



Submission to the
Australian Law Reform Commission
Inquiry into
Family Violence

On behalf of the
Anglican Church of Australia
General Synod Standing Committee

June 2010

Contents

1.	Executive Summary and List of Recommendations.....	2
2.	Introduction.....	3
3.	Context.....	3
4.	Interaction of federal law with state and territory laws.....	4
	4.1 Praxis.....	4
	4.2 Inter-jurisdictional Scope.....	7
5.	Impact on cases of sexual assault within a family violence context of inconsistent interpretation or application of legislation including rules of evidence.....	8
6.	Conclusion.....	9

1. Executive Summary and List of Recommendations

This submission focuses on the experience of the child in the family law system when violence is an issue for families. The understanding of violence, how it is identified and responded to can have far reaching consequences for children. Likewise, with the lack of focus or rather cursory focus on the child's best interests, for those children not captured by specialist processes, family litigation outcomes may be detrimental for the child. It is the role of the family law system to protect children from further harm and the opportunity exists for law systems within all jurisdictions and federally to establish a system that is truly child inclusive.

Recommendations

That a truly child inclusive family law system be established for the ongoing protection and wellbeing of Australian children.

1. Provide ongoing support for individuals within families with identified family violence issues throughout the entire legal proceeding and ongoing support for three months post adjudication.
 - a. Seek multilateral agreement with states and territories that such ongoing support be adopted as best practice
2. Explore options, in partnership with states and territories, for participating in an integrated sexual violence offender reintegration program including identifying transition pathways.
3. Explore improved screening processes for violence at all stages of the family court process.
4. Improve support pathways for individuals within families outside Family Dispute Resolution where violence is present, including improved child inclusive case management.
5. Refine the scope of primary consideration to include only 'best interests of the child' and to consider all other family issues in that context.
6. Develop an ongoing professional development and education awareness program for judicial officers and other legal and administrative officers of the court in matters of family violence and child inclusive practice.
7. Develop consistent national understandings of 'domestic violence', 'best interests of the child' and the flexibility required to act in situations where violence is present.
 - a. Seek multilateral agreement with states and territories that such understandings be adopted as best practice.
8. Develop synergies between federal and state and territory systems, including child protection systems, to improve the experience of families who have experienced violence to transition between and successfully navigate family court systems, with specific reference to:
 - a. Uniformity in laws or processes for the reporting and handling of child abuse notifications by the police and/or child protection authorities.
 - b. Exploring mechanisms for the sharing of information gathered through those processes with jurisdictional and federal courts.

2. Introduction

Anglicare Australia is the peak body for a national network of locally based Anglican care organisations serving the needs of disadvantaged Australians and their communities. The Anglicare network provides a wide range of services to people in need; and works to address issues of injustice across the nation. In 2007-08 Anglicare agencies served over 512,340 clients in rural, remote, regional and urban communities using the services of 12,000 staff and 21,000 volunteers and spending over \$624 million. Anglicare Australia seeks to influence social and economic policy to advocate for a society where the contribution, dignity and participation of everyone are equally valued.

Domestic violence is prevalent in our society. Anglicare Australia members provide family relationship services Australia wide and Anglicare acknowledges that both men and women experience violence within the family; the statistic of one in five women who will have experienced violence from a current or previous partner in her lifetime¹ is well known. Anglicare Australia is satisfied that the factors contributing to and effects of family violence are, in essence, documented and known to the Inquiry and notes that in this context the definition of family violence as outlined in the *Family Law Act 1975* is taken to be

conduct, whether actual or threatened, by a person towards, or towards the property of, a member of the person's family that causes that or any other member of the person's family reasonably to fear for, or reasonably to be apprehensive about, his or her personal wellbeing or safety.²

With the note that

A person reasonably fears for, or reasonably is apprehensive about, his or her personal wellbeing or safety in particular circumstances if a reasonable person in those circumstances would fear for, or be apprehensive about, his or her personal wellbeing or safety.²

It is due to the recognition of the closeted and insidious nature of family violence and the effects that it has on the whole community, in recognition of such attention and resources being paid to eliminate violence within families in Australian society that Anglicare Australia makes this submission. It is also provided on behalf of the Anglican Church of Australia General Synod Standing Committee.

