

THE INTERSECTIONALITY OF HUMAN RIGHTS AND FAMILY VIOLENCE IN THE STATE OF VICTORIA

This research piece's source is found in the pain and fear of all of who have endured the scourge that is family violence and is dedicated to all my colleagues on the Victim Survivors Advisory Council (VSAC) and to my son, Alexander

Liana Papoutsis

Deakin University, Melbourne

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SECTION ONE- INTRODUCTION

Applying a Human Rights Framework to Family Violence in the State of Victoria and why this is important

The very essence of family violence commands that acts of family violence violate a person's human rights. Whilst this may appear to be a simple connection, a consistent application of a human rights framework is not applied to the issue of family violence in Victoria, despite a

small, token recognition by the Victorian State Government that family violence is a systemic human rights issue.¹ The problem which arises is that the importance of human rights within the family violence context is diminished as is the efficacy and potential impact of United Nations (UN) human rights instruments that relate to family violence and to which Australia and its States and Territories are tethered to. This is significant, as international instruments and law have the capacity to create social and legal norms which the State of Victoria in its quest to confront family violence can crystallise and utilise. This research project examines the intersectionality of human rights and family violence in the State of Victoria and posits that the family violence narrative lacks a human rights framework and that the family violence legislation in the State of Victoria does not comprehensively engage with human rights norms.² Findings demonstrate that in the international realm, human rights instruments have given shape to emerging norms which implicate the State in protecting women and children from family violence, however, studies specific to the intersectionality of human rights and family violence in the State of Victoria have not yet been conducted whilst research pertaining to this nexus is emerging internationally.

With the landing of the Royal Commission into Family Violence in March, 2016³ in the State of Victoria, talk pertaining to family violence has increased exponentially within the community, the media, specialist family violence service providers, health professionals, the judicial system and across State government agencies such as Victoria Police. The State of Victoria under the Andrews government is currently in the midst of unprecedented family violence reform across service delivery, judicial responses, policing, legislation and policy implementation. However, amidst this flurry of activity, the obligation of government and other public authorities to protect women and children from family violence as indicated by international human rights law is not part of the narrative. The methodology employed in this research project include a combination of a broader philosophical justification and critical theory and the method employed chiefly examines human rights instruments ratified by Australia which relate to family violence against the background of the family violence

1 Victorian Human Rights and Equal Opportunity Commission, '*Guidelines launched to help family violence service providers prevent discrimination upon Royal Commission's recommendation*', 19 June 2017, <<https://www.humanrightscommission.vic.gov.au/home/news-and-events/commission-news/item/1579-guidelines-launched-to-help-family-violence-service-providers-prevent-discrimination-upon-royal-commission-s-recommendation>>, accessed 09 September 2017

2 *Ibid.*

3 Victoria State Government, Royal Commission into Family Violence, 2016.

framework in the State of Victoria. The findings therefore, conceivably will have the capacity to inform policy and law-makers in Victoria as to why and to what extent international human rights instruments can be utilised to tackle family violence and demonstrate the significant gap in the existing literature of the nexus of human rights and family violence.

SECTION TWO: Family Violence, what's in a name?

Family violence is a gendered crime in that it involves women excessively and a human rights violation. Whilst not all family violence is perpetrated by men against women, this research specifically observes men as perpetrators with women as victims, as historically, gender inequality has meant that women are affected disproportionately by family violence where the perpetrators overwhelmingly identify as male. At the centre of family violence lie power and control where perpetuating acts of family violence is a choice the perpetrator makes.⁴ It is a crime which is widespread, serious and driven by gender discrimination⁵ where rigid stereotypes of gender roles are strictly adhered to, where violence against women is widely tolerated and where disrespect towards women highlights aggression which establishes the vital social setting for violence against women and children.

Every week in Australia, one woman is murdered by her current or former partner and every single day, police around Australia deal with an average of six hundred and fifty seven family violence matters involving violence against women and children.⁶ In the State of Victoria for the year ending, 31 March 2016, there were 76,529 family violence incidents reported and attended to by police, a 10% increase on the previous year with 78% of the victims being female and 22% male.⁷ It is difficult to dispute that family violence therefore, is a gendered crime.

