From “private” problem to public responsibility

Family law has transformed over the past 200 years, moving from an essentially private space to a public one. Once it was the province of the ecclesiastical jurisdiction with respect to relations between husbands and wives, while questions of title and legitimacy of children with respect to real estate were played out in the courts of common law and equity.

The idea that the family is a “private” space has been a continuing theme in law—and especially family law (Altobelli, 2003; Graycar & Morgan, 2002; Thornton, 1995). But if it was treated as a private space outside the province of law, then violence within the family was also often lost from the legal arena (Schneider, 1994). A key area of reform energy has been directed towards ensuring that governments accept responsibility for preventing and dealing with violence as a serious infringement of women’s rights, and to move the issue of violence from the area of private action to that of public responsibility (Evatt, 1991).

The statistics on family violence are frightening. In January 2009, KPMG prepared a forward projection of the costs of family violence to 2021–22 and concluded that “an estimated three-quarters of a million Australian women will experience and report violence in 2021–22, costing the Australian economy an estimated $15.6 billion” (National Council to Reduce Violence against Women and their Children, 2009, p. 4). While the violence may begin in a private sphere, with figures like these it is very much a public issue and a national responsibility. The work of the Australian Law Reform Commission (ALRC) and NSW Law Reform Commission (NSWLRC)—comprising two reports (ALRC, 2011a; ALRC & NSWLRC, 2010) and 289 recommendations for reform—forms part of the public response.

The federal system

Any discussion about reform and family law in Australia has to begin with an understanding of where family law sits in the federal system. Legislative power is divided between the
Commonwealth and the states and territories, and neither the Commonwealth nor the states and territories have exclusive legislative competence in relation to families. The Australian Constitution gives the Commonwealth Government the power to make laws with respect to: (1) “marriage” (s 51(xxxi)); and (2) “divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants” (s 51(xxxii)). It also has the power to legislate with respect to “matters incidental to the execution of any power vested by this Constitution in the Parliament” (s 51(3xxix)). The power of the states to legislate in relation to family law is not limited in the same way, but where a state law is inconsistent with a Commonwealth law, the Commonwealth law prevails (s 109).2

As a general principle, private rights were regarded as more appropriately a matter for the states, while questions of status—marriage and divorce—needed uniformity across Australia and hence were more appropriate for allocation to federal power (Young & Monahan, 2009). But it was not until the Matrimonial Causes Act 1959 (Cth), followed two years later by the Marriage Act 1961 (Cth), that the Commonwealth entered the field. This was only just over 50 years ago. These laws superseded the laws of the states and provided a uniform Commonwealth law on marriage and divorce. The Family Law Act 1975 (Cth) and the establishment of the Family Court of Australia ushered in the current framework of federal family law.

The federal framework was later expanded by the referral of legislative power from the states to the Commonwealth. A major addition concerned the power to make laws with respect to the children of unmarried parents—“ex-nuptial children”. Between 1986 and 1990, all states (with the exception of Western Australia) referred their powers with respect to “guardianship, custody, maintenance and access” in relation to ex-nuptial children. The states did not, however, refer to the Commonwealth their power to legislate with respect to child protection and adoption. In 1996, the Family Law Act was amended to include a “welfare power” in relation to children. A further referral

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1 The Family Law Council (2000) provides a useful discussion of the constitutional context of family law in Australia.

2 This section provides that: “when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”. This provision may operate in two ways: it may directly invalidate state law where it is impossible to obey both the state law and the federal law; or it may indirectly invalidate state law where the Australian Parliament’s legislative intent is to “cover the field” in relation to a particular matter.

3 A reference to the Commonwealth is not required from the ACT, the Northern Territory and Norfolk Island because s 122 of the Australian Constitution assigns to the Commonwealth plenary power to “make laws for the government” of the territories.

4 There was an attempt in 1983 to extend the categories of children covered by the Family Law Act, but this was held to be constitutionally invalid, necessitating the referral of power (Dickey, 2007). In Re Cormick (1984) 156 CLR 170 it was held that the marriage power could not extend to a child who is neither a natural child of both the husband and wife, nor a child adopted by them.


