



Australian Government

Australian Law Reform Commission



NSW  
Law Reform  
Commission  
Justice & Attorney General

# Family Violence —A National Legal Response

FINAL REPORT

## Volume 1

ALRC Report 114  
NSWLRC Report 128

October 2010

**This Report reflects the law as at 1 September 2010.**

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Australian Government

Australian Law Reform Commission

The Hon Robert McClelland MP  
Attorney-General of Australia  
Parliament House  
Canberra ACT 2600

8 October 2010

Dear Attorney-General

***Review of particular legal frameworks to improve safety of women and their children***

On 17 July 2009, you issued Terms of Reference for the Australian Law Reform Commission, in association with the New South Wales Law Reform Commission, to undertake a comprehensive review of specified family violence laws and legal frameworks to improve the safety of women and their children.

On behalf of the Members of the Commission involved in this Inquiry—including Magistrate Anne Goldsbrough and in accordance with the *Australian Law Reform Commission Act 1996*, I am pleased to present you with the final Report on this reference, *Family Violence — A National Legal Response* (ALRC 114, 2010). Owing to the enormous breadth and complexity of the subject matter, and the consequent length, this Report is presented in two volumes.

Yours sincerely,

**Professor Rosalind Croucher**  
**President**





**NSW Law  
Reform Commission**  
Justice & Attorney General

## **Letter to the Attorney General**

To the Hon J Hatzistergos MLC  
Attorney General for New South Wales

Dear Attorney

### **Family Violence – A National Legal Response**

We make this report pursuant to the reference to this Commission received 14 July 2009.

The Hon James Wood AO QC

**Chairperson**

October 2010



# Contents

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## Volume 1

<b>Terms of Reference</b>	<b>11</b>
<b>List of Participants</b>	<b>13</b>
<b>List of Recommendations</b>	<b>17</b>
<b>Executive Summary</b>	<b>49</b>
<b>Part A – Introduction</b>	<b>83</b>
<b>1. Introduction to the Inquiry</b>	<b>85</b>
Background	85
Concurrent inquiries and actions	90
Scope of the Inquiry	98
Processes of reform	104
Overview of the Report	109
Stop Press—VLRC Child Protection Report	114
<b>2. International and Constitutional Settings—The Context for Reform</b>	<b>115</b>
Introduction	115
International instruments	116
Constitutional framework	125
The web of courts in family violence matters	132
Interactions and overlaps	134
<b>3. Framework for Reform</b>	<b>139</b>
Introduction—the reform challenge	139
Principles of reform	140
Framework of reform recommendations	143
Focus of reform	150
<b>Part B – Family Violence: A Common Interpretative Framework</b>	<b>153</b>
<b>4. Purposes of Laws Relevant to Family Violence</b>	<b>155</b>
Introduction	155
Family violence legislation	157
Family law	163
Child protection law	170
Criminal law	174
Victims' compensation	182
Migration legislation	185

<b>5. A Common Interpretative Framework—</b>	
<b>Definitions in Family Violence Legislation</b>	<b>187</b>
Introduction	186
Concepts of family violence	188
Current definitions in family violence legislation	189
Submissions and consultations	201
Commissions' views	234
<b>6. Other Statutory Definitions of Family Violence</b>	<b>249</b>
Introduction	249
Criminal law	250
Family law	265
Victims' compensation	284
Migration legislation	286
Summary and effect of Commissions' overall approach	289
<b>7. Other Aspects of a Common Interpretative Framework</b>	<b>293</b>
Introduction	293
Model provisions reflecting best practice	294
Guiding principles and a human rights framework	295
Purposes	308
Grounds for obtaining a protection order	318
Persons protected	330
<b>Part C – Family Violence and the Criminal Law</b>	<b>343</b>
<b>8. Family Violence and the Criminal Law—An Introduction</b>	<b>345</b>
Introduction	345
Prosecuting federal offences in a family violence context	346
Civil and criminal proceedings	351
Mandatory reporting	359
<b>9. Police and Family Violence</b>	<b>367</b>
Introduction	367
Police-issued protection orders	367
Police duties to investigate and to apply for orders	379
Police powers in dealing with family violence	393
Identifying the 'primary aggressor'	404
<b>10. Bail and Family Violence</b>	<b>411</b>
Introduction	411
Description and purpose of bail	411
Criteria for determining bail	412
Bail presumptions	413
Bail conditions and protection order conditions	420
Protection through bail conditions or a protection order	422
Informing victims about bail decisions	425

<b>11. Protection Orders and the Criminal Law</b>	<b>433</b>
Introduction	433
Concurrent proceedings under family violence laws and the criminal law	433
Protection order conditions and the criminal law	461
<b>12. Breach of Protection Orders</b>	<b>509</b>
Introduction	509
Aid and abet provisions	509
Public justice offences	520
Consent to breaches	526
Charging for breach of protection order rather than underlying offence	533
Penalties and sentencing for breach of protection orders	543
<b>13. Recognising Family Violence in Offences and Sentencing</b>	<b>561</b>
Introduction	561
Recognising family violence in criminal offences	563
Recognising family violence in sentencing	594
<b>14. Homicide Defences and Family Relationships in Criminal Laws</b>	<b>621</b>
Introduction	621
Recognising family violence in homicide defences	621
Recognising family relationships in criminal law responses to family violence	654



# **Terms of Reference**

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## **Reducing Violence against Women and their Children Terms of Reference**

The 2009 report of the National Council to Reduce Violence against Women and their Children, *Time for Action*, acknowledged the complex interaction between State and Territory family/domestic violence and child protection laws and the *Family Law Act 1975* (Cth). The National Council also stressed the importance of consistent interpretation and application of laws relating to family/domestic violence and sexual assault, including rules of evidence, in ensuring justice for victims of such violence.

At its meeting of 16–17 April 2009, the Standing Committee of Attorneys-General agreed that Australian law reform commissions should work together to consider these issues.

I refer to the Australian Law Reform Commission for inquiry and report pursuant to subsection 20(1) of the *Australian Law Reform Commission Act 1996* the issues of:

- 1) the interaction in practice of State and Territory family/domestic violence and child protection laws with the Family Law Act and relevant Commonwealth, State and Territory criminal laws; and
- 2) the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence.

In relation to both issues I request that the Commission consider what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and their children.

### *Scope of the reference*

In undertaking this reference, the Commission should be careful not to duplicate:

- a) the other actions being progressed as part of the Immediate Government Actions announced by the Prime Minister on receiving the National Council's report in April 2009;
- b) the evaluation of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* reforms being undertaken by the Australian Institute of Family Studies; and

- c) the work being undertaken through SCAG on the harmonisation of uniform evidence laws, in particular the development of model sexual assault communications immunity provisions and vulnerable witness protections.

*Collaboration and consultation*

In undertaking this reference, the Commission should:

- a) have regard to the National Council's report and any supporting material in relation to domestic violence and sexual assault laws;
- b) work jointly with the New South Wales Law Reform Commission with a view to developing agreed recommendations and consult with other State and Territory law reform bodies as appropriate;
- c) work closely with the Australian Government Attorney-General's Department to ensure the solutions identified are practically achievable and consistent with other reforms and initiatives being considered in relation to the development of a National Plan to Reduce Violence against Women and their Children or the National Framework for Protecting Australia's Children, which has been approved by the Council of Australian Governments; and
- d) consult with relevant courts, the Australian Government Department of Families, Housing, Community Services and Indigenous Affairs, relevant State and Territory agencies, State and Territory Legal Aid Commissions, the Family Law Council, the Australian Domestic Violence Clearinghouse and similar bodies in each State and Territory.

*Timeframe*

Considering the scale of violence affecting Australian women and their children and acknowledging the Australian Government's commitment to developing a National Plan through COAG for release in 2010, the Commission will report no later than 31 July 2010.

Dated: 17 July 2009



Robert McClelland

Attorney-General

\* In a letter dated 3 June 2010, the Attorney-General of Australia, the Hon Robert McClelland MP, agreed to extend the reporting date for the Inquiry to 10 September 2010. This date was again amended in a letter dated 13 September 2010, to a new reporting date of 10 October 2010.

# **List of Participants**

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## **Australian Law Reform Commission Commissioners**

Professor Rosalind Croucher, President

Magistrate Anne Goldsbrough, Part-time Commissioner

## **Special Adviser**

George Zdenkowski

## **Executive Director**

Sabina Wynn

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His Honour Judge Kevin O'Connor AM, part-time Commissioner

Professor Michael Tilbury (until February 2010)

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Bridget O'Keefe (May–October 2010)

Robyn Young (January–February 2010)



## **List of Recommendations**

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### **Part B – Family Violence: A Common Interpretative Framework**

#### **5. A Common Interpretative Framework — Definitions in Family Violence Legislation**

**Recommendation 5–1** State and territory family violence legislation should provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.

**Recommendation 5–2** State and territory family violence legislation should include examples of emotional and psychological abuse or intimidation and harassment that illustrate conduct that would affect—although not necessarily exclusively—certain vulnerable groups including: Indigenous persons; those from a culturally and linguistically diverse background; the aged; those with a disability; and those from the gay, lesbian, bisexual, transgender and intersex communities. In each case, state and territory family violence legislation should make it clear that such examples are illustrative and not exhaustive of the prohibited conduct.

**Recommendation 5–3** The definition of family violence in state and territory family violence legislation should not require a person to prove emotional or psychological harm in respect of conduct against the person which, by its nature, could be pursued criminally.

**Recommendation 5–4** The governments of NSW and the ACT should review the offences categorised as ‘domestic violence offences’ in their respective family violence legislation with a view to:

- (a) ensuring that the classification of such offences falls within the proposed definition of family violence in Rec 5–1; and
- (b) considering the inclusion of relevant federal offences committed in a family violence context, if they choose to retain such a classification system.

**Recommendation 5–5** Incidental to the review of ‘domestic violence offences’ referred to in Rec 5–4, s 44 of the *Crimes Act 1900* (NSW)—which deals with the failure to provide any wife, apprentice, servant or insane person with necessary food, clothing or lodgings—should be amended to ensure that its underlying philosophy and language are appropriate in a modern context.

## 6. Other Statutory Definitions of Family Violence

**Recommendation 6–1** State and territory criminal legislation—to the extent that it refers to the term ‘family violence’ in the context of homicide defences—should adopt the same definition as recommended to be included in state and territory family violence legislation (Rec 5–1). That is, ‘family violence’ should be defined as violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.

**Recommendation 6–2** State and territory family violence and criminal legislation should be reviewed to ensure that the interaction of terminology or definitions of conduct constituting family violence would not prevent a person from obtaining a protection order in circumstances where a criminal prosecution could be pursued.

**Recommendation 6–3** Where the definition of family violence in state or territory family violence legislation includes concepts recognised in that state or territory criminal legislation—such as stalking, kidnapping and psychological harm—family violence legislation should expressly adopt the criminal law definitions of those concepts.

**Recommendation 6–4** The *Family Law Act 1975* (Cth) should adopt the same definition as recommended to be included in state and territory family violence legislation (Rec 5–1). That is, ‘family violence’ should be defined as violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal, irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h).

## 7. Other Aspects of a Common Interpretative Framework

**Recommendation 7–1** State and territory family violence legislation should contain guiding principles, which should include express reference to a human rights framework, drawing upon applicable international conventions.

**Recommendation 7–2** State and territory family violence legislation should contain a provision that explains the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children. In addition, family violence legislation should refer to the particular impact of family violence on: Indigenous persons; those from a culturally and linguistically diverse background; those from the gay, lesbian, bisexual, transgender and intersex communities; older persons; and people with disabilities.

**Recommendation 7–3** The *Family Law Act 1975* (Cth) should be amended to include a similar provision to that in Rec 7–2 explaining the nature, features and dynamics of family violence.

**Recommendation 7–4** State and territory family violence legislation should articulate the following common set of core purposes:

- (a) to ensure or maximise the safety and protection of persons who fear or experience family violence;
- (b) to prevent or reduce family violence and the exposure of children to family violence; and
- (c) to ensure that persons who use family violence are made accountable for their conduct.

**Recommendation 7–5** State and territory family violence legislation should adopt the following alternative grounds for obtaining a protection order. That is:

- (a) the person seeking protection has reasonable grounds to fear family violence; or
- (b) the person he or she is seeking protection from has used family violence and is likely to do so again.

**Recommendation 7–6** State and territory family violence legislation should include as the core group of protected persons those who fall within the following categories of relationships:

- (a) past or current intimate relationships, including dating, cohabiting, and spousal relationships, irrespective of the gender of the parties and whether the relationship is of a sexual nature;
- (b) family members;
- (c) relatives;
- (d) children of an intimate partner;
- (e) those who fall within Indigenous concepts of family; and
- (f) those who fall within culturally recognised family groups.

## **Part C – Family Violence and the Criminal Law**

### **8. Family Violence and the Criminal Law—An Introduction**

**Recommendation 8–1** The Australian Institute of Criminology (AIC) or another suitable federal agency should gather and report data about federal offences committed in a family violence context. This should include data about:

- (a) which of these federal offences are prosecuted and the result;
- (b) who conducts the prosecution;
- (c) whether the offences are prosecuted jointly with state or territory crimes committed in a family violence context; and
- (d) when the offences form the basis of a protection order.

This information should be regularly given to the AIC or relevant agency by either the courts or Commonwealth, state and territory prosecutors—including police and directors of public prosecution.

**Recommendation 8–2** Police, prosecutors, lawyers and judicial officers should be given training about potential federal offences committed in a family violence context, including when such offences should be prosecuted or used as a basis for obtaining a family violence protection order.

This training should be incorporated into any existing or proposed training about family violence that is conducted by, among others: state and federal police, legal professional bodies, directors of public prosecution (state and Commonwealth), and judicial education bodies.

## 9. Police and Family Violence

**Recommendation 9–1** State and territory family violence legislation that empowers police to issue protection orders should call these orders ‘safety notices’ or ‘notices’ to distinguish them from court orders.

The legislation should provide that police may only issue safety notices where it is not reasonable or practicable for:

- (a) the matter to be immediately heard before a court; or
- (b) police to apply to a judicial officer for an order (by telephone or other electronic medium).

The safety notice should act as an application to the court for a protection order and a summons for the person against whom the notice is issued to appear before the court within a short specified time. The notice should expire when the person to whom it is issued appears in court.

**Recommendation 9–2** State and territory family violence legislation and/or police codes of practice should impose a duty on police to:

- (a) investigate family violence where they believe family violence has been, is being, or is likely to be committed; and
- (b) record when they decide not to take further action and their reasons for not taking further action.

**Recommendation 9–3** State and territory governments should ensure that support services are in place to assist persons in need of protection to apply for a protection order without involving police. These should include services specifically for:

- (a) Indigenous persons; and
- (b) persons from culturally and linguistically diverse backgrounds.

**Recommendation 9–4** State and territory family violence legislation should empower police officers, only for the purpose of arranging protection orders, to direct a person who has used family violence to remain at, or go to, a specified place or remain in the company of a specified officer.

**Recommendation 9–5** Police should be trained to better identify persons who have used family violence and persons who need to be protected from family violence, and to distinguish one from the other. Guidance should also be included in police codes of practice and guidelines.

## 10. Bail and Family Violence

**Recommendation 10–1** State and territory legislation should not contain presumptions against bail on the grounds only that an alleged crime occurred in a family violence context.

**Recommendation 10–2** State and territory legislation should provide that, on granting bail, judicial officers should be required to consider whether to impose protective bail conditions, issue or vary a family violence protection order, or do both.

**Recommendation 10–3** State and territory legislation should impose an obligation on police and prosecutors to inform victims of family violence promptly of:

- (a) decisions to grant or refuse bail; and
- (b) the conditions of release, where bail is granted.

Victims should also be given or sent a copy of the bail conditions. Where there are bail conditions and a protection order, police and prosecutors should explain how they interact.

Police codes of practice or operating procedures, prosecutorial guidelines or policies, and education and training programs should reflect these obligations. These should also note when it would be appropriate to send bail conditions to family violence legal and service providers with whom a victim is known to have regular contact.

## 11. Protection Orders and the Criminal Law

**Recommendation 11–1** State and territory family violence legislation should make it clear that the making, variation or revocation of a protection order, or the refusal to make, vary or revoke such an order, does not affect the civil or criminal liability of a person bound by the order in respect of the family violence the subject of the order.

**Recommendation 11–2** State and territory legislation should clarify that in the trial of an accused for an offence arising out of conduct that is the same or substantially similar to that on which a protection order is based, references cannot be made, without the leave of the court, to:

- (a) the making, variation and revocation of protection orders in proceedings under family violence legislation—unless the offence the subject of the trial is breach of a protection order, in which case leave of the court is not necessary;

- (b) the refusal of a court to make, vary or revoke a protection order in proceedings under family violence legislation; and
- (c) the existence of current proceedings for a protection order under family violence legislation against the person the subject of the criminal proceedings.

Evidence given in proceedings under family violence legislation may be admissible by consent of the parties or by leave of the court.

**Recommendation 11–3** State and territory family violence legislation should include an express provision conferring on courts a power to make a protection order on their own initiative at any stage of a criminal proceeding. Any such order made prior to a plea or finding of guilt should be interim until there is a plea or finding of guilt.

**Recommendation 11–4** State and territory family violence legislation should expressly empower prosecutors to make an application for a protection order where a person pleads guilty or is found guilty of an offence involving family violence.

**Recommendation 11–5** State and territory legislation should provide that a court before which a person pleads guilty, or is found guilty of an offence involving family violence, must consider whether any existing protection order obtained under family violence legislation needs to be varied to provide greater protection for the person against whom the offence was committed.

**Recommendation 11–6** State and territory family violence legislation should provide expressly that one of the conditions that may be imposed by a court making a protection order is to prohibit the person against whom the order is made from locating or attempting to locate the victim of family violence.

**Recommendation 11–7** Application forms for protection orders in each state and territory should clearly set out the types of conditions that a court may attach to a protection order, allowing for the possibility of tailored conditions. The forms should be drafted to enable applicants to indicate the types of conditions that they seek to be imposed.

**Recommendation 11–8** State and territory family violence legislation should require judicial officers making protection orders to consider whether or not to make an exclusion order—that is, an order excluding a person against whom a protection order is made from premises shared with the victim, even if the person has a legal or equitable interest in such premises.

**Recommendation 11–9** State and territory family violence legislation should provide that a court should only make an exclusion order when it is necessary to ensure the safety of a victim or affected child. Primary factors relevant to the paramount consideration of safety include the vulnerability of the victim and any affected child having regard to their physical, emotional and psychological needs, and any disability. Secondary factors to be considered include the accommodation needs and options available to the parties, particularly in light of any disability that they may have, and the length of time required for any party to secure alternative accommodation.

**Recommendation 11–10** State and territory family violence legislation should require a court to give reasons for declining to make an exclusion order where such order has been sought.

**Recommendation 11–11** State and territory family violence legislation should provide that:

- (a) courts have an express discretion to impose conditions on persons against whom protection orders are made requiring them to attend rehabilitation or counselling programs, where such persons have been independently assessed as being suitable and eligible to participate in such programs;
- (b) the relevant considerations in assessing eligibility and suitability to participate in such programs should include: whether the respondent consents to the order; the availability of transport; and the respondent's work and educational commitments, cultural background and any disability; and
- (c) failure to attend assessment or to complete such a program should not attract a sentence of imprisonment, and the maximum penalty should be a fine capped at a lower amount than the applicable maximum penalty for breaching a protection order.

**Recommendation 11–12** Where appropriate, state and territory courts should provide persons against whom protection orders are made with information about relevant culturally and gender-appropriate rehabilitation and counselling programs.

**Recommendation 11–13** State and territory legislation should provide that a court sentencing an offender for a family-violence related offence should take into account:

- (a) any protection order conditions to which the person being sentenced is subject, where those conditions arise out of the same or substantially the same conduct giving rise to the prosecution for the offence; and
- (b) the duration of any protection order to which the offender is subject.

## 12. Breach of Protection Orders

**Recommendation 12–1** State and territory legislation should provide that a person protected by a protection order under family violence legislation cannot be charged with or found guilty of an offence of aiding, abetting, counselling or procuring the breach of a protection order.

**Recommendation 12–2** Federal, state and territory police, and directors of public prosecution should train or ensure that police and prosecutors respectively receive training on how the dynamics of family violence might affect the decisions of victims to negate the existence of family violence or to withdraw previous allegations of violence.

**Recommendation 12–3** Police codes of practice or operating guidelines, and prosecutorial policies should ensure that any decisions to charge or prosecute victims of family violence with public justice offences—such as conspiracy or attempts to

pervert the course of justice, where the conduct alleged to constitute such offences is essentially conduct engaged in by a victim to reduce or mitigate the culpability of an offender—should only be approved at the highest levels within state or territory police services, and by directors of public prosecution, respectively.

**Recommendation 12–4** Police should be trained about the appropriate content of ‘statements of no complaint’ in which victims attest to the fact that they do not wish to pursue criminal action. In particular, police should not encourage victims to attest that no family violence occurred when the evidence clearly points to the contrary.

**Recommendation 12–5** The national family violence bench book—the subject of Rec 13–1 and Rec 31–2—should contain a section on the sentencing of offenders for breach of protection orders. This section should provide guidance to judicial officers on how to treat the consent of a victim to contact with a respondent that is prohibited by a protection order. In particular, this section should address the following issues:

- (a) that it is the responsibility of the respondent to a protection order to obey its conditions;
- (b) the dynamics of power and control in family violence relationships and how such dynamics might vitiate a victim’s initiation of, or consent to, contact prohibited by a protection order;
- (c) that the weight the court is to give to the fact that a victim initiated or agreed to contact prohibited by a protection order, will depend on the circumstances of each case; and
- (d) while a victim of family violence may have genuinely consented to contact with the respondent to a protection order, a victim can never be taken to have consented to any violence committed in breach of a protection order.

**Recommendation 12–6** State and territory police guidelines or codes of practice should provide guidance to police about charging an offender with breach of a protection order and any underlying criminal offence constituting the breach. In particular, such guidance should address the issue of perceived duplication of charges and how that issue is properly addressed by a court in sentencing an offender for multiple offences based on the totality principle and principles relating to concurrent and cumulative sentences.

**Recommendation 12–7** To the extent that state and territory courts record and maintain statistics about criminal matters lodged or criminal offences proven in their jurisdiction, they should ensure that such statistics capture separately criminal matters or offences that occur in a family-violence related context. In every other case, state and territory governments should ensure the separate capture of statistics of criminal matters and offences in their jurisdictions that occur in a family-violence related context.

**Recommendation 12–8** The national family violence bench book (see Recs 13–1 and 31–2) should contain a section guiding courts on how to sentence offenders for breach of protection orders, addressing, for example:

- (a) the purposes of sentencing an offender for breach of a protection order;
- (b) the potential impact of particular sentencing options, especially fines, on a victim of family violence;
- (c) sentencing factors relating to the victim, including the impact of the offence on the victim;
- (d) sentencing factors relating to the offender, including the timing of the breach;
- (e) factors relevant to determining the severity of sentencing range and the appropriateness of particular sanctions for different levels of severity of breach;
- (f) that breaches not involving physical violence can have a significant impact on a victim and should not necessarily be treated as less serious than breaches involving physical violence; and
- (g) the benefits of sentencing options that aim to change the behaviour of those who commit violence.

**Recommendation 12–9** Police operational guidelines—reinforced by training—should require police, when preparing witness statements in relation to breach of protection order proceedings, to ask victims about the impact of the breach, and advise them that they may wish to make a victim impact statement and about the use that can be made of such a statement.

**Recommendation 12–10** State and territory family violence legislation should not impose mandatory minimum penalties or mandatory imprisonment for the offence of breaching a protection order.

### **13. Recognising Family Violence in Offences and Sentencing**

**Recommendation 13–1** The national family violence bench book (see Rec 31–2) should include a section that:

- (a) provides guidance about the potential relevance of family-violence related evidence to criminal offences and defences—for example, evidence of a pre-existing relationship between the parties, including evidence of previous violence; and
- (b) addresses sentencing in family violence matters.

**Recommendation 13–2** Federal, state and territory police, and Commonwealth, state and territory directors of public prosecution respectively, should ensure that police and prosecutors are encouraged by prosecutorial guidelines, and training and education programs, to use representative charges wherever appropriate in family-violence related criminal matters, where the charged conduct forms part of a course of conduct. Relevant prosecutorial guidelines, training and education programs

should also address matters of charge negotiation and negotiation as to agreed statements of facts in the prosecution of family-violence related matters.

**Recommendation 13–3** State and territory sentencing legislation should provide that the fact that an offence was committed in the context of a family relationship should not be considered a mitigating factor in sentencing.

## **14. Homicide Defences and Family Relationships in Criminal Laws**

**Recommendation 14–1** State and territory criminal legislation should ensure that defences to homicide accommodate the experiences of family violence victims who kill, recognising the dynamics and features of family violence.

**Recommendation 14–2** State and territory governments should review their defences to homicide relevant to family violence victims who kill. Such reviews should:

- (a) cover defences specific to victims of family violence as well as those of general application that may apply to victims of family violence;
- (b) cover both complete and partial defences;
- (c) be conducted as soon as practicable after the relevant provisions have been in force for five years;
- (d) include investigations of the following matters:
  - (i) how the relevant defences are being used—including in charge negotiations—by whom, and with what results; and
  - (ii) the impact of rules of evidence and sentencing laws and policies on the operation of defences; and
- (e) report publicly on their findings.

**Recommendation 14–3** The national family violence bench book (see Rec 31–2) should include a section that provides guidance on the operation of defences to homicide where a victim of family violence kills the person who was violent towards him or her.

**Recommendation 14–4** The Model Criminal Law Officers' Committee of the Standing Committee of Attorneys-General—or another appropriate national body—should investigate strategies to improve the consistency of approaches to recognising the dynamics of family violence in homicide defences in state and territory criminal laws.

**Recommendation 14–5** State and territory criminal legislation should provide guidance about the potential relevance of family-violence related evidence in the context of a defence to homicide. Section 9AH of the *Crimes Act 1958* (Vic) is an instructive model in this regard.

## Volume 2

### Part D – Family Violence and Family Law

#### 16. Family Law Interactions: Jurisdiction and Practice of State and Territory Courts

**Recommendation 16–1** Family violence legislation in each state and territory should require judicial officers making or varying a protection order to consider, under s 68R of the *Family Law Act 1975* (Cth), reviving, varying, discharging or suspending an inconsistent parenting order.

**Recommendation 16–2** Application forms for protection orders under state and territory family violence legislation should include an option for an applicant to request the court to revive, vary, discharge or suspend a parenting order.

**Recommendation 16–3** The *Family Law Act 1975* (Cth) should be amended to allow state and territory courts, when making or varying a protection order, to make a parenting order until further order.

**Recommendation 16–4** Section 60CG of the *Family Law Act 1975* (Cth)—which requires a court to ensure that a parenting order does not expose a person to an unacceptable risk of family violence and permits the court to include in the order any safeguards that it considers necessary for the safety of a person affected by the order—should be amended to provide that the court should give primary consideration to the protection of that person over the other factors that are relevant to determining the best interests of the child.

**Recommendation 16–5** Section 68T of the *Family Law Act 1975* (Cth) should be amended to provide that, where a state or territory court, in proceedings to make an interim protection order under state or territory family violence legislation, revives, varies or suspends a parenting order under s 68R, or makes a parenting order in the circumstances set out in Rec 16–3, that parenting order has effect until:

- (a) the date specified in the order;
- (b) the interim protection order expires; or
- (c) further order of the court.

**Recommendation 16–6** State and territory family violence legislation should provide that courts not significantly diminish the standard of protection afforded by a protection order for the purpose of facilitating consistency with a parenting order.

**Recommendation 16–7** Application forms for protection orders under state and territory family violence legislation should include an option for applicants to indicate their preference that there should be no exception in the protection order for contact required or authorised by a parenting order made under the *Family Law Act 1975* (Cth).

**Recommendation 16–8** Australian courts and judicial education bodies should provide education and training, and prepare material in bench books, to assist judicial officers in state and territory courts better to understand and exercise their jurisdiction under the *Family Law Act 1975* (Cth). This material should include guidance on resolving inconsistencies between orders under the *Family Law Act* and protection orders to ensure the safety of victims of family violence.

**Recommendation 16–9** Australian, state and territory governments should collaborate to provide training to practitioners involved in protection order proceedings on state and territory courts' jurisdiction under the *Family Law Act 1975* (Cth).

**Recommendation 16–10** Application forms for protection orders under state and territory family violence legislation should clearly seek information about property orders under the *Family Law Act 1975* (Cth) or any pending application for such orders.

**Recommendation 16–11** State and territory family violence legislation should require courts, when considering whether to make personal property directions in protection order proceedings, to inquire about and consider any property orders under the *Family Law Act 1975* (Cth), or pending application for such orders.

**Recommendation 16–12** State and territory family violence legislation should provide that personal property directions made in protection order proceedings are subject to orders made by a federal family court or other court responsible for determining property disputes.

**Recommendation 16–13** State and territory family violence legislation should provide that personal property directions do not affect ownership rights.

## **17. Family Law Interactions: Jurisdiction and Practice of Federal Family Courts**

**Recommendation 17–1** The 'additional consideration' in s 60CC(3)(k) of the *Family Law Act 1975* (Cth), which directs courts to consider only final or contested protection orders when determining the best interests of a child, should be amended to provide that a court, when determining the best interests of the child, must consider evidence of family violence given, or findings made, in relevant family violence protection order proceedings.

**Recommendation 17–2** The Australian Government should initiate an inquiry into how family violence should be dealt with in property proceedings under the *Family Law Act 1975* (Cth).

**Recommendation 17–3** The *Family Law Act 1975* (Cth) should be amended to provide separate provisions for injunctions for personal protection.

**Recommendation 17–4** The *Family Law Act 1975* (Cth) should be amended to provide that a breach of an injunction for personal protection is a criminal offence.

**Recommendation 17–5** The *Family Law Act 1975* (Cth) should be amended to provide that, in proceedings to make or vary a protection order under state or territory family violence legislation, a state or territory court may revive, vary, discharge or suspend a *Family Law Act* injunction for personal protection of a party to a marriage.

**Recommendation 17–6** Section 114(2) of the *Family Law Act 1975* (Cth), which permits a court to make an order relieving a party to a marriage from any obligations to perform marital services or render conjugal rights, should be repealed.

## 18. Evidence of Family Violence

**Recommendation 18–1** State and territory courts should ensure that application forms for protection orders include information about the kinds of conduct that constitute family violence.

**Recommendation 18–2** Application forms for protection orders under state and territory family violence legislation should require that applicants swear or affirm a statement incorporated in, or attached to, the application form, setting out the basis of the application. Where the applicant is a police officer, the application form should require the police officer to certify the form.

**Recommendation 18–3** State and territory family violence legislation should prohibit the respondent in protection order proceedings from personally cross-examining any person against whom the respondent is alleged to have used family violence.

**Recommendation 18–4** State and territory courts should require that undertakings by a person against whom a protection order is sought should be in writing on a standard form. The form should require each party to sign an acknowledgment that he or she understands that:

- (a) breach of an undertaking is not a criminal offence nor can it be otherwise enforced;
- (b) the court's acceptance of an undertaking does not preclude further action by the applicant to address family violence; and
- (c) evidence of breach of an undertaking may be used in later proceedings.

