agree rather than litigate what is best for their children, and to establish a highly visible point of entry as a doorway to other services.<sup>19</sup> Within common law, the Full Court of the Family Court pre-empted the intent of the 2006 legislative amendments in favour of substantial involvement of both parents in their children's lives.<sup>20</sup>

Herein, the prioritisation of a child's meaningful relationship with both parents remains at odds with ongoing concerns of family violence. Despite amendments to family law legislation since 2006,<sup>21</sup> empirical research and legal commentary continue to evidence concerns.<sup>22</sup> Kaspiew et al reported on the amendments' limited legislative effects, finding that the rate of endorsement by family law system professionals of the proposition that adequate priority was accorded to the meaningful relationship consideration (87%) was twenty percentage points greater than that for the protection from harm consideration (67%).<sup>23</sup>

## III Mind the Gap

Implementation of children's rights may be compounded by potential gaps or duplications within multiple jurisdictions. In Australia, matters involving separation, divorce, and related issues are dealt with primarily within a federal system, and matters involving child protection and family violence are dealt with primarily within state or territory systems. This uneven approach and interplay between multiple jurisdictions arguably create barriers to adequate investigation, disclosure and communication. There may be the assumption that issues are being dealt with, or should be dealt with, elsewhere in the federal, state or territory systems, when in reality they might not be. Blaming cross-jurisdictional gaps may lead to further disjuncture. This has been a long-standing concern in Australia:

Often when a child protection authority is aware that matters are proceeding in the Family Court they will decide not to investigate, leaving the question to that court to decide on the issues. However, the Family Court is not resourced to investigate such matters. The children involved then fall through the jurisdictional gaps.<sup>24</sup>

A lack of information sharing, collaboration or consideration of where matters are currently, or have been before courts in other jurisdictions, leaves children at risk and limits the opportunities for them to express their views.<sup>25</sup> Justice Robert Benjamin noted, '[s]tate authorities generally treat children who are being dealt with in family law proceedings as being protected in and by those systems'.<sup>26</sup> Research asserts that when children have the opportunity to speak to child protection services, if there are family court orders or proceedings in place, their concerns may not be investigated past an initial interview:

So, from the initial complaint to children's services, they didn't even interview her until it was more than a year. If it had've being [sic] a stranger, or a guy at the garage, my child would have been looked at straight away. Yep, it wouldn't have been a problem, and he would've been charged. He has got away with it. (Mother, 42 years) ...

And once you have the Federal orders, as I know now, you've got nothing, you've got no State services, no police, no child protection, nothing because the Federal overrides the State. Once that is in place you are stuffed. It is so tragic, it is so bad (Mother, 44 years).<sup>27</sup>

Within my interviews with organisations, in this case, the National Child Protection Alliance, anecdotal cases provide further context as to the impact of this jurisdictional disjuncture. One example involved a child, 10 years of age, who was court ordered from the age of three to live with her father for five days every fortnight. During these visits the father was physically and emotionally abusive towards her and her sibling. The child begged to speak to authorities and, once granted an interview, was advised by child protection services that they would not intervene due to there being Family Court orders in place, but they would notify the father that a report had been made against him. During the child's later visits, this 10-year-old girl was taken, with her sibling, by the father to the local police station where a male police officer placed her in a police cell and closed the door, threatening that this was where she was going to end up if she did not obey her father. When the mother approached the police, the officer involved advised that this was normal police practice. When the mother shared that, just a fortnight before, the child had made a report to child protection, the police officer said he was under no obligation to check any reports in relation to the child or the father. When the mother spoke to child protection, child protection stated that there was no concern around either the father's or the police's behaviour.

A second example involved a young boy who was ordered to live with his father from the age of six. The child protection unit had substantiated that the father had sexually abused another child from his first marriage and was a violent man. At the age of 13, this young adolescent fled his father six times in a two-week period, going straight to police for help. The police forced him to return to his father each time (at one stage even putting him in handcuffs and placing him in a police car) without any investigation or checking of files and reports held by child protection services. Both these children, who are in their late teens, experience significant physical and mental health issues, and have struggled with friendships, completing their schooling, and substance misuse.

Although not specifically focused on family violence, research by Carson et al into the experiences within the Australian family law system of young people aged 10 to 17 years old reported that more than half of participants felt their views had either no or limited impact on the decision-making process.<sup>28</sup> These young people indicated that they wanted professionals to listen more effectively to their views and expressions, especially when they talked about their safety. Lastly, it is important to note that the latest Australian Law Reform Commission inquiry has recommended the closing of these jurisdictional gaps.<sup>29</sup>

#### iv Conclusion

Following separation, the multiple jurisdictions and protective systems concerning children remain challenging and complex. Whilst ongoing legislative reforms and policy developments endeavour to tailor court processes to support children experiencing family violence, there remains a real risk that these children may spend their formative years growing up in a system that may not adequately address family violence, may not seek to identify or deal with perpetrators, or that may bind a child to orders they have little say in.<sup>30</sup> There is real danger in assuming that issues are being dealt with, or should be dealt with elsewhere, when in reality they might or should not be. Children have rights that recognise their need for protection,<sup>31</sup> and it is argued that children's rights under the *CRC* may not be consistently implemented when children experience post-separation family violence.

Children, whether their parents are separated or not, have a right to grow up in an environment of happiness, love, belonging and understanding, and to ensure this, children need special safeguards, including legal protection. All children deserve to have access to professionals and services that not only understand and integrate current scientific research in order to respond effectively to allegations of family violence, but who are trained in family violence. Family law reform must continue to incorporate evidence-based frameworks that inform and support the development of better protection mechanisms and systems, and that recognise the rights of children to be active agents in their own protection.

28 Rachel Carson et al, *Children and Young People in Separated Families: Family Law System Experiences and Needs* (Final Report, 2018) 30.

29 *An Inquiry into the Family Law System* (n 13) 15.

30 See Family Court of Australia, 'The Lighthouse Project' (Web Page, 20 August 2020) <<http://www.familycourt.gov.au/wps/wcm/connect/fcoaweb/family-law-matters/family-violence/lighthouse-project/lighthouse-project>>.

31 *CRC* (n 1) arts 3, 18–19.