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FAMILY VIOLENCE AND FAMILY LAW

Time to re-visit the impact of violence on property settlements?

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Introduction

Research has established that family violence is a gendered harm and that Australian women are most likely to experience physical and sexual violence in their home, at the hands of a male partner or ex-partner. Family violence has been high on the political agenda during 2016 and 2017. Rosie Batty used her role as Australian of the Year to bring the issue of violence to the fore in both public and political discussion. The Commonwealth Government made substantial additional funding available to address family violence, and Victoria and Queensland initiated family violence inquiries leading to two significant reports.

However, family violence has been an issue for the family courts for some time. In response to the murder of four year old Darcey Freeman by her father, in 2009 the attorney-general commissioned former Justice Richard Chisholm to conduct a review of the family courts. The focus on family violence in the family law context has largely, and appropriately, been on how the family courts should deal with the presence of family violence when making parenting orders. Parenting orders govern the amount of time and the circumstances in which children spend time with each of their parents, or other people important in their lives. However, family violence can also be relevant to the accumulation of assets and financial resources and to the way these are divided on separation. With a better understanding of the impact of violence, this article suggests it is time to re-visit this issue and legislatively recognise the relevance of family violence in property settlements.

The definition of ‘family violence’

The definition of family violence in the Family Law Act 1975 (Cth) (‘FLA’) has changed a number of times, most recently in 2012 when a new section 4AB was added. This change was made as part of a suite of amendments that sought to improve the response of family courts to family violence and child abuse. Section 4AB (1) now states:

For the purposes of this Act, family violence means 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.

The definition includes a list of examples of behaviour coming within the definition, including denying a family member financial autonomy, unreasonably withholding financial support, isolating a family member from friends or family and deprivation of liberty. The definition also provides that a child is exposed to family violence if the child sees, hears or otherwise experiences the effects of family violence.

Family courts’ approach to parenting orders where there has been violence

While many people who separate do not involve the family courts in their arrangements for children or property, there is a relatively high incidence of family violence reported by those who do file in the courts.

2 Rosie Batty, A Mother’s Story (Harper Collins, 2015).
5 The Family Law Act 1975 established the Family Court of Australia. However under the Act, other courts are also able to hear family law matters. In fact, most family law matters are now heard in the Federal Circuit Court, with complex children’s and property matters heard in the Family Court. In this paper the term ‘Family Courts’ or ‘the Courts’ will be used to encompass these two courts.
7 Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth), most of which came into effect on 7 June 2012.
8 Family Law Legislation Amendment (Family Violence and Other Measures) Act 2011 (Cth).
9 Family Law Act 1975 (Cth) s 4AB(2).
10 Ibid s 4AB(3).
11 Renata Alexander, ‘Family Violence in Parenting Cases in Australia under the Family Law Act 1975(Cth): The Journey So Far – Where are We Now and are We There Yet?’ (2015), 29 International
Family violence has been described as ‘one of the most challenging and confronting issues facing the Family Court and the Federal Circuit Court.’

The most significant reforms in relation to violence and children came into effect in 2006 and 2012. The purpose of the 2006 reforms was, amongst other things, to better protect children from family violence and abuse by making this one of two primary considerations in determining what arrangements were in a child’s best interests. The 2012 reforms made explicit that protecting children from harm and from being exposed to family violence carries greater weight than all other considerations. These changes have been extensively evaluated.

The family courts’ current approach to property matters

The division of property and finances after separation for married couples is governed by Part VIII of the FLA, and for de facto, including same sex couples, it is Part VIIIAB. Part VIII and Part VIIIAB largely mirror one another. In deciding how property and finances are to be divided, the courts must only make a property adjustment where it is just and equitable to do so.

The FLA does provide some structure to this investigation, and requires the family courts to consider the contributions that each party made to acquiring, maintaining and improving their property and finances. The courts also considers factors that might impact on the financial capacity of a party in the future, for example, whether they have the care of young children, their age, income and earning capacity, state of health.

Indeed, ‘any fact or circumstance which, in the opinion of the court, the justice of the case requires to be taken into account’.