SECTION THREE: International Human Rights Instruments and Family Violence.

What do we know?

⁴United Nations, 'Convention on the Elimination of all forms of Discrimination against Women', 1979, www.ohchr.org/Documents/ProfessionalInterest/cedaw.pdf accessed 21 July 2017.

⁵Ibid.

⁶C. Blumer, 'Australian police deal with a domestic violence matter every two minutes', *ABC News*, 05 June 2015, www.abc.net.au/news/2015-05-29/domestic-violence-data/6503734 accessed 21 July 2017.

⁷Crime Statistics Agency, 'Family incidents, year ending 31 March 2016', 201, State Government of Victoria, < <https://www.crimestatistics.vic.gov.au/crime-statistics/latest-crime-data/family-incidents> > accessed 29 August 2017

The question of family violence as a human rights issue has been examined by a number of scholars who have looked at how international human rights instruments have the potential to influence the family violence narrative and legislative framework in countries around the world. In the Australian context, there is a place for the Commonwealth of Australia and all of its state and territorial jurisdictions to challenge the condoning of violence against women and children, to question gender stereotypes and roles, to promote women's independence and decision-making and to strengthen positive, equal and respectful relationships. These are crucial steps in eliminating family violence. Schubert, Croft and Bird argue that in a nation such as Australia, which is built on liberal democracy featuring individuality, capitalism and self-reliance via opportunity; gender inequality often precludes women from many opportunities and attainment of self-reliance. Women's human right of freedom from violence therefore is challenging for policy and law makers alike as the entrenched gender inequality is a prime cause of family violence.⁸ Despite the challenges individual countries such as Australia may face, international human rights law indicates unreservedly that preventing violence against women and children is an obligation of governments and other public authorities and bodies.⁹ There is also a place for governments to protect women and children who have endured family violence and to employ the many international instruments, such as the Universal Declaration on Human Rights (UDHR) which unequivocally state in their most basic of premises, that everyone has the right to life and security.

Talk of contemporary human rights arose from the newly formed multilateral institution of the United Nations (UN) after World War II. Levesque argues that the UN Charter calls for support of domestic human rights and due to the nature of the UN charter, human rights have become by default an international issue. For example, Levesque cites Articles 55 and 56 of the UN charter which outline respectively, that the UN, 'shall promote...universal respect for human rights', and member States will assist the UN in attaining human rights goals.¹⁰ By 10 December 1948, the discourse on human rights was further refined at the UN with the Universal Declaration of Human Rights (UDHR). Article 3, where everyone has the right to life, liberty and security of person, Article 4 where no-one shall be held in slavery or servitude and Article 5 where no-one shall be subjected to torture or to cruel, inhuman or

8 L Schubert, P Crofts & K Bird, "Good things Come to Those Who Wait", in SM Asay, J. Defrain, M Metzger, B Moyer eds., *Family Violence from a Global Perspective*, Sage Publications, 2014, pp. 215-234

9 B Meyersfield, *Domestic Violence and International Law*, Hart Publishing, US, 2010.

10 RJR Levesque, *Culture and Family Violence*, American Psychological Association, Washington, 2001, p. 126

degrading treatment of punishment¹¹ demonstrate an initial expression of a broad human rights framework. The norms which have emerged from the UDHR, including subsequent Conventions and Protocols, have, in an international law context acknowledged that acts of family violence are a violation of human rights and place an onus on the State to protect those affected.

An examination of the International Covenant on Civil and Political Rights (ICCPR) reveals an emphasis placed on the family which has implications for family violence. Article 23 bids that the family ought to be protected, Article 17 seeks that the family not be interfered with, whereas Article 24 demands that children's rights to safety within the family unit are paramount.¹² Australian Law Reform Commission researchers emphasise that the aforementioned ICCPR Articles present tensions when tackling family violence. Where women and children are endangered by family violence, the expectation would be that the family as defined in the ICCPR would need to succumb to scrutiny as per the human rights afforded in the UN charter and in particular, the UDHR.¹³

The early 1980s saw the human rights discourse attempt to grapple with the issue of violence against women with The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW). Bunch and Merry argue that CEDAW linked violence against women and children with the notion that States are to be held responsible for abuses exacted against women and children in the private sphere. Both scholars agree that CEDAW was a catalyst for new cultural norms which had the potential to challenge the status quo with regard to the law and societal attitudes towards family violence.¹⁴ Culture is not static, nor is it homogenous and it can embrace change.