**Recommendation 18–5** State and territory family violence legislation should provide that:

- (a) mutual protection orders should not be made by consent; and
- (b) a court may only make mutual protection orders where it is satisfied that there are grounds for making a protection order against each party.

## Part E – Child Protection

### 19. The Intersection of Child Protection and Family Laws

**Recommendation 19–1** Federal, state and territory governments should, as a matter of priority, make arrangements for child protection agencies to provide investigatory and reporting services to family courts in cases involving children’s safety. Where such services are not already provided by agreement, urgent consideration should be given to establishing specialist sections within child protection agencies to provide those services.

**Recommendation 19–2** State governments should refer powers to enable the Australian Government to make laws allowing family courts to confer parental rights and duties on a child protection agency in cases where there is no other viable and protective carer. Family courts should have the power to join a child protection agency as a party in this limited class of cases.

**Recommendation 19–3** Where a child protection agency investigates child abuse, locates a viable and protective carer and refers that carer to a family court to apply for a parenting order, the agency should, in appropriate cases:

- (a) provide written information to a family court about the reasons for the referral;
- (b) provide reports and other evidence; or
- (c) intervene in the proceedings.

**Recommendation 19–4** The *Family Law Act 1975* (Cth) should be amended to give children’s courts the same powers as magistrates courts.

**Recommendation 19–5** Federal, state and territory governments should ensure the immediate and regular review of protocols between family courts, children’s courts and child protection agencies for the exchange of information to avoid duplication in the hearing of cases, and that a decision is made as early as possible about the appropriate court.

### 20. Family Violence, Child Protection and the Criminal Law

**Recommendation 20–1** State and territory child protection legislation should authorise a person to disclose to a law enforcement agency—including federal, state and territory police—the identity of a reporter, or the contents of a report from which the reporter’s identity may be revealed, where:

- (a) the disclosure is in connection with the investigation of a serious offence alleged to have been committed against a child or young person; and
- (b) the disclosure is necessary to safeguard or promote the safety, welfare and wellbeing of any child or young person, whether or not the child or young person is the victim of the alleged offence.

The information should only be disclosed where:

- (a) the information is requested by a senior law enforcement officer, who has certified in writing beforehand that obtaining the reporter's consent would prejudice the investigation of the serious offence concerned; or
- (b) the agency that discloses the identity of the reporter has certified in writing that it is impractical to obtain the consent.

Where information is disclosed, the person who discloses the identity of the reporter, or the contents of a report from which the identity of a reporter may be revealed, should notify the reporter as soon as practicable of this fact, unless to do so would prejudice the investigation.

**Recommendation 20–2** State and territory law enforcement, child protection and other relevant agencies should, where necessary, develop protocols that provide for consultation about law enforcement responses when allegations of abuse or neglect of a child for whom the police have care and protection concerns are being investigated by the police.

**Recommendation 20–3** State and territory family violence legislation should confer jurisdiction on children's courts to hear and determine applications for family violence protection orders where:

- (a) the person affected by family violence, sought to be protected, or against whom the order is sought, is a child or young person; and
- (b) proceedings related to that child or young person are before the court; and
- (c) the court is satisfied that the grounds for making the order are met.

**Recommendation 20–4** Where a children's court has jurisdiction to hear a family violence protection order application (see Rec 20–3), the court should also be able to make a family violence protection order in favour of siblings of the child or young person who is the subject of proceedings, or other children or young people within the same household, who are affected by the same or similar circumstances.

**Recommendation 20–5** Where a children's court has jurisdiction to hear a family violence protection order application (see Rec 20–3), the court should also have jurisdiction to make a family violence protection order for the protection of an adult, where the adult is affected by the same or similar circumstances.

**Recommendation 20–6** Where a children's court has jurisdiction to hear a family violence protection order application (see Rec 20–3), the court should also have power to vary or revoke a family violence protection order on the application of a party to the order, or on its own motion.

**Recommendation 20–7** State and territory child protection legislation should:

- (a) specify that judicial officers and court staff are mandatory reporters; and
- (b) require child protection agencies to provide timely feedback to mandatory reporters, including an acknowledgement that the report was received and information as to the outcome of the child protection agency's initial investigation.

## **Part F – Alternative Dispute Resolution**

### **21. Family Dispute Resolution**

**Recommendation 21–1** The Australian Government Attorney-General's Department should continue to collaborate with the family dispute resolution sector to improve standards in identification and appropriate management of family violence by family dispute resolution practitioners.

**Recommendation 21–2** The Australian Government Attorney-General's Department should:

- (a) promote and support high quality screening and risk assessment frameworks and tools for family dispute resolution practitioners;
- (b) include these tools and frameworks in training and accreditation of family dispute resolution practitioners;
- (c) include these tools and frameworks in the assessment and evaluation of family dispute resolution services and practitioners; and
- (d) promote and support collaborative work across sectors to improve standards in the screening and assessment of family violence in family dispute resolution.

**Recommendation 21–3** The Australian Government Attorney-General's Department, family dispute resolution service providers, and legal education bodies should ensure that lawyers who practise family law are given training and support in screening and assessing risks in relation to family violence and making appropriate referrals to other services.

**Recommendation 21–4** The Australian Government Attorney-General's Department should continue to provide leadership, support and coordination to improve collaboration and cooperation between family dispute resolution practitioners and lawyers.

**Recommendation 21–5** The Australian Government Attorney-General's Department should take a comprehensive and strategic approach to support culturally responsive family dispute resolution, including screening and risk assessment processes.

## 22. Confidentiality and Admissibility

**Recommendation 22–1** Sections 10D(4)(b) and 10H(4)(b) of the *Family Law Act 1975* (Cth) should be amended to permit family counsellors and family dispute resolution practitioners to disclose communications made during family counselling or family dispute resolution, where they reasonably believe that disclosure is necessary to prevent or lessen a serious threat to a person’s life, health or safety.

**Recommendation 22–2** The Australian Government Attorney-General’s Department, in consultation with family dispute resolution practitioners and family counsellors, should develop material to guide family dispute resolution practitioners and family counsellors in determining the seriousness of a threat to an individual’s life, health or safety, and identifying when a disclosure may be made without consent. Such guidance should also encourage family dispute resolution practitioners and family counsellors to address the potential impact of disclosure on the immediate safety of those to whom the information relates, and for that purpose:

- (a) refer those at risk to appropriate support services; and
- (b) develop a safety plan, where appropriate, in conjunction with them.

**Recommendation 22–3** Bodies responsible for the education and training of family dispute resolution practitioners and family counsellors should develop programs to ensure that provisions in the *Family Law Act 1975* (Cth) and in state and territory child protection legislation regulating disclosure of information relating to actual or potential abuse, harm or ill-treatment of children are understood and appropriately acted on.

**Recommendation 22–4** Sections 10E and 10J of the *Family Law Act 1975* (Cth), which regulate the admissibility of family dispute resolution and family counselling communications, should be amended to state expressly that the application of these provisions extends to state and territory courts not exercising family law jurisdiction.

**Recommendation 22–5** The Australian Government Attorney-General’s Department should coordinate the collaborative development of education and training—including cross-disciplinary training—for family courts’ registry staff, family consultants, judicial officers and lawyers who practise family law, about the need for screening and risk assessment where a certificate has been issued under s 60I of the *Family Law Act 1975* (Cth) indicating a matter is inappropriate for family dispute resolution.

## 23. Intersections and Inconsistencies

**Recommendation 23–1** Where state and territory family violence legislation permits the use of alternative dispute resolution in family violence protection order proceedings, such legislation should provide that violence cannot be negotiated or mediated.

**Recommendation 23–2** State and territory legislation and policies for alternative dispute resolution in family violence protection order proceedings should provide for comprehensive screening and risk assessment mechanisms.

**Recommendation 23–3** State and territory governments, courts, and alternative dispute resolution service providers should ensure that, where alternative dispute resolution is permitted in relation to family violence protection order proceedings, education and training is provided to judicial and court officers and alternative dispute resolution practitioners on:

- (a) the nature and dynamics of family violence; and
- (b) the conduct of alternative dispute resolution processes in the context of family violence.

**Recommendation 23–4** State and territory courts should ensure that the terms of a family violence protection order indicate that participation in family dispute resolution, as ordered or directed by a family court, or provided under the *Family Law Act 1975* (Cth), is not precluded by a family violence protection order.

**Recommendation 23–5** State and territory courts should ensure that parties to family violence protection order proceedings are informed that, if involved in proceedings or family dispute resolution under the *Family Law Act 1975* (Cth):

- (a) they may be exempt from requirements to participate in family dispute resolution under the *Family Law Act 1975* (Cth);
- (b) they should inform a family dispute resolution practitioner about any family violence protection orders or proceedings; and
- (c) they should inform family courts about any family violence protection orders or proceedings, where family court proceedings are initiated.

**Recommendation 23–6** The Australian Government Attorney-General's Department and state and territory governments should ensure that family violence screening and risk assessment frameworks indicate the importance of including questions in screening and risk assessment tools about:

- (a) past or current applications for protection orders;
- (b) past or current protection orders; and
- (c) any breaches of protection orders.

**Recommendation 23–7** Family dispute resolution service providers should ensure that:

- (a) tools used for family violence screening and risk assessment include questions about past and current protection orders and applications, and any breaches of protection orders; and
- (b) parties are asked for copies of protection orders.

**Recommendation 23–8** State and territory legislation and policies for alternative dispute resolution in child protection matters should provide that violence cannot be negotiated or mediated within alternative dispute resolution processes.

**Recommendation 23–9** State and territory legislation and policies for alternative dispute resolution in child protection matters should provide for comprehensive screening and risk assessment mechanisms.

**Recommendation 23–10** State and territory child protection agencies and alternative dispute resolution service providers should ensure that child protection staff and alternative dispute resolution practitioners undertake training on:

- (a) the nature and dynamics of family violence; and
- (b) the need for parents, as well as children, who are victims of family violence to have access to appropriate support.

**Recommendation 23–11** State and territory governments should take a comprehensive and strategic approach to support culturally responsive alternative dispute resolution—including screening and risk assessment processes—in child protection matters.

**Recommendation 23–12** Alternative dispute resolution service providers should ensure that, in intake procedures for child protection matters, parties are asked about relevant:

- (a) orders, injunctions and applications under state and territory family violence legislation and the *Family Law Act 1975* (Cth);
- (b) family dispute resolution agreements and processes; and
- (c) alternative dispute resolution agreements and processes in family violence matters.

**Recommendation 23–13** The Australian Government Attorney-General's Department and state and territory governments should collaborate with Family Relationship Services Australia, legal aid commissions and other alternative dispute resolution service providers, to explore the potential of resolving family law parenting and child protection issues relating to the same family in one integrated process.

## **Part G – Sexual Assault**

### **25. Sexual Offences**

**Recommendation 25–1** State and territory sexual assault provisions should include a wide definition of sexual intercourse or penetration, encompassing:

- (a) penetration (to any extent) of the genitalia (including surgically constructed genitalia) or anus of a person by the penis or other body part of another person and/or any object manipulated by a person;

- (b) penetration of the mouth of a person by the penis of a person; and
- (c) continuing sexual penetration as defined in paragraph (a) or (b) above.

**Recommendation 25–2** Federal, state and territory sexual offence provisions should provide a uniform age of consent for all sexual offences.

**Recommendation 25–3** The Australian, state and territory governments should review the utilisation and effectiveness of persistent sexual abuse type offences, with a particular focus on offences committed in a family violence context.

**Recommendation 25–4** Federal, state and territory sexual offence provisions should include a statutory definition of consent based on the concept of free and voluntary agreement.

**Recommendation 25–5** Federal, state and territory sexual offence provisions should set out a non-exhaustive list of circumstances that may vitiate consent including, at a minimum:

- (a) lack of capacity to consent, including because a person is asleep or unconscious, or so affected by alcohol or other drugs as to be unable to consent;
- (b) where a person submits because of force, or fear of force, against the complainant or another person;
- (c) where a person submits because of fear of harm of any type against the complainant or another person;
- (d) unlawful detention;
- (e) mistaken identity and mistakes as to the nature of the act (including mistakes generated by the fraud or deceit of the accused);
- (f) abuse of a position of authority or trust; and
- (g) intimidating or coercive conduct, or other threat, that does not necessarily involve a threat of force, against the complainant or another person.

**Recommendation 25–6** Federal, state and territory sexual assault provisions should provide that it is a defence to the charge of ‘rape’ that the accused held an honest and reasonable belief that the complainant was consenting to the sexual penetration.

**Recommendation 25–7** State and territory sexual offence provisions should provide that the judge must, if it is relevant to the facts in issue in a sexual offence proceeding, direct the jury:

- (a) on the meaning of consent, as defined in the legislation;
- (b) on the circumstances where there may be no consent, and the consequence of a finding beyond reasonable doubt that one of these circumstances exists;
- (c) that a person is not to be regarded as having consented to a sexual act just because:

- (i) the person did not say or do anything to indicate that she or he did not consent; or
- (ii) the person did not protest or physically resist; or
- (iii) the person did not sustain physical injury; or
- (iv) on that, or an earlier, occasion the person consented to engage in a sexual act—whether or not of the same type—with that person or another person.

Where evidence is led, or an assertion is made, that the accused believed that the complainant was consenting to the sexual act, then the judge must direct the jury to consider:

- (d) any evidence of that belief;
- (e) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps;
- (f) the reasonableness of the accused's belief in all the circumstances, including the accused's knowledge or awareness of any circumstance that may vitiate consent; and
- (g) any other relevant matter.

**Recommendation 25–8** State and territory legislation dealing with sexual offences should state that the objectives of the sexual offence provisions are to:

- (a) uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity; and
- (b) protect children, young people and persons with a cognitive impairment from sexual exploitation.

**Recommendation 25–9** State and territory legislation dealing with sexual offences, criminal procedure or evidence, should contain guiding principles, to which courts should have regard when interpreting provisions relating to sexual offences. At a minimum, these guiding principles should refer to the following:

- (a) sexual violence constitutes a form of family violence;
- (b) there is a high incidence of sexual violence within society;
- (c) sexual offences are significantly under-reported;
- (d) a significant number of sexual offences are committed against women, children and other vulnerable persons, including those from Indigenous and culturally and linguistically diverse backgrounds, and persons with a cognitive impairment;
- (e) sexual offenders are commonly known to their victims; and
- (f) sexual offences often occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.

## 26. Reporting, Prosecution and Pre-trial Processes

**Recommendation 26–1** The Australian Centre for the Study of Sexual Assault, the Australian Institute of Criminology and similar state and territory agencies should prioritise the collection of comprehensive data in relation to sexual assault perpetrated in a family violence context. In particular on:

- (a) attrition rates, including reasons for attrition and the attrition point;
- (b) case outcomes; and
- (c) trends in relation to particular groups including Aboriginal and Torres Strait Islander peoples.

**Recommendation 26–2** Commonwealth, state and territory Directors of Public Prosecution should ensure that prosecutorial guidelines and policies:

- (a) facilitate the referral of victims and witnesses of sexual assault to culturally appropriate welfare, health, counselling and other support services at the earliest opportunity;
- (b) require consultation with victims of sexual assault about key prosecutorial decisions, including whether to prosecute, discontinue a prosecution, or agree to a charge or fact bargain;
- (c) require the ongoing provision of information to victims of sexual assault about the status and progress of proceedings;
- (d) facilitate the provision of information and assistance to victims and witnesses of sexual assault in understanding the legal and court process;
- (e) facilitate the provision of information and assistance to victims and witnesses of sexual assault in relation to the protective provisions available to sexual assault complainants when giving evidence in criminal proceedings;
- (f) ensure that family violence protection orders or stalking intervention orders are sought in all relevant circumstances; and
- (g) require referral of victims and witnesses of sexual assault to providers of legal advice on related areas, such as family law, victims' compensation and the sexual assault communications privilege.

**Recommendation 26–3** Federal, state and territory governments and relevant educational, professional and service delivery bodies should ensure ongoing and consistent education and training for judicial officers, lawyers, prosecutors, police and victim support services in relation to the substantive law and the nature and dynamics of sexual assault as a form of family violence, including its social and cultural contexts.

**Recommendation 26–4** State and territory legislation should prohibit:

- (a) any child; and
- (b) any adult complainant, unless there are special or prescribed reasons, from being required to attend to give evidence at committal hearings in relation to sexual offences.

**Recommendation 26–5** Federal, state and territory legislation should:

- (a) establish a presumption that, when two or more charges for sexual offences are joined in the same indictment, those charges are to be tried together; and
- (b) state that this presumption is not rebutted merely because evidence on one charge is inadmissible on another charge.

**Recommendation 26–6** Federal, state and territory legislation should permit the tendering of pre-recorded evidence of interview between a sexual assault complainant and investigators as the complainant's evidence-in-chief. Such provisions should apply to all complainants of sexual assault, both adults and children.

**Recommendation 26–7** Federal, state and territory legislation should permit child complainants of sexual assault and complainants of sexual assault who are vulnerable as a result of mental or physical impairment, to provide evidence recorded at a pre-trial hearing. This evidence should be able to be replayed at the trial as the witness' evidence. Adult victims of sexual assault should also be permitted to provide evidence in this way, by leave of the court.

**Recommendation 26–8** The Australian, state and territory governments should ensure that relevant participants in the criminal justice system receive comprehensive education about legislation authorising the use of pre-recorded evidence in sexual assault proceedings, and training in relation to interviewing victims of sexual assault and pre-recording evidence.

## **27. Evidence in Sexual Assault Proceedings**

**Recommendation 27–1** Federal, state and territory legislation should provide that complainants of sexual assault must not be cross-examined in relation to, and the court must not admit any evidence of, the sexual reputation of the complainant.

**Recommendation 27–2** Federal, state and territory legislation should provide that the complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual activities—whether consensual or non-consensual—of the complainant, other than those to which the charge relates, without the leave of the court.

**Recommendation 27–3** Federal, state and territory legislation should provide that the court must not grant leave under the test proposed in Rec 27–2, unless it is satisfied that the evidence has significant probative value and that it is in the interests of justice to allow the cross-examination or to admit the evidence, after taking into account:

- (a) the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked;
- (b) the risk that the evidence may arouse discriminatory belief or bias, prejudice, sympathy or hostility;
- (c) the need to respect the complainant's personal privacy;
- (d) the right of the defendant to fully answer and defend the charge; and
- (e) any other relevant matter.

**Recommendation 27–4** Federal, state and territory legislation should provide that evidence about the sexual activities—whether consensual or non-consensual—of the complainant, other than those to which the charge relates, is not of significant probative value only because of any inference it may raise as to the general disposition of the complainant.

**Recommendation 27–5** Federal, state and territory legislation should require that an application for leave to cross-examine complainants of sexual assault, or to admit any evidence, about the sexual activities of the complainant must be made:

- (a) in writing;
- (b) if the proceeding is before a jury—in absence of the jury; and
- (c) in the absence of a complainant, if a defendant in the proceeding requests.

**Recommendation 27–6** Federal, state and territory legislation should require a court to give reasons for its decision whether or not to grant leave to cross-examine complainants of sexual assault, or to admit any evidence, about the sexual activities of the complainant and, if leave is granted, to state the nature of the admissible evidence.

**Recommendation 27–7** Australian courts, and judicial education and legal professional bodies should provide education and training about the procedural requirements for admitting and adducing evidence of sexual activity.

**Recommendation 27–8** Federal, state and territory legislation and court rules relating to subpoenas and the operation of the sexual assault communications privilege should ensure that the interests of complainants in sexual assault proceedings are better protected, including by requiring:

- (a) parties seeking production of sexual assault communications, to provide timely notice in writing to the other party and the sexual assault complainant;
- (b) that any such written notice be accompanied by a pro forma fact sheet on the privilege and providing contact details for legal assistance; and
- (c) that subpoenas be issued with a pro forma fact sheet on the privilege, also providing contact details for legal assistance.

**Recommendation 27–9** The Australian, state and territory governments, in association with relevant non-government organisations, should work together to develop and administer training and education programs for judicial officers, legal practitioners and counsellors about the sexual assault communications privilege and how to respond to a subpoena for confidential counselling communications.

**Recommendation 27–10** State and territory evidence legislation should provide that:

- (a) the opinion rule does not apply to evidence of an opinion of a person based on that person's specialised knowledge of child development and child behaviour; and
- (b) the credibility rule does not apply to such evidence concerning the credibility of children.

**Recommendation 27–11** Federal, state and territory legislation should authorise the giving of jury directions about children's abilities as witnesses and responses to sexual abuse, including in a family violence context.

**Recommendation 27–12** Judges should develop model jury directions, drawing on the expertise of relevant professional and research bodies, about children's abilities as witnesses and responses to sexual abuse, including in a family violence context.

**Recommendation 27–13** Federal, state and territory legislation should provide that, in sexual assault proceedings, tendency or coincidence evidence is not inadmissible only because there is a possibility that the evidence is the result of concoction, collusion or suggestion.

## **28. Other Trial Processes**

**Recommendation 28–1** Federal, state and territory legislation should prohibit a judge in any sexual assault proceedings from:

- (a) warning a jury, or making any suggestion to a jury, that complainants as a class are unreliable witnesses; and
- (b) giving a general warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant or witness who is a child.

**Recommendation 28–2** Australian courts and judicial education bodies should provide judicial education and training, and prepare material for incorporation in bench books, to assist judges to identify the circumstances in which a warning about the danger of convicting on the uncorroborated evidence of a particular complainant or child witness is in the interests of justice.

**Recommendation 28–3** State and territory legislation should provide, consistently with s 165B of the uniform Evidence Acts, that:

- (a) if the court, on application by the defendant, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of

delay, the court must inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence;

- (b) the judge need not comply with (a) if there are good reasons for not doing so; and
- (c) no particular form of words needs to be used in giving the warning pursuant to (a), but in warning the jury, the judge should not suggest that it is ‘dangerous to convict’ because of any demonstrated forensic disadvantage.

**Recommendation 28–4** Federal, state and territory legislation should provide that, in sexual assault proceedings:

- (a) the effect of any delay in complaint, or absence of complaint, on the credibility of the complainant should be a matter for argument by counsel and for determination by the jury;
- (b) subject to paragraph (c), except for identifying the issue for the jury and the competing contentions of counsel, the judge must not give a direction regarding the effect of delay in complaint, or absence of complaint, on the credibility of the complainant, unless satisfied it is necessary to do so in order to ensure a fair trial; and
- (c) if evidence is given, a question is asked, or a comment is made that tends to suggest that the victim either delayed making, or failed to make, a complaint in respect of the offence, the judge must tell the jury that there may be good reasons why a victim of a sexual offence may delay making or fail to make a complaint.

**Recommendation 28–5** Federal, state and territory legislation should:

- (a) prohibit an unrepresented defendant from personally cross-examining any complainant, child witness or other vulnerable witness in sexual assault proceedings; and
- (b) provide that an unrepresented defendant be permitted to cross-examine the complainant through a person appointed by the court to ask questions on behalf of the defendant.

**Recommendation 28–6** Federal, state and territory legislation should permit prosecutors to tender a record of the original evidence of the complainant in any re-trial ordered on appeal.

## **Part H – Overarching Issues**

### **29. Integrated Responses**

**Recommendation 29–1** The Australian, state and territory governments, in establishing or further developing integrated responses to family violence, should ensure that any such response is based on common principles and objectives, developed in consultation with relevant stakeholders.

**Recommendation 29–2** The Australian, state and territory governments, in establishing or further developing integrated responses to family violence, should ensure ongoing and responsive collaboration between agencies and organisations, supported by:

- (a) protocols and memorandums of understanding;
- (b) information-sharing arrangements;
- (c) regular meetings; and
- (d) where possible, designated liaison officers.

**Recommendation 29–3** The Australian, state and territory governments should prioritise the provision of, and access to, culturally appropriate victim support services for victims of family violence, including enhanced support for victims in high risk and vulnerable groups.

**Recommendation 29–4** The Australian, state and territory governments should prioritise the provision of, and access to, legal services for victims of family violence, including enhanced support for victims in high risk and vulnerable groups.

**Recommendation 29–5** State and territory victims' compensation legislation:

- (a) should define an 'act of violence' to include family violence and ensure that evidence of a pattern of family violence may be considered;
- (b) should not provide that acts are 'related' merely because they are committed by the same offender, and should provide that victims have the opportunity to object if claims are to be treated as related; and
- (c) should ensure that victims' compensation claims are not excluded on the basis that the offender might benefit from the claim. (Other measures should be adopted to ensure that offenders do not have access to victims' compensation award.)

## 30. Information Sharing

**Recommendation 30–1** The *Initiating Application (Family Law)* and *Initiating Application (Family Law) Response* forms should clearly seek information about past and current family violence protection and child protection orders obtained under state and territory family violence and child protection legislation and past, pending or current proceedings for such orders.

**Recommendation 30–2** The *Initiating Application (Family Law)* and *Initiating Application (Family Law) Response* forms should be amended to include a question seeking more general information, for example, 'Do you have any fears for the safety of you or your child or children that the court should know about?'

**Recommendation 30–3** Non-publication provisions in state and territory family violence legislation should expressly allow disclosure of information in relation to protection orders and related proceedings that contains identifying information in

appropriate circumstances, including disclosure of family violence protection orders to the federal family courts under s 60CF of the *Family Law Act 1975* (Cth).

**Recommendation 30–4** State and territory child protection legislation should not prevent child protection agencies from disclosing to federal family courts relevant information about children involved in federal family court proceedings in appropriate circumstances.

**Recommendation 30–5** Federal family courts and state and territory child protection agencies should develop protocols for:

- (a) dealing with requests for documents and information under s 69ZW of the *Family Law Act 1975* (Cth); and
- (b) responding to subpoenas issued by federal family courts.

**Recommendation 30–6** State and territory family violence legislation should require courts exercising jurisdiction under that legislation to inquire about existing parenting orders under the *Family Law Act 1975* (Cth), or pending proceedings for such orders.

**Recommendation 30–7** Application forms for family violence protection orders in all states and territories, including applications for variation of protection orders, should clearly seek information about existing parenting orders under the *Family Law Act 1975* (Cth), or pending proceedings for such orders.

**Recommendation 30–8** Federal family courts should provide state and territory courts dealing with family violence and child protection matters—and others with a proper interest in such matters, including police and child protection agencies—with access to the Commonwealth Courts Portal to ensure that they have reliable and timely access to relevant information about existing federal family court orders and pending proceedings for such orders.

**Recommendation 30–9** The Australian, state and territory governments should ensure that privacy principles regulating the handling of personal information in each jurisdiction expressly permit the use or disclosure of information where agencies and organisations reasonably believe it is necessary to lessen or prevent a serious threat to an individual's life, health or safety.

**Recommendation 30–10** The Australian, state and territory governments should consider amending secrecy laws that regulate the disclosure of government information to include an express exception to allow the disclosure of information in the course of a government officer's functions and duties.

**Recommendation 30–11** State and territory family violence legislation should expressly authorise the use or disclosure of personal information for the purpose of ensuring the safety of a victim of family violence or an affected child.

**Recommendation 30–12** State and territory child protection legislation should expressly authorise agencies to use or disclose personal information for the purpose of ensuring the safety of a child or young person.

**Recommendation 30–13** State and territory family violence legislation and child protection legislation should expressly provide for information sharing among specified agencies in specified circumstances, and should include provision to allow information to be shared with specified private sector organisations.

**Recommendation 30–14** The Australian, state and territory governments should develop guidelines to assist agencies and organisations working in the family violence and child protection systems to better understand the rules relating to the sharing of information.

**Recommendation 30–15** The Australian, state and territory governments should ensure that, in developing any database to allow the sharing of information between agencies and organisations in the family violence or child protection systems, appropriate privacy safeguards are put in place.

**Recommendation 30–16** Federal family courts, state and territory magistrates courts, police, and relevant government agencies should develop protocols for the exchange of information in relation to family violence matters. Parties to such protocols should receive regular training to ensure that the arrangements are effectively implemented.

**Recommendation 30–17** Federal family courts and state and territory child protection agencies should develop protocols for the exchange of information in those jurisdictions that do not yet have such arrangements in place. Parties to such protocols should receive regular training to ensure that the arrangements are effectively implemented.

**Recommendation 30–18** A national register should be established. At a minimum, information on the register should:

- (a) include interim, final and police-issued protection orders made under state and territory family violence legislation; child protection orders made under state and territory child protection legislation; and related orders and injunctions made under the *Family Law Act 1975* (Cth); and
- (b) be available to federal, state and territory police, federal family courts, state and territory courts that hear matters related to family violence and child protection, and child protection agencies.

**Recommendation 30–19** The national register recommended in Rec 30–18 should be underpinned by a comprehensive privacy framework and a privacy impact assessment should be prepared as part of developing the register.

## 31. Education and Data Collection

**Recommendation 31–1** The Australian, state and territory governments and educational, professional and service delivery bodies should ensure regular and consistent education and training for participants in the family law, family violence and child protection systems, in relation to the nature and dynamics of family violence, including its impact on victims, in particular those from high risk and vulnerable groups.

**Recommendation 31–2** The Australian, state and territory governments should collaborate with relevant stakeholders to develop and maintain a national bench book on family violence, including sexual assault, having regard to the Commissions' recommendations in this Report in relation to the content that should be included in such a book.

**Recommendation 31–3** Australian tertiary institutions offering legal qualifications should review their curriculums to ensure that legal issues concerning family violence are appropriately addressed.

**Recommendation 31–4** Australian legal professional bodies should review continuing professional development requirements to ensure that legal issues concerning family violence are appropriately addressed.

**Recommendation 31–5** The Australian, state and territory governments should collaborate in conducting a national audit of family violence training conducted by government and non-government agencies in order to:

- (a) ensure that existing resources are best used;
- (b) evaluate whether training meets best practice principles; and
- (c) promote the development of best practice in training.

**Recommendation 31–6** State and territory governments should undertake systemic and ongoing reviews into deaths resulting from family violence.

## 32. Specialisation

**Recommendation 32–1** State and territory governments, in consultation with relevant stakeholders, should establish or further develop specialised family violence courts within existing courts in their jurisdictions.

**Recommendation 32–2** State and territory governments should ensure that specialised family violence courts are able to exercise powers to determine: family violence protection matters; criminal matters related to family violence; and family law matters to the extent that family law jurisdiction is conferred on state and territory courts.

**Recommendation 32–3** State and territory governments should ensure that specialised family violence courts have, as a minimum:

- (a) specialised judicial officers and prosecutors;
- (b) regular training on family violence issues for judicial officers, prosecutors, lawyers and registrars;
- (c) victim support, including legal and non-legal services; and
- (d) arrangements for victim safety.

**Recommendation 32–4** State and territory governments should, where possible, promote the following measures in all courts dealing with family violence matters, including courts in regional and remote communities:

- (a) identifying and listing on the same day, protection order matters and criminal proceedings related to family violence, as well as related family law and child protection matters;
- (b) training judicial officers in relation to family violence;
- (c) providing legal services for victims and defendants;
- (d) providing victim support on family violence list days; and
- (e) ensuring that facilities and practices secure victim safety at court.