Property settlements commonly involve allocating responsibility for debts, determining whether one party will have the family home, how much they have to pay the other party to do so and how superannuation entitlements will be allocated. Many people agree outside of court on the division of their property and finances.

Research has established that women are generally financially disadvantaged after divorce or separation compared with men, particularly if they have care of the children. A party’s experience of family violence can put them at a further disadvantage when dividing property and ‘the indications are that women settle for less than they are entitled to in material terms in an attempt to secure their own and their children’s safety.’ This is less the case when women have access to court services and legal assistance.

Violence and contributions

Since the decision of Kennon, the courts have been able to take family violence into account in property matters when assessing the relative contributions of the parties under s 79(4)(c). Previously, the Family Court suggested that there was only a limited place for the consideration of family violence under a ‘no fault’ based regime. Scholars argued that this reasoning was a way of silencing family violence. They argued that although introduction of the FLA in 1975 removed fault as a ground for divorce, this did not mean that ‘fault’ was not relevant to family law disputes, such as property settlement.

The court in Kennon limited the circumstances when family violence would be taken into account where:

20 Ibid ss 75(2)(o), 90SF(3)(r).
21 Qu, Weston, Maloney, Kaspiew and Dunstan, Post-Separation Parenting, Property and Relationship Dynamics after Five Years, Australian Institute of Family Studies, Melbourne, 2014.
23 Sheehan and Smyth above n 22, 111.
24 Kennon v Kennon (1997) 139 FLR 118.
25 This has been extended to the equivalent section, s90SM applying to de facto relationships, see eg Baranski & Baranksi (2012) FamCAFC 18.
27 Behrens above n 26; Middleton above n 26.
28 Behrens above n 26.
… there is a course of violent conduct by one party towards the other during the marriage which is demonstrated to have had a significant adverse impact upon that party’s contributions to the marriage, or, put the other way, to have made his or her contributions significantly more arduous than they ought to have been…

Their honours in Kennon noted that this argument could only be made in a ‘narrow band of cases’. Indeed, an analysis of subsequent cases demonstrates that the Kennon argument has not been widely used. In a 2013 study, Eastal et al examined 57 first instance judgments and concluded that only 42 per cent of applications for a Kennon adjustment were successful. They argue that this is in part because of the complexities and ambiguities of the Kennon criteria. These scholars call for the explicit legislative recognition of the impact of family violence on contributions.

While Kennon has generally been accepted, Federal Magistrate Brewster has expressed the view that Kennon is not binding because the comments in Kennon were merely obiter dicta. He stated that ‘contributions are to be measured in absolute terms and not weighed by considerations of arduousness, whether caused by domestic violence or otherwise.’ Some scholars have likewise been critical of the principle in Kennon because it focuses on the victim’s actions rather than those of the perpetrator.

Violence and future needs

The impact of family violence in property adjustments could also be reviewed when future needs are assessed.

Scholars have identified that there is no reason that family violence could not currently be taken into account in determining any property alteration arising from the parties’ future needs. For instance, the consequences

29 Kennon (1997) 139 FLR 118, 140 (Fogarty and Lindenmayer JJ).
30 Ibid 141.
32 Ibid 7.
33 Ibid 25; Middleton above n 26.
34 Poloniou v York (2010) FamCAFC 228; Whelan & Whelan (2010) FamCAFC 530; Baranski & Baranksi (2012) FamCAFC 18 – which applied to a de facto relationship and considered conduct after separation, that is, not ‘during the course of the marriage’ as referred to in Kennon.
37 When assessing future needs, section 79(4)(a) refers to the consideration of any matter set out in s 75(2) and s 90SM to s 90SF(3) for de facto couples.
38 Sarah Middleton, ‘Matrimonial property reform: legislating arising from family violence such as medication and counselling might be accommodated under health needs. The related inability to gain full time employment due to loss of self-confidence and self-esteem can also be included under a number of the factors addressing capacity for future employment. However, this has not generally been the practice. It is unclear why. The application of these future needs could also take greater account of lost opportunity costs, labour market conditions and the difficulties facing those who wish to re-enter the workforce.

