

**OPENING ADDRESS OF THE
2021 ANNUAL SCIENTIFIC MEETING OF THE
AUSTRALASIAN COLLEGE OF LEGAL MEDICINE
LEGAL ASPECTS OF CHILD AND ADOLESCENT HEALTH
VIDEO PRESENTATION BY
HER EXCELLENCY THE HONOURABLE BARBARA BAKER AC
GOVERNOR OF TASMANIA
SATURDAY 11 SEPTEMBER 2021**

**Impact of Domestic and Family Violence and Abuse on Children and
the Responses of Courts**

Introduction

I would like to raise with you the challenge to child and adolescent health posed by domestic and family violence and/or child abuse. Significant numbers of children in Australia experience family violence and abuse. This can have long-lasting deleterious effects not only on health and well-being, but on education, housing and relationship outcomes.¹ Children are particularly at risk of experiencing family violence during and after parental separation.²

As a former judge of the Federal Circuit Court, I heard numerous matters in which children had been exposed to family violence or were victims of abuse. That is the area of law I would like to talk with you about.

In outline, I shall first turn to some statistics on the prevalence of domestic and family violence, which involves abusive and violent behaviour towards a partner, former partner or family member, including children. I will then mention some studies about the impact

¹ Family, domestic and sexual violence in Australia: continuing the national story 2019 In brief Australian Institute of Health and Welfare at page 13.

² Campo M 2015 Children's exposure to domestic and family violence: key issues and responses. Child Family Community Australia Information Exchange (CFCA) paper no.36.Melbourne, Australian Institute of Family Studies at page 4.

of violence and abuse on children and then turn to responses of the family law courts in dealing with family violence and abuse cases.

Prevalence of Violence and Abuse against Women and Children

Australian Bureau of Statistics (ABS) for 2016 reported that 2.2 million Australians had experienced physical and/or sexual violence from a partner; 3.6 million experienced emotional abuse from a partner; and, about 2.2 million Australians had experienced sexual violence since the age of 15.³

Disturbingly, around 418,000 women and 92,200 men, who had experienced violence from a previous partner, said the children in their care had witnessed this violence.⁴

The Australian Institute of Health and Welfare (AIHW) reported equally disturbing statistics in 2017-2018, with:

- 628 hospitalisations of children aged 0-14 for injuries due to abuse (including sexual assault, maltreatment or neglect); and
- one in 35 children received child protection services.⁵

Additionally, domestic and family violence services have reported the prevalence of domestic and family violence has increased during the Covid-19 lockdowns.⁶ This has been supported by an Australian Institute of Criminology online survey of 15,000 women in May 2020, which found that, for many women, the pandemic coincided with the onset or escalation of violence and abuse.⁷

³ Australian Bureau of Statistics (ABS) *Personal Safety Survey* 2016 cited in <https://aihw.gov.au/reports-data/behaviours-risk-factors/do> accessed 16/07/2021

⁴ Australian Bureau of Statistics *Personal Safety Survey* 2016 (ABS, 2017)

⁵ **Australian Institute of Health and Welfare (AIHW.)** *Family, domestic and sexual violence in Australia: continuing the national story 2019-in brief*. Cat. no. FDV 4. Canberra:at 6.

⁶ <https://www.abc.net.au/news/2021-06-25/coronavirus-covid-lockdown-referring-to-QUT-Centre-for-Justice-survey>: accessed 31/08/2021.

⁷ <https://www.aic.gov.au/publications/sb/sb28> accessed 31/08/2021.

These statistics must be considered in the light of women’s reluctance to report offenders because the justice response can have negative outcomes and may cause further harm to the victim.⁸

More positively, during the period of Covid-19 and lockdowns, the Royal Australian College of General Practitioners (RACGP) has started a “new tailored family violence training for primary care.”⁹ A key aim of the program is to assist GPs, primary health carers, in being able to identify survivor women who attend general practice. Such identification may not always be straightforward but “...the program aims to build capacity to more effectively recognise, respond, refer and record disclosures of domestic and family violence using a trauma-and violence-informed approach.”¹⁰

Impact of Violence and Abuse on Children

Research funded by Australia’s National Research Organisation for Women’s Safety (ANROWS)¹¹ confirms that family and domestic violence impacts on children are severe, affecting their health, well-being, education, relationships and housing outcomes. This is supported by an earlier study by Kaspiw et al (2017) that “*children in families with parental conflict have worse health, social and educational outcomes than children in families without parental conflict. Children in families with persistent domestic and family violence have the worst health and social outcomes: - for example, 27.5 percent of children in separated families with parental conflict were found to have socio-emotional problems, compared to 12.7 percent of children in intact families with no current parental conflict.*”¹²

⁸ National Plan to Reduce Violence Against Women and Their Children Fourth Action Plan (2019-22) at page 26.