**Recommendation 32–5** State and territory police should ensure, at a minimum, that:

- (a) specialised family violence and sexual assault police units are fostered and structured to ensure appropriate career progression for officers and the retention of experienced personnel;
- (b) all police—including specialised police units—receive regular education and training consistent with the *Australasian Policing Strategy on the Prevention and Reduction of Family Violence*;
- (c) specially trained police have responsibility for supervising, monitoring or assuring the quality of police responses to family violence incidents, and providing advice and guidance in this regard; and
- (d) victims have access to a primary contact person within the police, who specialises, and is trained, in family violence, including sexual assault issues.

# **Executive Summary**

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## **Contents**

Context	49
Inquiry in context	50
The brief	50
Fragmentation of laws and practice	52
Framework for reform	52
Development of the reform response	53
Principles for reform	53
Summary of key recommendations	54
Improving legal frameworks	54
Common interpretative framework	55
Corresponding jurisdictions	57
Improving evidence of family violence	61
Improving fairness	63
Sexual assault laws	65
Improving practice	71
Specialisation	71
Education and training	75
National family violence bench book	75
Integrated responses	76
Improving police and prosecutorial practice	78
Information sharing	78
National register	81
Net effect of the recommendations	82

## **Context**

This Report contains 187 recommendations for reform spread across eight parts—as summarised in Chapter 1. The recommendations reflect, on the one hand, objectives with respect to the reduction of violence, particularly in relation to women and children, and, on the other hand, a framework of key principles for the Inquiry. The Australian Government has identified a clear goal ‘to reduce all violence in our communities’, recognising that ‘whatever the form violence takes, it has serious and often devastating consequences for victims, their extended families and the

community', and 'comes at an enormous economic cost'.<sup>1</sup> The Terms of Reference to the Commissions form one plank in the response.

### Inquiry in context

This Inquiry into family violence by the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (the Commissions) is one of a number of concurrent inquiries on the subject—reflecting intense and ongoing concern in relation to victims of such violence and the public cost over time.

First, the Australian Government Attorney-General commissioned a review by Professor Richard Chisholm, former Justice of the Family Court of Australia, of the practices, procedures and laws that apply in the federal family law courts in the context of family violence. The review was completed at the end of November 2009, and released on 28 January 2010. Secondly, the Family Law Council provided advice to the Attorney-General on the impact of family violence on children and on parenting, which was released at the same time as the Chisholm's review. Thirdly, the Australian Institute of Family Studies released its evaluation of the 2006 family law reforms, which provided empirical data about the impact of the 2006 changes to the *Family Law Act 1975* (Cth). This Inquiry therefore takes place in the context of very active contemporary scrutiny of the legal system and its engagement with families and family violence.

### The brief

While the scope of the problem of family violence is extensive, the brief in this Inquiry is necessarily constrained both by: the Terms of Reference—set out at the front of this Report; and by the role and function of the Commissions—set out in their constituting Acts. The Commissions were asked to consider:

- 1) the interaction in practice of State and Territory family/domestic violence and child protection laws with the *Family Law Act* and relevant Commonwealth, State and Territory criminal laws; and
- 2) the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence on victims of such violence.

In relation to both these issues, the Commissions were asked to consider 'what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and their children'. The range of legal frameworks the focus of this Inquiry was also not 'at large', but limited, in the first Term of Reference, to specified areas of interaction; and, in the second Term of Reference, to the impact of inconsistent interpretation and application of law in relation to sexual assault. Nevertheless, the range of laws to be considered was broad—embracing at least 26 legislative regimes. The canvas, therefore, was a very large one—given the number of laws under

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1 Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009), 2.

consideration; and the issues were very complex—given the focus on interaction and inconsistencies.

Each area of law reflects its own distinct purposes, anchored in its own history, considered in Chapter 4. The concurrent inquiries, noted above, were focused on the *Family Law Act*. When the other legislative regimes are brought into consideration—as they were in this Inquiry—the challenges for the Commissions were increased exponentially. There is a further clustering of regimes in which the State is the principal actor—namely, criminal and child protection laws; and those in which the laws essentially concern litigation between parties—namely, family law and family violence law; and the further hybrid nature of family violence laws, where the police may play a key role in a protective regime under the civil law.

### ***The limits of law***

A theme articulated during the Inquiry and also in relation to the more general issue of responding to family violence, is the limits of law, both in terms of services but also in terms of its application. As remarked by one stakeholder, ‘you can have the perfect law, but ...’. The Commissions also recognise that the Inquiry concerns only a narrow slice of the vast range of issues raised by family violence—when women and children encounter the legal system in its various manifestations. A comment made by the Family Law Council in its advice to the Attorney-General of Australia in January 2009, is equally apt with respect to the problems of family violence in a much wider sense. The Council, noting that it was only focusing on family violence ‘when it becomes visible in the Family Law system in Australia’, stated that:

This visible pattern is only the tip of the iceberg of family violence, alcoholism, drug addiction and mental illness which is apparently entrenched in Australia.<sup>2</sup>

### ***Gendered nature of terms of reference***

The Terms of Reference are clearly gendered—in their focus on women and children; and they have a particular lens—family violence. The National Council to Reduce Violence Against Women and their Children acknowledged that while women as well as men can commit—as well as be victims of—family violence or sexual assault, the research shows that ‘the overwhelming majority of violence and abuse is perpetrated by men against women’.<sup>3</sup> Put very simply, ‘[t]he biggest risk factor for becoming a victim of sexual assault and/or domestic and family violence is being a woman’.<sup>4</sup>

The suite of recommendations presented in this Report, however, are directed towards reforming legal frameworks with the aim of improving the safety of *all* victims of family violence—the effect will be to the benefit of all victims, whether male or female.

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2 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 7.

3 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council’s Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 25.

4 Ibid, 26.

### **Fragmentation of laws and practice**

A key element of the challenge of this Inquiry is that, in the area of family law, neither the Commonwealth nor the states and territories have exclusive legislative competence. The result is an especially fragmented system with respect to children. Moreover the boundaries between the various parts of the system are not always clear and jurisdictional intersections and overlaps are ‘an inevitable, but unintended, consequence’.<sup>5</sup>

For example, family violence involving children may arise as a dispute between parents and the state in a children’s court—where care and protection proceedings are initiated with respect to a child or children—or as a dispute between parents in a court with jurisdiction under the *Family Law Act*. There is also a danger that issues concerning violence may fall into the cracks between the systems. The consequence of the division of powers means that:

neither the Commonwealth nor the States’ jurisdiction provides a family unit with the complete suite of judicial solutions to address all of the legal issues that may impact on a family in respect of their children.<sup>6</sup>

The fragmentation of the system has also led to a fragmentation of practice. A number of stakeholders in this Inquiry commented that the different parts of the legal framework dealing with issues of family violence operated in ‘silos’ and that this was the key problem in the system. Although the laws utilised within each ‘silo’ might be perceived to operate effectively, or to require minor refinement and change, the problems faced by victims of violence required engagement with several different parts of the system. Consequently, as discussed particularly in Chapter 2 and Part E, these people could be referred from court to court, and agency to agency, with the risk that they may fall into the gaps in the system and not obtain the legal solutions—and the protection—that they require.

### **Framework for reform**

The specific objective of this Inquiry is to improve safety for women and children in the context of family violence through recommendations for reform of legal frameworks. In this context, the idea of ‘frameworks’ extends beyond law in the form of legislative instruments to include education, information sharing and other measures to improve police and prosecutorial practice. The overall touchstones throughout the chapters and recommendations, however, are to improve safety and that ensure that where laws are in place, that they need to work well.

5 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [2.3].

6 L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies, [7.3.2].

## Development of the reform response

Commitment to widespread consultation is a hallmark of best practice law reform. In undertaking the Inquiry, and in developing a comprehensive response to the Terms of Reference, the Commissions embarked on a wide consultative process as described in Chapter 1. For this Inquiry, a multi-faceted consultation strategy was required—using a broad mix of face-to-face consultations and roundtable discussions; online communication tools and the release of a Consultation Paper together with a companion Consultation Paper Summary.

Two hundred and thirty-six consultations were conducted nationally to reach key stakeholders around the country, including many groups representing Indigenous clients. Internet communication tools were also integrated into the consultation process, to provide information and obtain comment. A monthly e-newsletter highlighted an ‘issue in focus’ and the comments received provided an important additional input. By the end of the Inquiry there were 965 subscribers to the e-newsletter.

The Consultation Paper was a major publication, running to 1,018 pages. To facilitate stakeholder contributions in the restricted time frame for this Inquiry, the Commissions simultaneously released a Consultation Paper Summary of 243 pages. However, the enduring nature of law reform projects is such that the research and evidence base, on which recommendations are based, must be fully explored and reported—and in a complex and extensive Inquiry such as this, substantial documentation is inevitable.

## Principles for reform

The framework for reform in this Inquiry is set out in Chapter 3. In summary, the recommendations in this Report are underpinned by four specific principles or policy aims that relevant legal frameworks in this Inquiry should express: seamlessness, accessibility, fairness and effectiveness:

- (1) *Seamlessness*—to ensure that the legal framework is as seamless as possible from the point of view of those who engage with it.
- (2) *Accessibility*—to facilitate access to legal and other responses to family violence.
- (3) *Fairness*—to ensure that legal responses to family violence are fair and just, holding those who use family violence accountable for their actions and providing protection to victims.
- (4) *Effectiveness*—to facilitate effective interventions and support in circumstances of family violence.

The reform principles are reflected in an interlinking suite of recommendations addressing both Terms of Reference, plus a specific set in relation to particular aspects of the second Term of Reference. The principles express, at a policy level, the foundation of the recommendations.

## **Summary of key recommendations**

The recommendations themselves can be viewed from two distinct perspectives—a systems perspective, and a participant perspective. The overarching, or predominant principle is that of seamlessness, and to achieve this both perspectives must be connected, to the greatest extent possible, within the constitutional and practical constraints of a federal system. This seamlessness is expressed in recommendations focused on improving legal frameworks and improving practice.

The improvement of legal frameworks will be achieved through:

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

The improvement of practice will be achieved through:

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

## **Improving legal frameworks**

In this Report, the Commissions make recommendations directed towards improving the legal frameworks in the area of family violence. In particular, reforms are directed to developing a common interpretative framework, enhancing corresponding jurisdictions, improving the quality and use of evidence and the interpretation and application of sexual assault laws.

## Common interpretative framework

A key plank of the Commissions' recommendations is the adoption of a common interpretative framework in relation to family violence across state and territory family violence legislation, the *Family Law Act* and, in limited circumstances, the criminal law. This involves: establishing a shared understanding of what constitutes family violence across these legislative schemes; and of the nature, features and dynamics of family violence. In relation to state and territory family violence legislation, it also involves the adoption of core guiding principles based on a human rights framework, the adoption of core purposes, and striving for equality of treatment of family violence victims by establishing common grounds for obtaining protection orders and a core set of persons to be protected.

The common interpretative framework, discussed in Chapters 5 to 7, is based on the same core definition of family violence, describing the context in which behaviour takes place, as well as a shared common understanding of the types of conduct—both physical and non-physical—that may fall within the definition of family violence in the following legislation:

- state and territory family violence legislation;
- the *Family Law Act*; and
- the criminal law—in the limited circumstances where ‘family violence’ is defined in the context of defences to homicide.

The Commissions recommend, in Chapters 5 and 6, that each legislative regime should provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.

Adopting consistent definitions of family violence across different legislative schemes allows the courts to send clear messages about what constitutes family violence. The Commissions also recommend, in Chapter 7, that this definition be complemented in

family violence legislation by a provision that explains the nature, features and dynamics of family violence, including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children. In addition, family violence legislation should refer to the particular impact of family violence on: Indigenous persons; those from a culturally and linguistically diverse (CALD) background; those from the gay, lesbian, bisexual, transgender and intersex communities; older persons; and people with disabilities. The Commissions recommend the adoption of a similar provision in the *Family Law Act*.

The Commissions are not advocating that all types of conduct that constitute family violence should be criminalised, nor that family violence should be given the same treatment in the various legal frameworks considered in this Report. In each case, the severity and context of particular family violence may carry varying weight in different legal proceedings, depending on the reasons for advancing evidence of family violence and the purposes of the respective legal frameworks—which are analysed in Chapter 4. Nor do the Commissions consider that the adoption of a shared understanding of what constitutes family violence in any way compromises the objects and purposes of the legislative schemes that are the subject of this approach. It is imperative that common definitions of family violence reflect a consistent and shared understanding of the concepts that underlie the legislative schemes, reinforced by appropriate and regular training.

The Commissions consider that there is a stronger case for uniformity of the definition of family violence across an individual state or territory's family violence and criminal laws, in the limited circumstances where family violence is defined in the context of defences to homicide. Uniformity of the definition *within* an individual state or territory—as opposed to a core definition with a shared understanding of what constitutes family violence—has the advantage of clearly conveying a legislative intention for a consistent interpretation of family violence across criminal and civil jurisdictions. Moreover, this will also facilitate the proper recognition in the criminal law of the broad ambit of family violence, as discussed in Chapter 14, in the context of defences to homicide.

The Commissions consider that significant systemic benefits would flow from the adoption of a common interpretative framework, across different legislative schemes, promoting the foundational policy principles of seamlessness and effectiveness underlying the approach to reform advocated by this Inquiry. Embracing a common understanding of family violence is also likely to have a positive flow-on effect in the gathering of evidence of family violence for use in more than one set of proceedings. Another significant benefit of adopting a commonly shared understanding of family violence is that it will facilitate the registration and enforcement of family violence protection orders under the proposed national registration of protection orders scheme, considered in Chapter 30, and provide more useful and comparable data upon which policies to address family violence can be based.

## Corresponding jurisdictions

A crucial set of recommendations in this Report, in the chapters identified below, is aimed at implementing in law the concept of ‘one court’, through an expansion of jurisdiction of federal, state and territory courts responding to family law, family violence and child protection issues. In particular, while the prospect of a single new specialist court to deal with all legal matters relating to family violence is not practicable, an effective way to achieve the benefits of ‘one court’ is to develop corresponding jurisdictions, in which each of the jurisdictions of courts dealing with family violence correspond to an appropriate degree. Enhancing the ability of courts to deal with matters outside their core jurisdiction will allow victims of family violence to resolve their legal issues relating to family violence in the same court, as far as practicable, consistent with the constitutional division of powers.

### ***State and territory courts***

#### *Family law*

The Commissions recommend, in Chapter 16, that the *Family Law Act* should be amended to allow state and territory courts, when making or varying a protection order, to make a parenting order under pt VII of the *Family Law Act* until any further order—a reinstatement of the jurisdiction that was removed from state and territory courts in 2006.

State and territory magistrates courts are often the first point of contact with the legal system for separating families who have experienced family violence. As such, the Commissions consider that it is important that state and territory magistrates courts can deal with as many issues relating to the protection of victims of family violence as possible. Making an interim parenting order at this time may take the heat out of the situation by regulating how separating parents spend time and communicate with their children. For example, while a protection order may include conditions to protect a person from violence or harassment, a parenting order may prescribe handover arrangements to minimise contact between the parents. In appropriate cases, a judicial officer making a parenting order during protection order proceedings could also make orders to facilitate transfer to a federal family court, for example by making orders about family counselling or appointing an independent children’s lawyer.

One reason for the recommendation to repeal the power of state and territory courts to make parenting orders, was the view that magistrates courts had limited time and resources to perform this role. The Commissions acknowledge the force of the practical concerns reflected in submissions to this Inquiry. The recommendations made in this Report are put forward as part of a package. The goal of ensuring that legal systems that deal with issues of family violence are as accessible and seamless as possible requires that changes to the jurisdiction as well as the practices of state and territory courts to be implemented together.

In particular, the Commissions consider that developing and extending specialised practices in family violence in state and territory courts is an important way to foster the expertise and focus the resources of courts, judicial officers and legal practitioners.

The importance of specialisation in the exercise of family law jurisdiction by state and territory magistrates courts is discussed in Chapter 16, while the benefits of specialised practice across the systems responding to family violence are considered in Chapter 32.

#### *Criminal law*

The Commissions have made a number of recommendations to improve the interaction of family violence and criminal laws. In Chapter 10, the Commissions recommend that in granting bail, judicial officers should be required to consider whether to impose protective bail conditions, issue or vary a family violence protection order, or do both.

In Chapter 11, the Commissions recommend that state and territory family violence legislation should include an express provision conferring on courts a power to make a protection order on their own initiative at any stage of a criminal proceeding. Any such order made prior to a plea or finding of guilt should be interim until there is a plea or finding of guilt. The Commissions have also recommended prosecutors be empowered to apply for protection orders where a person pleads guilty or is found guilty of an offence.

Further, a court before which a person pleads guilty or is found guilty of an offence involving family violence should be required to consider whether any existing protection order needs to be varied to provide greater protection for the person against whom the offence was committed.

The combined effect of these recommendations is to increase the likelihood that judicial officers and prosecutors in family violence related criminal proceedings will focus on victim safety and protection and lessen the trauma, stress and time involved in a victim having to apply for a protection order, or the variation of such an order, in separate civil proceedings.

#### *Federal family courts*

##### *Personal protection*

In Chapter 17, the Commissions consider how to make the federal family courts' jurisdiction as similar as possible to that of state and territory magistrates courts with respect to the protection it can provide for personal safety. Although federal family courts already have powers directed towards the safety of victims of family violence who come within the jurisdiction of the *Family Law Act*, the Commissions have heard that solutions available for victims of family violence in federal family courts are largely ineffective. Consequently, the Commissions recommend reforms to make injunctions for personal protection more effective for victims of family violence who are before a federal family court. The Commissions recommend that the existing framework for protection orders in the *Family Law Act* be amended to provide that a breach of such orders is a criminal offence—so that they operate as closely as possible to the protection provisions available under state and territory legislation.

In making this recommendation, the Commissions do not suggest the development of a protection order practice in federal family courts to replicate exactly the jurisdiction of state and territory courts. The Commissions consider that state and territory courts

should remain the primary jurisdiction for obtaining a protection order—particularly given the role of police in proceedings in those courts, the wider range of persons who may be protected by state and territory family violence legislation, and the considerable experience of state and territory magistrates and court staff with respect to family violence protection order proceedings.

However, the Commissions are of the view that victims of family violence—in particular, those for whom family law proceedings are on foot or anticipated—should be able to obtain effective orders for their protection in federal family courts, if they need them. This allows victims to resolve their legal issues to a greater extent in the one court process—in this instance, in federal family courts. The Commissions consider that fostering the seamlessness of the court process in this way has significant benefits for victims of family violence. This approach also minimises victims' exposure to multiple proceedings in different jurisdictions, thereby avoiding the personal and financial impacts of repeated proceedings and consequent reiteration of the same facts before different courts.

The Commissions acknowledge the potential resource implications in developing corresponding jurisdictions, notably in the provision of training to judicial officers and police, which is the subject of a specific set of recommendations, drawn together in Chapter 31. Developing the ability of federal family courts to deal with matters of personal protection may also have an effect on legal aid funding. However, the Commissions consider these reforms will lead to long term savings, by reducing replication across different jurisdictions.

#### *Parenting orders and child protection agencies*

A clear jurisdictional gap in the power of federal family courts to respond to family violence arises where a case involves allegations of child abuse and the court wishes to make an order giving parental responsibility to the child protection agency because the judge considers that there is no other viable option for that child. This also attracted attention when in 2009 the Family Law Council recommended that:

The Attorney General as a member of SCAG address the referral of powers to federal family courts so that in determining a parenting application federal family courts have concurrent jurisdiction with that of State Courts to deal with all matters in relation to children including where relevant family violence, child protection and parenting orders.<sup>7</sup>

While the Commissions are disinclined to recommend a general reference of child welfare powers to federal family courts, in Chapter 19 it is recommended that there be a limited referral of powers to enable the Australian Government to make laws allowing family courts to confer parental rights and duties on a child protection agency in cases where there is no other viable and protective carer—but only in this limited class of case.

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<sup>7</sup> Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Rec 7.

### ***State and territory children’s courts***

#### *Parenting orders*

Each state and territory court of summary jurisdiction is vested with jurisdiction under pt VII of the *Family Law Act*. Magistrates are able to exercise federal family law jurisdiction under s 69J of the *Family Law Act*, but children’s court magistrates are not always able to do so. *Seen and Heard: Priority for Children in the Legal Process* (ALRC Report 84) criticised legal processes which required a child’s persistent and multiple engagement with the legal system as being contrary to the child’s best interests. It is also at odds with the goal of seamlessness that the Commissions have identified as a principal aim of this Inquiry.

The Commissions consider that, wherever possible, matters involving children should be dealt with in one court—or as seamlessly as the legal and support frameworks can achieve in any given case. This was also the outcome recommended by the Family Law Council in 2002 in its report on family law and child protection, as part of its ‘one court’ principle—that is, that state and territory courts should have a broad power to make residence and contact orders under the *Family Law Act* in child protection proceedings so that one court can deal with all substantive matters and ensure the child’s best interests and welfare are addressed.

The Commissions therefore recommend, in Chapter 19, that the *Family Law Act* should be amended to provide that when a matter is before a children’s court, such courts should have the same powers to make decisions under the *Family Law Act* as magistrates courts—including the expanded powers recommended in Chapter 16.

Expanding the jurisdiction of children’s courts in this way would have the advantage that where a case commences in a children’s court but raises parenting issues, a court apprised of the child protection concerns and having evidence from a child protection authority would be able to decide if it were more appropriate for a decision to be made under child protection legislation, or under the *Family Law Act*. It would have jurisdiction to make both types of orders.

#### *Protection orders*

A number of state and territory family violence laws already confer jurisdiction on children’s courts to make family violence protection orders, although the powers conferred on some state and territory children’s courts are more limited than others.

The Commissions recommend, in Chapter 20, that all Australian children’s courts should have clear jurisdiction under family violence legislation to hear and determine applications for family violence protection orders where the person affected by the family violence, to be protected, or against whom the order is sought, is under 18 years. However, the jurisdiction should only be enlivened where there are proceedings in the court involving the child or young person, or a member of the child’s or young person’s family.

Expanding the jurisdiction of children’s courts to make family violence protection orders is consistent with the Commissions’ overarching policy objective that, to the

maximum extent possible, families who enter the legal system should be able to apply for, and be granted the orders they need to address their safety concerns by the court with which they first engage. Such orders would be a significant adjunct to the orders presently available under child protection legislation to ensure the safety of the child and the child's non-offending parent.

Jurisdiction to make family violence protection orders also fits squarely within the expertise of children's court magistrates. Family violence issues are part of the core work of children's courts. Many children's courts magistrates are also likely to have experience in exercising jurisdiction under family violence legislation in their capacity as magistrates dealing with adults. The benefits of the enhanced jurisdiction are significant. It creates a more seamless system for victims of family violence—including children—to allow them to access as many orders and services as possible in the court in which the family is first involved; removes the need for the child and the family to have to navigate multiple courts; reduces the need for victims of family violence to have to repeat their stories; and consequently reduces the likelihood that people will drop out of the system without the protections they need.

Where a children's court has jurisdiction to hear a family violence protection order application, the court should also be able to make a family violence protection order in favour of siblings of the child or young person who is the subject of proceedings, or other children or young people within the same household, who are affected by the same or similar circumstances; and to make a family violence protection order for the protection of an adult where the adult is affected by the same or similar circumstances.

### **Improving evidence of family violence**

From the first moment a victim of family violence enters the legal system—most often in a state or territory magistrates court—the aim of the recommendations in this Report is to capture the evidence in a way that reduces the need for repetition—a common complaint. Some recommendations are aimed at improving what information is provided by parties; others focus on what courts are expected to ask of parties; others place attention on ensuring that information about family violence is properly considered.

The Commissions consider that legal and other responses to family violence are improved if information is provided and of better quality from the outset. In Chapter 18, the Commissions recommend that state and territory courts should ensure that application forms for protection orders include information about the kinds of conduct that constitute family violence and should require that applicants swear or affirm a statement incorporated in, or attached to, the application form, setting out the basis of the application. In Chapter 16 a similar recommendation is made with respect to seeking information about property orders under the *Family Law Act* or any pending application for such orders.

Complementing this encouragement of better information from the parties, the Commissions recommend—in Chapters 30 and 16 respectively—that courts exercising jurisdiction under state and territory family violence legislation should inquire about existing parenting orders under the *Family Law Act* or pending proceedings for such

orders; and when considering whether to make personal property directions in protection order proceedings, to inquire about and consider any property orders under the *Family Law Act* or pending application for such orders.

As discussed in Chapter 15, in the family law context there are a number of ways that information about family violence may be brought to the attention of the court, including where information is supplied by the parties, or by other professionals working with the parties. Information may also be shared between different courts or between agencies and organisations and the courts—this is considered in Chapter 30. The Commissions are of the view that a range of mechanisms should be used to collect information relevant to parenting proceedings in the family courts.

Currently, the *Initiating Application (Family Law)* includes one general question seeking information on existing orders and one general question seeking information on ongoing cases about family law, child support, family violence or child welfare. In comparison, some state and territory protection order application forms ask separately for details about, for example, children’s court orders, protection orders, and family court orders. The Commissions support this more detailed approach in which questions are asked, or tick boxes provided, in relation to each different order and each different kind of case.

The Commissions acknowledge that some caution must be exercised in using family violence protection orders as evidence of family violence in the family court system in some circumstances, and this issue is discussed in detail in Chapter 18. However, it is important that the family court system be aware that such orders exist so as to avoid, as far as possible, the making of inconsistent parenting orders.

In relation to family law applications, in Chapter 30, the Commissions recommend amending initiating application forms to clearly seek information about past and current family violence protection and child protection orders obtained under state and territory family violence and child protection legislation and past, pending or current proceedings for such orders. Then, in assessing what parenting order to make in the context of allegations of family violence, the Commissions recommend in Chapter 17 that a court, when determining the best interests of the child, must consider evidence of family violence given, or findings made, in relevant family violence protection order proceedings.

Further, to improve the understanding of victims of family violence concerning their options in the context of family dispute resolution under the *Family Law Act*, the Commissions recommend in Chapter 23 that participants are advised that: they may be exempt from requirements to participate in family dispute resolution; they should inform a family dispute resolution practitioner about any family violence protection orders or proceedings; and they should inform federal family courts about any family violence protection orders or proceedings, where family court proceedings are initiated.

These recommendations represent a combination of ‘push’ and ‘pull’ factors directed towards better information capture on the most likely first occasion of presentation.

## **Improving fairness**

A number of recommendations throughout this Report are directed to ensuring fairness—both to victims of family violence and to those who have used it—reflecting a key reform principle in this Inquiry.

### ***To the victim***

To improve the experience of victims of family violence in the context of family violence proceedings, the Commissions recommend, in Chapter 18, that state and territory family violence legislation should prohibit the respondent in protection order proceedings from personally cross-examining any person against whom the respondent is alleged to have used family violence. Further, where a decision is made not to grant an exclusion order against the person who has used family violence, even though such order has been sought, the Commissions recommend in Chapter 11 that a court should be required to give reasons for declining to make the order. Transparency of decision-making is an essential ingredient of fairness.

To ensure that victims are fully informed about decisions in relation to family violence offences committed against them, the Commissions recommend, in Chapter 10, that state and territory legislation should impose an obligation on police and prosecutors to inform victims of family violence promptly of decisions to grant or refuse bail and, where bail is granted, the conditions of release. Victims should also be given or sent a copy of the bail conditions, or such conditions should be sent to family violence legal and service providers with whom a victim is known to have regular contact. Where there are bail conditions and a protection order, police and prosecutors—properly trained about such matters—should explain how these interact.

The Commissions also make recommendations in the context of criminal offences that recognise the nature and dynamics of family violence and the impact on victims. For example, such as the recommendation, in Chapter 12, that state and territory legislation should provide that a person protected by a protection order under family violence legislation cannot be charged with or found guilty of an offence of aiding, abetting, counselling or procuring the breach of a protection order. In addition, the Commissions recommend, in Chapter 14, that state and territory criminal legislation should ensure that defences to homicide accommodate the experiences of family violence victims who kill.

### ***Accountability***

A key aspect of fairness is the accountability of those who use family violence. While the imposition of rehabilitation and counselling conditions as part of a protection order raises some challenging issues in application, the Commissions consider that these challenges ought to be met as part of a broad integrated response to family violence. It is important for family violence legislation expressly to allow for courts making protection orders to impose conditions requiring persons to attend rehabilitation or counselling programs in appropriate circumstances. Recommendations to this effect are made in Chapter 11.

Rehabilitation programs are an essential measure for treating the causes rather than the symptoms of family violence. While protection order conditions prohibiting or restricting a respondent's contact with the victim may assist in reducing or preventing violence against that victim in the short term, successful participation by a respondent in appropriate and relevant rehabilitation and counselling programs has the advantage of targeting the long-term reduction or prevention of family violence—including as against persons other than the victim who is the subject of the protection order.

In addition, where appropriate, state and territory courts should provide persons against whom protection orders are made with information about relevant culturally and gender-appropriate rehabilitation and counselling programs.

***To the respondent/accused***

The Commissions have made recommendations to ensure fair treatment of those who use family violence—whether in civil family violence proceedings, in a criminal trial, or in sentencing.

In Chapter 9, the Commissions make a recommendation limiting the circumstances in which police can issue protection orders against those who have used family violence. The ALRC is under an obligation under the *Australian Law Reform Commission Act 1996* (Cth) to ensure that the laws it reviews do not make the rights and liberties of citizens unduly dependent on administrative rather than judicial decisions.

In Chapter 11, the Commissions recommend that judicial officers making protection orders be required to consider whether or not to make an exclusion order. While the primary factor to consider in making this decision is the necessity of ensuring the safety of a victim or affected child, the Commissions also consider that relevant secondary factors include the accommodation needs and options available to the parties, particularly in light of any disability that they may have.

Fairness to a person accused of a criminal offence is a fundamental principle of justice and, as discussed in Chapter 2, reflective of obligations under the *International Covenant on Civil and Political Rights*, including the right to a 'fair and public hearing' in art 14 with minimum procedural guarantees in the case of criminal charges.

In the context of the trial of an accused for an offence arising out of conduct that is the same or substantially similar to that on which a protection order is based, the Commissions recommend—in Chapter 11—that references cannot be made, without the leave of the court, to:

- (a) the making, variation and revocation of protection orders in proceedings under family violence legislation—unless the offence the subject of the trial is breach of a protection order, in which case leave of the court is not necessary;
- (b) the refusal of a court to make, vary or revoke a protection order in proceedings under family violence legislation; and

- (c) the existence of current proceedings for a protection order under family violence legislation against the person the subject of the criminal proceedings.

To allow references to be made to facts that have not been subject to the criminal standard of proof may be prejudicial to an accused, affecting his or her rights to a fair trial. The risk of prejudice is significantly increased in circumstances where an accused has agreed to a protection order without admission of liability. Evidence about whether protection orders were made, varied or revoked, or whether applications for such orders were rejected, could improperly influence juries in their deliberations. Where the evidence is about the making of a protection order, or a variation to increase the protection provided by such an order, adverse inferences might be drawn by jurors, which may operate unfairly for an accused.

On the other hand, the fact that a protection order was made or that the court refused to vary or revoke an order could, for example, be relevant to tendency or coincidence or motive. Requiring a party to seek the leave of the court to lead evidence of such matters acts as an important safeguard in ensuring that an accused is given a fair trial.

In Chapter 12, the Commissions recommend that state and territory family violence legislation should not impose mandatory minimum penalties or mandatory imprisonment for the offence of breaching a protection order. The maintenance of individualised justice and broad judicial discretion are essential attributes of our criminal justice system, outweighing any potential deterrent effect that mandatory sentencing might have.