Future change in the family courts’ approach

These suggestions for reform have been raised before. In its 2010 Consultation paper, the Australian Law Reform Commission recommended that the provisions of the FLA relating to property adjustment be amended to expressly refer to the impact of violence on past contributions and on future needs. The impact of family violence on property adjustment has been included as a specific Term of Reference in the 2017 Parliamentary Inquiry into the family law system, leading to renewed discussion of this issue, informed by a better understanding of the consequences of family violence. However there is a divergence of opinion about this reform, demonstrated by the views expressed in public submissions to the Inquiry.

Conclusion

39 Family Law Act 1975 (Cth) ss 75(2)(a), 90SF(3)(a).
40 For example, Ibid ss 75(2)(b), 90SF(3)(b).
43 House of Representatives, Standing Committee on Social Policy and Legal Affairs, ‘Parliamentary Inquiry into a better family law system to support and protect those affected by family violence’, <http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Terms_of_Reference>. Term of Reference 4: how the family law system can better support people who have been subjected to family violence recover financially, including the extent to which family violence should be taken into account in the making of property division orders.
44 Submissions to Parliamentary Inquiry, for example, Law Council of Australia Submission No 85, Professor Belinda Fehlberg, Melbourne Law School submission no 106 <http://www.aph.gov.au/Parliamentary_Business/Committees/House/Social_Policy_and_Legal_Affairs/FVlawreform/Submissions>.
children’s matters has been the subject of reform, the impact of family violence on the economic outcomes of separation has not. The adjustment of property and finances on separation can be influential in determining the ongoing financial prosperity, or otherwise, of victims of family violence, as well as their children.

The family courts play an important role, both for those applying to the court and those negotiating ‘in the shadow of the law’, in determining the financial position of separating parties. Negotiated settlements are influenced by the decisions and the approach of the family law courts. With a better understanding of the ramifications of family violence, including the economic consequences, it is time to re-visit the approach of the family courts to violence and property matters.

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**Student activities**

1. In your own words describe what you think family violence relates to.
2. What has generally been the focus of the family courts in relation to family violence.
3. Briefly describe the purpose of the 2006 and 2012 changes to the *Family Law Act 1975* (Cth)
4. What are the main considerations by the family courts in relation to property settlements?
5. Why do you think women might settle for less in property settlements?
6. What have been the consequences of the Kennon case?
7. Discuss the arguments for and against the inclusion in the *Family Law Act 1975* (Cth) of a provision that explicitly requires consideration of the impact of family violence when dividing property after separation?
8. When do you think family courts should consider the impact of family violence?
   a) When the family courts are assessing the contributions each party has made to the acquisition and maintenance of their assets?
   b) When the family courts are assessing the future needs and financial resources of each party?
   c) Both of the above? Give your reasons.
9. Why do you think family violence reform has been successful in relation to parenting orders, but not property adjustment orders?
10. What is the reasoning that suggests that referring to family violence in property orders reintroduces fault? Do you agree?
11. The article states that many family law disputes are settled without going to court. If the legislation changes and family violence is explicitly considered in property orders, do you think it will make a difference to disputes negotiated in the ‘shadow of the law’?
12. For women who are escaping domestic violence, what might be some of the barriers in pursuing a fair property settlement?

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ABORTION LAW IN AUSTRALIA

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Introduction

The debate about abortion draws out different perspectives with respect to when life begins, the importance of the autonomy of women and the economic and social impact of having children. Despite the different philosophical and moral perspectives, for almost 200 years the Australian legal position was clear. Abortion was prohibited and was a criminal offence.

However, in the past three decades the law has changed. In many states and territories, an exception was developed at common law or incorporated into legislation. In the last decade, some state and territory parliaments have gone further and passed specific legislation to decriminalise abortion. Decriminalisation has been justified on the basis that the criminalisation of abortion was made in an earlier era,7 when women had limited moral and legal authority to make decisions about their own bodies and property.2 Those supporting decriminalisation have also argued that criminalisation did not stop women having abortions; it merely drove the practice underground and put women’s lives at risk.3

The last two years has seen a renewed push around Australia to further decriminalise abortion. Yet, while this year the Northern Territory successfully passed legislation which decriminalised abortion,4 last year in New South Wales and Queensland law reform proposals failed.5 This article provides an update on the existing law and highlights the increasingly divergent legal approaches used to regulate abortion around Australia.