6 Commonwealth Powers (Family Law—Children) Act 1986 (NSW) s 3(2); Commonwealth Powers (Family Law—Children) Act 1986 (Vic.) s 3(2); Commonwealth Powers (Family Law—Children) Act 1990 (Qld) s 3(2); Commonwealth Powers (Family Law) Act 1986 (SA) s 3(2); Commonwealth Powers (Family Law) Act 1987 (Tas.) s 3(2).

of power led to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth).

Western Australia took a different approach from the other states by availing itself of the opportunity provided in the *Family Law Act* for the creation of a state family court exercising federal and state jurisdiction. Given that Western Australia has kept family law matters within the state, it provides, in some respects, a “control jurisdiction” for a consideration of some of the issues generated by the fragmentation between the state and federal spheres in the other states and territories.

Where and how do issues of family violence arise in such a context? The primary mechanism exercised at state and territory level is that of protection orders under family violence legislation, variously described as: apprehended violence orders (AVOs), family violence intervention orders, violence restraining orders, family violence orders, domestic violence orders, and domestic violence restraining orders. They are essentially a response of the civil law to immediate concerns of safety, though the police get involved in many jurisdictions.

Family violence legislation was enacted in most states and territories in the 1980s and 1990s, largely as a result of two decades of feminist pressure and lobbying, highlighting in particular the inability of the criminal justice system to protect women from future violence (Fehlberg & Behrens, 2008). It was a response to the growing recognition that existing legal mechanisms failed to protect victims—predominantly women—from family violence.

A key area of intersection of federal and state jurisdictions is the way in which protection orders may interact with the *Family Law Act*. There is an inherent tension between the focus of protection orders and parenting orders. On the one hand, the protection order may direct a person to keep away from a named person and children. On the other hand, the parenting order is focused on time that children are to spend with or live with their parents—a focus on the longer term.

The boundaries between the various parts of the legal system dealing with families are not always clear, and jurisdictional intersections and overlaps are “an inevitable, but unintended, consequence” (Family Law Council, 2000, para. 2.3). The fragmentation of the system has a particular effect in relation to child protection issues. As the Family Law Council (2000) commented:

> In essence, at least two court systems are potentially involved in any child protection dispute: the State and Territory children's courts, and the federal Family Court. With the introduction of the Federal Magistrates Service, this fragmentation now extends to three courts. Further, if a dispute extends across State and Territory borders, more than one children's court may be involved. Family violence issues are also often relevant when child protection issues are raised, but the State and Territory courts that deal with violence issues are usually the generalist magistrates' courts. This can add a further layer of complexity. (para. 2.4)

Further, while state and territory child welfare laws take precedence over Family Court orders under s 69ZK of the *Family Law Act*, as there was no referral of such powers,

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8 *Family Court Act 1975* (WA), replaced by *Family Court Act 1997* (WA); see ss 35–36.
9 Now the Federal Circuit Court of Australia.
10 See the discussion of s 69K in Family Law Council (2000), paras 2.21–2.22.
in contrast, in the area of family violence, contact and residence orders made under the *Family Law Act* can be used to defeat state and territory family violence protection orders dealing with such issues (Family Law Council, 2000, para. 3.9). As noted in the Family Law Council’s advice to the Commonwealth Attorney-General in December 2009 (Family Law Council, 2009):

> The reality for a separating family experiencing contentious issues in respect of parenting capacity is that there is no single judicial forum that can provide them with a comprehensive response to address their disputes, particularly where there are underlying issues of family violence and/or child abuse. (para. 7.2)

The result is a fragmented system with respect to children (Altobelli, 2003). There is a danger, moreover, that issues concerning violence may fall into the cracks between the systems (Family Law Council, 2002), described by Higgins and Kaspiew (2008) as being analogous to the London Underground warnings of “mind the gap” (see also Peel & Croucher, 2011). Where the relevant child protection authority may decide not to investigate, because the mother is behaving “protectively”, the Family Court does not investigate either, because it can’t. As noted by the Family Law Council (2009), the division of powers means that “neither the Commonwealth nor the States’ jurisdiction provides a family unit with the complete suite of judicial solutions to address all of the legal issues that may impact on a family in respect of their children” (para. 7.3.2).