One aspect of achieving fairness in sentencing is the Commissions' recommendation, in the context of family violence related offences, that state and territory legislation should provide that a court sentencing an offender should take into account:

- (a) any protection order conditions to which the person being sentenced is subject, where those conditions arise out of the same or substantially the same conduct giving rise to the prosecution for the offence; and
- (b) the duration of any protection order to which the offender is subject.

### **Sexual assault laws**

Each Australian jurisdiction has its own set of substantive and procedural criminal laws. The main point of divergence between jurisdictions is whether the criminal law is codified or remains guided by the common law.

Legislative reform is only one of a number of mechanisms available to respond to problems arising from the response of the legal system to sexual assault. Nonetheless, to the extent that reform of the content of sexual offences can help ensure fairness through consistent expectations and treatment of sexual assault matters across jurisdictions, the Commissions support further harmonisation of sexual assault offence provisions.

Jurisdictions also differ as to the adoption of the uniform Evidence Acts. The implementation of the uniform Evidence Acts in all Australian jurisdictions—as

recommended in *Uniform Evidence Law* (ALRC Report 102)—is a critical step towards ensuring consistent application of laws in cases of sexual assault.

The recommendations in this Report focus particularly on those aspects of sexual assault laws that are most likely to arise in a family violence context—that is, for those who have been sexually assaulted by a current or former intimate partner (spouse, de facto, boyfriend/girlfriend) or family member. However, most of the issues apply to all sexual assault proceedings, regardless of the relationship between the complainant and the perpetrator.

Part G highlights ways in which particular laws and procedures operate for victims of sexual assault. In many instances, Australian jurisdictions take different approaches to law and procedure in the areas discussed. As a result, these chapters examine which approaches best recognise the nature of sexual violence and address the negative experience of complainants in the criminal justice system. Where it is possible to identify certain approaches as more promising and progressive than others, the Commissions propose that the Australian, state and territory governments should implement consistent measures of these kinds.

The Commissions make a number of recommendations aimed at consistency of laws concerning sexual assault that arise in a family violence context. The recommendations concern, among other things: objectives and guiding principles in relation to sexual offences; definitions of consent and other elements of offences; and jury directions. Recommendations are also made in relation to a range of procedural and evidentiary issues.

Many areas of law and procedure relating to sexual assault proceedings are not addressed in this Report. Given the timeframe and ambit of the Terms of Reference, the Commissions' work focused on inconsistencies in the interpretation or application of laws in those areas which have the most direct impact on victims of sexual assault in a family violence context. The Commissions acknowledge that reform in this area has been substantial over the last three decades, resulting in legislative and procedural changes which have improved legal responses to sexual assault committed in a family violence context. However, much remains to be done to address both legislative and practice-based gaps and inconsistencies which have a negative impact on victims of sexual assault.

### ***Guiding principles and objects clauses***

Statements of objectives and guiding principles can perform an important symbolic and educative role in the application and interpretation of the law, as well as in the general community. While much more is required to change culture, such statements provide an important opportunity for governments and legal players to articulate their understanding of sexual violence and provide a benchmark against which to assess the implementation of the law and procedure.

Such objectives and principles are intended to provide a contextual framework for the legislative response to sexual assault, rather than any exhaustive list of issues to which judicial officers and jurors should have regard. The Commissions' recommendations

do, however, expand on the Victorian provisions, which are used as a model, to incorporate certain other matters. In particular, the Commissions consider that it is desirable to acknowledge that sexual violence in the family context constitutes family violence, as it is precisely these cases that criminal justice systems deal with least effectively. Further, it is important to recognise the particular vulnerability of certain groups of women and, as a result, specifically recognise the experiences of Aboriginal and Torres Strait Islander women, those from CALD backgrounds and women with a cognitive impairment.

The Commissions recommend that legislative statements of objectives should underline the aims of upholding individual sexual autonomy and agency, while ensuring the protection of vulnerable persons from sexual exploitation. In addition, guiding principles should be incorporated in sexual offences, criminal procedure or evidence legislation, to recognise the nature and dynamics of sexual assault.

In particular, the Commissions recommend that state and territory legislation dealing with sexual offences should state that the objectives of the sexual offence provisions are to:

- (a) uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity; and
- (b) protect children, young people and persons with a cognitive impairment from sexual exploitation.

Complementing such objectives, the Commissions recommend the inclusion of guiding principles in state and territory legislation dealing with sexual offences, criminal procedure or evidence, to which courts should have regard when interpreting provisions relating to sexual offences. At a minimum, these guiding principles should refer to the following, that:

- (a) sexual violence constitutes a form of family violence;
- (b) there is a high incidence of sexual violence within society;
- (c) sexual offences are significantly under-reported;
- (d) a significant number of sexual offences are committed against women, children and other vulnerable persons, including those from Indigenous and CALD backgrounds, and persons with a cognitive impairment;
- (e) sexual offenders are commonly known to their victims; and
- (f) sexual offences often occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.

### ***Sexual offences***

In Chapter 25, the Commissions make a number of recommendations with respect to the definition of sexual intercourse or penetration; the age of consent for all sexual

offences; consent—based on the concept of free and voluntary agreement—and the circumstances that may vitiate consent.

The Commissions recommend that the definition of sexual intercourse or penetration should be broad and not gender-specific, and should be made more consistent across jurisdictions. The definition is in keeping with the shift away from historically gendered and restrictive definitions of sexual intercourse and is consistent with the definition in the Model Criminal Code.

The Commissions recommend the age of consent for sexual activity should be made more uniform both within and across jurisdictions and that there be no distinction made based on gender, sexuality or any other factor.

In adult sexual assault trials, it is common for the defendant to admit sexual activity but assert a belief that it was consensual. This is a matter for the jury to determine by reference to the defendant's actual state of mind—and, in some jurisdictions, by reference to whether that state of mind was reasonable—at the time the sexual conduct occurred. In a family violence context, where the complainant and the defendant know each other, the issue of consent is particularly complex.

The Commissions recommend the adoption of a statutory definition of consent across all Australian jurisdictions. The Commissions consider that a definition based on agreement properly reflects the two objectives of sexual offences law: protecting the sexual autonomy and freedom of choice of adults; and reinforcing both positive and communicative understandings of consent through use of the term 'agreement'.

To the extent that introducing the concept of 'agreement' to the definition of consent may give rise to interpretation issues and problems in practice, the Commissions consider that supplementing any legislative provision that defines consent with a provision that includes a list of circumstances where free agreement may not have been given will assist, in practice, to clarify the meaning and expression of 'agreement'.

Identifying the circumstances where there can be no consent, and where there may be no consent, as determined by the jury, has been a key concern of law reform in this area. The Commissions recommend that, at a minimum, federal, state and territory legislation should recognise certain specified circumstances as ones where consent may be vitiated. The recommendation intentionally leaves it open to the Australian, state and territory parliaments to decide whether particular circumstances should be considered as automatically negating consent. The recommended list of circumstances is non-exhaustive, as is presently the case in all Australian jurisdictions. This allows juries to find, on the evidence, that there was no consent, even if a case does not fall within one of the listed circumstances.

### ***Procedure and evidence***

In Chapters 26 to 28, the Commissions examine selected developments aimed at reducing attrition and improving the experiences in the criminal justice system of those who have suffered a sexual assault, and make a range of recommendations concerning criminal procedure and evidence.

Some of these reforms are of particular application to sexual assault cases involving multiple incidents and multiple complainants—a situation that often arises in a family violence context, for example, where a number of siblings allege that a parent has sexually abused them.

In such situations, the prosecution is likely to make a pre-trial application to have the counts against the defendant heard in a joint trial, rather than separate trials. The defence, in contrast, is more likely to apply for separate trials for each offence. The power to order a joint trial is discretionary and is exercised in order to prevent prejudice to the defendant.

When the complainant's credibility is attacked in a separate trial, evidence that would support his or her credibility may be disallowed and the jury kept in ignorance of the fact that there are multiple allegations of abuse against the defendant. This has the potential to cause unfairness and injustice.

Further, if separate trials are held, children involved may have to give evidence numerous times, a process which can exacerbate the emotional stress experienced by child complainants. Adult victims of sexual offences in a family violence context also face additional trauma, especially as the pattern of offending is often long term, rather than centred on one specific incident.

The Commissions recommend, in Chapter 26, a presumption of joint trial to encourage judges to order joint trials in sexual offence proceedings wherever possible. The main justification for this recommendation is that joint trials tend to reduce trauma for complainants. It would still be open to a court to order separate trials where evidence on one charge is inadmissible on another charge—for example, because its probative value is outweighed by the danger of unfair prejudice to the defendant.

Recommendations in Chapter 27 address aspects of evidence law, including in relation to: restrictions on the admission of evidence of a complainant's sexual experience or activity; the admission of expert evidence on the development and behaviour of children and implications for their credibility as witnesses; and the admission of tendency or coincidence evidence.

Complementing these recommendations are others in Chapter 28 that concern jury directions—specifying what a judge should, or should not, say to a jury in any sexual assault proceedings, in order to ensure a fair trial. These include recommendations intended to: ensure that judges in sexual assault proceedings do not suggest to juries that complainants as a class are unreliable witnesses, or give a general warning about the danger of convicting on the uncorroborated evidence of any complainant or witness who is a child; and restricting the circumstances in which directions regarding the effect of delay in complaint, or absence of complaint, on the credibility of the complainant may be given.

### ***Protecting victims of sexual assault***

The Commissions make a range of recommendations concerning the protection of victims of sexual assault in relation to the giving of evidence. While these

recommendations are principally directed to situations most likely to involve family violence, they are of more general application to sexual assault proceedings.

#### *Committals*

In relation to committal hearings, the Commissions recommend, in Chapter 26, that state and territory legislation should prohibit: any child; and any adult complainant, unless there are special or prescribed reasons, from being required to attend to give evidence at committal hearings in relation to sexual offences.

#### *Pre-recorded evidence*

Most states and territories have enacted regimes for the comprehensive pre-recording of evidence for child victims of sexual assault (and those who are cognitively or intellectually impaired). The Commissions recommend that similar provisions should be available in relation to the evidence of all adult complainants of sexual assault, to minimise the negative experiences of complainants of sexual assault in the criminal justice system where this can be done without prejudicing defendants' rights to a fair trial.

In Chapter 26, the Commissions recommend that all Australian jurisdictions should adopt comprehensive provisions dealing with pre-recorded evidence in sexual offence proceedings, permitting the tendering of pre-recorded evidence of interview between investigators and a sexual assault complainant as the complainant's evidence-in-chief. Such provisions should apply to all complainants of sexual assault (adults and children).

In addition, child complainants of sexual assault, and complainants of sexual assault who are vulnerable as a result of mental or physical impairment, should be permitted to provide evidence recorded at a pre-trial hearing. This evidence should be able to be replayed at the trial as the witness' evidence. Adult victims of sexual assault should also be permitted to provide evidence in this way, by order of the court.

#### *Sexual assault communications privilege*

From the mid-1990s, ongoing reform of sexual assault laws and procedure has included the enactment of legislation to limit the disclosure and use of sexual assault communications—communications made in the course of a confidential relationship between the victim of a sexual assault and a counsellor. The defence may seek access to this material to assist with their preparation for trial and for use during cross-examination of the complainant and other witnesses.

The Commissions concluded that more needs to be done to ensure that existing legislative provisions operate effectively, in practice, to protect counselling communications. The Commissions recommend, in Chapter 27, that federal, state and territory legislation relating to subpoenas and the operation of the sexual assault communications privilege should ensure that the interests of complainants in sexual assault proceedings are better protected, including by requiring:

- parties seeking production of sexual assault communications, to provide timely notice in writing to the other party and the sexual assault complainant;

- that any such written notice issued be accompanied by a pro forma fact sheet on the privilege and providing contact details for legal assistance;
- that subpoenas be issued with a pro forma fact sheet on the privilege, also providing contact details for legal assistance.

## Improving practice

Improving practice is based upon a number of inter-related elements: specialisation; appropriate and regular education and training; the development of a national family violence bench book; integrated practice; improved police and prosecutorial practice; improved information flow and the establishment of a national register.

### Specialisation

In the course of this Inquiry, the Commissions have concluded that the specialisation of key individuals and institutions is crucial to improving the interaction in practice of legal frameworks governing family violence, and sexual assault in the family violence context. Chapter 32 considers ways to foster and improve the effectiveness of specialised family violence courts and specialised police units with the aim of producing safe, fair and just outcomes for victims and their families.

#### *Specialised family violence court*

The term ‘specialised court’ can be used to refer to a number of things. For example, the term can be used to refer to separate stand alone courts that deal only with a particular subject matter—such as the Family Court of Australia, which ‘specialises’ in matters under the *Family Law Act*. Children’s courts, similarly, may be considered as specialised courts dealing with child-related matters. There are, however, no stand alone specialised family violence courts in Australia.

In courts that deal with a range of subject matters, there can be a division or special program embedded within existing court structures that deals with a particular subject matter. For example, in Victoria, there is the Family Violence Division of the Magistrates’ Court of Victoria. In other instances, a court may operate a ‘specialised list’, in which certain categories of cases are heard on certain days of the week, often by dedicated judicial officers. Both these types of ‘specialised courts’ are common in the Australian legal system.

Many specialised courts simply operate as a matter of practice, and their structures are established through administrative mechanisms. However, some specialised courts may be expressly established by legislation.

Specialisation can help to ensure that victims have contact with those in the system—including judicial officers, lawyers, prosecutors, police and family dispute resolution practitioners—who have the best understanding of the nature, features and dynamics of family violence. This knowledge and understanding allows these individuals better to assist victims in navigating the legal, social and health systems by connecting legal frameworks and social services.

Specialisation can also operate to improve the system as a whole. As many stakeholders have emphasised, attitudinal and behavioural change—although highly desirable—can be slow to achieve. Specialisation acts both as a way of attracting those with an interest and aptitude for family violence work, and allows education, training and other resources to be focused upon a smaller group for more immediate results and improved outcomes. Specialists can help to promote attitudinal change if they are given opportunities to share information with, and to contribute to, the education and training of those in the general system.

Specialisation can improve consistency and efficiency in the interpretation and application of laws, as a result of shared understandings and the awareness and experience of a smaller number of decision makers. Specialists can identify and solve problems more quickly and effectively and can develop and promote best practice that can then be mainstreamed to drive change in the system more generally.

In the long run, the efficiency gains through specialisation may produce better outcomes that result in substantial savings elsewhere in the system—for example, earlier and more effective legal intervention may result in fewer cases requiring child protection agencies to intervene, and fewer demands on medical and psychological services. For these reasons, specialists are more likely to be effective in addressing family violence, and in their ability to make the system more efficient as a whole.

The Commissions received significant support for the proposal that specialised family violence courts should be more widely established in Australia. The experiences of Australian and overseas jurisdictions provide evidence of the value of specialised family violence courts in terms of improving the interaction in practice of legal frameworks relevant to this Inquiry. These benefits include:

- greater sensitivity to the context of family violence and the needs of victims through the specialised training and skills of staff;
- greater integration, coordination and efficiency in the management of cases through identification and clustering of cases into a dedicated list, case tracking, inter-agency collaboration, and the referral of victims and offenders to services;
- greater consistency in the handling of family violence cases both within and across legal jurisdictions;
- greater efficiency in court processes;
- development of best practice, through the improvement of procedural measures in response to regular feedback from court users and other agencies; and
- better outcomes in terms of victim satisfaction, improvement in the response of the legal system (for example, better rates of reporting, prosecution, convictions and sentencing in the criminal context), better victim safety, and—potentially—changes in offender behaviour.

In Chapter 16, the Commissions set out a framework for reform of the jurisdictions of courts that deal with issues of family violence to address the gaps arising as a result of the interaction between different legal systems. The local or magistrates court is the

first port of call for many victims of family violence and their families. The Commissions consider that state and territory magistrates courts should be in a position to address, at least on an interim basis, the range of issues that commonly arise in family violence matters. A system in which one court is able to deal with most legal issues—and where it cannot, is able to facilitate the transfer of the matter to another court—will go some way towards reducing the impact of inconsistencies between the legal systems, and better ensure the protection and safety of victims of family violence. The Commissions consider that these benefits are best leveraged in a specialised family violence court.

In the Commissions' view, specialised family violence courts with certain minimum core features, including specialised prosecutors, would enhance the efficacy and effectiveness of the courts in dealing with family violence. The Commissions' recommendations envisage, where possible, the creation of specialised family violence courts—being divisions, programs, lists or a specialised court room—within existing state and territory local and magistrates courts with a number of essential support features. The Commissions are not recommending the establishment of a separate stand alone court.

First, all judicial officers in a family violence court should be especially selected for their roles. The attitude, knowledge and skills of judicial officers are critical to the success of such a court, and it is important that selection be based on such criteria. The adoption of specialised lists and specialised practices may attract judicial officers who have experience and are interested in working in family violence. This is an important step in building a leadership cohort, who can drive reform and promote attitudinal change within the system.

Secondly, there was strong support for the role of specialised prosecutors as an essential feature of specialised family violence courts. The Commissions agree with the majority of submissions that specialised prosecutors—working in cooperation with magistrates, police and victim support workers—can play an important role in achieving consistent and quality outcomes for victims of family violence.

Thirdly, the Commissions are of the view that the provision of specialised, free and timely legal advice and representation would enhance the effectiveness of specialised family violence courts. In Chapter 29, the Commissions recommend that federal, state and territory governments should prioritise the provision of access to legal services, for victims of family violence, including enhanced support for victims in high risk and vulnerable groups.

Fourthly, specialised and ongoing training on family violence issues is critical to ensuring a shared understanding of family violence within the court. Ideally, this training should be provided to all staff, as was done with the Victorian Family Violence Court Division. At a minimum, training should be provided to the following key participants: judicial officers, prosecutors, lawyers and registrars.

Fifthly, victim support workers play a key role in ensuring the success of such courts. Such workers may be employed directly by the court or a community organisation may be funded to provide the service. In Chapter 29, the Commissions recommend that the

Australian, state and territory governments should prioritise the provision of, and access to, culturally appropriate victim support services for victims of family violence, including enhanced support for victims in high risk groups.

Lastly, family violence courts should also have special arrangements for victim safety at court, such as separate waiting rooms for victims, separate entrances and exits, remote witness facilities and appropriately trained security staff. The provision of interpreters is also essential.

The Commissions acknowledge the establishment or further development of specialised family violence courts will be dependent on mechanisms such as funding, programs of action, policy and operational support from inter-agency committees, and political support across those departments affected. The Commissions refer to the relative success achieved by the cross-government approach in Victoria as an illustrative model. The cost of establishing or further developing specialised family violence courts needs to be considered in light of the cost of family violence to the Australian community, as noted in Chapter 1.

### ***Specialised police***

Police play an important role in responding to, intervening in, and preventing family violence, and are the first point of contact for many victims. Police are responsible for recording incidents, interviewing victims and collecting evidence to support criminal charges and—as discussed in Chapter 9—applying for protection orders in the civil system. It is well recognised that initial positive police response is vital not only to victim safety, but also to whether victims report any further victimisation, or seek engagement with the legal system more generally. In Chapter 32, the Commissions make a number of recommendations about improving police and prosecutorial practice.

Although there is little information or research available on the role and value of specialised police units in Australia, a significant number of stakeholders reported positive experiences with such units. The Commissions concluded that there is substantial merit in the use of specialised police in family violence, sexual assault and child protection matters. Liaison officers provide an important early point of contact for victims and assist them in navigating the legal system. Specialised police at all levels provide contact points for inter-agency collaboration, and may form a key element of integrated responses. Further, monitoring and supervision by specialised police is likely to improve consistency in the application of laws in the context of family violence.

The Commissions recommend that state and territory police should ensure, at a minimum, that:

- (a) specialised family violence and sexual assault police units are fostered and structured to ensure appropriate career progression for officers and the retention of experienced personnel;
- (b) all police—including specialised police units—receive regular education and training consistent with the *Australasian Policing Strategy on the Prevention and Reduction of Family Violence*;

- (c) specially trained police have responsibility for supervising, monitoring or assuring the quality of police responses to family violence incidents, and providing advice and guidance in this regard; and
- (d) victims have access to a primary contact person within the police, who specialises, and is trained, in family violence, including sexual assault issues.

### **Education and training**

A central and critical theme in this Report is the need for effective education and training of individuals—including judicial officers, lawyers, prosecutors, police, family dispute resolution practitioners and victim support services—working in the family law, family violence, criminal justice and child protection systems. A proper appreciation and understanding of the nature and dynamics of family violence, and the overlapping legal frameworks is fundamental in practice to ensuring the safety of victims and their families.

A key set of recommendations in this Report focus on education and training for all participants in the various systems dealing with family violence, beginning with law curriculums and extending to judicial officers. The recommendations, interwoven throughout the Report, are drawn together in Chapter 31 of Part H, and form a major plank in the reform recommendations. They express a commitment to embedding an understanding of the nature and dynamics of family violence across the various legal systems dealing with this issue. The Commissions recommend that the Australian, state and territory governments and educational, professional and service delivery bodies should ensure regular and consistent education and training for participants in the family law, family violence and child protection systems, in relation to the nature and dynamics of family violence, including its impact on victims, in particular those from high risk and vulnerable groups.

This is reinforced and complemented by further recommendations in Chapter 22 in relation to lawyers who practice family law; in Chapter 29, for government staff and community workers; and in Chapter 30, for parties involved in integrated responses—including judicial officers, legal practitioners, police and staff of relevant agencies.

### **National family violence bench book**

Family violence may engage a range of overlapping frameworks and familiarity with, and competence in, these frameworks by judicial officers and legal professionals is vital to ensuring fair and just outcomes for victims. The Commissions recommend the development of a national bench book—again, complemented by quality education and training—to promote consistency in the interpretation and application of laws across jurisdictions, and offer guidance and promote best practice among judicial officers and legal professionals.

Relevant bench books have been published by judicial institutes and bodies in Australia and these could be built upon and, with adequate resourcing, such bodies could contribute towards the development of a national family violence bench book. The Victorian Department of Justice is currently in the process of securing access to

the Canadian family violence bench book, and Victoria and South Australia are exploring a partnership agreement to progress work at a state level in relation to a bench book.

The Commissions consider that there is potential for collaboration between the Australian and state and territory governments to develop a similar bench book in Australia, using the Canadian bench book as a model. The Commissions therefore recommend, in Chapter 31, that the Australian, state and territory governments should collaborate with relevant stakeholders to develop and maintain a national bench book on family violence, including sexual assault, having regard to the Commissions' recommendations throughout this Report in relation to the content that should be included in such a book.

In particular, the Commissions make a number of recommendations in Chapters 12 and 13 about the guidance that a national family violence bench book should provide on sentencing for family violence matters, including for breach of protection orders. In addition, in Chapter 14, the Commissions recommend that the bench book contain a section that provides guidance on the operation of defences to homicide where a victim of family violence kills the person who was violent towards him or her.

### **Integrated responses**

Integrated responses offer clear benefits for service delivery to victims, including—importantly for this Inquiry—improving the experience of victims involved in multiple proceedings across different legal frameworks. For example, co-location of services facilitates victims' access to a range of options and referrals. Another benefit is that such responses enable networks to be formed across services and government departments at a local level, fostering collaboration and communication between key players in different legal frameworks, and providing ongoing improvements to practice and understanding.

A number of Australian jurisdictions have either implemented, or are in the process of implementing, various forms of integrated responses. Some of these are quite comprehensive, while others are smaller in scale, including for example, liaison arrangements between police and victim support services.

Features of an integrated response may include:

- common policies and objectives;
- inter-agency collaboration and information sharing, including possibly: coordinated leadership across services and resources; sharing of resources and protocols; and inter-agency tracking and management of family violence incidents;
- involvement of, and recognition of the need for, victim support;
- commitment to ongoing training and education—discussed in Chapter 31;
- ongoing data collection and evaluation, with a view to system review and process improvements discussed in Chapter 31; and

- specialised family violence courts, lists, and offender programs for those who engage in family violence—discussed in Chapter 32.

While a comprehensive integrated response has all of these features, not all features are required for a project to be considered an integrated response.

In Chapter 29, the Commissions review the range and diversity of integrated responses to family violence in Australia. In Chapter 30, the Commissions express the view that information-sharing protocols and Memorandums of Understanding (MOUs) are important, but cannot stand alone, and are dependent on the knowledge and involvement of officers and staff. Simply putting protocols in place is not sufficient. In the same way, integrated response arrangements are not simply formal arrangements between agencies. They must be given an ongoing profile among court and agency officers; they must form the basis of an ongoing and responsive relationship between the parties, and be supported and implemented in practice. Therefore, the Commissions recommend that integrated responses include a set of common policies and objectives; mechanisms for inter-agency collaboration—including information-sharing protocols, regular inter-agency meetings and liaison officers—and provision for victim support. Chapter 31 acknowledges the importance of ongoing education and training programs.

Where organisations work together to develop and deliver integrated responses to family violence—whether this involves just two organisations or many more—there is value in coming to an agreement about the principles and objectives that are to underpin the response. In Chapters 5 and 6, the Commissions discuss the importance of developing a shared understanding of what amounts to family violence across the different legal frameworks considered in this Report, to help close gaps between the systems. The Commissions are also of the view that developing common principles and objectives when integrating the work of different agencies and organisations in response to family violence will help to ensure that all the parties involved in the integrated response understand what they are working together to achieve.

The Commissions note that the process of developing common principles and objectives should involve all the agencies and organisations that are part of the integrated response, including those working with Indigenous communities, CALD communities and the disability sector. The development process itself is an important point of contact and empowerment for those involved. It may also provide a basis for ongoing and active collaboration between the parties, essential to the success of any integrated response.

The Commissions note that there are a number of ways in which the Australian, state and territory governments may foster the development and dissemination of common principles and objectives to underpin integrated responses to family violence. These include developing strategic plans and creating regional, state and territory or national steering committees. Any such process should, however, involve close consultation with relevant stakeholders to ensure that the principles and objectives of any particular integrated response mechanism accurately reflect and respond to the diversity of local conditions and needs.

## **Improving police and prosecutorial practice**

### *Police practice*

The Commissions make a number of recommendations aimed at improving police practice, ensuring that victims of family violence obtain an effective criminal justice response. In Chapter 9, the Commissions recommend that police should have a duty to investigate family violence where they believe family violence has been, is being, or is likely to be committed; and record when they decide not to take further action and their reasons for not taking further action. Police should also be able to better identify persons who have used family violence and persons who need to be protected from family violence, and to distinguish one from the other. In Chapter 12, the Commissions make recommendations towards improving police decision making about charging an offender with breach of a protection order and any underlying criminal offence constituting the breach; in relation to breach of protection order proceedings, to require police, when preparing witness statements, to ask victims about the impact of the breach, and advise them that they may wish to make a victim impact statement; and as to the appropriate content of ‘statements of no complaint’ in which victims attest to the fact that they do not wish to pursue criminal action.

Chapters 8, 12, 13 and 31, make complementary recommendations focused on the training of police and prosecutors.

### *Prosecutorial practice*

The Commissions make a number of recommendations aimed at improving the exercise of prosecutorial discretion and decision making. These include education and training about: potential federal offences committed in a family violence context; the use of representative charges in family violence related criminal matters, where the charged conduct forms part of a course of conduct; and how the dynamics of family violence might affect the decisions of victims to negate the existence of family violence or to withdraw previous allegations. Importantly, the Commissions have also recommended that any decisions to prosecute victims of family violence with any public justice offences—such as conspiracy or attempts to pervert the course of justice—where the conduct alleged to constitute such offences is essentially conduct engaged in by a victim to reduce or mitigate the culpability of an offender—should only be approved by directors of public prosecution.

### **Information sharing**

Throughout the course of this Inquiry, the Commissions have heard about the problems that arise because of the gaps in information flow between the family law system, the family violence system and the child protection system. In many circumstances, important information is not being shared among courts and agencies and this is having a negative impact on victims, impeding the ‘seamlessness’ of the legal and service responses to family violence. There are many recommendations throughout this Report directed towards improving the flow of information, including: clarifying initiating application forms; amending legislation that regulates the disclosure of information in relation to parenting orders, family violence orders and child protection orders;

providing state and territory courts with access to the Commonwealth Courts Portal and establishing information sharing protocols and MOUs between courts, agencies and organisations working in these areas.

Chapter 30 contains recommendations to improve information flow between critical elements of the family violence system, including courts, relevant government agencies and other people and institutions involved in the family violence, family law and child protection systems. These include improving the way information is collected from parties and shared between courts—including the establishment of a national register of relevant court orders—some changes to confidentiality and privacy legislation, and the development of information sharing protocols and MOUs. The intention is to avoid, as far as possible, victims falling into gaps between the various systems due to lack of relevant information.

Information sharing is also one element of an integrated response to family violence, considered in Chapter 29.

#### ***Permitted disclosures***

The 2009 report of the National Council to Reduce Violence against Women and their Children, *Time for Action*, identified privacy laws as one of the obstacles to an integrated and effective response to family violence. Many stakeholders consulted in this Inquiry agreed that they encounter difficulties sharing information because of actual or perceived limits imposed by privacy and secrecy laws. Implementation of the model use and disclosure principle set out in *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108) would address some of the issues identified.

In particular, the Commissions recommend, in Chapter 30, that Australian, state and territory governments should ensure that the privacy principles applicable in each jurisdiction permit the use or disclosure of personal information where agencies and organisations reasonably believe it is necessary to lessen or prevent a serious threat to an individual's life, health or safety. Given the high level of involvement of private sector service providers in the areas of family violence and child protection, this exception should apply to both government agencies and private sector organisations. The threat should not have to be imminent. Agencies and organisations should be able to share information in order to intervene early in family violence and child protection situations to prevent a serious threat from manifesting.

In *Secrecy Laws and Open Government in Australia* (ALRC Report 112) the ALRC recommended that secrecy laws should generally include an exception for disclosures in the course of an officer's functions or duties. The recommendations in ALRC Report 112 were limited to Commonwealth secrecy laws, because that was the extent of the Terms of Reference for that Inquiry. The Commissions consider that the principles underlying the ALRC's recommendation that Commonwealth secrecy laws should include an express exception for disclosure in the course of an officer's functions and duties is a principle of wider application.

If this approach were adopted by Australian, state and territory governments, it would ensure that, where an officer disclosed information, for example, in accordance with

the provisions of state and territory family violence or child protection legislation, or in accordance with an information-sharing protocol or MOU, the officer would not breach the relevant secrecy law. The Commissions therefore endorse the relevant recommendations in ALRC Report 112 in relation to Commonwealth secrecy laws, and recommend that state and territory governments consider amending secrecy laws that regulate the disclosure of government information to include an express exception to allow the disclosure of information in the course of an officer's functions and duties.

These recommendations complement the provisions in relation to permitted disclosures by child protection agencies in Chapter 19, and those in Chapter 22, in relation to family counsellors and family dispute resolution practitioners to permit disclosures where reasonably necessary to prevent or lessen a serious threat to a person's life, health or safety.