3. Context

Anglicare Australia notes that this inquiry does not occur in isolation. The *Family Law Violence Review*, the *2006 Family Law Amendments Evaluation* and the *Improving Responses To Family Violence In The Family Law System Review* have also recently been reported on and are awaiting response from Government. While the areas covered by these reviews are not within the scope of this inquiry, they closely interact. It is Anglicare Australia's view that this inquiry needs to be considered in that context.

Anglicare Australia provides this submission on the basis that it is advocating on behalf of those individuals who are currently, have been or will be involved in the family court system. It makes no claims to assess the efficacy of federal or state and territory legislation, only to comment on the observed experiences of Anglicare clients.

¹ Australian Bureau of Statistics. 2006. *Personal Safety, Australia 2005*. Australian Bureau of Statistics: Canberra

² Family Law Act 1975

4. Interaction of federal law with state and territory laws

This section discusses the main concerns as identified by the Anglicare Australia network for the interaction of state and territory laws with federal law.

4.1 Praxis

Domestic Violence

Anglicare Australia notes the *Family Law Act 1975* definition of family violence. With the existing definition there are considerations relating to it that require its re-evaluation for the benefit of those to whom the laws must apply. Though the Report from the National Council to Reduce Violence Against Women and Children, *Domestic Violence Laws in Australia*, states that across jurisdictions there are similarities in the definitions of terms which relate to the generally understood concept of domestic violence, there is enough “wobble room” to allow for discrepancies in practice across jurisdictional boundaries, both within and between courts.³ Anglicare Australia supports Recommendation One of the Family Law Council report for the expansion of the definition of family violence to include a range of other threatening behaviour⁴ and moreover support the ongoing education of judicial officers and other legal officers in the consistent application of it.

The Australian Institute of Family Studies (AIFS) 2009 review of the 2006 shared parenting arrangements found that

around one in five parents reported that they held safety concerns associated with ongoing contact with their child’s other parent and over 90% of these parents had been either physically hurt or emotionally abused by the other parent.⁵

A fundamental aspect of any family law system must be its ability to protect its participants via an informed pathway for recognising and responding to violence and potentially violent situations within and for a family. It is also necessary for such systems to be transparent, partial to the less powerful and accountable to those who utilise it. Having said this however, for a family law system it is also vitally important to maintain fluidity and flexibility for individuals who are in distinctly individual circumstances and for the system to be able to adapt to those circumstances. This includes the ability to openly acknowledge family violence and to have recourse available for families where violence exists to be supported, including the perpetrator, throughout the legal process to ensure better outcomes for all. The *Family Law Act 1975* and the *Shared Parenting Amendment 2006* in their provisions have laid the groundwork for this type of support.

Recommendation 1

Provide ongoing support for individuals within families with identified family violence issues throughout the entire legal proceeding and ongoing support for three months post adjudication.

- a. Seek multilateral agreement with states and territories that such ongoing support be adopted as best practice

Despite the family court having a specific objective to achieve, it is not outside its purview to deliver support to families undergoing adjudication, specifically in relation to cases where there has been incidents of sexual violence. The Australian Centre for the Study of Sexual Assault has found that sexual assault has far reaching consequences and has a traumatising effect far beyond the experiences of the

³ National Council to Reduce Violence Against Women and Children. 2009. *Domestic Violence Laws in Australia*. Department of Families, Housing, Community Services and Indigenous Affairs: Canberra.

⁴ Family Law Council. 2009. *Improving responses to family violence in the family law system: An advice on the intersection of family violence and family law issues*. Department of the Attorney General: Canberra.

⁵ Kaspiew R., Gray M., Weston R., Moloney L., Hand K. & Qu L. 2009. *Evaluation of the 2006 Family Law Reforms: Summary report*. Australian Institute of Family Studies: Canberra. p. 5.

victim.⁶ In situations such as these a whole of family approach needs to be taken to ensure the harm already perpetrated is mitigated throughout adjudication.

Though generally at lower levels than other types of violent crime, recidivism in sexual offenders is too high (13.4% of sexual offenders were likely to re-offend in 2007).⁷ Treatment of sexual offenders, either psychological or pharmacological, is a highly specialised area and Anglicare Australia is by no means advocating the family court or any other jurisdictional courts take up the responsibility of it. However, the courts responsible for presiding over cases which have involved incidents of sexual violence could take part in an integrated sexual violence offender reintegration program and operate as its first phase, for example, prior to entry into the criminal justice system and release from prison. The court might operate as one facet of a support program allowing offenders to admit to their crimes and access the wrap around support to begin the work toward reducing re-offending thereby minimising the potential costs on families and the community.