⁹ <https://www1.racgp.org.au/newsgp/clinical/new-tailored-family-violence-training-for-primary>

¹⁰ Ibid at 3

¹¹ Research Summary: The Impacts of domestic and family violence on children)(2nd ed; ANROWS Insights 11/2018.

¹² ibid ANROWS 2018, at page 1

Children exposed to domestic and family violence over a sustained period of time may experience trauma symptoms that can have long-lasting effects. *“These include depression; low self-esteem; anxiety; poor coping mechanisms; suicidal thought; eating disorders; self-harm; substance abuse; physical symptoms such as chronic pain.”*¹³

The Australian Burden of Disease Study 2015 found that for women aged 15 and over, mental health conditions made the largest contribution to the disease burden due to domestic violence. Depressive disorders made up the largest proportion; followed by anxiety disorders and suicide and self-inflicted injuries.¹⁴ Three diseases were linked to child abuse and neglect, namely depressive disorders, anxiety disorders and self-inflicted injuries.¹⁵

Courts exercising family law jurisdiction

A substantial proportion of parenting disputes involve violence and abuse against women and children. The very recently merged Federal Circuit Court and Family Court of Australia will continue to deal with such family law matters.

Family violence is defined in the *Family Law Act 1975* as *“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.”*¹⁶ This includes violence between family members as well as intimate partners.

Abuse of a child is also defined in the *Family Law Act 1975* as an assault or a sexual assault, causing a child to suffer serious psychological harm or serious neglect.¹⁷

¹³ Jaffe, P.G., Wolfe, D., & Campbell, M. (2012) *Growing up with domestic violence: Assessment, intervention, and prevention strategies for children and adolescents*. Cited by Campo M. at page 7.

¹⁴ AIHW Family, domestic and sexual violence in Australia: continuing the national story 2019-In brief. Cat.no.FDV4. Canberra: at page 13

¹⁵ <https://www.aihw.gov.au/reports/australias-health/health-impacts> at 3, accessed 16/07/2021

¹⁶ Section 4AB

¹⁷ Section 4(1)

By 2006, amendments to the *Family Law Act 1975* placed greater emphasis on the protection of children from family violence,¹⁸ with further amendments in 2011¹⁹.

Importantly, the definition of *family violence* was amended to provide a substantial list of examples of behaviour that may constitute “family violence” including assault, sexual assault, economic abuse as well as injury to animals²⁰. Examples of situations of being exposed to family violence are also listed.²¹ They include overhearing threats of death or personal injury; attempting to stop the violence; witnessing the violence; comforting or providing assistance after an assault; cleaning up a site after the intentional damage of property; witnessing harm to family pets; or being present when police or ambulance officers attend an incident.

Further, and importantly, it was recognised, for the first time in the definition of *abuse* that exposure to *family violence* can cause a child to suffer serious psychological harm.²²

Parenting Orders

When a court is considering what parenting order to make, such as a “live with” or “spend time with” order, the protection of children is a paramount issue. A court is required to consider a number of “best interests” considerations, set out in section 60CC *Family Law Act 1975*. Protecting children from exposure to family violence, or from abuse, is directly relevant to what kind of parenting order is made. The primary consideration of the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse,

¹⁸ Family Amendment (Shared Parental Responsibility) Act 2006

¹⁹ The Family Law Legislative Amendment (Family Violence and Other Measures) Act 2011

²⁰ (Section 4AB(2))

²¹ Section 4AB(3)

²² Section 4(1)(c)

neglect or family violence is to be given greater weight than the other primary consideration of the benefit to the child of having a meaningful relationship with both of the parents.²³ A court is also required to consider whether a family violence order has been made involving a child or a family member.²⁴

Importantly, the presumption that it is in the best interests of the child that the parents have *equal shared responsibility* for the child does *not* apply if there are reasonable grounds to believe that a parent has engaged in child abuse or family violence.²⁵

A court will not make a *live with or unsupervised time parenting order* if a child is at an *unacceptable risk* of harm from sexual abuse, physical, emotional abuse or family violence. The question of whether there is an unacceptable risk involves an evaluation of the nature and degree of the risk and whether, with or without safeguards, it is acceptable.²⁶ If a court makes a finding of unacceptable risk, an order for time may be made either with supervision requirements or totally refused.