The Commissions note that databases in some jurisdictions facilitate the sharing of information between agencies working together, particularly in the area of child protection. Such databases provide a useful mechanism to help ensure that agencies are aware of the fact that other agencies are working with a particular child or family, and to prevent the duplication of services. It would be logical, for example, to establish a shared database where family violence or child protection legislation expressly provides for the disclosure of certain information from one agency to another. The Commissions note, however, that such databases raise significant privacy concerns. The Commissions recommend, therefore, that in developing any such databases, the Australian, state and territory governments should ensure that appropriate privacy safeguards are put in place.

The Commissions' recommendations in Chapter 30 are intended to ensure that legislative provisions do not prevent the sharing of information in circumstances where there is a risk to an individual's life, health or safety. In addition, the Commissions recommend that family violence and child protection legislation should clearly set out which agencies and organisations may use and disclose information and in what circumstances. This will provide clarity for individual officers and staff and will ensure that where information is shared it does not breach privacy or secrecy laws.

### ***Protocols and MOUs***

Information-sharing protocols and MOUs between the courts and relevant agencies and organisations have a valuable role to play in facilitating communication and information exchange between parties in the family law, family violence and child protection systems.

At present, there are few information-sharing protocols in the context of family violence. In Chapter 30, the Commissions recommend that federal family courts, state and territory magistrates courts, police, and relevant government agencies should develop protocols for the exchange of information in relation to family violence matters. The recommendations in Chapter 30 are complemented by additional recommendations in Chapters 19, 20 and 29. The development of information-sharing protocols in the context of family violence is consistent with the views expressed in *Time for Action*.

## National register

The capacity for family violence protection orders to be enforced across jurisdictions is essential to the safety of victims, especially given that it is common for victims of family violence to seek to move to escape violent relationships. Currently, in most jurisdictions, a protection order that has been obtained in one state or territory is not automatically enforceable in another state or territory. Rather, the victim of family violence or some other person must register the ‘external protection order’ in the second jurisdiction.

The Australian Government has committed to the development of a national scheme for the registration and recognition of family violence protection orders. The Commissions consider that this is an excellent development that should be supported as a constructive step towards improving the protection available for victims of family violence. It will allow victims of family violence to move seamlessly from one jurisdiction to another without the need to take action to register a family violence order in the second jurisdiction. It will also help to ensure that police in the second jurisdiction are aware of the existence of the order.

The Commissions consider that a national register of this kind also provides an opportunity for a formalised exchange of information relevant to proceedings involving family violence more broadly. While the initial proposal is to include information about family violence protection orders, there is scope to extend the ambit of the register to include, for example, child protection orders made under state and territory child protection legislation, and information about parenting orders and family violence related injunctions made under the *Family Law Act*. The Commissions are also of the view that the Australian Government Attorney-General’s Department—as the Central Authority for the *Hague Convention on Civil Aspects of International Child Abduction* (Hague Convention)—should give future consideration to including conditions and non-molestation undertakings made in Hague Convention cases on the national register. While registration would not affect the enforceability of undertakings and conditions, it would ensure that police officers, state and territory courts and federal family courts are aware that they exist, and may take them into consideration, where appropriate, in protection order or parenting proceedings.

A related issue is the persons and entities that may access information on the national register. The Commissions’ view is that—at a minimum—access should be available to federal family courts, state and territory courts that deal with matters related to family violence and child protection, child protection agencies and the police.

The Commissions agree with the Office of the Privacy Commissioner that a national register of this kind needs to be accompanied by a comprehensive privacy framework and recommend that a privacy impact assessment be prepared as part of developing the register.

## **Net effect of the recommendations**

The net effect of the recommendations, taken as an overall reform package, will be that:

- the legal framework is as seamless as possible from the point of view of those who engage with it;
- victims have better access to legal and other responses to family violence;
- legal responses to family violence are fair and just, holding those who use family violence accountable for their actions and providing protection to victims, but also ensuring safeguards to accused persons in the criminal justice context; and
- interventions and support in circumstances of family violence are effective.

As noted at the outset, the referral of this Inquiry to the Commissions forms one plank in the Australian Government response towards the goal ‘to reduce all violence in our communities’. To meet the challenges of such a goal requires enormous co-operation, trust, respect, patience, commitment—and leadership. In this Inquiry, the Commissions have undertaken consultations nationwide and received over 240 submissions from a wide range of stakeholders. The expectations of our work—and that of the Australian, state and territory governments in response—are also considerable.

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**Part A**

**Introduction**

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# 1. Introduction to the Inquiry

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## Contents

Background	85
The extent of the problem	87
Compounding factors	88
Cost of family violence	89
Concurrent inquiries and actions	90
Immediate Government Actions	91
Australian Institute of Family Studies evaluation	91
Standing Committee of Attorneys-General	94
The Chisholm Review	94
Family Law Council	96
Scope of the Inquiry	98
Terms of Reference	98
The intersecting nature of the Terms of Reference	100
Matters outside the Inquiry	101
The gendered nature of the Terms of Reference	102
Processes of reform	104
Consultation and collaboration processes	104
Community consultations	104
Submissions	107
Overview of the Report	109
Definitions and terminology	109
Structure of the Report	112
Stop Press—VLRC Child Protection Report	114

## Background

1.1 On 17 July 2009, the Attorney-General of Australia, the Hon Robert McClelland MP, asked the Australian Law Reform Commission (ALRC) to conduct an Inquiry together with the New South Wales Law Reform Commission (NSWLRC) into particular questions in relation to family violence that had arisen out of the 2009 report of the National Council to Reduce Violence against Women and their Children, *Time for Action*, released in March 2009.<sup>1</sup> At its meeting on 16–17 April 2009, the Standing Committee of Attorneys-General (SCAG) agreed that Australian law reform commissions should work together to consider these issues.

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<sup>1</sup> National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009).

1.2 The ALRC was asked to consider the issues of:

- 1) the interaction in practice of State and Territory family/domestic violence and child protection laws with the *Family Law Act* and relevant Commonwealth, State and Territory criminal laws; and
- 2) the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence.

1.3 In relation to both these issues, the ALRC was asked to consider ‘what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and their children’.<sup>2</sup>

1.4 On 14 July 2009, the NSWLRC received terms of reference in parallel terms from the New South Wales Attorney General, the Hon J Hatzistergos.<sup>3</sup> A joint project of this nature, involving a state law reform body in conjunction with the ALRC, is a practical way of tackling an inquiry in relation to matters many of which lie at the intersections of—or fall between—federal and state/territory laws. During the Inquiry the NSWLRC took principal responsibility for Part E, in relation to child protection; the ALRC took principal responsibility for the remainder of the work.

#### *Time for Action*

1.5 The National Council to Reduce Violence against Women and their Children (the National Council), established in May 2008, was given the role of drafting a national plan to reduce violence against women and their children.<sup>4</sup>

1.6 *Time for Action* identified six core areas for improvement together with strategies and actions to achieve them.<sup>5</sup> While the report concentrated on ‘preventative measures that challenge the values and attitudes that support violence in the community’ and the need ‘to develop respectful relationships’,<sup>6</sup> it included recommendations that the ALRC be given references on the two specific tasks that are reflected in the Terms of Reference.<sup>7</sup> It was accompanied by a background paper providing a fuller discussion of the matters in the report, with more detailed references.<sup>8</sup>

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2 The Terms of Reference for this Inquiry are set out at the front of this Report.

3 New South Wales Law Reform Commission, *Family Violence Inquiry: Terms of Reference* (2009) <[www.lawlink.nsw.gov.au/lawlink/lrc/l1\\_lrc.nsf/pages/LRC\\_cref125](http://www.lawlink.nsw.gov.au/lawlink/lrc/l1_lrc.nsf/pages/LRC_cref125)> at 19 January 2010.

4 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 11.

5 Ibid, 16–20. The six ‘outcome areas’ listed are that: communities are safe and free from violence; relationships are respectful; services meet the needs of women and their children; responses are just; perpetrators stop their violence; and systems work together effectively. The plan identified 25 outcomes with 117 strategies.

6 Ibid, iv.

7 Ibid, 119: Strategies for Action 4.2.1 and 4.1.2 are the background for the first and second limbs of the Terms of Reference, respectively.

8 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009).

1.7 Further background documents include: *Domestic Violence Laws in Australia*,<sup>9</sup> published by the Australian Government Solicitor in September 2009, providing an overview and comparative analysis of Commonwealth, state and territory and New Zealand domestic violence legislation; and a report, *The Cost of Violence against Women and their Children*,<sup>10</sup> published in March 2009.

### The extent of the problem

1.8 *Time for Action* provided a summary of the extent of the problem of violence against women in the Australian community. It reported the estimate that '[a]bout one in three Australian women experience physical violence and almost one in five women experience sexual violence over their lifetime';<sup>11</sup> and stated that while violence 'knows no geographical, socio-economic, age, ability, cultural or religious boundaries',<sup>12</sup> the experience of violence is not evenly spread.

1.9 For example, Indigenous women reported higher levels of physical violence during their lifetime than did non-Indigenous women, and the violence was more likely to include sexual violence.<sup>13</sup> Other groups may also experience violence in a different and/or disproportionate way, for example: women with disability;<sup>14</sup> women who identify themselves as lesbian, bisexual, transgender or intersex,<sup>15</sup> and immigrant women.<sup>16</sup> Such experiences were also strongly echoed in submissions made to this Inquiry.<sup>17</sup>

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9 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009).

10 KPMG, *The Cost of Violence against Women and their Children* (2009), prepared for the National Council to Reduce Violence Against Women and their Children.

11 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 9.

12 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 16.

13 Ibid, 17.

14 Ibid, 18.

15 Ibid.

16 Ibid.

17 For example, in relation to Indigenous women: Women's Legal Service Brisbane, *Submission FV 223*, 2 July 2010; North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Shoalcoast Community Legal Centre, *Submission FV 141*, 24 June 2010. In relation to women with disability: Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women With Disabilities Australia, *Submission FV 143*, 24 June 2010; Disability Services Commission (WA), *Submission FV 138*, 23 June 2010; J Fletcher, *Submission FV 01*, 27 July 2009. In relation to immigrant women: Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women's Legal Service Brisbane, *Submission FV 223*, 2 July 2010; Women's House Shelta, *Submission FV 139*, 23 June 2010; Migrant Women's Emergency Support Service trading as Immigrant Women's Support Service, *Submission FV 61*, 1 June 2010; Confidential, *Submission FV 48*, 22 May 2010; P Easteal, *Submission FV 39*, 14 May 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 18*, 13 January 2010; Confidential, *Submission FV 15*, 11 November 2009. In relation to lesbian, bisexual, transgender or intersex women: ACON, *Submission FV 119*, 15 June 2010; Centacare Safer Families Support Service, *Submission*

1.10 The National Council responded to this diversity of experience of violence not by taking a ‘one size fits all approach’, but rather by focusing

on helping women in different circumstances and from different backgrounds to live free from violence and the threat of violence. It uses an intersectional analysis to enhance our understanding of the way lifestyle factors affect women. This is because the ways in which women and their children experience violence, the options open to them in dealing with violence, and their access to services that meet their needs in all their diversity, are shaped by the intersection of gender with factors such as disability, English language fluency, ethnicity, geographical location and migration experience.<sup>18</sup>

### **Compounding factors**

1.11 The National Council also pointed to a range of compounding factors in the presentation of violence, especially alcohol,<sup>19</sup> and that of geographical and social isolation.<sup>20</sup> Moreover, both have been identified as critical issues for Indigenous women and children:

Some groups of women within rural and remote communities experience particularly high rates of domestic violence. For example, the proportion of Aboriginal and Torres Strait Islander Australians who reported being victims of physical or threatened violence has been found to be similar in remote and non-remote areas. However, the proportion of Aboriginal and Torres Strait Islander people in remote areas who said that they, their family or friends had witnessed violence is three times as high as for Aboriginal and Torres Strait Islander people in non-remote areas. In remote and very remote areas, more than three-quarters of homicide victims in 2005–06 were Aboriginal or Torres Strait Islander.<sup>21</sup>

1.12 During this Inquiry the Commissions have heard such matters referred to repeatedly. For example, during one consultation in Alice Springs, Russell Goldflam, a solicitor with the Northern Territory Legal Aid Commission remarked that ‘everything is grog here’.<sup>22</sup>

1.13 Social isolation in an urban setting also affects immigrant and refugee women in particular:

For many immigrant and refugee women, insufficient knowledge of English creates a specific disadvantage in comparison to men in their families. English is often used as

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17 *FV 118*, 15 June 2010; Same Sex Domestic Violence Interagency, *Submission FV 116*, 10 June 2010; Inner City Legal Centre—Safe Relationships Project, *Submission FV 17*, 13 January 2010.

18 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 19.

19 Ibid, 29. See also: Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), [4.2].

20 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 30–35.

21 Ibid, 32.

22 Central Australian Aboriginal Legal Aid Service and Northern Territory Legal Aid Commission, *Consultation*, Alice Springs, 2010.

a tool of power and control, engendering the total dependence of refugee women on their husbands.<sup>23</sup>

- 1.14 In addition, the experience of violence in childhood also has a profound and compounding effect on the incidence of violence in adults:

Witnessing or experiencing violence as a child increases sharply the risk of becoming a perpetrator or victim of violence in later life. Women who experience abuse as a child are one-and-a-half times more likely to experience violence, and twice as likely to experience sexual violence as an adult than those who have not. Women who are physically and sexually abused in childhood also have an increased risk of being sexually abused in adulthood.<sup>24</sup>

- 1.15 Not only are there compounding factors causing family violence, there are also compounding consequences, such as: financial difficulty flowing from economic dependence on a violent partner;<sup>25</sup> homelessness, where women are seeking to escape violence at home;<sup>26</sup> and health issues associated with treating the effects of violence on the victim.<sup>27</sup> As noted by the Department of Premier and Cabinet Tasmania, ‘the causes of violence are various, and can manifest differently, but can “drag in” every aspect of the people’s lives’.<sup>28</sup>

### Cost of family violence

- 1.16 In producing *Time for Action*, an estimate of the cost of family violence in Australia was updated. A 2004 study by Access Economics had estimated the total annual cost of violence against women by their partners as \$8.1 billion.<sup>29</sup> This study was repeated by KPMG in January 2009 for the National Council with a forward projection of costs to 2021–22. The study concluded that an estimated 750,000

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23 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 33. The Family Law Council also drew attention to the vulnerability of women and children in some communities, contributing factors include, for example, ‘cultural or religious practices that subordinate women and cultural expectations that loyalty to family and community take precedence over personal safety’: Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), [4.4]. Submissions to this Inquiry reinforced such concerns: Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Women’s Legal Service Brisbane, *Submission FV 223*, 2 July 2010; Women’s House Shelta, *Submission FV 139*, 23 June 2010; Migrant Women’s Emergency Support Service trading as Immigrant Women’s Support Service, *Submission FV 61*, 1 June 2010; Confidential, *Submission FV 48*, 22 May 2010; P Easteal, *Submission FV 39*, 14 May 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 18*, 13 January 2010; Confidential, *Submission FV 15*, 11 November 2009.

24 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 25.

25 Ibid, 44.

26 Ibid, 45.

27 Ibid, 42.

28 Department of Premier and Cabinet Tasmania, *Submission FV 236*, 20 July 2010.

29 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 42.

Australian women ‘will experience and report violence in 2021–22, costing the Australian economy an estimated \$15.6 billion’.<sup>30</sup>

## **Concurrent inquiries and actions**

1.17 The ALRC and NSWLRC (the Commissions) are not alone in looking at the problem of family violence and seeking appropriate policy responses. Several other inquiries, state and federal, are being conducted at the same time as this Inquiry. A number have also been conducted before. The concurrent and previous work is referred to throughout this Report. In particular, the ALRC has been directed not to duplicate:

- a) the other actions being progressed as part of the Immediate Government Actions announced by the Prime Minister on receiving the National Council’s report in April 2009;
- b) the evaluation of the *Family Law Amendment (Shared Parental Responsibility) Act 2006* reforms being undertaken by the Australian Institute of Family Studies; and
- c) the work being undertaken through SCAG on the harmonisation of uniform evidence laws, in particular the development of model sexual assault communications immunity provisions and vulnerable witness protections.

1.18 In addition to these specific areas of concurrent work, there are two further contributions of significance to this Inquiry. First, the Attorney-General commissioned a review by Professor Richard Chisholm, former Justice of the Family Court of Australia, of the practices, procedures and laws that apply in the federal family law courts in the context of family violence (Chisholm Review).<sup>31</sup> The review was completed at the end of November 2009, and released on 28 January 2010.<sup>32</sup> Secondly, the Family Law Council provided an advice to the Attorney-General on the impact of family violence on children and on parenting, which was also released at the same time as the Chisholm Review.<sup>33</sup> As both these initiatives were commissioned by the Attorney-General, and essentially at the same time as the Terms of Reference for this Inquiry, the Commissions have included them in the ambit of the work not to be duplicated in this Report.

1.19 Each of these is summarised, in turn, below. Their relationship to particular aspects under consideration in this Inquiry is considered at relevant points throughout this Report.

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30 Ibid, 43; KPMG, *The Cost of Violence against Women and their Children* (2009), prepared for the National Council to Reduce Violence Against Women and their Children.

31 Australian Government Attorney-General’s Department, *Family Courts Violence Review* (2009) <[http://www.ag.gov.au/www/agd/agd.nsf/Page/Families\\_FamilyCourtsViolenceReview](http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_FamilyCourtsViolenceReview)> at 28 January 2010.

32 Ibid.

33 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009).

## Immediate Government Actions

1.20 In response to *Time for Action* the Australian Government announced a package of immediate actions,<sup>34</sup> including investments in a new national domestic violence and sexual assault telephone and online crisis service; in primary prevention activities towards building respectful relationships; and to support research on perpetrator treatment.

1.21 The Government also committed to working with the states and territories through SCAG to: establish a national scheme for the registration of domestic and family violence orders; improve the uptake of relevant coronial recommendations; and identify the most effective methods to investigate and prosecute sexual assault cases.

1.22 Further immediate actions included the development of a multi-disciplinary training package for lawyers, judicial officers, counsellors and other professionals working in the family law system, to improve consistency in the handling of family violence cases, and the establishment of the Violence Against Women Advisory Group to advise on the National Plan to Reduce Violence against Women.

1.23 The list of actions also included asking the ALRC to work with state and territory law reform commissions to examine the inter-relationship of federal and state and territory laws that relate to the safety of women and their children. In the list of ‘priority actions’ the Australian Government agreed to:

Make a reference to the Australian Law Reform Commission to examine the integration of domestic violence, child protection and federal family law.<sup>35</sup>

## Australian Institute of Family Studies evaluation

1.24 In 2006, the Australian Institute of Family Studies (AIFS) was commissioned by the Attorney-General’s Department and the Department of Families, Housing, Community Services and Indigenous Affairs to undertake an evaluation of the changes introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) and the accompanying increased funding for new and expanded family relationships services. The amendments introduced significant procedural and substantive changes to the legal framework for resolving parenting disputes following parental separation—including a presumption in favour of equal parental responsibility; an increased focus on protecting children from harm resulting from abuse, neglect and exposure to family violence; and a more child-focused process for those disputes that do proceed to court.<sup>36</sup>

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<sup>34</sup> Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009).

<sup>35</sup> Australian Childhood Foundation and Child Abuse Prevention Research Australia, *Responding to Child Abuse in Australia: A Joint Submission to the Australian Government Responding to Australia’s Children: Safe and Well—A National Framework for Protecting Australia’s Children* (2009), 15.

<sup>36</sup> For a summary of the 2006 changes, see Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms: Summary Report* (2009), 2. The Chisholm Review also includes a summary of the background of the 2006 reforms: R Chisholm, *Family Courts Violence Review* (2009), 121–124.

1.25 The purpose of the evaluation was to assess the extent to which the reform package has been effective in achieving its policy aims.<sup>37</sup> The report, *Evaluation of the 2006 Family Law Reforms*, was released at the same time as the Chisholm Review, on 28 January 2010.<sup>38</sup> It involved the collection of data from 28,000 people involved in the family law system—including parents, grandparents, family relationship services staff and clients, lawyers, court professionals and judicial officers—and the analysis of administrative data and court files.

1.26 Of particular relevance in the context of this Inquiry are the findings in relation to family violence and safety concerns:

Around two-thirds of separated mothers and just over half of separated fathers indicated that their child's other parent had emotionally abused them before or during the separation. One in four mothers and around one in six fathers said that the other parent had hurt them physically prior to separation and, among those who report such experiences, most indicated their children had seen or heard some of the abuse or violence. When family court files ... were examined, over half of the files contained an allegation of family violence on the written file.

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.<sup>39</sup>

1.27 Notwithstanding the high incidence of family violence identified, the evaluation also found that:

a majority of separated mothers (62%) and fathers (64%) had friendly and cooperative relationships with each other about 15 months after separation. About a fifth had a distant relationship and a little under a fifth had a highly conflicted or fearful relationship.<sup>40</sup>

1.28 Even when there was violence, therefore, a large number of parents separating after July 2006 were able to reach agreement about their parenting arrangements themselves, although as one in five were conflicted or fearful, the quality of some of those agreements may be called into question.

1.29 The study also reported a ‘cultural shift’ from a primary reliance on legal services to one where ‘a greater proportion of post-separation disputes over children are being seen and responded to primarily in relationship terms’.<sup>41</sup> However, ensuring

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37 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009). There are three components of the AIFS research program for the evaluation: the Legislation and Courts Project; the Service Provision Project; and the Families Project. Each of these components involves a series of studies which will combine to develop a composite picture based on multiple perspectives.

38 Ibid; Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms: Summary Report* (2009); R McClelland (Attorney-General), ‘Release of Family Law Reviews’ (Press Release, 28 January 2010).

39 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms: Summary Report* (2009), [3.1.1]. The family courts comprise the Family Court of Australia, the Federal Magistrates Court and the Family Court of Western Australia.

40 Ibid, [3.1.3].

41 Ibid, [3.2.2].

that families are able to reach appropriate services in a timely way was also crucial to the success of this shift:

Pathways through the system need to be more defined and more widely understood. There is still evidence that some families with family violence and/or child abuse issues are on a roundabout between relationship services, lawyers, courts and state-based child protection and family violence systems. While complex issues may take longer to resolve, resolutions that are delayed by unclear pathways or lack of adequate coordination between services, lawyers and courts have adverse implications for the wellbeing of children and other family members.<sup>42</sup>

1.30 Screening properly to identify family violence and child abuse was another significant theme. The evaluation provided ‘clear evidence’ that the family law system had improved in relation to the identification of concerns about family violence and child abuse, although there were still significant problems:

Relevant issues include a lack of understanding of family violence and child abuse in various parts of the system, and perceptions of there being pressure to reach agreements notwithstanding the presence of such concerns. Problems also stem from the intersection of the state and federal systems, and with lawyers (and family relationship sector professionals) finding child protection systems difficult to engage with when there are concerns about risks to children. These issues pre-date the reforms and are longstanding. Further, some professionals believed that some new aspects of the legislative framework have discouraged concerns about family violence and child abuse from being raised. These include an obligation of courts to make costs orders against a party found to have ‘knowingly made a false allegation or statement in proceedings’ [Family Law Act s 117AB] and the requirement for courts to consider the extent to which one parent has facilitated the child having a relationship with the other parent (s 60CC(3)(c)).

While there was widespread concern that family violence and child abuse and neglect are being inadequately responded to, some legal professionals and fathers also claimed that allegations about family violence and child abuse were being used to impede fathers’ claims for a shared parenting role after separation.<sup>43</sup>

1.31 While ‘systematic attempts to screen such families in the family relationship service sector and in some parts of the legal sector’ have improved the identification of such issues, the expectation that most families will attempt family dispute resolution (FDR) has meant that ‘FDR is occurring in some cases where there are very significant concerns about violence and safety’.<sup>44</sup>

[There is a] need for professionals across the system to have greater levels of access to finely tuned assessment and screening mechanisms applied by highly trained and experienced professionals. Protocols for working constructively and effectively with state-based systems and services (such as child protection systems) also need further work. At the same time, the progress that continues to be made on improved screening practices will go only part of the way to assisting victims of violence and abuse.<sup>45</sup>

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42 Ibid, 21.

43 Ibid, 15.

44 Ibid, 23.

45 Ibid, 24.

1.32 Another area of concern identified in the evaluation was the misunderstanding that shared parental responsibility allows for ‘equal’ shared care time:

This confusion has resulted in disillusionment among some fathers who find that the law does not provide for 50–50 ‘custody’. This sometimes can make it challenging to achieve child-focused arrangements in cases in which an equal or shared care-time arrangement is not practical or not appropriate. Legal sector professionals in particular indicated that in their view the legislative changes had promoted a focus on parents’ rights rather than children’s needs, obscuring to some extent the primacy of the best interests principle (s 60CA). Further, they indicated that, in their view, the legislative framework did not adequately facilitate making arrangements that were developmentally appropriate for children.<sup>46</sup>

1.33 The overall conclusion of the evaluation was that the 2006 reforms to the family law system have had ‘a positive impact in some areas and have a less positive impact in others’. More parents are sorting out their parenting arrangements without an automatic recourse to the court, notwithstanding a high incidence of family violence and child abuse. However, whether FDR is appropriate in such cases and, if so, when, is a matter requiring further consideration:

This is an area where collaboration between relationship service professionals, family law system professionals and courts needs to be facilitated so that shared understandings about what types of matters are not suitable for FDR can be developed and so that other options can be better facilitated.<sup>47</sup>

### **Standing Committee of Attorneys-General**

1.34 SCAG, through the National Working Group on Evidence, has recently considered harmonisation of sexual assault counselling communications privileges and immunities. At the conclusion of this work, SCAG Ministers agreed on principles to be applied as the minimum standard in Australia.<sup>48</sup>

1.35 The National Working Group on Evidence is currently considering harmonisation of provisions protecting vulnerable witnesses giving evidence in court proceedings. Vulnerable witnesses in this context may include children, people with disabilities, and traumatised people—such as victims of sexual assault.

### **The Chisholm Review**

1.36 Professor Chisholm was required to ‘assess the appropriateness of the legislation, practices and procedures’ that apply in cases where family violence is an issue and to recommend improvements. In acknowledging the challenges for the family law system of such cases—involving ‘more than half the parenting cases that come to the courts’—Chisholm reiterated in his opening remarks that ‘[v]iolence is bad for everyone, and particularly dangerous for children, whether or not it is specifically directed at them’:

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46 Ibid.

47 Ibid, 26.

48 Standing Committee of Attorneys-General, *Communiqué*, 7 May 2010.

These cases present the courts with truly daunting tasks: to provide a setting in which the parties feel safe and confident that they will be treated with respect; to deal with the cases with necessary efficiency but most importantly with justice and fairness; and to ensure as far as possible that arrangements made for children, whether as a result of the parties' consent or by the court's adjudication, are suitable for their needs, which will include being safe and having both parents contribute to their developmental needs.<sup>49</sup>

1.37 Chisholm identified a theme that recurred throughout his review: 'that family violence must be disclosed, understood, and acted upon'.<sup>50</sup> In terms of the family law system, this means that each component of it 'needs to encourage and facilitate the disclosure of family violence, ensure that it is understood, and act effectively upon that understanding'.<sup>51</sup>

1.38 With respect to the procedures of the family law courts, Chisholm pointed to the importance of expertise in relation to children's cases and a goal of achieving the same approach in both the Federal Magistrates Court and the Family Court of Australia. In order to ensure disclosure of family violence, Chisholm targeted the document that is used to alert the court to allegations of violence or abuse, and concluded that 'this system is not working'.<sup>52</sup> He suggested, instead, moving to a system of risk identification and assessment that applies to all parenting cases.<sup>53</sup>

1.39 Chisholm identified three particular provisions of the *Family Law Act 1975* (Cth) as needing amendment:

In essence, the recommendations are that the 'friendly parent' provision [s 60CC(3)(c)] should be amended so it recognises that parents sometimes need to take action to protect children from risk; that the specific and separate costs provision (s 117AB) dealing with knowingly false allegations and statements should be replaced by a simple reference to the giving of knowingly false evidence in the provision that deals with costs (s 177); and that the information that advisers are required to provide should reflect not only the importance of parental involvement but also the importance of safety for children.<sup>54</sup>

1.40 Key recommendations also focused on the provisions dealing with parental responsibility and the guidelines included in the legislation—primary and additional considerations—for determining what is in the child's best interests.<sup>55</sup> As noted by Chisholm, this is 'a large and controversial topic'.<sup>56</sup> The package of reforms introduced by the *Family Law Amendment (Shared Parental Responsibility) Act*, emphasised two main concerns as the primary considerations:

49 R Chisholm, *Family Courts Violence Review* (2009), 4.

50 Ibid, 5.

51 Ibid.

52 Ibid, 6. The document is the 'Form 4': *Family Law Rules 2004* (Cth) r 2.04, sch 2.

53 R Chisholm, *Family Courts Violence Review* (2009), 70–80.

54 Ibid, 7. The 'friendly parent' provision is considered in pt 3.2; the obligations on advisers in pt 3.3; and costs orders in pt 3.4.

55 Ibid, pt 3.5. *Family Law Act 1975* (Cth) s 60CC sets out the matters that must be considered in determining what is in a child's best interests.

56 R Chisholm, *Family Courts Violence Review* (2009), 120.

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.<sup>57</sup>

1.41 Although these two matters were principal motivating concerns behind the 2006 amendments, Chisholm considered that ‘the “twin pillars” formula is not an ideal guide to children’s best interests’.<sup>58</sup> Chisholm preferred instead guidelines that did not include ‘the artificial distinction ... between “primary” and “additional” considerations’.<sup>59</sup>

1.42 In addition, a central issue in the lead-up to the 2006 reforms was whether there should be a presumption in favour of ‘equal time’ in relation to parental responsibility.<sup>60</sup> The formula, that when making a parenting order in relation to a child, the court must apply a presumption that it is in the best interests of the child for the child’s parents to have ‘equal shared parental responsibility’,<sup>61</sup> has created considerable controversy, particularly a confusion between ‘equal responsibility’ and ‘equal time’. Such misunderstandings were also evident in the AIFS evaluation, described above. Chisholm preferred instead a presumption simply of each parent having ‘parental responsibility’.<sup>62</sup>

1.43 Other recommendations in the Chisholm Review include the provision of additional funding to support the work of contact centres, FDR agencies, legal aid, and family consultants; better education in relation to issues of family violence; and recognition of the importance of experience and knowledge of family violence in making appointments to significant positions in the family law system.<sup>63</sup>

### **Family Law Council**

1.44 In *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues*, the Family Law Council makes a number of recommendations about family violence ‘if and when it becomes visible in the Family Law system in Australia’.<sup>64</sup> The Council recommended a number of strategies to improve the understanding and identification of family violence, including that:

- the definition of ‘family violence’ in the *Family Law Act* be widened to include a range of threatening behaviour;<sup>65</sup>

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57      *Family Law Act 1975* (Cth) s 60CC(2).

58      R Chisholm, *Family Courts Violence Review* (2009), 127.

59      *Ibid*, 8; Rec 3.4.

60      *Ibid*, 121–124.

61      *Family Law Act 1975* (Cth) s 61DA(1).

62      R Chisholm, *Family Courts Violence Review* (2009), Rec 3.3.

63      *Ibid*, recommendations in pt 4.

64      Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 7.

65      *Ibid*, Rec 1.