11 United Nations, 'United Nations Declaration of Human Rights', UDHR, 10 December 1948, <<http://www.un.org/en/universal-declaration-human-rights/>>, accessed 02 August 2017

12 United Nations, 'International Covenant on Civil and Political Rights', 16 December, 1966, <<https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>>, accessed 02 August 2017.

13 Australian Law Reform Commission, 'Family Violence-A National Response.' Commonwealth of Australia, 2010, p. 117.

14 C Bunch, 'Women's Rights as Human Rights: Toward a revision of Human Rights', Human Rights Quarterly, 1990.

SE Merry, 'Constructing a Global Law-Violence against Women and the Human Rights System', Law & Social Enquiry, 2003, pp. 941-977.

The advent of the 1990s gave rise to UN instruments which specifically tackled family violence. McGuigg¹⁵ and Morgaine¹⁶ maintain that the 1993 Declaration on the Elimination of Violence against Women (DEVAW) was pioneering in recognising family violence as a human rights issue and the recognition was sealed in 1994 with the appointment of the first ever Special Rapporteur on Violence against Women. McGuigg contends that these developments acknowledged for the first time that prevention of violence against women both in the public and the private spheres was clearly the responsibility of the state.¹⁷ Morgaine reinforces that the 1995 Beijing Declaration brought violence to the forefront as a human rights issue.¹⁸ Dierks deems the Beijing Declaration of considerable importance as for the first time States were obligated to conceive of national action plans to confront family violence.¹⁹ Australia released its national action plan to reduce violence against women and their children in 2010,²⁰ whose mandate is to make perpetrators accountable across all jurisdictions and systems, to develop an effective response to children affected by family violence, to offer greater support and choice for victim-survivors and to develop early intervention and prevention strategies in order to reduce the prevalence of family violence.

Nancarrow argues that Australia's federal and state system hinders tackling family violence nationally due to the differences in policies, law and even the definition of family violence across the various state and territorial jurisdictions.²¹ Nancarrow concedes this as a problem, but argues that the latter international human rights instruments have strengthened the narrative on family violence as a human rights violation. However, Nancarrow recognises

15 RJA McGuigg, 'Domestic Violence as Human Rights Issue', *The European Journal of International Law*, Vol. 26 no 4, 2015, pp.1009-1025.

16 K Morgaine, 'Domestic Violence and Human Rights: Local Challenges to a Universal Framework', *Journal of Sociology & Social Welfare*, December 2006, Volume XXXIII Number 4, pp. 109-129

17 McGuigg, op. cit, pp.1009-1025.

18 Morgaine, op. cit, pp.109-129.

19 BW Dierks, 'The UN Fourth Conference on Women', *NWSA Journal*, Vol. 8, Issue 2, Summer 1996, accessed EbscoHost.

20 Department of Social Services, 'The National Action Plan to reduce violence against women and their children 2010-2022', <<https://www.dss.gov.au/women/programs-services/reducing-violence/the-national-plan-to-reduce-violence-against-women-and-their-children-2010-2022>> accessed 05 August 2017.

21 H Nancarrow, 'Time is of the Essence Progress on the National Council's Plan for Australia to reduce violence against women and their children,' *The University of New South Wales journal*, Vol. 33, Issue 3, 2010 pp. 836-853, EbscoHost, accessed 05 August 2017.

along with Meyersfield,²² that a narrative alone cannot lead to legislation and policies which enshrine human rights and provide the protection owed to women and children who have endured family violence.²³ A look at the State of Victoria is a case in point.