How are children heard in the court process?

One of the objects of the *Family Law Act 1975* is to give effect to the *Convention on the Rights of the Child*, including *participation rights*. Participation rights empower children by extending rights to freedom of expression, access to information, making their views known and participating in processes relevant to their care.

However, in matters involving violence or abuse, there is a necessary balancing act between upholding a child's right to participate in the proceedings and protecting a child from any harm that may be caused

²³ Sections 60CC(2) (a), (b) and 2A.

²⁴ Sections 60CC(j) and (k).

²⁵ section 61DA

²⁶ M and M (1988) 166 CLR 69.

by such participation. Children, for example, may be subject to retaliation for speaking out.²⁷

Under section 60CC(3)(a), the court is required to consider any views expressed by a child.²⁸ This can be done by the court:

- appointing an Independent Children’s Lawyer (“ICL”). Some ICLs are careful about overburdening or further traumatising children by being interviewed by too many professionals. Other ICLs consider that children, exposed to family violence or abused, have an acute need to participate in the proceedings;²⁹
- ordering a child inclusive conference, in which the child is interviewed by a Family Consultant, who is either a psychologist or a social worker. In such cases, the Court receives a report containing information about the family, the child and their views and recommendations for future action; or
- ordering a report to be prepared by an expert, such as a psychiatrist or a psychologist, who can include information about a child’s views in the report.

Further Responses of the Federal Circuit Court and Family Court of Australia

In cases involving allegations of family violence or child abuse, the Court has developed a range of responses to try to ensure that family violence and abuse of children are brought to its attention, so that children can be protected from risk of harm by:

- A requirement to file a *Notice of Risk* in proceedings where there are allegations of abuse or family violence, requiring the Court to take prompt action.

²⁷ ²⁹ www.alrc.gov.au/publication/review-of-the-family-law-system accessed 16/07/2021 at page5

²⁹ Ibid at page 5.

- The *Lighthouse Project*, which involves an early screening process for risk, with a primary focus on improving outcomes for families involved in the family law system. There is a triage process involving registrars, family consultants and support staff with detailed knowledge in family violence and family safety risks.
- The *Magellan List* is a special list that manages and determines cases involving serious allegations of child abuse. This ensures co-ordination between the overlapping jurisdictions of child protection and the family law system.
- In respect of matters not in the Magellan List, there is improved *information sharing* between courts and child welfare agencies and the Police. This is important because research has found that gaps in protection may reflect gaps in the flow of information, between the *federal* family law system, the *state* family violence system and the *state* child welfare system. It also aims to avoid delays and inefficiencies in outcomes for children.
- The publication of *Family Violence Best Practice Principles* provides a checklist of matters to which judges, court staff, legal professionals and litigants may wish to refer.
- Compulsory specialist training about family violence for judicial officers, registrars and court staff to equip them to identify and manage risk and protect children and victims in need of the courts' assistance.

Conclusion

We know that children who are exposed to acts of violence or abuse in the home can experience lifelong consequences that affect their behaviour, schooling, psychological and physical well-being and other impacts on development.

While the family law system is working to improve its responses to family violence, changes in behaviors and power imbalances that lead to violence against women and children need to occur in the community. The rates of domestic and family violence remain unacceptably high. There is national recognition of the need for primary prevention of violence against women and children. Early intervention and creating a gender equal society are necessary for addressing violence against them. Change the Story,³⁰ a shared framework for the primary prevention of violence against women and their children in Australia, provides an evidence-based framework for action in prevention, based on awareness of how gender inequality contributes to violence against women.

We still have far to go to protect children and their mental and physical health and to diminish their exposure to family violence. It is imperative that those who work in the family law system, the support services, police and our educators continue to work together.

³⁰ Our Watch together with ANROWS, Australia's National Research Organisation for Women's Safety, and Vic Health 2015.