- a common knowledge base be established to assist all those in the family law system to better understand the patterns and effects of family violence;<sup>66</sup>
- the *Best Practice Guidelines for Lawyers Doing Family Law Work* be revised to incorporate detailed information on family violence;<sup>67</sup> and
- the forms for notifying family law courts about family violence be improved.<sup>68</sup>

1.45 The Family Law Council was concerned to address ‘certain widespread misunderstandings’ about the *Family Law Act* through education, in particular:

- Recurrent gossip that notification of family violence may lead to a judicial perception that the notifier is an ‘unfriendly parent’
- Widespread perception that each parent now has a ‘starting right’ to equal time (50/50) with children
- Common belief that a parent will receive *both* substantial time with a child, and equal shared parental responsibility, (similar to historic ‘guardianship’), *despite* a history of poor communication and hostility between parents; and *despite* the long term health and emotional consequences for children as casualties on such parental battlefields.<sup>69</sup>

1.46 Such misunderstandings were also identified in both the Chisholm Review and the AIFS evaluations, considered above.

1.47 Co-ordination and collaboration between various participants in the system was also seen as being of critical importance, for example:

between the state and territory child protection agencies, and the federal *Family Law Act*, including: the transportability of state family violence injunctive orders; the establishment of a national register of family violence orders; and the establishment of a network database which records family violence orders, and a residual family court power to require state Child Protection Agencies to become parties to Family Law Court proceedings about children.<sup>70</sup>

1.48 A specific aspect of concern was also whether FDR practitioners should have responsibility for providing to federal family law courts any information about family violence or other related issues disclosed during an intervention.<sup>71</sup>

1.49 A recommendation of structural significance is the possibility of a referral of powers to the Commonwealth and a consequent expansion of jurisdiction of the family courts, so that, in determining a parenting application, federal family courts would have concurrent jurisdiction with that of state courts to deal with all matters relating to children including, where relevant, family violence, child protection and parenting orders.<sup>72</sup> The context for a consideration of referral of powers, and the constitutional

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66 Ibid, Rec 2.

67 Ibid, Rec 3.

68 Ibid, Rec 10.

69 Ibid, 8; Rec 13.

70 Ibid, 7; Rec 12.

71 Ibid, Rec 8.

72 Ibid, Rec 7.

division of family law matters between the states and territories and the federal sphere are considered in Chapter 2.

## **Scope of the Inquiry**

### **Terms of Reference**

1.50 The Terms of Reference are reproduced at the beginning of this Report. There are two terms of reference, the first focusing on ‘interaction in practice’ of various laws, the second on ‘inconsistency’ in interpretation and application of sexual assault laws.

#### ***First Term of Reference***

The interaction in practice of State and Territory family/domestic violence and child protection laws with the *Family Law Act* and relevant Commonwealth, State and Territory criminal laws.

1.51 The Commissions have interpreted this as requiring a consideration of the interaction of:

- state and territory family violence laws with the *Family Law Act*;
- state and territory child protection laws with the *Family Law Act*;
- state and territory family violence laws with relevant Commonwealth, state and territory criminal laws;
- state and territory child protection laws with relevant Commonwealth, state and territory criminal laws.

1.52 There are further areas of interaction that the Commissions consider lie within the first Term of Reference, in particular, the interaction of state and territory family violence laws and child protection laws.

#### ***Second Term of Reference***

The impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence.

1.53 The second Term of Reference requires the Commissions to focus on two key facets of sexual assault legal responses: (1) inconsistency in the interpretation or application of laws; and (2) a specific focus on sexual assaults perpetrated by a person with whom the complainant is in a domestic or family relationship.

1.54 ***Inconsistency of laws:*** Inconsistency in the application and interpretation of sexual assault laws can be considered on multiple levels:

- inconsistency of approach between jurisdictions (for example, there are different: offences, definitions of consent, ways in which sexual experience evidence is restricted, judicial directions to the jury, and so on);
- inconsistency between the legal response to victims of sexual assault perpetrated in a family violence context compared to victims of sexual assault perpetrated in other contexts (for example, by a stranger or an acquaintance);
- inconsistency between the legal response to victims of sexual assault perpetrated in a family violence context where those victims come from different backgrounds and have different needs (for example, are Indigenous victims of sexual assault treated in a different way by the legal system compared to other victims of sexual assault within this category?); and
- inconsistency more generally—whether individual cases of sexual assault, regardless of who has perpetrated the sexual assault, are likely to encounter a different response or different result depending upon the police, prosecutors or judicial officers with whom they come in contact.

1.55 In this Inquiry the Commissions are adopting a broad approach to considering the issue of inconsistency.

1.56 While the primary focus of the Inquiry with respect to the second Term of Reference will be on the interpretation and application of laws in the criminal justice system, it is important that this is not seen as the only legal response to sexual assault. Sexual assault occurring in a family violence context may give rise to multiple legal issues (often concurrently)—for example, issues involving family law, civil protection orders, child protection, crimes or victims' compensation, as well as personal injury law.<sup>73</sup> This multiplicity of legal responses and avenues also directly relates to the first Term of Reference, which is concerned with the interaction between the areas of law that respond to family violence.

1.57 In terms of the response of the criminal justice system, the use of the term 'laws' is also to be understood broadly to include not only the laws prescribing certain offences and the common law, but also rules of evidence and criminal procedure. It also necessarily includes the policies, procedures, training and education that apply to the key legal players who implement and interpret those 'laws'—police, prosecutors and judicial officers. This wider interpretation of law is also important in meeting the continuing criticism about the gap between the law as written and its practice.

1.58 **Family violence context:** The Commissions have been asked to focus on a particular category of sexual assault—sexual assault committed in a family violence context. This reflects the fact that most sexual assaults are perpetrated by someone known to the victim.

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<sup>73</sup> The importance of considering the way other legal categories respond to sexual assault is highlighted in R Graycar, 'Frozen Chooks Revisited: The Challenge of Changing Law/s' in R Hunter and M Keyes (eds), *Changing Law: Rights, Regulation and Reconciliation* (2005) 49, 59.

1.59 The *Personal Violence Survey* conducted by the Australian Bureau of Statistics (ABS) in 2005 found that of those women who had been sexually assaulted in the 12 months prior to the survey, 22% had been assaulted by a stranger in the most recent incident, 21% by a former partner,<sup>74</sup> 39% by a family member or friend, and 32% by another known person.<sup>75</sup> Thus in 60% of cases, women were sexually assaulted by a former partner, family member or friend.<sup>76</sup> A 2004 ABS report on sexual assault noted that ‘all available data sources indicate that over half of perpetrators ... are known to their victims’.<sup>77</sup>

1.60 The focus on sexual assault in a family violence context provides an important opportunity to focus on the category of sexual assault that comprises the majority of sexual assaults experienced by women and children. It also provides an opportunity to focus more intently not only on the largest category of sexual assaults, but the one that is more likely to remain unreported; and when it is reported is more likely to fall out of the legal system and less likely to result in conviction (a process known as ‘attrition’).<sup>78</sup> In this way, intimate and familial sexual assaults remain the most hidden in general—and from the view of the legal system in particular—despite forming the largest category of sexual assaults.

1.61 The Commissions recognise that there are continuing issues with sexual assault laws and procedures for *all* victims of sexual assault, not only those who are the focus of this Inquiry. In this regard the Commissions anticipate that any recommendations that are made to assist victims of sexual assault in a family context would have benefits for all victims of sexual assault engaging with the legal system.<sup>79</sup>

### **The intersecting nature of the Terms of Reference**

1.62 There are areas of intersection between the two Terms of Reference, as sexual assault can also constitute family violence. However, given the particular emphasis in *Time for Action* on sexual assault and the specific strategy of giving the ALRC terms of reference in relation to it, a separate term of reference was warranted.

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74 Note that the ABS defined a partner as current and former marital or de facto partners: Australian Bureau of Statistics, *Personal Safety Survey*, Catalogue No 4906.0 (2005), 60.

75 Ibid, 11. Other known person includes an ‘acquaintance, neighbour, counsellor or psychologist or psychiatrist, ex-boyfriend or girlfriend, doctor, teacher, minister, priest or clergy and prison officer’: Australian Bureau of Statistics, *Personal Safety Survey*, Catalogue No 4906.0 (2005), 33.

76 Note that the ABS included former boyfriends/girlfriends within the definition of ‘other known person’ (although current boyfriend/girlfriend or date was a category on its own reflecting, in some instances, ‘different levels of commitment and involvement’ when compared to a marital or de facto partner), thus the percentage of offenders with a close intimate or familial relationship with the victim would be larger if former boyfriend/girlfriends was included within the definition of ‘partner’. For the detailed explanation of the various relationship categories relied on by the ABS, see Australian Bureau of Statistics, *Personal Safety Survey*, Catalogue No 4906.0 (2005), 60.

77 Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 26.

78 Data on reporting and attrition are detailed in Ch 26.

79 The wider implications of the Commissions’ work in this regard also responds to strategy 4.1.2 in National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009).

1.63 At the intersection of all the areas under consideration, however, sits the issue of sexual assault of children, potentially bringing together all the areas of law under consideration in this Inquiry—child protection, criminal law, the *Family Law Act*, and family violence laws.

### Matters outside the Inquiry

1.64 While the scope of the problem of family violence is extensive, the brief in this Inquiry is necessarily constrained both by the Terms of Reference and by the role and function of a law reform commission. Under the Terms of Reference, the Commissions are required to consider ‘what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and their children’. The range of legal frameworks is also not ‘at large’, but limited, in the first Term of Reference, to specified areas of interaction; and, in the second, to the impact of inconsistent interpretation and application of law in relation to sexual assault.

1.65 The Commissions recognise that the Inquiry concerns only a narrow slice of the vast range of issues raised by the prevalence of family violence—when women and children encounter the legal system in its various manifestations. A comment made by the Family Law Council in its advice to the Commonwealth Attorney-General, referred to above, is equally apt as a comment with respect to the problems of family violence in a much wider sense. The Council, noting that it was only focusing on family violence ‘when it becomes visible in the Family Law system in Australia’, stated that: ‘this visible pattern is only the tip of the iceberg of family violence, alcoholism, drug addiction and mental illness which is apparently entrenched in Australia’.<sup>80</sup>

1.66 In this Inquiry, the Commissions noted widespread concern about the link between alcohol and family violence, and recognise that any serious attempt to develop preventative measures in the area of family violence must tackle the problem of alcohol abuse in Australian society. This issue is, however, beyond the scope of the Terms of Reference and was not pursued in this Inquiry.

1.67 The limits of law, both in terms of services but also in terms of its application, was a theme articulated during the Inquiry. For example, Penny Taylor, a solicitor with the Top End Women’s Legal Service, commented that ‘you can have the perfect law, but ...’,<sup>81</sup> and the Commissioner for Victims’ Rights, South Australia, stated that:

Law alone is not a satisfactory response to family violence. The law must be augmented by consistent, comprehensive and co-operative agencies, organisations and individuals. Existing law and range of approaches to family violence serve as a baseline from which people concerned about that violence and its effects can reach out to establish better laws and approaches reflecting victims’ needs and respecting their fundamental rights.<sup>82</sup>

<sup>80</sup> Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 7.

<sup>81</sup> Top End Women’s Legal Service, *Consultation FVC 107*, Darwin, 27 May 2010; See also J Drake, *Submission FV 66*, 1 June 2010 ('it is the practice, not the law, that is the problem'; Women’s House Shelta, *Submission FV 139*, 23 June 2010 ('We need more than better laws')).

<sup>82</sup> Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010.

1.68 The Commissions are also acutely aware that there is a limited range of legal responses to the persistent and endemic problem of family violence. The Commissions note that *Time for Action* identified many other strategies in areas beyond legal frameworks to achieve outcomes such as relationships that are respectful, and services that meet the needs of women and children.<sup>83</sup>

1.69 Family violence is also relevant—or potentially relevant—to other legislative schemes in the Commonwealth arena, including, for example, those regulating workplace relations, immigration, social security and child support. Given the importance of this issue the Commissions considered that the Australian Government should initiate an inquiry into how family violence is treated in this and other federal legislative schemes not falling within the Terms of Reference.<sup>84</sup> A number of stakeholders supported the need for a consideration of such areas.<sup>85</sup> On 9 July 2010 the Attorney-General of Australia, the Hon Robert McClelland MP, issued new Terms of Reference reflecting the suggestion made in the Consultation Paper.

### **The gendered nature of the Terms of Reference**

1.70 In *Time for Action* the National Council acknowledged that while women as well as men can commit—as well as be victims of—family violence or sexual assault, the research shows that ‘the overwhelming majority of violence and abuse is perpetrated by men against women’,<sup>86</sup> and that ‘[t]he biggest risk factor for becoming a victim of sexual assault and/or domestic and family violence is being a woman’.<sup>87</sup> Such findings lie behind the National Council’s strategies that, in turn, led to the Terms of Reference for this Inquiry being focused on the reduction of violence against ‘women and their children’.

### **Criticism**

1.71 Although the Terms of Reference are directed to reforms relating to violence against women and their children, during the Inquiry the gendered nature of the Terms of Reference attracted considerable negative comment, both with respect to the focus on women as victims, and the attachment of the possessive pronoun ‘their’ to the children concerned.<sup>88</sup>

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83 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), Outcomes 2–3.

84 Consultation Paper, [1.74].

85 For example: Victorian Government, *Submission FV 120*, 15 June 2010; Migrant Women’s Emergency Support Service trading as Immigrant Women’s Support Service, *Submission FV 61*, 1 June 2010; P Easteal, *Submission FV 39*, 14 May 2010.

86 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 25.

87 Ibid, 26.

88 M Wenzel, *Submission FV 226*, 7 July 2010; Men’s Rights Agency, *Submission FV 214*, 29 June 2010; R Mitchell, *Submission FV 208*, 25 June 2010; Shared Parenting Council of Australia, *Submission FV 206*, 28 June 2010; T McLean, *Submission FV 204*, 28 June 2010; M Payne, *Submission FV 193*, 28 June 2010; Confidential, *Submission FV 191*, 27 June 2010; R Smith, *Submission FV 135*, 22 June 2010; NT Office Status of Family, *Submission FV 123*, 18 June 2010; Fairness In Child Support, *Submission*

1.72 A common theme from stakeholders critical of the gendered nature of the Terms of Reference, however, was that ‘Australia should be making a stand on violence no matter who is perpetrating [that violence]’<sup>89</sup> and ‘of course women and children should be protected from violence and abuse BUT so should men and children!’<sup>90</sup>

1.73 Specific criticism from individual men and men’s groups included: complaints of unfair treatment of men by the legal system dealing with family law cases and protection orders;<sup>91</sup> and what was described as the ideology of ‘solely male blame’.<sup>92</sup>

### ***Focus of recommendations***

1.74 Although the Terms of Reference are focused on women and children, the suite of recommendations presented in this Report are ones that are directed towards reforming legal frameworks with the aim of improving the safety of victims of family violence. The effect will be to the benefit of all victims, whether male or female. Given the statistical over-representation of women as victims of family violence, the measures recommended can be seen to be a ‘litmus test’ for how well the legal system is working overall in improving safety for those who suffer family violence. The Commissions acknowledge that family violence occurs against men and in the gay, lesbian, transgender and intersex communities and, as such, family violence in such contexts may be matters which deserve separate consideration by government at an appropriate time.

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FV 100, 4 June 2010; G Hilton-Smith, *Submission FV 95*, 3 June 2010; Family Voice Australia, *Submission FV 75*, 2 June 2010; J Drake, *Submission FV 66*, 1 June 2010; J Evans, *Submission FV 60*, 31 May 2010; Confidential, *Submission FV 59*, 31 May 2010; Confidential, *Submission FV 58*, 31 May 2010; Non-Custodial Parents Party (Equal Parenting), *Submission FV 55*, 1 June 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010; A Carvalho, *Submission FV 30*, 4 May 2010; J Matysek, *Submission FV 27*, 29 March 2010.

89 J Matysek, *Submission FV 27*, 29 March 2010.

90 Men’s Rights Agency, *Submission FV 214*, 29 June 2010. See also: Fairness In Child Support, *Submission FV 100*, 4 June 2010; Anonymous, *Submission FV 74*, 2 June 2010; Non-Custodial Parents Party (Equal Parenting), *Submission FV 55*, 1 June 2010.

91 For example, in relation to family law cases: Fairness In Child Support, *Submission FV 100*, 4 June 2010; Anonymous, *Submission FV 74*, 2 June 2010; Non-Custodial Parents Party (Equal Parenting), *Submission FV 55*, 1 June 2010; R Wallace, *Submission FV 16*, 9 November 2009; R Wallace, *Submission FV 9*, 13 October 2009; R Wallace, *Submission FV 07*, 18 September 2009; B Healey, *Submission FV 06*, 14 September 2009. In relation to protection orders: J Schramm, *Submission FV 218*, 1 July 2010; Shared Parenting Council of Australia, *Submission FV 206*, 28 June 2010; Family Law Reform Association NSW Inc, *Submission FV 142*, 24 June 2010; G Hilton-Smith, *Submission FV 95*, 3 June 2010; Confidential, *Submission FV 94*, 3 June 2010; D Matthews, *Submission FV 67*, 1 June 2010; J Evans, *Submission FV 60*, 31 May 2010; Confidential, *Submission FV 58*, 31 May 2010; Non-Custodial Parents Party (Equal Parenting), *Submission FV 55*, 1 June 2010; E McGuire, *Submission FV 53*, 28 May 2010; A Carvalho, *Submission FV 30*, 4 May 2010.

92 M Bourne, *Submission FV 159*, 25 June 2010. See also NT Office Status of Family, *Submission FV 123*, 18 June 2010.

## **Processes of reform**

### **Consultation and collaboration processes**

1.75 Commitment to widespread consultation is a hallmark of best practice law reform.<sup>93</sup> Moreover, under the provisions of the *Australian Law Reform Commission Act 1996* (Cth), the ALRC ‘may inform itself in any way it thinks fit’ for the purposes of reviewing or considering anything that is the subject of an inquiry.<sup>94</sup> Similarly, the NSWLRC may ‘hold and conduct such inquiries as it thinks fit’.<sup>95</sup>

1.76 For this Inquiry, the ALRC was directed to work closely with a number of bodies and to consult particular groups, complementing the multi-faceted consultation strategy adopted for this Inquiry. This strategy used a broad mix of face-to-face consultations and roundtable discussions; online communication tools and the release of a Consultation Paper together with a companion summary.

1.77 This Report is released as a joint document of the ALRC and the NSWLRC, reflecting the co-operative work in the Inquiry. The use of the term ‘the Commissions’ as appropriate throughout, reflects this joint endeavour. To ensure that the solutions developed in the Inquiry are ‘practically achievable and consistent with other reforms and initiatives being considered’, the ALRC provided regular briefings to key staff in the Attorney-General’s Department.

1.78 The consultation strategy for this Inquiry included consultation with all of the bodies identified expressly in the Terms of Reference and other key stakeholder groups.

1.79 A key aspect of ALRC procedures is to establish an expert Advisory Committee or ‘reference group’ to assist with the development of its inquiries. Because of the complex nature of this Inquiry the Commissions used roundtables of invited experts and advisers to inform the consultative processes at key points during the Inquiry—including, in particular, Magistrate Anne Goldsbrough as a part-time Commissioner and George Zdenkowski as special adviser. Expert readers on specific topics were also enlisted at key points in the development of the Consultation Paper and this Report, including Dr Anne Cossins, Dr Jane Wangmann, Professor Patrick Parkinson, Stephen Odgers SC, Professor Les McCrimmon and Hannah McGlade.

### **Community consultations**

1.80 A multi-pronged strategy of seeking community comments was adopted during the Inquiry. First, internet communication tools—an e-newsletter and an online forum—were used to provide information and obtain comment; secondly, the Consultation Paper with its companion summary were released; and thirdly, a national round of stakeholder consultation meetings, forums and roundtables was conducted. In

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93 B Opeskin, ‘Measuring Success’ in B Opeskin and D Weisbrod (eds), *The Promise of Law Reform* (2005), 202.

94 *Australian Law Reform Commission Act 1996* (Cth) s 38.

95 *New South Wales Law Reform Commission Act 1966* (NSW) s 10(1)(c).

addition, in accordance with a commitment in the ALRC's Reconciliation Action Plan,<sup>96</sup> the Commissions developed an Indigenous consultation strategy.

### **Online tools**

1.81 **E-newsletter:** Monthly Family Violence Inquiry e-newsletters provided a way to keep stakeholders informed about the Inquiry progress on a regular basis, with a calendar of stakeholder consultations or other key events in the upcoming month, and a summary of consultations and other work in the previous month. Each e-newsletter also highlighted an 'Issue in Focus' on which views were sought. Links were provided to give immediate feedback on the relevant issue through the online comment form, as well as to information about how to make formal submissions. In addition, there were links to the other inquiries of immediate relevance, including the Chisholm Review and the AIFS evaluation.

1.82 The comments received in response to the Issues in Focus provided an important additional means of input into the Inquiry. Eight e-newsletters were published during the Inquiry and by the end of the Inquiry there were 965 subscribers to the e-newsletter distribution list.

1.83 **Online forum:** The Family Violence Online Forum conducted from November 2009 to January 2010 amongst a closed group from the women's legal services community. The forum was assisted by a grant from the Government 2.0 Taskforce, formed in 2008 against a backdrop of increased interest by governments worldwide in the potential of online engagement. The ALRC received funding from the Taskforce to run an online stakeholder consultation pilot, with the technical and strategic support of social business and development consultancy, Headshift.

1.84 The Family Violence Online Forum facilitated frank and open discussion in a secure online environment about issues relevant to the concerns and experiences of women's legal services.

1.85 **Online submission and blog:** An online submission form was designed to enable people to respond in a focused way, addressing the individual questions and proposals set out in the Consultation Paper. Each question or proposal was followed by an area to enter a response, with the option to upload a pre-prepared submission or supporting document. As with other methods of submission, online submissions could be marked 'confidential'. Sixty-six submissions were completed using the online facility.

1.86 The blog was set up to enable public discussion and debate around questions and proposals contained in the Consultation Paper. The invitation to join this discussion was open to all. Unlike the online submission form, all comments made on this site were public. One hundred and sixty-five blog posts were made during the Inquiry.

1.87 The online submission facility and the blog were ALRC pilot projects in modes of consultation.

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96 Australian Law Reform Commission, *Reconciliation Action Plan* (2009).

***Consultation Paper and Consultation Paper Summary***

1.88 In the past, the ALRC's standard practice has been to produce an issues paper and a discussion paper, prior to producing a final report. In this Inquiry, in response to the wide-ranging and challenging Terms of Reference, and a tight time frame, the Commissions have had to adopt different practices in relation to consultation documents to provide appropriate opportunities for community engagement without overloading stakeholders.

1.89 First, only one consultation document—a Consultation Paper—was published, released on 29 April 2010, complemented by the monthly e-newsletters. The Consultation Paper posed questions—particularly in highly contested areas—and presented options and proposals for reform. The Consultation Paper was a major publication, running to 1,018 pages. To facilitate stakeholder contributions in the restricted time frame for this Inquiry, the Commissions simultaneously released a Consultation Paper Summary of 243 pages—another new practice introduced in this Inquiry. However, the enduring nature of law reform projects is such that the research and evidence base, on which recommendations are based, must be fully explored and reported.

1.90 In most ALRC inquiries, proposals and recommendations for reform are addressed to those appropriate persons or agencies in the federal sphere best placed to implement them. This reflects the ALRC's functions under the *Australian Law Reform Commission Act*.<sup>97</sup> The NSWLRC's functions are similarly set out in its constituting Act, the *New South Wales Law Reform Commission Act 1966* (NSW).<sup>98</sup>

1.91 This Inquiry engages with Commonwealth laws, as well as state and territory laws on many levels—and in both Terms of Reference. The ALRC—as a Commonwealth body—is principally concerned with Commonwealth laws or matters of uniformity and complementarity of Commonwealth laws with state and territory laws; and the NSWLRC—as a state body—is principally concerned with New South Wales laws.

1.92 In this Inquiry, however, both bodies, acting together, have been asked to go further in their respective functions. Given the importance of the Australian Government's commitment to reducing violence against women and children, the nature of the Terms of Reference, and the compelling and widespread nature of the issues being considered, the implementation of many of the recommendations will be primarily the responsibility of the states and territories. The Commissions recommend that reform in this area be led by the Commonwealth Attorney-General and NSW Attorney General cooperatively and through SCAG.

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97       *Australian Law Reform Commission Act 1996* (Cth) s 21(1).

98       *New South Wales Law Reform Commission Act 1966* (NSW) s 10(1).

### **Consultations**

1.93 During this Inquiry the Commissions conducted 236 consultations, as listed in Appendix 2 of this Report. Consultations were undertaken with individuals, legal services and support agencies, courts, police and non-government organisations. Cross-sectional roundtables and forums were conducted in Sydney, Melbourne, Perth, Hobart and Darwin. They comprised a range of groups involved in aspects of responding to family violence, including child abuse and sexual assault, as well as across the family law system.

1.94 The Commissions' approach to consultation with Indigenous stakeholders was to take the same approach as taken in relation to victims generally, working principally through legal and other services to identify issues, given the focus of the Terms of Reference on 'legal frameworks'.<sup>99</sup>

1.95 In addition, rather than separating out issues concerning Indigenous women and children, the Commissions adopted an integrated approach. The same approach was taken with respect to other groups such as women with a disability and women of culturally and linguistically diverse backgrounds. However, the mainstreaming of Indigenous issues in this manner caused problems for some stakeholders working with Indigenous groups in identifying the particular issues to address.<sup>100</sup>

### **Submissions**

1.96 The Terms of Reference initially stipulated a reporting date of 31 July 2010. In order to ensure that the views of key stakeholders could be received and considered fully, the ALRC requested, and the Attorney-General granted, an extension until 10 September 2010 and a further extension to 10 October 2010.

1.97 The Commissions received 240 submissions in the Inquiry, a full list of which is included in Appendix 1. Submissions were received from a wide range of people and agencies including individuals; academics; lawyers; community legal centres; law societies; women's centres and legal services; support services for men, women and children; Indigenous legal and other services; directors of public prosecutions, both Commonwealth and state and territory; state governments; government departments and agencies, both state and federal; victims' support groups and rape crisis centres; and judicial officers, including heads of jurisdiction. Although submissions closed on 25 June 2010—after the extension of time—significant submissions continued to be contributed after that date, including for example a 191-page submission on 16 July 2010.

1.98 Submissions ranged from very detailed submissions addressing the many questions and proposals in the Consultation Paper to passionate and personal stories of

<sup>99</sup> See Appendix 2 for a list of consultations undertaken during the Inquiry.

<sup>100</sup> Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

disaffection and dismay with the way the legal and welfare systems—principally the Family Court—affected individuals.

1.99 The Commissions acknowledge the considerable amount of work involved in preparing submissions and the impact, particularly in organisations with limited funding, of committing staff resources to this task. It is the invaluable work of participants that has enriched the whole consultative process of this Inquiry and the Commissions record their deep appreciation to all participants.

1.100 The time frame for an inquiry of the magnitude covered by the Terms of Reference did, however, cause concern for many stakeholders. While acknowledging that the Consultation Paper was, for example, ‘a fantastic resource’,<sup>101</sup> ‘extremely comprehensive’,<sup>102</sup> an ‘extraordinarily impressive effort in a limited period of time’,<sup>103</sup> and ‘the level of detail is welcome’,<sup>104</sup> and commending the Commissions for ‘engaging in such a substantial undertaking’,<sup>105</sup> many submissions referred to the fact that a lack of resources in community organisations limited the ability to respond.<sup>106</sup> For example, Women’s Legal Service Brisbane commented that:

Many of the issues raised in this inquiry are so large and so complex and deal with the interaction of federal and state laws and bureaucracies that we see no feasible way forward, other than the establishment of a permanent on-going body to continue the work of the inquiry, focusing on specific aspects of the system. We are also concerned that the large discussion papers published and volume of them, (although a fantastic resource) and the limited time-frames, may have acted as an impediment to an effective response being obtained from some of the most disadvantaged women in our community and the organisations that work with them.<sup>107</sup>

1.101 A further compounding factor affecting a number of government stakeholders was the need to secure approval at appropriate levels for submissions and the time required for such processes.<sup>108</sup> In view of all the constraints in the process of this Inquiry—and the importance of the issues involved—many stakeholders expressed a desire for a continued engagement with the issues and process of reform in this area.<sup>109</sup>

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101 Women’s Legal Service Brisbane, *Submission FV 223*, 2 July 2010.

102 Office of the Child Safety Commissioner, *Submission FV 215*, 30 June 2010.

103 FV Confidential C, *Submission FV Confidential C*, 5 June 2010.

104 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

105 Domestic Violence Legal Workers Network, *Submission FV 154*, 28 June 2010.

106 WESNET—The Women’s Services Network, *Submission FV 217*, 30 June 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women Everywhere Advocating Violence Elimination, *Submission FV 210*, 29 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Confidential, *Submission FV 190*, 25 June 2010; NSW Women’s Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

107 Women’s Legal Service Brisbane, *Submission FV 223*, 2 July 2010.

108 For example: Government of South Australia, *Submission FV 227*, 9 July 2010; Queensland Government, *Submission FV 229*, 14 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

109 For example: Government of South Australia, *Submission FV 227*, 9 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Family Relationship Services Australia, *Submission FV 231*, 15 July

## Overview of the Report

### Definitions and terminology

1.102 This section sets out some of the terminology that will be used in this Report in referring to specific concepts in the family violence sphere.

#### *Culturally and linguistically diverse*

1.103 The phrase ‘culturally and linguistically diverse’—and the abbreviation ‘CALD’—are commonly used in referring to people of diverse backgrounds. The Commissions recognise that the discussion in this Report may apply to people who are ‘culturally *or* linguistically diverse’ as well as those who are ‘culturally *and* linguistically diverse’. The phrase is used for convenience to embrace both kinds of diversity.

#### *Family*

1.104 The definition of ‘family’ or ‘domestic’ relationship varies across the Australian jurisdictions and legislation. In this Report the particular definitions of ‘family’ are considered in the context of the specific legislation under consideration. In the discussion of sexual assault in a family violence context—under the second Term of Reference—emphasis is placed on sexual assault by current or former intimate partners (defined as spouses, de facto, and boyfriend/girlfriend).<sup>110</sup>

#### *Family violence*

1.105 The terminology that should be adopted to describe violence within families and intimate relationships has been, and continues to be, the subject of controversy and debate.<sup>111</sup> Invariably there will be difficulties in attaching any one label to describe a complex phenomenon varying in degrees of severity and reflecting the differing experiences of persons from diverse cultural, socio-economic, geographical groups, and those in same-sex relationships or in family structures that do not replicate the nuclear family structure.

1.106 Professors Belinda Fehlberg and Juliet Behrens note that:

The label attached to such violence has been a key issue in feminist struggles to bring it out of the shadow of the private sphere, where historically it remained as a vestige of the era when husbands had the right to use physical force to discipline not only their children but also their wives. According to feminist arguments, the lack of visibility of such violence in public discourse, in policy and in the legal system served to reinforce the gendered imbalances in power that its physical enactment in private

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2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

110 The Terms of Reference require the Commissions to consider violence against ‘women and their children’. The Commissions acknowledge that this may include same-sex relationships where women are the target of family violence.