**Different planets**

In the course of the first family violence inquiry, the ALRC and NSWLRC (2010) received the clear message that, from the point of view of parents and children engaging with legal frameworks in which issues of family violence and child abuse arise, the system should be as seamless as possible, so that whatever point a child and his or her parents encounter the legal system they should not feel lost in a maze or be blocked by frequent dead ends.

An example of some of the kinds of tensions that were presented is that a mother hears conflicting messages and meets divergent expectations at different points in the continuum of the broad “family law system”, including the concerns of child protection authorities. Marianne Hester (2009), describing the experience in the United Kingdom, referred to the different cultural histories of what she saw as the three “planets” of domestic violence, child protection and child contact:

> Within the context of divorce proceedings, mothers must be perceived as proactively encouraging child contact and must not be attempting to “aggressively protect” their children from the direct or indirect abuse of a violent father. The child protection and child visitation/contact planets thus create further contradictions for mothers and children: there may be an expectation that mothers should protect their children, but at the same time, formally constituted arrangements for visitation may be implemented that do not adequately take into account that in some instances mothers and/or children may experience further abuse. (pp. 50–51)

So, for example, when a mother is experiencing family violence that may have attracted the attention of the relevant child protection authority, she is told that she
is expected to be “protective”, otherwise she faces the potential that the interest of the child protection authority may lead to her “losing” her children. And yet, if she is drawn into family law proceedings, she is faced by the allegation that she is not being a “friendly parent”, so, in order that her children have a “meaningful relationship” with both parents, she is faced with a parenting order that requires contact with the man she fears—particularly at moments of “handover” of the children to their father—and her fear continues.

Such dynamics, moreover, are compounded by other factors; for example, for Indigenous and migrant women. In a conference paper titled “Mothers, Domestic Violence and Child Protection”, Douglas and Walsh (2010) noted that:

For many Aboriginal people the intervention of child protection services is a common experience that often goes back several generations. Recently it was reported that child protection workers in Australia have begun removing the fifth generation of Aboriginal children from their parents, meaning that some Aboriginal families have an eighty year history of child protection intervention … Many scholars have observed that as a result of the intersecting factors of poverty, race and gender, Aboriginal women, and women who are recent immigrants, are particularly disadvantaged and discriminated against in their engagements with institutional processes. (pp. 20–21)

Some answers
How can a bifurcated system overcome these fundamental problems? The Family Law Council (2009), in its advice to the Commonwealth Attorney-General, signalled that a referral of powers should be given so that federal family courts can have concurrent jurisdiction with state and territory courts “to deal with all matters in relation to the children including where relevant family violence, child protection and parenting orders” and that “achieving this goal would be the best outcome for people experiencing family violence and may circumvent the disparity between children’s, state and family courts” (para. 7.7). If this is not possible, other ways through the system need to be found. The Family Court has introduced a solution in the form of the Magellan case management program (see Higgins, 2007). In other parts of the system there are a growing number of other examples of agreements, protocols, memoranda of understanding and other ways of regulating relationships between agencies working with family violence. Consequently, an issue for the law reform commissions was to think about what the limits of the law might be and whether other forms of regulation could work as well, or better. There is much to be said for the simple mantra advocated by Professor Richard Chisholm (2009) in his review of the procedures and laws applying in the federal family law courts in the context of family violence—that family violence needs to be “disclosed, understood and acted upon” (p. 49).

The conceptual framework that the ALRC and NSWLRC (2010) developed to underpin the recommendations in the report was expressed as four specific principles or policy aims that relevant legal frameworks in this inquiry should reflect: seamlessness, accessibility, fairness and effectiveness:

(1) **Seamlessness**—to ensure that the legal framework is as seamless as possible from the point of view of those who engage with it.