SECTION FOUR: Family Violence and the State of Victoria

The Preamble of the *Family Violence Protection Act 2008* (Vic) unequivocally states in section, (b), ‘that family violence is a fundamental violation of human rights and is unacceptable in any form’.²⁴ The *Family Violence Protection Act 2008* (Vic) defines family violence as behaviour by a person towards a family member of that person if that behaviour is physically or sexually abusive; or is emotionally or psychologically abusive; or economically abusive. Behaviour which is coercive or in any way controls or dominates the family member to feel fear for the safety or wellbeing of that family member or another person or behaviour by a person that causes a child to hear or witness, or otherwise be exposed to the effects of, any of the aforementioned behaviour also constitutes family violence.²⁵ Fittingly, the Act lists a string of human rights violations although they are not presented in a human rights narrative on any scale, but in a narrow legal context.

In its entirety the *Family Violence Protection Act 2008* (Vic) is two hundred and fourteen pages long, however, a reference to human rights is made only once. Whilst the *Family Violence Protection Act 2008* (Vic) is vital in that the State of Victoria has an ethical responsibility to legislate against family violence in order to provide a semblance of protection for victim-survivors and to attempt to make perpetrators accountable, there is no evidence in this piece of legislation that family violence is addressed with the premise that the State is actually required to do so by law. The omission of references to CEDAW and DEVAW and further international instruments such as the Convention on the Rights of the

22 B Meyersfield, *Domestic Violence and International Law*, Hart Publishing, US, 2010.

23 Department of Families, Housing, Community Services and Indigenous Affairs, ‘*The National Council Plan to Reduce Violence against Women and their Children, ‘Back-ground Paper to Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children*’, <<https://www.dss.gov.au/our-responsibilities/women/publications-articles/reducing-violence/national-plan-to-reduce-violence-against-women-and-their-children/background-paper-to-time-for-action-the-national-councils-plan-for-australia-to-reduce-violence-against-women-and-their?HTML>> March, 2009, accessed 15 August 2017.

24 *Family Violence Protection Act 2008*, (Vic), <[http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e9200e23be/083D69EC540CD748CA2574CD0015E27C/\\$FILE/08-52a.pdf](http://www.legislation.vic.gov.au/Domino/Web_Notes/LDMS/PubStatbook.nsf/f932b66241ecf1b7ca256e9200e23be/083D69EC540CD748CA2574CD0015E27C/$FILE/08-52a.pdf)>, accessed 05 August 2017.

25 *Ibid*, p. 12.

Child being incorporated into the *Family Violence Protection Act 2008* (Vic) negate that acts of family violence are human rights violations. To integrate such references would create an unmistakable connection with international human rights instruments and law and create a human rights framework for, in particular, front line responders to family violence, such as police and refuge providers. The current lack of a human rights framework abrogates a human-centred approach which is imperative to victim-survivors of family violence in terms of acknowledgment of their lived experiences and actual needs.

Victim-survivors often articulate that their human rights have been violated. A female victim-survivor submitted the following to Victoria's Royal Commission into Family Violence (RCFV), "*Survivors like me and my children have been deprived of our basic human rights as a direct result of the abuser not being adequately or appropriately controlled...*"²⁶ There has been a call by some family violence service providers in Victoria for a human rights framework to be applied to the issue of family violence,²⁷ however, there is no evidence currently to suggest that there are any moves to employ such a framework. It is telling when victim-survivors can easily identify that family violence acts are a violation of human rights and despite this, the family violence system response in Victoria is not equipped to respond within a human rights framework as it does not have a foundation in a human rights discourse. The lack of a human rights framework in relation to family violence in Victoria and across Australia has also come to the attention of the United Nations.

In June, 2017, the UN Special Rapporteur for Violence against Women, Ms. Simonovic, released her report outlining findings and recommendations for all States & Territories across Australia as per her tour of Australia in February, 2017. Ms. Simonovic stated that, "*the persistence of systemic gender based violence against women even when zero tolerance has been proclaimed on Violence against Women, indicates that Gender Based Violence is deeply entrenched in our still predominantly patriarchal societies and accepted as just the way things are*".²⁸ The first and most significant recommendation made by the Rapporteur was for Australian States and Territories to apply a human rights framework based on at least CEDAW and VEDAW to prevent the rights of women and children. The recommendation asks for human rights to be linked with policies and laws addressing family violence and that

²⁶Victorian State Government, Royal Commission into Family Violence, March 2016, p. 207.