111 See, eg, Domestic Violence and Incest Resource Centre, *What’s In a Name? Definitions and Domestic Violence: Domestic Violence? Family Violence? Violence Against Women?*, Discussion Paper No 1 (1998).

relationships perpetuated. Consequently both gender and power have been central to evolving feminist definitions of domestic violence.<sup>112</sup>

1.107 State, territory and Commonwealth legislation that refers to violence within families and intimate relationships uses various descriptions—‘family violence’, ‘domestic violence’ and ‘domestic abuse’. The term ‘domestic’ has been criticised on the basis that it ‘qualifies and arguably reduces the term “violence”’.<sup>113</sup> The Macquarie Dictionary notes the colloquial use of the term ‘domestic’ as ‘an argument with one’s spouse or another member of the household’.<sup>114</sup> Thus, from a cultural perspective, the term ‘domestic’ can trivialise the impact of the violence on the victim. However the phrase ‘family violence’ has also been criticised:

The problem with the term ‘family violence’ is not even in its gendered neutrality, but the picture that it paints that violence in the family is something in which all members are complicit, and which is just to do with difficulties in relationships between family members and problems in handling conflict in non ‘violent’ ways. ... The term is even less acceptable than the more commonly used ‘domestic violence’. ‘Domestic’ with all its implications of ‘just a domestic’, at least cannot be taken to qualify the violence by reference to the ungendered perpetrator, as ‘family’ can.<sup>115</sup>

1.108 Reports and writing in this area have adopted varying terminology. Some have referred to both ‘family and domestic violence’, or vice versa;<sup>116</sup> others to ‘family violence’;<sup>117</sup> and some to ‘domestic violence’.<sup>118</sup> Fehlberg and Behrens adopt the terminology of ‘violence and abuse in families’.<sup>119</sup> In each case, the differing terminology—in the Australian context—attempts to refer to the same type of conduct, although the boundaries of such conduct have expanded over the years.

1.109 In this Inquiry the Commissions will refer to ‘family violence’, rather than ‘domestic violence’ or ‘domestic abuse’, unless specifically quoting from sources including legislation which use alternative terminology. The Commissions adopt this terminology to reflect the language used in the Terms of Reference, acknowledging that there is a robust debate about the appropriateness of such terminology.

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112 B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 177.

113 Ibid, 178.

114 Anecdotally, the Commissions have heard that the term is used in the context of police being called out to a ‘domestic’.

115 B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 178 J Behrens, ‘Ending the Silence, But ... Family Violence under the Family Law Reform Act 1995’ (1996) 10 *Australian Journal of Family Law* 35, 38.

116 See, eg, National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009); Australian Bureau of Statistics, *Conceptual Framework for Family and Domestic Violence* (2009); Government of Western Australia, *Family and Domestic Violence Action Plan (2007–2008)*.

117 See, eg, Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006); Queensland Centre for Domestic and Family Violence Research, *Indigenous Family Violence Prevention Forum 2009: Report* (2009).

118 See, eg, Australian Government Solicitor, *The Giving of Evidence by Victims of Sexual Assault* (2008); M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007); Australian Law Reform Commission, *Domestic Violence*, Report 30 (1986).

119 B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 178.

***Family violence legislation***

1.110 Each of the states and territories has legislation which provides for the making of court orders to protect victims from future incidents of family violence.<sup>120</sup> In some cases the legislation deals exclusively with the obtaining of protection orders in the family violence context; in other cases the legislation that deals with these protection orders also deals with the obtaining of protection orders in circumstances outside the family violence context. For ease of reference, in this Report the Commissions refer generically to both sets of legislation as family violence legislation.

1.111 At the time of writing this Report, the family violence legislation current in South Australia is the *Domestic Violence Act 1994* (SA). This legislation, however, will be repealed once the *Intervention Orders (Prevention of Abuse) Act 2009* (SA)—which was assented to on 10 December 2009—comes into effect. Parliamentary debates indicate that this may be sometime later in 2010.<sup>121</sup> As of 1 September 2010 no proclamation had been made fixing a date of commencement. When the Commissions refer to the South Australian family violence legislation, it is to the Act which is yet to come into effect—unless the text indicates otherwise.<sup>122</sup>

***Indigenous peoples/Indigenous women***

1.112 In this Report the Commissions use the term ‘Indigenous peoples’ to refer to Aboriginal and Torres Strait Island peoples, consistently with the terminology adopted by the Aboriginal and Torres Strait Islander Social Justice Commissioner in the *Social Justice Report 2009*:

Aborigines and Torres Strait Islanders are referred to as ‘peoples’. This recognises that Aborigines and Torres Strait Islanders have a collective, rather than purely individual, dimension to their livelihoods. ... The use of the term ‘Indigenous’ has evolved through international law.<sup>123</sup>

1.113 ‘Indigenous women’ and ‘Indigenous children’ also reflect this terminology.

***Protection orders***

1.114 Protection orders under family violence legislation are variously described as: apprehended violence orders, family violence intervention orders, violence restraining orders, family violence orders, domestic violence orders, and domestic violence restraining orders. For the purposes of this Report the Commissions use the generic term of ‘protection order’, unless we are specifically quoting from legislation or case law which uses the specific terminology adopted by a particular state or territory.

120 *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Family Violence Protection Act 2008* (Vic); *Domestic and Family Violence Protection Act 1989* (Qld); *Restraining Orders Act 1997* (WA); *Intervention Orders (Prevention of Abuse) Act 2009* (SA); *Family Violence Act 2004* (Tas); *Domestic Violence and Protection Orders Act 2008* (ACT); *Domestic and Family Violence Act 2007* (NT).

121 South Australia, *Parliamentary Debates*, House of Assembly, 27 October 2009, 4460 (V Chapman—Shadow Attorney-General).

122 For example, when reference is made to supporting documents—including application forms for protection orders—the documents under the old legislation are referred to, as they are the forms available online at the time of writing.

123 Aboriginal and Torres Strait Islander Social Justice Commissioner, *Social Justice Report* (2009), vi.

## **Structure of the Report**

1.115 The Report is arranged by parts, dividing up the subject areas of the Terms of Reference as the lens through which the interaction issues are considered. The arrangement of material in this way is a pragmatic one to make the consideration of the wide ranging area of the Inquiry more manageable through the dissection of issues. The Commissions are of the view, however, that it is essential for a proper understanding of the nature of family violence to see the problems from the perspective of those engaging with the legal framework, rather than through the laws themselves. In order to highlight the issues in the Terms of Reference from the perspective of those engaging with the legal system, a number of case studies, hypotheticals and illustrations have been used, integrated throughout the chapters.

1.116 Part A, Introduction, comprises three chapters: this introductory chapter; Chapter 2, focused on the international and constitutional settings for the Inquiry; and Chapter 3, setting out the framework for reform, including a consideration of the specific principles or policy aims on which the recommendations are based.

1.117 Part B, Family Violence—A Common Interpretative Framework, comprises four chapters. Chapter 4 considers the purposes of the various laws under review in the Inquiry. Chapter 5 then focuses on the definition of family violence in family violence legislation and considers the desirability of attaining a common understanding of what constitutes family violence across family violence legislation. Chapter 6 considers the definition of family violence in other legislative schemes, including the *Family Law Act*, and in the criminal law—and explores the relationship between the definitions in those schemes and in family violence legislation. Definitions form one limb of a common interpretative framework, complemented for example, by guiding principles and statutory objects, which are discussed in Chapter 7.

1.118 Part C, Family Violence and the Criminal Law, considers the interaction between family violence legislation and criminal laws. Chapters 8–10 consider the interaction between family violence laws and state and territory criminal procedures, with a focus in Chapter 9 on the role of police. Chapters 11–12 focus on family violence protection orders and the criminal law, including the issue of breach. Chapter 13 considers the recognition of family violence in offences and sentencing, and Chapter 14 considers family violence issues in the context of defences to homicide, as well as the issue of recognising family relationships in criminal law responses to family violence.

1.119 Part D, Family Violence and Family Law, focuses on the interaction between state and territory family violence legislation and the *Family Law Act*. This part comprises four chapters. Following an introductory chapter, Chapter 13, there is a consideration of the family law interactions with, first, the jurisdiction and practice of state and territory courts—in Chapter 14; and, secondly, the jurisdiction and practice of federal family courts—in Chapter 15.

1.120 Part E, Child Protection, considers interactions between child protection laws and a range of other laws. Chapter 19 focuses on the interactions with the federal

family law, while Chapter 20 considers intersections between family violence protection orders, child protection and criminal laws.

1.121 Part F, Alternative Dispute Resolution, comprises three chapters. Chapter 21 considers the regulation of FDR by the *Family Law Act* and the role of FDR in cases of family violence, while Chapter 22 focuses on issues of confidentiality and the admissibility of family dispute resolution and family counselling communications. The final chapter in the part, Chapter 23, focuses on alternative processes in the context of child protection and family violence protection orders.

1.122 Part G, Sexual Assault, focuses on the second Term of Reference and considers sexual assault in a family violence context. This requires the Commissions to focus on the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family violence context, including rules of evidence, on victims of such violence. Chapter 24 outlines key background understandings of sexual assault in a family violence context, its nature and prevalence, and the response of the criminal justice system and other areas of law. Chapter 25 then describes the range of existing sexual offences and identifies inconsistencies in relation to elements of these offences, notably in relation to the issue of consent. It also discusses the role that guiding principles and objects clauses can play in attempting to mitigate the impact of laws on victims of sexual assault in a family violence context. Chapters 26–28 highlight ways in which particular laws and procedures operate for victims of sexual assault. In some cases, where it is possible to identify certain approaches as more promising and progressive than others, the Commissions recommend that the Commonwealth, state and territory governments should implement consistent measures based on the best model. Chapter 26 discusses some of the problems that may lead to attrition of sexual assault cases at the reporting, investigation, prosecution and other pre-trial stages. Chapter 27 focuses on issues that arise at trial, notably in relation to the application of laws of evidence, and Chapter 28 on other trial processes including the giving of jury warnings and the cross-examination of complainants and other witnesses in sexual offence proceedings. Overall, these chapters examine reform aimed at reducing attrition and improving the experiences of those who have suffered a sexual assault.

1.123 The final part of the Report, Part H, Overarching Issues, comprising four chapters, focuses on some of the overarching issues considered throughout the Inquiry. Chapter 29 examines integrated responses across Australia to issues of family violence and child maltreatment including the essential elements of such responses: common policies and objectives; inter-agency collaboration; and the provision of victim support. Information sharing, which underpins effective integrated responses, is discussed in Chapter 30. Chapter 31 focuses on the practices, resources and mechanisms required to provide and maintain quality education and training in the family violence context. The chapter then considers ways in which data collection and analysis can be improved to ensure systemic change and improvement. Specialisation—in particular specialised courts—which may also be a feature of integrated responses, is discussed in Chapter 32. Given that specialised practice is identified by the Commissions as a principal reform objective in this Inquiry, this chapter is the final chapter in this Report.

## **Stop Press—VLRC Child Protection Report**

1.124 On 7 October 2010, as this Report was in press, the Commissions received the report of the Victorian Law Reform Commission, *Protection Applications in the Children's Court*, Final Report 19, 2010 (VLRC 19). There are many overlaps and synergies between VLRC 19 and this Report. The Commissions note briefly below the intersections between the two reports, identifying the chapter in this Report, followed by comments concerning the VLRC's proposals.

1.125 **Chapter 19—The Intersection of Child Protection and Family Laws.** In Chapter 19, the Commissions consider the practical and legal difficulties arising from the fact that child protection laws are state and territory laws, whereas family laws are federal laws. The desirability of having one court deal with both areas of law and the problems of achieving this are considered. It is recommended, amongst other things, that state and territory children's courts should have the power to make parenting orders under the *Family Law Act* in certain circumstances. VLRC 19 also supports the 'one court' principle—considered in Chapter 3 of this Report—and proposes that, in child protection cases, the Children's Court of Victoria should be permitted to make an order granting guardianship and/or custody of the child to one parent to the exclusion of the other, when satisfied that this order is necessary to meet the needs of the child (VLRC 19, Proposal 2.23).

1.126 **Chapter 20—Family Violence, Child Protection and the Criminal Law.** In Chapter 20, the Commissions recommend the expansion of the powers of children's courts to enable those courts to make protection orders under family violence legislation in certain circumstances. The VLRC takes the same approach and proposes the amendment of the *Family Violence Protection Act 2008* (Vic) to permit the Children's Court of Victoria to make orders when a child, who is the subject of a child protection application, is a child of 'the affected family member' or the 'protected person' (VLRC 19, Proposal 2.24).

1.127 **Chapter 23—Intersections and Inconsistencies.** In Chapter 23, the Commissions consider the use of alternative dispute resolution (ADR) in child protection cases and the challenges presented by family violence. The Commissions make recommendations concerning the importance of taking family violence into account in child protection ADR in a number of ways. The VLRC proposes expanding and developing the use of ADR in child protection cases and that, in Victoria, a 'graduated range of supported, structured and child centred agreement-making processes should become the principal means of determining the outcome of child protection applications'. The VLRC considers, among other things: the design of these processes; the need for risk assessment; management of the power relationships inherent in child protection cases; the availability of legal advice to the parties; participation of children and young people in ADR processes; and training and qualifications of ADR practitioners.

## **2. International and Constitutional Settings — The Context for Reform**

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### **Contents**

Introduction	115
International instruments	116
Universal Declaration of Human Rights	116
International Covenant on Civil and Political Rights	116
Convention on the Elimination of Discrimination Against Women	117
Declaration on the Elimination of Violence against Women	119
Convention on the Rights of the Child	120
Convention on the Civil Aspects of International Child Abduction	123
Constitutional framework	125
Introduction	125
The federal system	125
Commonwealth laws	126
Referral of powers	126
Western Australia	127
Cross-vesting	129
Dual judicial appointments	130
The web of courts in family violence matters	132
Overview	132
Magistrates courts	132
District (County) and Supreme Courts	132
Children's courts	133
Family courts	133
Interactions and overlaps	134
Children	134
Family violence	135
Fragmentation	136

### **Introduction**

2.1 Family violence as a legal issue sits within a complex framework of laws, state and federal, and against the backdrop of international instruments. This chapter begins with a consideration of the international instruments that affect the range of issues in focus in this Inquiry. Following this is an analysis of the division of jurisdiction in relation to family law matters between federal and state and territory laws, together with a brief description of the nature of the jurisdictions of the range of courts in which family violence issues may arise.

## **International instruments**

2.2 Under its constituting legislation, the ALRC is directed to have regard to ‘all of Australia’s international obligations that are relevant to the matter’.<sup>1</sup> A number of international conventions are relevant to the legal framework in relation to violence against women and children in the family. In particular, these reflect the acknowledgment that violence against women and children is a violation of human rights.

2.3 Such international instruments do not become part of Australian law until incorporated into domestic law by statute.<sup>2</sup> But, as noted by the High Court in *Minister for Immigration and Ethnic Affairs v Teoh*, a convention can still assist with the interpretation of domestic law:

The provisions of an international convention to which Australia is a party, especially one which declares universal fundamental rights, may be used by the courts as a legitimate guide in developing the common law. But the courts should act in this fashion with due circumspection when the Parliament itself has not seen fit to incorporate the provisions of a convention into our domestic law.<sup>3</sup>

### **Universal Declaration of Human Rights**

2.4 The Universal Declaration of Human Rights was adopted and proclaimed by the General Assembly of the United Nations on 10 December 1948, in the wake of the Second World War, and as the first international expression of rights to which all human beings are entitled.<sup>4</sup> Comprising 30 articles, it provides the backdrop for a number of later instruments which embody and expand upon its provisions.

### **International Covenant on Civil and Political Rights**

2.5 The *International Covenant on Civil and Political Rights* (ICCPR), described as ‘one of the most important human rights conventions of the United Nations era’,<sup>5</sup> was adopted by the United Nations General Assembly on 16 December 1966 and ratified by the Australian Government in 1980. In making any proposals or recommendations the ALRC is directed to ensure that they are consistent, ‘as far as practicable’, with the ICCPR.<sup>6</sup>

2.6 A number of articles of the ICCPR are of particular relevance in the context of a consideration of family violence. Article 23 provides that ‘[t]he family is the natural and fundamental group unit of society and is entitled to protection by society and the State’;<sup>7</sup> and art 17 includes protection for the family in stipulating that:

1 Australian Law Reform Commission Act 1996 (Cth) s 24(2).

2 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, 286–8, 315.

3 Ibid, 288.

4 *Universal Declaration of Human Rights*, 10 December 1948, (entered into force generally on 10 December 1948).

5 B Opeskin and D Rothwell (eds), *International Law and Australian Federalism* (1997), 16.

6 Australian Law Reform Commission Act 1996 (Cth) s 24(1)(b).

7 Reflecting art 16 of the *Universal Declaration of Human Rights*, 10 December 1948, (entered into force generally on 10 December 1948).

No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.<sup>8</sup>

2.7 With respect to children, art 24 provides that:

Every child shall have, without any discrimination as to race, colour, sex, language, religion, national or social origin, property or birth, the right to such measures of protection as are required by his status as a minor, on the part of his family, society and the State.

2.8 Other key rights are the right to a ‘fair and public hearing’ in art 14 with minimum procedural guarantees in the case of criminal charges,<sup>9</sup> and the right in art 26 that ‘all persons are equal before the law and are entitled without any discrimination to the equal protection of the law’.

2.9 In the context of family violence, there are evident tensions in the way that these articles—and the expectations they engender—might operate. The person accused of committing family violence is entitled to a fair hearing (art 14); the family itself, as a fundamental unit of society, is entitled to protection (art 23); and the child is entitled to the expectation of protection by his or her family and the state (art 24). When, for example, a child is the subject of abuse by a family member, each of these articles, and their inherent expectations, may be in apparent conflict. Similarly, where a woman is the subject of family violence, the protection of the family requires the family to be open to some public scrutiny—notwithstanding the right to privacy and the protection of the home (art 17).

### **Convention on the Elimination of Discrimination Against Women**

2.10 The *Convention on the Elimination of All Forms of Discrimination Against Women* (CEDAW)<sup>10</sup> specifically targets discrimination against women. CEDAW came into force for Australia on 27 August 1983.<sup>11</sup>

2.11 CEDAW defines discrimination as any distinction, exclusion or restriction which prevents the equal exercise or enjoyment by women of human rights and fundamental freedoms ‘in the political, economic, social, cultural, civil or any other

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8     *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 17(1). This article reflects art 12 of the UDHR.

9     This article reflects art 10 of the UDHR.

10    *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, [1983] ATS 9, (entered into force generally on 3 September 1981).

11    Ibid; and see, eg, E Evatt, ‘Eliminating Discrimination Against Women: The Impact of the UN Convention’ (1991) 18 *Melbourne University Law Review* 435. In March 2009 Australia became a party to the CEDAW Optional Protocol, which allows individuals to bring a complaint directly to the UN CEDAW Committee, after all domestic remedies have been exhausted.

field'.<sup>12</sup> It supplements the anti-discrimination provisions in the ICCPR, amongst others.<sup>13</sup> In particular it builds upon art 26 of the ICCPR, that

the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.<sup>14</sup>

2.12 The importance of a human rights approach to family violence in this Inquiry and one embracing the human rights of men as well as women was emphasised in some submissions,<sup>15</sup> while the role of CEDAW in counterbalancing ‘historical discrimination’ was also noted by another:

reference to CEDAW is not to exclude but to redress inherent discrimination and imbalances as they manifest themselves in law as well as the rest of society.<sup>16</sup>

2.13 CEDAW has been called ‘an international bill of rights for women’,<sup>17</sup> and described as representing ‘a commitment by the international community to equality in the enjoyment of human rights’.<sup>18</sup>

2.14 In 1993 the ALRC was given Terms of Reference on equality before the law as part of the Australian Government’s ‘New National Agenda for Women’ requiring the ALRC to consider whether laws should be changed or new laws made to remove any unjustifiable discrimination with a view to ensuring women’s full equality before the law. Two reports resulted.<sup>19</sup> The ALRC noted in particular that:

As a party to [CEDAW], Australia has undertaken to pursue ‘by all appropriate means and without delay a policy of eliminating discrimination against women’.<sup>20</sup>

2.15 The ALRC also noted that as a party to the ICCPR, considered below, ‘Australia must guarantee the equal protection of human rights to men and women without discrimination and equality before the law’.<sup>21</sup>

2.16 The ALRC concluded that a significant aspect of gender inequality—and therefore of discrimination in contravention of CEDAW—was ‘women’s experience

12 *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, [1983] ATS 9, (entered into force generally on 3 September 1981), arts 1–3.

13 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 2.1. See also E Evatt, ‘Eliminating Discrimination Against Women: The Impact of the UN Convention’ (1991) 18 *Melbourne University Law Review* 435.

14 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976).

15 See, eg, R Smith, *Submission FV 135*, 22 June 2010.

16 Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010.

17 E Evatt, ‘Eliminating Discrimination Against Women: The Impact of the UN Convention’ (1991) 18 *Melbourne University Law Review* 435, 435.

18 Ibid, 437.

19 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994); Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 2)*, Report 69 (1994).

20 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), [1.2].

21 Ibid.

and fear of violence'.<sup>22</sup> This was not a new discovery. As noted by Young and Monahan, while academic commentators had been writing about the dynamic of violence in gender inequality 'for some years',<sup>23</sup>

The ALRC's distinctive contribution was to raise the general public and government awareness of the issue and to act as a mouthpiece for the views of women across Australia.<sup>24</sup>

2.17 A further aspect of inequality highlighted by the ALRC was the impact that violence has on women's access to the legal system:

Violence directly impedes women in enforcing their legal rights through its destructive impact on their personal confidence and because they may fear retaliation.<sup>25</sup>

2.18 Although CEDAW does not expressly mention violence as a form of discrimination, parties are asked to report on the protection of women against the incidence of all kinds of violence, 'including sexual violence, abuses in the family, sexual harassment at the work place, etc'.<sup>26</sup> So, for example, where art 16 calls for the elimination of discrimination in marriage and the family, family violence 'is clearly a form of discrimination which denies women equality'.<sup>27</sup>

### **Declaration on the Elimination of Violence against Women**

2.19 The Declaration on the Elimination of Violence against Women was adopted by the General Assembly of the United Nations on 20 December 1993, to complement and strengthen CEDAW. The commencing articles of the declaration define violence against women:

#### Article 1

For the purposes of this Declaration, the term 'violence against women' means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

#### Article 2

Violence against women shall be understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

22 Ibid, [2.30].

23 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [16.2], drawing attention to R Graycar and J Morgan, *The Hidden Gender of Law* (2nd ed, 2002), ch 10 and the literature cited by them there.

24 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [16.2].

25 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), [9.6].

26 E Evatt, 'Eliminating Discrimination Against Women: The Impact of the UN Convention' (1991) 18 *Melbourne University Law Review* 435, 438, n 21 citing Rec 12, 8<sup>th</sup> session 1989.

27 Ibid, 441.

- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.

2.20 In 1999, the General Assembly designated 25 November as the International Day for the Elimination of Violence against Women.

### **Convention on the Rights of the Child**

2.21 The United Nations *Convention on the Rights of the Child* (CROC)<sup>28</sup> has been described as ‘the most comprehensive statement of children’s rights ever drawn up at the international level’.<sup>29</sup> Following ratification by Australia on 17 December 1990, CROC has proved of significance in ‘shaping the first wave of reforms to Pt VII of the *Family Law Act 1975* (Cth) effected under the *Family Law Reform Act 1995* (Cth)’.<sup>30</sup>

2.22 CROC sets out the full range of human rights—civil, cultural, economic, political and social rights—pertaining to children under 18 years of age.<sup>31</sup> CROC spells out that children everywhere have the right:

- to survival;<sup>32</sup>
- to develop to the fullest;<sup>33</sup>
- to protection from harmful influences, abuse and exploitation;<sup>34</sup> and
- to participate fully in family, cultural and social life.<sup>35</sup>

2.23 The four core principles of the Convention are non-discrimination; devotion to the best interests of the child; the right to life, survival and development; and respect for the views of the child. In a joint 1997 report, the ALRC and the Human Rights and Equal Opportunity Commission stated that:

CROC recognises that children, as members of the human family, have certain inalienable, fundamental human rights. It emphatically endorses the proposition that the family is the fundamental environment for the growth and well-being of children and states that, for the well-being of society, the family should be afforded protection and assistance so as to fully assume its responsibilities. At the same time, it recognises

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28 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990).

29 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [7.3].

30 *Ibid*, [7.5].

31 UNICEF, *Convention on the Rights of the Child: Introduction* <[www.unicef.org/crc/index\\_30160.html](http://www.unicef.org/crc/index_30160.html)> at 18 January 2010.

32 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990), art 6.

33 *Ibid*, art 6.

34 *Ibid*, art 19.

35 *Ibid*, arts 9, 16, 17, 27, 28.

that children need special safeguards and care where the family does not or cannot assume these roles.<sup>36</sup>

- 2.24 A number of the provisions of CROC are particularly relevant to this Inquiry. First, ‘the best interests of the child’ is a central principle, as set out in art 2:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.<sup>37</sup>

- 2.25 Secondly, the maintenance of contact between a child and his or her parents is affirmed, subject to the ‘best interests’ principle, in art 12:

States Parties shall ensure that a child shall not be separated from his or her parents against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child. Such determination may be necessary in a particular case such as one involving abuse or neglect of the child by the parents, or one where the parents are living separately and a decision must be made as to the child’s place of residence.<sup>38</sup>

- 2.26 Of particular note is the rider in the above provision—that separation of a child from a parent may be in the child’s best interests where the child is subject to abuse or neglect by a parent. However, notwithstanding this qualification, it is also stated that:

States Parties shall respect the right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child’s best interests.<sup>39</sup>

- 2.27 The risk of violence and abuse to a child is given specific attention in art 19, which requires States Parties to

take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.<sup>40</sup>

- 2.28 CROC also includes articles concerning protection from sexual exploitation and sexual abuse;<sup>41</sup> and promoting physical and psychological recovery from, amongst other things, any form of neglect, exploitation or abuse.<sup>42</sup>

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36 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), [3.15].

37 Convention on the Rights of the Child, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990), art 3(1).

38 Ibid, art 9(1).

39 Ibid, art 9(3).

40 Ibid, art 19(1). ‘Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up instances of child maltreatment described heretofore, and, as appropriate, for judicial involvement’: art 19(2).

41 Ibid, art 34.

42 Ibid, art 39.

2.29 The child's right to be heard in proceedings involving him or her is also addressed:

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.<sup>43</sup>

2.30 The right to express his or her own views may be satisfied by being given an opportunity to be heard in any judicial or administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of applicable national law.<sup>44</sup>

2.31 These articles provide the base guidelines for children's interactions with legal processes. Some aspects of CROC, however, may need further consideration—particularly in relation to the *Family Law Act*—such as art 12, dealing with the child's right to be heard in proceedings affecting it, either directly, or indirectly through a representative or appropriate body.<sup>45</sup> One stakeholder referred to the arguable tension between the rights:

That tension arises if a paternalistic approach is taken, namely that children are innately harmed by exposure to the fact or the detail of litigation between adults they love or respect. There is no evidence that this is the case, and the autonomous or rights-based view of children says that (like adults) each child understands as much as they are capable of understanding and what they don't know won't hurt them: it is the fact of the aggression between adults or the violence or neglect in the home that causes the harm. Giving effect to both these two rights means that [Separate Representatives] have not one, but two jobs:

1. To provide the actual opportunity for the child to be 'heard' regardless of the age and maturity of the child and that their views are given due weight in accordance with the age and maturity of the child; and
2. To ensure that other evidence is adduced to help the tribunal reach a decision in the [best interests of the child].<sup>46</sup>

2.32 In *B and B: Family Law Reform Act 1995*, the Full Court of the Family Court expressed the view that CROC

must be given special significance because it is an almost universally accepted human rights instrument and thus has much greater significance for the purposes of domestic law than does an ordinary bilateral or multilateral treaty not directed at such ends.<sup>47</sup>

2.33 The relationship between CROC and the *Family Law Act* has been considered by the High Court in the context of mandatory detention of children in immigration detention centres when proceedings for the release of two boys were brought under

<sup>43</sup> Ibid, art 12(1).

<sup>44</sup> Ibid, art 12(2).

<sup>45</sup> L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [7.5].

<sup>46</sup> Commissioner for Children (Tas), *Submission FV 62*, 1 June 2010. Other stakeholders commented about the 'failure' by the Family Court, Independent Children's Lawyers and Family Reports to take into account children's views: C Pragnell, *Submission FV 70*, 2 June 2010.

<sup>47</sup> *B and B: Family Law Reform Act 1995* (1997) 21 Fam LR 676, [10.19].

pt VII of the *Family Law Act*.<sup>48</sup> The High Court held that the welfare power was constrained by the constitutional head of power under which it was enacted and, accordingly, that the Family Court had no jurisdiction either to order the release of the children from detention or to make general orders concerning the welfare of detained children.

### **Convention on the Civil Aspects of International Child Abduction**

2.34 The 1980 *Hague Convention on Civil Aspects of International Child Abduction* (Hague Convention), to which Australia became a signatory on 1 January 1988,<sup>49</sup> sought to provide for the return of children under the age of 16 years who have been wrongfully removed from, or retained outside, their country of habitual residence.<sup>50</sup>

2.35 The Convention sets up a Central Authority in each country to deal with requests for the return of children taken to or from each country. Signatories commit to the prompt return of children to the country in which they habitually reside so that issues of parental responsibility can be resolved by the courts in that country.

2.36 The Convention was implemented in Australia through s 111B of the *Family Law Act* and the *Family Law (Child Abduction Convention) Regulations 1986* (Cth). The Secretary of the Attorney-General's Department is designated as the Commonwealth Central Authority under the Convention with responsibility for coordinating incoming and outgoing requests to and from overseas Central Authorities and liaising with the relevant state or territory Central Authority in Australia to perform Australia's obligations under the Convention.<sup>51</sup>

2.37 Article 1 sets out the objects of the Convention:

- a) to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and
- b) to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in the other Contracting States.

2.38 There are a number of exceptions to the requirement to return the child set out in art 13, in particular where:

- a) the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention;
- b) there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

48 Minister for Immigration and Multicultural and Indigenous Affairs v B (2004) 219 CLR 365.

49 *Convention on the Civil Aspects of International Child Abduction*, [1987] ATS 2, (entered into force generally on 1 December 1983).

50 UNICEF, *Convention on the Rights of the Child: Introduction* <[www.unicef.org/crc/index\\_30160.html](http://www.unicef.org/crc/index_30160.html)> at 18 January 2010, arts 3, 4.