As much as the existing support offered within the confines of the court system by Family Relationship Centre's (FRC), the same principles must apply here- people receiving support must have a clear pathway to move from one source of support to the next to effectively build on the foundations of the former. Whether these services are provided by the court, the FRCs or in partnership with local agencies, support services offered and taken up at an early stage have greater opportunity of ameliorating further acts of sexual violence.

Recommendation 2

Explore options, in partnership with states and territories, for participating in an integrated sexual violence offender reintegration program including identifying transition pathways.

Best Interests of the Child

This issue is more complicated as it involves individuals who have even less power, ability or opportunity to uphold their right to safety and wellbeing.⁸ A major concern raised by the Anglicare Australia Member Network is the inconsistencies of interpretation and application of terms across legislation, across jurisdictions, where the needs of a child or children are concerned. That family law suggests the best interests and safety of the child are of primary concern^{9,10} and then fails to implement this in practice¹¹ is irresponsible at best and at worst, negligent.

The AIFS evaluation has indicated that screening and triaging of violence across the whole of the family system is not managed well. The ability of the court system to protect children from experiencing further family violence is noted to be relatively successful where family violence is known to the court¹², such as in Family Dispute Resolution (FDR) via the FRCs where violence within the family is stringently screened for. A portion of these families, particularly those with complex family violence issues are exempted and do not undergo the FDR process, perhaps contributing to its success.

Where violence is not known to the court, whether due to a failure in the screening process, as a result of the 'friendly parenting' clause in current legislation or a litany of other reasons, outcomes are generally less positive for children. Regardless of family litigation outcomes, where ongoing fear and safety

⁶ Morrison, Z., Quadara, A & Boyd, C. 2007. "Ripple effects" of sexual assault'. *ACSSA Issues* No. 7 June 2007. The Australian Institute of Family Studies: Canberra

⁷ Sullivan, D.H., Mullen, P.E & Pathé, M.T. 2005. 'Legislation in Victoria on sexual offenders: issues for health professionals'. *The Medical Journal of Australia*. Volume 183 Number 6 19 September 2005

⁸ Convention on the Rights of the Child 1989, ratified in Australia 17 December 1990

⁹ Family Law Act 1975 s7:1B 60CA

¹⁰ Shared Parenting Amendment Act 2006 s1:8 60CA

¹¹ Chisholm, R. 2010. *Family Law Violence Review*. Department of the Attorney General: Canberra.

¹² Kaspiew R., Gray M., Weston R., Moloney L., Hand K. & Qu L. 2009. *Evaluation of the 2006 Family Law Reforms: Summary report*. Australian Institute of Family Studies: Canberra.

concerns are present in the family dynamic it has been observed that the child's wellbeing has been negatively impacted and greatly reduced.¹³

Exposure to inter-parental relationships characterised by high levels of acrimonious conflict, or by fear, safety concerns or physical harm, clearly jeopardise children's wellbeing. However, while the development and maintenance of a close relationship requires spending time together... "more time" does not necessarily equate with better outcomes for children.¹⁴

Recommendation 3

Explore improved screening processes for violence at all stages of the family court process.

Recommendation 4

Improve support pathways for individuals within families outside Family Dispute Resolution where violence is present, including improved child inclusive case management.

The Family Court of Australia (FCA) presides over the complex issues relating to the protection of children. Despite increasing evidence that the cases before the family court are primarily complex financial and property issue cases there are still a substantial amount of cases involving parenting issues.¹⁵ In 2008-2009 the FCA finalised 268 Magellan cases. These are the cases that involve allegations of serious physical harm or sexual abuse of children. At 30 June 2009 there were a further 277 cases pending.¹⁶ The handling of Magellan cases is unique in that a case management approach by a judge, a registrar and a family consultant is undertaken. This is one side of an extreme scale while the other is the FRC process.

With the introduction of FRC's came a reorientation from a legal to a relationships based approach to relationship dissolution, which indicates a positive shift in attitudes and recognition of the benefits of a cooperative rather than adversarial perspective. Division 12A of Part VII of the *Family Law Act* and the subsequent *Less Adversarial Trial: Education Package* released in 2009 for the benefit of judicial and other legal officers here and overseas is testament to this shift. But it still leaves the children of families where violence is present to go through the most traumatic of processes, adjudication, which unfortunately can often result in the worst outcomes.