²⁷ Ibid, p. 415.

²⁸ Human Rights Council, D. Simonovic, "*Report of the Special Rapporteur on Violence Against Women, its causes and consequences*", 02 June 2017, p. 18.

an effective human rights mechanism be applied across police, prosecutors, the judiciary, healthcare professionals, non-government organisations and all other services dealing with family violence.²⁹ It is still to be seen if this recommendation will be implemented.

It has not always been the case whereby a human rights framework was not considered in dealing with family violence. In 2008, the Commonwealth and the States were well-positioned to communicate to the community with clear and direct messaging that family violence is indeed a human rights violation, however, unfortunately, the opportunity presented was missed. The opportunity came about with the formation of the National Council to Reduce Violence against Women and their Children which was formed in May 2008 involving all States and Territories. The Council's main scope was to design a national plan to decrease the prevalence and the effects of family violence against women and their children. The terms of reference also provided the Council with the responsibility to consult broadly across the community in order to co-design the National Plan with the relevant stakeholders.³⁰ The sitting Members of the Council acknowledged from the outset that, "*family violence and specifically intimate partner violence... continue to be the most pervasive human rights abuses of women in Australia*"³¹ and that the work to be done in a policy context and the co-design process needed to be undertaken using a human rights lens. As Nancarrow contends, the Council was fully aware that the application of a human rights lens in developing the Plan was necessary if Australia was to comply with its human rights obligations with regard to international law.³² For the first time ever, it looked as if developments in dealing with family violence were going to address international human rights instruments to which Australia was party to. Specifically, these included the United Nations Declaration of Human Rights, the Convention on the Elimination of Discrimination against Women, the Convention on the Rights of the Child, the Declaration on the Elimination of Violence against Women and the 1995 Beijing Platform for Action. The Council had an opportunity to leverage the work done before it in the international human rights space with relation to family violence and contextualise it to a national Plan to combat family violence by applying a human rights framework. This was the time to establish that

29 Ibid.

30 H Nancarrow, '*Time is of the essence: Progress on the National Council's plan for Australia to reduce violence against women and their children*', University of NSW Law Journal, Volume 33, no 3, 2010 p. 836-53.

31 Ibid, p. 837.

32 Ibid.

family violence is a human rights violation and embed it in the evolving family violence narrative as initially acknowledged by the Council.

Regrettably, it was not to be, as the states of Victoria and Tasmania began to drag their feet on a human rights discourse, instead; concentrating on tightening the evidence process for police and criminal justice interventions to bring perpetrators into view for the purposes of higher accountability.³³ It can be argued that at this point the development of the Plan was diverted onto an alternative trajectory and the opportunity for the envisioned human rights framework which was embraced at the outset became lost in the increasing focus on the civil and legal procedures for incidents of family violence. The failure to apply a human rights framework for the way family violence is to be dealt with is not without implications.

With regard to children, for example, Allen argues that submissions made to the Royal Commission into Family Violence stated that numerous statutes in the State of Victoria such as the *Charter of Human Rights and Responsibilities Act 2006* (Vic) unequivocally acknowledge children's rights to safety, including safety from all forms of family violence.³⁴ Despite the presence of such statutes, the vernacular in courts, family violence advertising campaigns, by service providers, lawyers, police and others dealing with family violence victims and survivors does not reflect a human rights discourse and the State's obligation to protect the rights of children as per the United Nations Convention on the Rights of the Child,³⁵ which is a human rights instrument. As Kelly and Mullender argue, the UN Convention on the Rights of the Child in Article 18 outlines that both parents have a co-parenting responsibility for raising their children. This Article, however, entirely dismisses the human rights which should automatically be afforded to children when one of the parents is the perpetrator.³⁶ In Victoria, *The Family Violence Protection Act* (2008) does not automatically include children who have seen or heard family violence on an intervention order with their mother even though it acknowledges an act of family violence to be behaviour by a family member that causes a child to hear or witness, or otherwise be exposed

33 Ibid.

34 State Government of Victoria, '*Royal Commission into Family Violence*,' Vol II, 2016, p.201.

35 United Nations, 'Convention on the Rights of the Child', 1989, <https://www.humanrights.gov.au/convention-rights-child>>.