Different legal approaches to abortion

This section explains the two main legal approaches to abortion in Australia; criminalisation and decriminalisation. Where harm is caused to a foetus that is capable of being born alive,6 or has been born alive7, different laws apply and these are not considered here.

Criminalisation of abortion

Making an activity a crime is a means by which society stigmatises behaviour. It identifies certain actions as serious moral wrongs, and seeks to deter individuals from engaging in those activities through punishment, either through fines or imprisonment.

The criminalisation of abortion in Australia has its roots in English law. The first statutory provisions in England which made abortion illegal were passed in the early 19th century.8 The Australian colonies adopted these laws either implicitly through the reception of English law,9 or explicitly through the criminal legislation enacted in the colony.10

Although each of the Australian states and territories has the power to pass its own criminal laws, including the criminalisation of abortion, the shared English roots have meant that the criminalisation of abortion was achieved in broadly similar terms. Generally, an abortion is the act of intentionally bringing about a miscarriage, either through the ingestion of any drug or through the use of an instrument.11 Although there are some exceptions, the mother and any person assisting the mother, such as a health professional or person supplying or procuring the drug, could also have been charged.12

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1 Second Reading Speech, Abortion Law Reform (Miscellaneous Acts Amendment) Bill 2016 (NSW), (11 August 2016, (Faruqi).
2 Second Reading Speech, Access to Reproductive Health Act (Medical Terminations) 2013 Bill (Tas) 2013; 2.
3 Second Reading Speech, Access to Reproductive Health Act (Medical Terminations) 2013 Bill (Tas) 2013, 1-2.
4 Termination of Pregnancy Law Reform Act 2017 (NT).
5 Abortion Law Reform (Miscellaneous Acts Amendments) Bill 2016 (NSW); Abortion Law Reform (Woman’s Right to Choose) Bill 2016 (Qld); Health (Abortion Law Reform) Bill 2016 (Qld).
6 This is captured by the rules which govern late term abortions where the foetus is in utero but is capable of being born alive and is called ‘child destruction’. See Natasha Cica ‘Abortion Law in Australia’ (Parliamentary Library, Commonwealth of Australia, No 1 1998-99).
7 This is captured by State and Territory laws on homicide. See Ibid, 32.
8 See Natasha Cica, Above n 5, 3. In particular references to Lord Ellenborough’s Act 1803, followed by Lord Landsdowne’s Act (1828), and Offences Against the Person Act 1837 (UK), Offences Against the Person Act 1861 (UK)
9 Australian Courts Act 1828 (UK).
10 For eg Criminal Code Act 1983 (NT) ss. 172, 173; Criminal Code Act 1924 (Tas) ss 51(1), 134, 135; Criminal Law Consolidation Act 1935 (SA) ss. 81, 82; Criminal Code Act 1899 (Qld) ss. 224-226; Crimes Act 1900 (ACT) ss. 42-44; Crimes Act 1990 (NSW) s 62 – 84; Criminal Code 1902 (WA) s 199; Crimes Act 1958 (Vic) ss 65, 66.
11 For eg, see Crimes Act 1990 (NSW) s82 – 84.
12 For eg, see Crimes Act 1990 (NSW) s 85.
A limited decriminalisation of abortion through exceptions