For the children not caught by the Magellan process and those who do not enter the FDR process there is no safety net. Those children are somewhere in the middle, lost and reliant on judicial officers to determine in actuality what is in their best interests. In 2008-2009 there were 441 'properly' filed notices of child abuse or family violence before the court which represent just under 10 per cent of cases.¹⁷ If 268 of those were Magellan cases, that is still 173 cases of **known** violence that are not captured by FDR or special case management processes.

All children have the right to grow up in an environment free from neglect and abuse. Their best interests are paramount in all decisions affecting them.^{18,19}

It is the belief of Anglicare Australia that it is the genuine desire of all judicial officers to do 'right' by the families over which they preside. However, there is a definite disjunct between the principle of 'act in the best interests of the child' and the practice of it. Anglicare Australia supports the position taken by Mr

¹³ Kaspiew R., Gray M., Weston R., Moloney L., Hand K. & Qu L. 2009. *Evaluation of the 2006 Family Law Reforms: Summary report*. Australian Institute of Family Studies: Canberra. p.22

¹⁴ Kaspiew R., Gray M., Weston R., Moloney L., Hand K. & Qu L. 2009. *Evaluation of the 2006 Family Law Reforms: Summary report*. Australian Institute of Family Studies: Canberra. p.15

¹⁵ Family Court of Australia. 2009. *Annual Report*. Family Court of Australia: Canberra.

¹⁶ Family Court of Australia. 2009. *Annual Report*. Family Court of Australia: Canberra.

¹⁷ Family Court of Australia. 2009. *Annual Report*. Family Court of Australia: Canberra.

¹⁸ Department of Families, Housing, Community Services and Indigenous Affairs. 2009. *National Framework for Protecting Australia's Children*. FaHCSIA: Canberra. p.12

¹⁹ Convention on the Rights of the Child 1989, ratified in Australia 17 December 1990

Richard Chisholm in the *Family Law Violence Review*.²⁰ Were judicial officers able to refine the scope of their consideration from two primary concerns to the consideration of all family issues in the context of the best interests of the child only, such as recommended as a guiding principle in the *National Framework for the Protection of Australian Children*¹⁸, officers would be less restricted in their deliberations. They could provide orders based on a much broader field of understanding than there is currently an opportunity to do.

Lawyers and relationship service professionals both expressed much greater confidence in the ability of the family law system to ensure that children had meaningful involvement with each parent than in its ability to ensure that children are protected from harm, family violence, child abuse and neglect.²¹

Recommendation 5

Refine the scope of primary consideration to include only ‘best interests of the child’ and to consider all other family issues in that context.

Anglicare Australia acknowledges the Child Responsive Program, the program established in 2007 to facilitate parents reaching an agreement about their child/ren by focusing on their needs. Similar to FDR, the Child Responsive Program is based on a series of meetings with a qualified Family Consultant. Where the two programs differ is that all the information gathered from these meetings is admissible in court and the Family Consultant will provide a verbal report to the court at its first session. This is an admirable first step and goes some way to highlighting to the court the circumstances surrounding the child however this process still does not capture all the families not captured by other specialist processes. Families enter into the Child Responsive Program at the discretion of the judge.²²

Recommendation 6

Develop an ongoing professional development and education awareness program for judicial officers and other legal and administrative officers of the court in matters of family violence and child inclusive practice.

4.2 Inter-jurisdictional Scope

In this current climate of reform and new approaches to service delivery and with the current restructure of the Family and Federal Magistrate Courts it would be imprudent not to consider a joined up approach²³ to family law. Rather than looking at the interaction of state and territory family law with federal law through a problem focused lens it might be approached through an innovation or opportunity based lens. Here exists an opportunity to include aspects into the family law system to improve the integration or inter-activity of the two levels of legislation to further support families with experiences of violence.

Recommendation 7

Develop consistent national understandings of ‘domestic violence’, ‘best interests of the child’ and the flexibility required to act in situations where violence is present.

- a. Seek multilateral agreement with states and territories that such understandings be adopted as best practice.