(2) **Accessibility**—to facilitate access to legal and other responses to family violence.
(3) **Fairness**—to ensure that legal responses to family violence are fair and just, holding those who use family violence accountable for their actions and providing protection to victims.

(4) **Effectiveness**—to facilitate effective interventions and support in circumstances of family violence. (para. 3.10)

The overarching, or predominant principle was that of seamlessness, which was expressed in recommendations focused on improving legal frameworks and improving practice.

The commissions considered that the improvement of legal frameworks could be achieved through:

- a common interpretative framework, core guiding principles and objects, and a better and shared understanding of the meaning, nature and dynamics of family violence that may permeate through the various laws involved when issues of family violence arise;
- corresponding jurisdictions, so that those who experience family violence may obtain a reasonably full set of responses, at least on an interim basis, at whatever point in the system they enter, within the constraints of the division of power under the *Australian Constitution*;
- improved quality and use of evidence; and
- better interpretation or application of sexual assault laws. (ALRC & NSWLRC, 2010, para. 3.52)

And the improvement of practice could be achieved through:

- specialisation—bringing together, as far as possible, a wide set of jurisdictions to deal with most issues relating to family violence in one place, by specialised magistrates supported by a range of specialised legal and other services;
- education and training;
- the development of a national family violence bench book;
- the development of more integrated responses;
- information sharing and better coordination overall, so that the practice in responding to family violence will become less fragmented; and
- the establishment of a national register of relevant court orders and other information. (ALRC & NSWLRC, 2010, para. 3.53)

By way of illustration of how the goal of “seamlessness” could be achieved, the idea of “corresponding jurisdictions” was aimed at implementing in law the concept of “one court”, through an expansion of the jurisdictions of federal, state and territory courts responding to family law, family violence and child protection issues. In particular, while the commissions concluded that the prospect of a single new specialist court to deal with all legal matters relating to family violence was not practicable, an effective way to achieve the benefits of “one court” is to develop corresponding jurisdictions, in which each of the jurisdictions of courts dealing with family violence correspond to an appropriate degree. Enhancing the ability of courts to deal with matters outside their core jurisdiction would allow victims of family violence to resolve their legal issues relating to family violence in the same court, as far as practicable, consistent with the constitutional division of powers.
So, for example, state and territory magistrates courts are often the first point of contact with the legal system for separating families who have experienced family violence. The commissions therefore considered that it would be important for state and territory magistrates courts to be able to deal with as many issues relating to the protection of victims of family violence as possible. Making an interim parenting order at this time might take the heat out of the situation by regulating how separating parents spend time and communicate with their children.

An important start in implementing the recommendations was the package of amendments to the Family Law Act in the Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth), which commenced on 7 June 2012. The definition of family violence in the amended s 4AB(1) is not precisely the one recommended by the ALRC and NSWLRC, but it is essentially the same.11 It will provide the foundation for the improved understanding that Professor Chisholm identified as being fundamental to the family courts’ response to family violence. In the ALRC’s second family violence report, the commission recommended that the definition be included in other Commonwealth laws that were considered in that inquiry.12

Conclusion

The first family violence inquiry was one of the biggest challenges for the ALRC to date, given its incredibly complex nature. There are many involved in trying to find the way out of this particular maze. The challenge is that it does not end up like a children’s swimming party—lots of arms and legs and much thrashing in the water—with so many inquiries going on almost simultaneously. It is a metaphor that may also be applied to the contrasting, even clashing, and possibly contradictory, way in which the various laws concerning family violence operate in Australia. The goal is that we should end up as Olympic-level synchronised swimmers. The commissions consider that adopting the recommendations, including the idea of developing corresponding jurisdictions, will go some way in this direction.

References


11 For a consideration of the differences see ALRC (2011b).

12 Other recommendations that are picked up in the Family Law Act amendments are noted at: <www.alrc.gov.au/inquiries/family-violence>.