36L Kelly & A Mullender, '*Complexities and contradictions: living with domestic violence and UN Convention on Children's Rights*,' The international Journal of Children's Rights, Issue 8, 2000, pp. 229-241.

to the effects of, family violence acts. Is it not a basic human right for children to be protected from further family violence? When mothers need to fight to have their children on the same Intervention Orders as themselves is an appalling reflection of a system that is out of touch with the rights of children. There is no value in having ratified the UN Convention on the Rights of the Child when children are not heard or protected against a background of family violence.

Manjoo (2012)³⁷ and Simonovic (2017)³⁸ have found that the failure to coherently raise violence against women and children as a human rights issue is a significant concern which leads to insufficient responses by government bodies and the family violence sector which in turn leads to poor social and economic outcomes for victim-survivors. Data pertaining to inadequate and substandard long-term outcomes for victim-survivors are also identified in the Victorian State Government's Royal Commission into Family Violence.³⁹ It is these contradictions and anomalies which make a clear application of a human rights framework for family violence a challenge but also a necessity.

CONCLUSION

A human rights framework is not necessarily applied to the scourge which is family violence and as such, family violence continues to be dealt with in a legal and clinical context. The current state of play therefore, diminishes the significance of human rights and the international human rights obligations which Australia and its states and territories are party to, which could ordinarily protect those who are victim-survivors of family violence.

The intersectionality of human rights with family violence is downplayed, if not mostly dismissed, as the emphasis it should be afforded is not. Despite the multiple international human rights instruments available to policy and lawmakers and ratified by the Commonwealth of Australia, these are not part of a considered response to family violence in the State of Victoria. Clarifying the significance of family violence as a human rights issue is important so as family violence can readily be identified as a human rights violation and whereby human rights discourse becomes a natural part of the family violence patois, hence

37 Australian Human Rights Commission, '*Australian Study Tour Report-Visit of the Special Rapporteur on Violence against Women*,' 2012, < <https://www.humanrights.gov.au/our-work/family-and-domestic-violence/publications/australian-study-tour-report-visit-un-special>>, accessed 05 August 2017.

38 D Simonovic, '*OHCHR-End of Mission Statement to Australia*', Feb, 2017, accessed 05 August 2017.

39 Victoria State Government, '*Royal Commission on Family Violence*', 2016.

leading to the emergence of new norms in the State of Victoria in its endeavour to confront and eliminate family violence.

The implications are that when the explicit connection between human rights and family violence is overseen policy and law making are unnecessarily affected in a negative manner. Most importantly, family violence deserves the significance of human rights and a human rights framework which is already embedded in international law and whilst the literature now conveys this as a given, more research is required as to why international human rights instruments are not used in a practical sense to protect women and children. There is also the question of why human rights, which are broadly understood by the Victorian population as something one possesses by the very nature of being human, are not applied to family violence awareness campaigns whereby the nexus between family violence and human rights can and should be highlighted.

What the literature does demonstrate is that whilst generally, family violence advocates would be unsatisfied with the family violence system which victim-survivors are forced to navigate, new norms have emerged from international instruments which has ignited a discourse which inextricably links family violence to human rights despite the perceived complexities. The question of applying a human rights lens on family violence in a meaningful way is complicated. There is a general understanding of state obligations for those affected by family violence, however, the reality is that the research exposes a gap which demonstrates that governments can choose to recognise family violence as a human rights violation but are challenged by patriarchy, culture and political will. On balance, the association of human rights and family violence is not such a contradictory or outlandish notion and one which has the potential to revolutionise the way governments and society as a whole deal with the atrocious, cruel and vile experience which is family violence.

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