Recently, Chief Justice Diana Bryant publicly stated that judges need more information, and that the decisions made by judges are only as good as the information that they are made on.²⁴ This was in response to her call on Government to make available to the court information which arises during family

²⁰ Chisholm, R. 2010. *Family Law Violence Review*. Department of the Attorney General: Canberra.

²¹ Kaspiew R., Gray M., Weston R., Moloney L., Hand K. & Qu L. 2009. *Evaluation of the 2006 Family Law Reforms: Summary report*. Australian Institute of Family Studies: Canberra. p.14

²² Family Court of Australia Inquiries line. Access to the Child Responsive Program. [Phone Call] (Personal communication, 1 March 2010)

²³ Social Inclusion Board. 2010. *A Stronger, Fairer Australia – a new social inclusion strategy*. Department of Prime Minister and Cabinet: Canberra

²⁴ *The Age*. 2 March 2010.

mediation. Anglicare Australia would advocate caution in regard to this particular strategy however it does agree with Chief Justice Bryant that the court is operating on less than complete information.

The *National Framework for Protecting Australia's Children* is an intergovernmental strategy to protect children from abuse and neglect.²⁵ The Framework, which has agreement from all jurisdictions within Australia, advocates for, *inter alia*, the primacy of the best interests of the child in all circumstances. A supporting outcome of the Framework is that all survivors of child abuse have the support and care they need for their safety and wellbeing (Outcome 4). This includes children who are drawn into the country's child protection and legal systems.

A particular strategy for which states and territories have carriage in this outcome is to ensure the enhanced consistency and continuous improvement of child protection services across Australia. It is noted that child protection services cannot respond to nor be accountable for all vulnerable families, However, in this context they might look at the way they work with the families they do have responsibility for. This is another opportunity where the Family Court might engage with states and territories, this time to initiate discussion around uniform reporting and handling of child protection notifications and developing ways and means for the information gathered through these processes to be shared with jurisdictional and federal courts.

It was noted in the AIFS report that existing relationships between the court and child protection services are tenuous to say the least and attitudes underpinning these relations have been entrenched for some time.²⁶ In looking at these relations as part of a greater child protection system, where information might be shared across boundaries and systems the disparate agendas become one. With a common agenda and a single focus- the protection of children- the onus on both parties will be to cooperate. Rather than questioning either party's ability to do their job; the question then becomes 'how the information might best be shared and utilised whilst still maintaining the integrity of the process and the protection of the child and their family?' Coming back to Chief Justice Bryant's comment, in a cooperative system such as this, judicial officers would be better placed to make determinations for a child's best interests as they would have the best possible information available to them.

Recommendation 8

Develop synergies between federal and state and territory systems, including child protection systems, to improve the experience of families who have experienced violence to transition between and successfully navigate family court systems, with specific reference to:

- a. Uniformity in laws or processes for the reporting and handling of child abuse notifications by the police and/or child protection authorities.
- b. Exploring mechanisms for the sharing of information gathered through those processes with jurisdictional and federal courts.

5. Impact on cases of sexual assault within a family violence context of inconsistent interpretation or application of legislation including rules of evidence

Anglicare Australia has no comment on this issue and will defer to experts in this field.

²⁵ Department of Families, Housing, Community Services and Indigenous Affairs. 2009. *National Framework for Protecting Australia's Children*. FaHCSIA: Canberra.

²⁶ Kaspiew R., Gray M., Weston R., Moloney L., Hand K. & Qu L. 2009. *Evaluation of the 2006 Family Law Reforms: Summary report*. Australian Institute of Family Studies: Canberra.

6. Conclusion

Anglicare Australia acknowledges the complex nature of building a system where all are protected however that is what we are seeking. With the triangulation of the family law review and the amalgamation of the family and federal courts and this inquiry, a unique opportunity exists to legitimately reorient the family law system towards the best interests of the child. While taking a theory in practice approach to family law and viewing the redevelopment of the law system through a child focused lens may see drastic, costly changes made to the system, every effort needs to be made to protect children from violence. How the Attorney General will decide to address these issues will be a matter for him and his Department however Anglicare Australia reiterates that any decisions made in regard to these issues should be done so in the context of the current government's reform agenda and in response to the aforementioned family court reviews. Anglicare Australia hopes to see the inquiry call for **a truly child inclusive family law system be established for the ongoing protection and wellbeing of Australian children.**