The shift from criminalisation to decriminalisation in Australia was prompted by English common law developments. In the 1930s, the English decision of R v Bourne created an exception to the crime of abortion. Abortion was lawful where it was necessary to preserve the life of the mother. This was interpreted by subsequent English cases to include not only imminent and lethal danger to the mother’s life, but also a danger to her physical and mental health. This English precedent was first explicitly applied in Australia in 1969 in the Victorian decision of R v Davidson (the Menhennitt ruling). In that case, Menhennitt J held that ‘an abortion will be lawful if the accused held an honest belief on reasonable grounds that the abortion was both ‘necessary’ and ‘proportionate.’ The exception was not limited by the age of the foetus or who carried out the abortion. As other states applied the Menhennitt ruling, the scope of the justification was expressed in slightly different ways. For instance in 1971, Levine J established that the Menhennitt ruling was good law in NSW. Levine J went on to hold that an abortion would be lawful in NSW if there was ‘any economic, social or medical ground or reason upon which a doctor could base an honest and reasonable belief that an abortion was required to avoid a ‘serious danger to the pregnant woman’s life or to her physical or mental health’’. So while the ‘necessary and proportionate’ test from the Menhennitt ruling was affirmed, the definition of serious danger was widened. The decision also was authority for the proposition that the exception only applied where the abortion had been carried out by a medical professional.

The decriminalisation of abortion through common law exceptions remains the legal approach NSW and Queensland. While the common law exception does remove some legal barriers to being able to access an abortion, the common law is silent on the outer limitations of the exceptions. This silence fails to give doctors operating in the shadow of the law clear guidelines about when the exception will apply. The risk of criminal prosecution creates uncertainty for doctors, which potentially reduces the number of doctors willing to provide these services. In turn, this creates practical barriers to women wishing to lawfully terminate a pregnancy.

To provide a more certain legal foundation, South Australia and Western Australia passed legislation that codified this common law. This is a limited form of decriminalisation, as in both these states an abortion that is carried out beyond the exception is still a crime. In 1969, South Australia passed amendments to its criminal code which permitted medical abortions provided that two doctors agreed either that the pregnancy risks the physical or mental health of the mother, or that the child is likely to have a serious disability. One doctor can carry out an abortion where it is necessary to save the mother’s life. Since 1998 in Western Australia, terminations have been lawful provided they are carried out according to the Health (Miscellaneous Provisions) Act 1922 (WA). This act permits women to access an abortion where she ‘consents’ (which requires attendance at counselling) up until 20 weeks. An abortion can be carried out after that time only with the consent of two approved medical practitioners in an approved facility.

Regulating abortion as a ‘health issue’

The Australian Capital Territory, Northern Territory, Victoria and Tasmania have taken a new approach to decriminalisation. They have entirely removed abortion as a criminal offence and instead regulate abortion as a medical procedure. The rest of this article will focus on analysing three important issues emerging in these states and territories.

13 R v Bourne [1938] All ER 615. For discussion see K Petersen ‘Abortion Regimes’ (Dartmouth Publishing, Aldershot, 1993); See Natasha Cica, Above n 5, 4-5.
18 R v Wald (1972) 3 DCR (NSW) 25, 29.
19 R v Wald (1972) 3 DCR (NSW) 25.
Distinctions based on the stage of the pregnancy

These states and territories have, broadly speaking, legalised abortion in the early stages of pregnancy when the procedure is overseen by health practitioners. At later stages of pregnancy however, the regulations are more onerous.

In the ACT, a pregnancy can be lawfully terminated at any time, although in practice it is ‘generally 16 weeks’. An abortion must be carried out by a doctor in an approved medical facility.

In Victoria, an abortion is available up to 24 weeks, provided that it is carried out by a medical practitioner. It is possible for a doctor to carry out an abortion after 24 weeks if it is ‘reasonable in the circumstances’ (including the woman’s medical and future physical, psychological and social circumstances), and if another doctor has been consulted and agrees.

In Tasmania, an abortion can be carried out by a doctor up to 16 weeks with the woman’s consent. It is possible for a doctor to carry out an abortion after 16 weeks if two doctors agree that it is ‘necessary’ for the woman’s health.

In the NT, an abortion is permitted by a qualified medical practitioner or health practitioner up to 14 weeks. An abortion is permitted between 14 and 23 weeks by a medical practitioner where two doctors agree. An abortion can be carried out at any time if the life of the mother is at risk.

Other than in the Australian Capital Territory, these states and territories make clear distinctions according to the stage of the pregnancy. The involvement of the medical profession in the later stages of pregnancy has been justified on the basis that there are different health needs and dangers involved with termination in later stages of pregnancy. As most pregnancies in Australia are terminated in the first trimester, there has been much public criticism of this approach.

Conscientious objections and a duty to refer

A second important issue is the doctor’s ability to make a conscientious objection. Where a woman wishes to terminate her pregnancy, does the doctor have a right to refuse to carry out the termination? If a doctor is allowed to conscientiously object, do they have a duty to refer a woman to another doctor who does not have a conscientious objection? The failure of a doctor to refer or provide information so that the woman may follow her preferred option places a practical barrier to accessing abortion. The failure to refer may impact more harshly on women who have fewer options for medical services.

In Western Australia and the Australian Capital Territory, there is no obligation to carry out an abortion therefore doctors can exercise a conscientious objection. These jurisdictions to not establish a duty to refer where there has been a conscientious objection.

However, in Tasmania, Northern Territory and Victoria, there is a positively stated duty to perform an abortion where it would save a woman’s life. Only where there is no health risk to the mother are doctors permitted to exercise a conscientious objection. Where a doctor does exercise a conscientious objection, they nonetheless have a duty to refer women to others who will assist them to terminate the pregnancy.

Safe zones

Safe zones have been created in the Australian Capital Territory, Tasmania and the Northern Territory around facilities where abortions are carried out. This has been necessary as protesters have blocked and picketed facilities, or photographed women entering the facilities with the intention to deter women from carrying out abortions. This has prompted the need to create protections for women entering and exiting facilities.

In the Australian Capital Territory, the Minister can declare an area of 50 metres or less around a medical facility ‘a protected area’. In Tasmania and the Northern Territory the zone is 150m. The legislation in these states and territories protects individuals by prohibiting the ‘harassment, intimidation, interference with, threatening or obstruction’ in these zones.
Victoria’s legislation is silent on the creation of ‘safe zones’.

**Conclusion**

Abortion is regulated in different ways around Australia. There has been a recent reform push to better align approaches to abortion law. This article explains, compares, and contrasts the different approaches. In doing so, it flags some directions in which legislation may continue to be developed.

**Student activities**

1. What does the debate relating to abortion revolve around?
2. What is an abortion?
3. What exception to abortion laws did *R v Bourne* establish? How was this precedent later extended?
4. In what way was the *R v Bourne* precedent adopted in Australia?
5. In your own words explain how the Menhennitt ruling was widened in 1971.
6. What condition did Levine J place on the widening of the Menhennitt ruling?
7. How does the common law approach of NSW and Queensland place barriers on women wanting to have an abortion?
8. What is the meaning of the term codified common law?
9. What approach have the Australian Capital Territory, Northern Territory, Victoria and Tasmania taken?
10. Explain the law relating to abortions in your state or territory.
11. Do you think that the safe zones unnecessarily interfere with a right to protest? In your response refer to the article that can be found using the Internet address below about the issue of safe zones and the implied constitutional protection of freedom of political communication. [http://theconversation.com/tasmanias-abortion-protest-law-is-probably-constitutionally-valid-20784](http://theconversation.com/tasmanias-abortion-protest-law-is-probably-constitutionally-valid-20784)

12. Do you think the legal requirement should vary depending on the stage of the pregnancy? Why?
13. How might requiring doctors who have a conscientious objection to refer a woman seeking an abortion, support equality between women? In particular, refer to equality between women in rural and remote Australia, and those in major cities and urban centres?
14. One criticism of the new legal reforms is that women continue to be denied the right to autonomy of decision-making over their bodies. In other words, the oversight of the criminal justice system has merely been replaced by the medical system. Do you agree? What are the advantages and disadvantages of regulation of this issue by the medical profession, rather than the criminal justice system?
15. One of the criticisms of the different legal approaches around Australia to abortion is that it leads to ‘abortion tourism’. That is, women travel to more permissive states or territories to have their abortion lawfully carried out. What would be some of the benefits of a uniform legal approach to abortion across Australia? What would be some of the disadvantages?