51 Australian Government Attorney-General's Department, *International Child Abduction* <[www.ag.gov.au/www/agd/agd.nsf/Page/Families\\_Children\\_Internationalchildabduction](http://www.ag.gov.au/www/agd/agd.nsf/Page/Families_Children_Internationalchildabduction)> at 16 March 2010.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

2.39 While these provide some qualification to the ‘prompt return’ principle, the overall emphasis in the Hague Convention is not on ‘the best interests of the child’—language used, for example, in CROC—but rather on the ‘rights of custody and access’—namely, rights of the parents. In a study on Hague Convention cases in Australia, Deborah Fry remarked of this different emphasis that:

While the Convention is generally praised for providing hope and redress for many parents in providing the prompt return of abducted children, it is also criticised for failing to adequately balance the needs and interests of particular children against the needs and interests of all children everywhere. The Hague Convention does not rest upon consideration of the principle of the ‘best interests of the child’ but rather purports to uphold the best interests of children collectively by deterring international abduction. It is Utilitarian at its philosophical base, aimed at enforcing the greatest good for the greatest number.<sup>52</sup>

2.40 The Full Court of the Family Court summarised the effect of the Hague Convention and regulations in *In the Marriage of Emmett and Perry*:

The *Family Law (Child Abduction Convention) Regulations* impose upon the court a primary obligation to promptly return children wrongfully removed or retained. Matters coming before this court are not to be treated as competing claims for interim custody. Proceedings under the regulations are to be heard in a prompt and summary way and it is only in exceptional circumstances that a court would give consideration to refusing the application of the Central Authority for the return of the children. Regulation 16 does vest in the court a discretion to refuse to return children if certain conditions are established. The onus of establishing those preconditions rests upon the party resisting the order for return of the children and that onus must necessarily be a heavy one.<sup>53</sup>

2.41 Hague Convention matters may sit at the intersection of *Family Law Act*, child protection and family violence laws. For example, where there has been violence to the mother of the child by her partner, and the child has witnessed the violence, how might this be considered in relation to a Hague Convention application for the recovery of the child? How difficult is it for a mother who seeks to escape violence by leaving her partner to argue that the exposure of the child to the violence on her ‘would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation’? Aspects of these questions relevant to this Inquiry are considered in Chapter 17.

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52 D Fry, ‘Children’s Voices in International Hague Convention Child Abduction Cases: An Australian Experience’ (Paper presented at 5th World Congress on Family Law and Human Rights, Halifax, Canada, August 2009), 8.

53 *In the Marriage of Emmett and Perry* (1995) 20 Fam LR 380, 383.

## Constitutional framework

### Introduction

2.42 The constitutional framework provides the critical backdrop in this Inquiry, underpinning some of the potential for gaps in the system and contributing to problems in providing safety for those experiencing family violence. This section describes the division of power between the Commonwealth and the states and territories with respect to relevant areas of law. It then considers the range of courts potentially involved in the various issues under the banner of ‘family violence’.

### The federal system

2.43 Australia has a federal system of government in which legislative power is divided between the Commonwealth and the states and territories. In the area of family law, neither the Commonwealth nor the states and territories have exclusive legislative competence.<sup>54</sup> It has been remarked that ‘[i]f family law is viewed as an integral and homogeneous subject area on which it is appropriate to legislate, containing within it subject matters requiring a uniform approach, the conferral of legislative power has been incomplete’.<sup>55</sup>

2.44 The *Australian Constitution* gives the Commonwealth the power to make laws with respect to: ‘marriage’,<sup>56</sup> and ‘divorce and matrimonial causes; and in relation thereto, parental rights, and the custody and guardianship of infants’.<sup>57</sup> It also has the power to legislate with respect to ‘matters incidental to the execution of any power vested by this Constitution in the Parliament’.<sup>58</sup>

2.45 The power of the states to legislate in relation to family law is not limited in the same way, but where a state law is inconsistent with a Commonwealth law, the Commonwealth law prevails to the extent of the inconsistency.<sup>59</sup>

2.46 Federal Magistrate Geoff Monahan and Associate Professor Lisa Young comment—with respect to this division between the Commonwealth and the states—that ‘as a general principle, private rights were regarded as more appropriately a matter for the states than for the Commonwealth’. However, questions of status—marriage and divorce—needed uniformity across Australia and hence were more appropriate for allocation to federal power:<sup>60</sup>

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54 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000) provides a useful discussion of the constitutional context of family law in Australia: ch 2.

55 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.3].

56 *Australian Constitution* s 51(xxi).

57 Ibid s 51(xxii).

58 Ibid s 51(XXXIX).

59 Section 109 of the *Australian Constitution* provides that: ‘when a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid’. This provision may operate in two ways: it may directly invalidate state law where it is impossible to obey both the state law and the federal law; or it may indirectly invalidate state law where the Australian Parliament’s legislative intent is to ‘cover the field’ in relation to a particular matter.

60 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.6].

what was chiefly in the minds of the framers of the Constitution was the need to ensure the recognition of such a basic institution as marriage in the different parts of the new Commonwealth and beyond its borders, throughout what was then known as the British Empire. Legislation for marriage necessarily also implied legislation for its dissolution, since the recognition of a person's status as a divorced person was a necessary precondition to the capacity to remarry.<sup>61</sup>

### **Commonwealth laws**

2.47 The Commonwealth Parliament did not race into the field of family law. The first Commonwealth legislation was the *Matrimonial Causes Act 1959* (Cth), followed two years later by the *Marriage Act 1961* (Cth). These laws superseded the laws of the states and provided a uniform Commonwealth law on marriage and divorce.

2.48 The *Family Law Act* and the establishment of the Family Court of Australia ushered in the current framework of federal family law. The new regime reflected the intention ‘to exercise as plenary a power as the Constitution permitted the Commonwealth to take’, and was subject to a series of constitutional challenges.<sup>62</sup>

2.49 The federal framework was later expanded by the referral of legislative power from the states to the Commonwealth.<sup>63</sup> Section 51(XXXVII) of the Constitution gives the Commonwealth Parliament power to make laws with respect to:

matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States, but so that the law shall extend only to States by whose Parliaments the matter is referred, or which afterwards adopt the law.

### **Referral of powers**

2.50 Dr Anthony Dickey has noted that the referral of powers has been ‘the practical way in which problems resulting from the division of State and Commonwealth powers have most often been overcome’.<sup>64</sup>

2.51 A major addition to federal power was the referral to the Commonwealth of the power to make laws with respect to the children of unmarried parents—‘ex-nuptial children’.<sup>65</sup> Between 1986 and 1990, all states (with the exception of Western Australia) referred state powers with respect to ‘guardianship, custody, maintenance

61 Ibid, [3.7]. Dickey notes that it would appear that members of the Constitutional Convention of 1897–1898 were averse to repeating the United States experience where the law of divorce varies with the law of the different states: A Dickey, *Family Law* (5th ed, 2007), 13–14. Sir Garfield Barwick suggested another reason—Queen Victoria, who proved reluctant to assent to colonial Bills which liberalised divorce, her approval being necessary for such Bills: G Barwick, ‘Some Aspects of the New Matrimonial Causes Act’ (1961) 3 *Sydney Law Review* 409, 410.

62 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.30] ff discusses the various constitutional challenges.

63 A referral of power to the Commonwealth is not required from the ACT, the Northern Territory and Norfolk Island because s 122 of the *Australian Constitution* assigns to the Commonwealth plenary power to ‘make laws for the government’ of the territories.

64 A Dickey, *Family Law* (5th ed, 2007), 40.

65 There was an attempt in 1983 to extend the categories of children covered by the *Family Law Act* but this was held to be constitutionally invalid, necessitating the referral of power: Ibid, 32. In *Re Cormick* (1984) 156 CLR 170 it was held that the marriage power could not extend to a child who is neither a natural child of both the husband and wife, nor a child adopted by them.

and access' in relation to ex-nuptial children to the Commonwealth.<sup>66</sup> The states did not, however, refer to the Commonwealth their power to legislate with respect to child protection and adoption.<sup>67</sup> As a consequence, in 1996, the *Family Law Act* was amended to include a 'welfare power' in relation to children,<sup>68</sup> although this was narrower than 'child welfare' as reflected in state child welfare legislation.

2.52 A further referral of power led to the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth). This was necessary to fill a remaining gap in relation to federal power. After the 1996 extension of the *Family Law Act* to ex-nuptial children, but prior to the referral that lay behind the 2008 Act, unmarried couples had to seek the resolution of issues arising from the breakdown of their relationship in two different courts: the state system, for property and partner maintenance disputes; and the federal system for parenting disputes and child support issues.<sup>69</sup> The remaining relationship gaps concern same-sex couples and other non-marital domestic relationships.

2.53 The effect of these referrals is that the federal parliament has jurisdiction over marriage, divorce, parenting and family property on separation. The states retain jurisdiction over adoption and child welfare. Of particular relevance is that the states have power to legislate in relation to criminal law. Further, as a matter of practical reality, many of the family law disputes that are litigated—as opposed to resolved without a court hearing—involve child welfare concerns, including involvement of state child welfare agencies and sometimes children's courts. These interactions and overlaps are discussed below.

### **Western Australia**

2.54 Western Australia took a different approach from the other states by availing itself of the opportunity provided in the *Family Law Act* for the creation of a state family court exercising both federal and state jurisdiction.<sup>70</sup> The reasons for doing so were explained in the Second Reading Speech to the *Family Court Act 1975* (WA):

- (1) to provide a single court of unified jurisdiction, administering matters of family law, both federal and state;
- (2) to enable the state to continue to exercise jurisdiction in family law matters which would otherwise have been removed into the Family Court of Australia,

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66 See *Commonwealth Powers (Family Law—Children) Act 1986* (NSW); *Commonwealth Powers (Family Law—Children) Act 1986* (Vic); *Commonwealth Powers (Family Law—Children) Act 1990* (Qld); *Commonwealth Powers (Family Law) Act 1986* (SA); *Commonwealth Powers (Family Law) Act 1987* (Tas).

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

68 *Family Law Reform Act 1995* (Cth), introducing a new pt VII. The relationship between the *Family Law Act* and the child welfare legislation of the states and territories is considered in Ch 19.

69 For a summary see B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 34–35.

70 *Family Court Act 1975* (WA), replaced by *Family Court Act 1997* (WA).

with the opportunity of retaining complementary action with other responsibilities in the areas of welfare and counselling services;

- (3) in the public interest to keep the administration of justice as close as possible to the people it is designed to serve;
- (4) to obviate the creation of a further Commonwealth court in the state.<sup>71</sup>

2.55 When the states referred power in relation to parenting disputes involving parents who are not married to each other, Western Australia again enacted similar laws at a state level, in the *Family Court Act 1997* (WA). That Act reaffirmed the separate state Family Court in Western Australia and its expanded jurisdiction on the basis that

the Western Australian Family Court allows us in Western Australia—the tyranny of distance is always a problem with legislation—to be responsive to local demands and needs for the benefit of people using the Family Court.<sup>72</sup>

2.56 The court also has power to exercise jurisdiction under the *Children and Community Services Act 2004* (WA) and so, unlike the federal family courts, it may issue care or protection orders in relation to children.

2.57 The effect of the establishment and expansion of the Family Court of Western Australia has been described as follows:

As it happens, however, Western Australia has followed the federal law closely and its Family Court has administered the [*Family Law Act*] in conformity with guidelines set out by the Full Court of the Federal Court and by the High Court. There has been full interchange of judges between that court and the Family Court and, to all intents and purposes, the existence of a separate Family Court has not affected the administration of the law under the federal Act.<sup>73</sup>

2.58 Given that Western Australia has kept family law matters within the state, it provides, in some respects, a ‘control jurisdiction’ for a consideration of some of the issues generated by the fragmentation between state and federal jurisdiction in the other states and territories. As remarked by the Family Law Council,

Western Australia is uniquely placed, as the only State Family Court in Australia with a single court for family law matters, to be the first State in Australia to develop and implement a unified Family Law/Child Protection Court to manage all cases involving the welfare of children with the same judicial officers able to determine both public [child protection] and private [parental responsibility and the care arrangements for children] family law matters.<sup>74</sup>

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<sup>71</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 October 1975, 3606 (D O'Neill—Minister for Works).

<sup>72</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 25 November 1997, 8534 (J van de Klashorst—Parliamentary Secretary).

<sup>73</sup> L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.86].

<sup>74</sup> Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), 1.

### Cross-vesting

One of the most creative and effective schemes for addressing some of the unsatisfactory issues arising out of the constitutional limitations of power between the Commonwealth and the states was the cross-vesting scheme.<sup>75</sup>

2.59 The scheme for cross-vesting was introduced in 1987 by uniform legislation enacted by the Commonwealth together with all the states and territories.<sup>76</sup> The purpose of the uniform scheme—‘as ingenious as it was simple’<sup>77</sup>—was evident in the preamble to the *Jurisdiction of Courts (Cross-vesting) Act 1987* (Cth):

WHEREAS inconvenience and expense have occasionally been caused to litigants by jurisdictional limitations in federal, State and Territory courts, and whereas it is desirable—

- (a) to establish a system of cross-vesting of jurisdiction between those courts, without detracting from the existing jurisdiction of any court;
- (b) to structure the system in such a way as to ensure as far as practicable that proceedings concerning matters which, apart from this Act and any law of a State relating to cross-vesting of jurisdiction, would be entirely or substantially within the jurisdiction (other than any accrued jurisdiction) of the Federal Court or the Family Court or the jurisdiction of a Supreme Court of a State or Territory are instituted and determined in that court, whilst providing for the determination by one court of federal and State matters in appropriate cases; and
- (c) if a proceeding is instituted in a court that is not the appropriate court, to provide a system under which the proceeding will be transferred to the appropriate court.

2.60 The Explanatory Memorandum accompanying the federal Bill articulated the hope ‘that no action will fail in a court through lack of jurisdiction, and that as far as possible no court will have to determine the boundaries between federal, state and territory jurisdiction’.<sup>78</sup> State and territory Supreme Courts were vested with federal jurisdiction; federal courts were vested with the full jurisdiction of state and territory Supreme Courts; and from 1988–1999, the scheme ‘overcame constitutional deadlocks that used to bedevil the Family Court’s jurisdiction’.<sup>79</sup>

2.61 The scheme was ‘revolutionary (yet ultimately flawed)<sup>80</sup> and did not withstand constitutional challenge—at least in the direction of the attempt to vest state jurisdiction in federal courts. In *Re Wakim; Ex parte McNally*, the High Court held that Ch III of the *Australian Constitution* exhaustively defined the ‘matters’ that may be the subject of the judicial power of the Commonwealth—and this did not include

<sup>75</sup> T Altobelli, *Family Law in Australia: Principles and Practice* (2003), 56.

<sup>76</sup> For a consideration of the scheme see, eg, K Mason and J Crawford, ‘The Cross-Vesting Scheme’ (1988) 62 *Australian Law Journal* 328; C Baker, ‘Cross-Vesting of Jurisdiction between State and Federal Courts’ (1987) 14(2) *University of Queensland Law Journal* 118; R Chisholm, ‘Cross-vesting and Family Law: A Review of Recent Developments’ (1991) 7 *Australian Family Lawyer* 15.

<sup>77</sup> L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.96].

<sup>78</sup> Explanatory Memorandum, *Jurisdiction of Courts (Cross-Vesting) Bill 1987* (Cth).

<sup>79</sup> L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.96].

<sup>80</sup> Ibid, [3.87].

exercising the jurisdiction of the states.<sup>81</sup> That part of the scheme that enabled federal courts to hear state matters—such as the Family Court determining a claim under state based de facto relationships legislation or family provision legislation—was unconstitutional.

2.62 *Re Wakim* struck down the cross-vesting scheme in one direction, but not the other. While it held invalid the purported vesting in federal courts of state judicial power, cross-vesting remains valid from the Commonwealth to the states, pursuant to s 77(iii) of the *Australian Constitution*. In addition, a vesting of jurisdiction between the Commonwealth and the territories is still permissible.<sup>82</sup> Young and Monahan describe the impact of the failure of the cross-vesting scheme:

In addition to its impact on corporate law ... the partial demise of the cross-vesting scheme had an immediate effect on Australian family law. While the former was swiftly remedied by a reference of powers by the states to the Commonwealth, the latter has proved more difficult to solve. Many family law matters now needed to be resolved in both a federal and state court. Of immediate relevance was the reality that cross-vesting had allowed de facto families to seek orders in the Family Court to resolve both parenting disputes (federal jurisdiction) and property disputes (state jurisdiction). This problem was, of course, resolved by a state reference of powers over de facto relationships that resulted in amendments to the [*Family Law Act*] (by the *Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008* (Cth) ... Nevertheless, many other procedural benefits that cross-vesting provided to family law litigants have now been lost.<sup>83</sup>

2.63 In consequence, any expansion of Commonwealth power not already covered in the heads of power in the *Constitution* has to be achieved through the mechanism of referral of power pursuant to s 51(xxxvii). In this case the Australian Government may make laws—as federal laws—with the additional heads of power. It does not give the Australian Government, or federal courts, authority to act under state laws—this was the flaw in the cross-vesting scheme.

### Dual judicial appointments

2.64 Because of the challenges posed by the constitutional division of power between the Commonwealth and the states, another strategy has been mooted—in the form of dual commissions—with a judicial officer holding, simultaneously, state and federal judicial appointments. On 23 October 2009, the Australian Government Attorney-General, the Hon Robert McClelland MP and the Victorian Attorney-General, Rob Hulls MP, in a joint press release announced their intention to make the first judicial federal-state appointment. The Hon Justice Julie Dodds-Streeton was appointed to the Federal Court and it was proposed that she be offered reappointment to the Victorian State Supreme Court.<sup>84</sup> As remarked by Attorney-General McClelland:

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81 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

82 *Australian Constitution* s 122. An example is *Falconio v Conchita* [2009] FamCA, noted in ‘Court grants first adoption’ (2010) (6) *Family Court Bulletin* 1.

83 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.100].

84 R McClelland (Federal Attorney-General) and R Hulls (Victorian Attorney-General), ‘Sharing Expertise in the Judiciary’ (Press Release, 23 October 2009).

The appointment follows initiatives being pursued through the Standing Committee of Attorneys-General (SCAG) to create a national judiciary to promote greater consistency and uniformity in the provision of judicial services in Australia.<sup>85</sup>

2.65 Attorney-General Hulls considered that such an arrangement ‘would allow both the Commonwealth and Victoria to jointly utilise the experience and expertise of appointees across jurisdictions’.<sup>86</sup> New South Wales Attorney-General, the Hon John Hatzistergos MLC, also indicated his intention to facilitate similar appointments in that state by legislative amendment.<sup>87</sup>

2.66 At a judges’ conference on 25 January 2010, the Attorney-General reiterated the aspiration expressed on the appointment of Dodds-Streton J to the Federal Court, in saying that the initiative of dual commissions ‘is another means of promoting nationally consistent standards of judicial decision-making’, complementing ‘the work SCAG has been doing on judicial exchange’:

These initiatives provide greater scope for the sharing of expertise across jurisdictions, will encourage a dynamic judiciary, and will provide for greater uniformity and consistency in the application of laws that have national significance.<sup>88</sup>

2.67 While the Attorney-General was ‘enthusiastic about the opportunity ... for progressing dual commissions’, he acknowledged that there are ‘a number of practical challenges’ before a dual commission could be implemented:

no judge can be forced to accept a commission from another jurisdiction. Similarly, no Government can be forced to appoint a judicial officer from another jurisdiction. I expect that, once appointed, working arrangements for the holders of a dual commission would be the subject of discussion and arrangement between heads of jurisdictions.<sup>89</sup>

2.68 The Commissions acknowledge the potential of dual commissions to meet some of the problems created by the division of power, in that holders of such commissions would be able to exercise, as a Federal Court judge, jurisdiction under federal laws, and, as a state Supreme Court judge, jurisdiction under state laws. However, at the time of writing this Report, no such dual appointment has been made and the constitutional validity of such appointments also remains untested. Moreover, in the context of recommendations for reform of legal frameworks to improve safety for victims of family violence, a concurrent appointment of a judge to a federal court, namely a federal family court, and a state Supreme Court, would not necessarily overcome the particular problems of division of power, as the principal judicial work in relation to family violence—as considered in the next section of this chapter—takes place in state and territory magistrates courts, and dual appointments to a federal court and a magistrates court has not yet been proposed.

<sup>85</sup> Ibid.

<sup>86</sup> Ibid

<sup>87</sup> Ibid.

<sup>88</sup> R McClelland (Attorney-General), *Address at Supreme and Federal Court Judges’ Conference* (2010) <[http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/Speeches\\_2010\\_25January2010-SupremeandFederalCourtJudgesConference](http://www.ag.gov.au/www/ministers/mcclelland.nsf/Page/Speeches_2010_25January2010-SupremeandFederalCourtJudgesConference)> at 24 September 2010.

<sup>89</sup> Ibid.

## The web of courts in family violence matters

### Overview

2.69 Family violence issues not only straddle the constitutional division of power described above, they may also arise in a number of judicial settings:<sup>90</sup>

- magistrates courts;
- District (County) and Supreme Courts;
- children's courts; and
- family courts—including the Family Court of Australia, the Federal Magistrates Court and the Family Court of Western Australia.

2.70 Children's courts and family courts can be described as 'specialist' courts, with specific jurisdiction in relation to particular matters. The other courts listed are ones of general jurisdiction, although aspects of specialisation may be present in the form, for example, of specialist lists, such as a family violence list.<sup>91</sup> The jurisdiction of each court will be described briefly, leading into a consideration of where family violence matters may arise in the context of such jurisdiction.

### Magistrates courts

2.71 Many family violence matters are likely to arise first in a local court of a state or territory, before a magistrate. Such matters may include proceedings for protection orders and summary criminal offences—such as common assault, property damage, stalking, and breach of a protection order. Committal proceedings for serious criminal offences—for example, sexual assault—may also be heard in such courts.<sup>92</sup> Magistrates courts also exercise some limited jurisdiction in matters under the *Family Law Act*.<sup>93</sup>

### District (County) and Supreme Courts

2.72 State and territory District (County) and Supreme Courts exercise jurisdiction in relation to state and territory law, in particular as to more serious criminal offences. Appeals regarding protection orders may go to the District (County) Court.<sup>94</sup>

2.73 Although s 39 of the *Family Law Act* originally vested the Supreme Courts of the states and territories with jurisdiction in relation to matrimonial causes, this vesting arrangement was terminated by Proclamation in 1976, except in relation to the Northern Territory. However, the Supreme Courts may exercise the jurisdiction of the

<sup>90</sup> The particular name of the court in each jurisdiction may vary.

<sup>91</sup> Specialised courts are considered in detail in Ch 32.

<sup>92</sup> Various lower courts generally have their own legislation, eg *Local Court Act 2007* (NSW); *Magistrates Court Act 1989* (Vic).

<sup>93</sup> *Family Law Act 1975* (Cth) ss 69J(1), 67ZC. See A Dickey, *Family Law* (5th ed, 2007), 110–111; B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 83–84.

<sup>94</sup> For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 84.

Family Court of Australia by virtue of the cross-vesting of jurisdiction legislation discussed above, under s 77(iii) of the *Australian Constitution*.<sup>95</sup>

### **Children's courts**

2.74 In all states and territories there are specialised children's courts that have jurisdiction related to the care and protection of children and young people, and also criminal cases concerning children and young people.<sup>96</sup>

2.75 The proceedings are conducted with as little formality and legal technicality as the case permits. Proceedings in the care and protection jurisdiction are not conducted in a strictly adversarial manner. Children's courts take all measures practicable to ensure that a child or young person has every opportunity to be heard and participate in proceedings, and that the proceedings, decisions or rulings are understood by the child or young person.

2.76 In Tasmania, the ACT and the Northern Territory, the Children's Court is presided over by a magistrate. In New South Wales, Victoria, Queensland, Western and South Australia, the head of the court is a specialist judge from the District Court.<sup>97</sup> Most states have specialist children's courts operating in the capital cities. Outside these areas, the local magistrate can convene a children's court when necessary.<sup>98</sup>

### **Family courts**

2.77 The Family Court of Australia, the Federal Magistrates Court and the Family Court of Western Australia all exercise jurisdiction under the *Family Law Act* to hear family law matters. The Family Court of Australia was established by the *Family Law Act* as a superior court of record. Appeals from a judge of the Family Court go to the Full Court of the Family Court with a further appeal to the High Court of Australia where the court grants special leave.

2.78 The Federal Magistrates Court was established under the *Federal Magistrates Act 1999* (Cth) and commenced operation on 23 June 2000. As set out in s 3, it is intended that the court: operate as informally as possible; use streamlined procedures; and encourage the use of dispute resolution procedures.<sup>99</sup> The Federal Magistrates Court exercises limited jurisdiction under the *Family Law Act* including in relation to matrimonial causes, and matters arising under Part VII (Children).

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95 The Supreme Court of the Northern Territory still exercises original jurisdiction under the *Family Law Act*, together with the Family Court of Australia: see A Dickey, *Family Law* (5th ed, 2007), 108.

96 For example, the NSW Children's Court has jurisdiction to hearing protection order matters where the defendant is less than 18 years of age: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 91(1)(b). South Australia and the Northern Territory have a Youth Court and a Family Matters Court with jurisdiction over child welfare.

97 C Cunneen, 'Young People and Juvenile Justice' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 187, [9.11]—note that since this publication, the Chief Children's Magistrate in NSW is a District Court Judge, as reflected in the text above.

98 Ibid, [9.11].

99 *Federal Magistrates Act 1999* (Cth) s 3(2).

2.79 A very high proportion of the work in the Federal Magistrates Court concerns family law—in 2007–08, it was 91.7% of the work.<sup>100</sup> The majority of family law matters overall are heard in the Federal Magistrates Court. For example, in the period 2007–08, over 79% of first instance family law applications were filed in the Federal Magistrates Court.<sup>101</sup> Appeals in family law matters go to the Family Court.

2.80 The Family Law Council described the differences in the work of the two courts as follows:

In the family law context, the Family Court of Australia deals with the most intractable disputes and in particular with those parenting applications where there are extremely serious allegations of child abuse or physical abuse which often involve allegations of substance abuse and mental health issues. However, issues of child abuse, substance abuse, mental health and family violence are also highly prevalent issues in parenting applications dealt with by the Federal Magistrates Court.<sup>102</sup>

2.81 As discussed above, the Family Court of Western Australia is a state family court, exercising both federal and state jurisdiction. It is vested with jurisdiction in relation to most original proceedings arising under the *Family Law Act*, including matrimonial causes, and to hear appeals under the Act from the Magistrates Court of Western Australia, other than appeals against decisions made by a family law magistrate.

## **Interactions and overlaps**

### **Children**

2.82 Protection issues concerning children are mainly the domain of the state and territory children’s courts as the Commonwealth has only limited legislative power with respect to children, principally reflected in the Family Court’s power to make parenting orders.

For example, a parent in a Family Court proceeding may allege that the other parent has been violent towards the child. Conversely, in exercising their power to make protection orders, State and Territory children’s courts sometimes make orders on issues that could also be the subject of parenting orders made by the Family Court. For example, in making a protective order, a children’s court may make orders regarding access and custody.<sup>103</sup>

2.83 Section 69ZK of the *Family Law Act* provides that state and territory child welfare laws and orders made under those laws take precedence over Family Court

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100 Federal Magistrates Court of Australia, *Annual Report 2007–08*, 24.

101 Ibid, 28.

102 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 49; drawing upon L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies.

103 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [3.8].

orders.<sup>104</sup> In contrast, in the area of family violence, ‘live with’ and ‘reside with’ orders made under the *Family Law Act* can be used to defeat state and territory family violence protection orders.<sup>105</sup>

2.84 In general terms, the *Family Law Act* governs the resolution of private disputes about the parenting of all children in Australia, while state and territory ‘child protection laws’—that is, laws that aim to protect children from abuse and neglect<sup>106</sup>—govern the resolution of public disputes between state or territory governments and individuals about the care and protection of their children.

2.85 The contrasting nature of the different proceedings was described by the Family Law Council:

[T]he applicant in family proceedings in State and Territory children’s courts is always the State and Territory child protection authority. Hence, children’s court disputes are public law disputes with the State acting as applicant. This is in contrast to disputes under the Commonwealth [*Family Law Act*] where both the applicant and respondent are usually a parent or family member, and the dispute is thus a private one. There can, however, be a private element to child protection disputes and a public element to Family Court disputes. For example, in a matter before the Family Court an allegation of abuse may be made requiring child protection authorities to become involved. At the State and Territory level, once the public law threshold for intervention has been met, a children’s court may make custody and access orders in favour of individuals in the context of exercising their protective jurisdiction (although the ambit of this power depends on the order made), thus creating a private law dimension in such disputes.<sup>107</sup>

2.86 The Council also observed that despite the differences between the jurisdictions and the ‘distinct divide between private and public law’, the orders available under the state and territory family violence and child protection legislation ‘cover much of the same ground’ as the *Family Law Act*.<sup>108</sup>

### **Family violence**

2.87 The primary mechanism exercised at state and territory level in relation to family violence is that of protection orders in magistrates courts—and these may interact with the *Family Law Act*:

There is often interplay between State Protection orders which provide for the protection of a parent and their children by prohibiting the alleged perpetrator (the

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104 *Family Law Act 1975* (Cth) s 69ZK. See the discussion of s 69K in Ch 19 and in Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [2.21]–[2.22].

105 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [3.9].

106 *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Children, Youth and Families Act 2005* (Vic); *Child Protection Act 1999* (Qld); *Children’s Protection Act 1993* (SA); *Children, Young Persons and Their Families Act 1997* (Tas); *Children and Young People Act 2008* (ACT); *Care and Protection of Children Act 2007* (NT).

107 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [2.6].

108 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), [7.3.4].

other parent) from coming within a defined distance of the parent and child, and federal family court orders that provide for the child to spend time with that parent.<sup>109</sup>

2.88 Division 11 of the *Family Law Act* was introduced with the objective of resolving inconsistencies between state and territory family violence orders and *Family Law Act* contact orders, as they were known at the time.<sup>110</sup> However ‘the possibility of inconsistent orders still exists where one court orders contact while another court prohibits it’.<sup>111</sup>

While the [*Family Law Act*] contains quite detailed procedures for the Court to follow when the possibility of inconsistent orders arises, the written law is not necessarily the same as the law in practice.<sup>112</sup>

## **Fragmentation**

### ***Fragmented jurisdiction***

2.89 The net effect of the complexities of the division of power between the Commonwealth and the states and territories is a system which is fragmented. As Federal Magistrate Dr Tom Altobelli remarked:

The chaos and complexity of jurisdiction in Australian family law is mainly attributable to Australia’s federal system of government and the distribution of powers under s 51 of the Constitution. Under the Constitution, neither the Commonwealth nor the states have exclusive legislative competence in the area of family law. This has meant that a complex and fragmented system for determining family law issues has developed and been exacerbated by attempts to interpret constitutional powers in various ways.<sup>113</sup>

2.90 Moreover, the boundaries between the various parts of the system are not always clear and jurisdictional intersections and overlaps are ‘an inevitable, but unintended, consequence’.<sup>114</sup>

2.91 The fragmentation of the system has a particular impact in relation to child protection issues. As noted by the Family Law Council, cases in which children are allegedly being abused may be dealt with on the initiative of a child protection agency in a children’s court. However, such cases are increasingly being litigated in family courts—as a private law matter—where a parent must take responsibility for proving the abuse. Family courts have limited capacity to generate independent evidence of allegations of child abuse.<sup>115</sup> The levels of complexity increase for ‘blended’ families, where the parents have had children with different partners:

109 Ibid, 54.

110 Since 2006 the language has changed from ‘contact’ to, eg, ‘spend time with’: *Family Law Act 1975* (Cth) ss 63C(2)(b), 64B(2)(b).

111 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [3.2].

112 Ibid, [3.5].

113 T Altobelli, *Family Law in Australia: Principles and Practice* (2003), 46.

114 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [2.3].

115 Family Law Council, *Family Law and Child Protection: Final Report* (2002), [2.15].

For example, one child may be the subject of a State child protection order (public law) and the arrangements in respect of the other child(ren) are determined under private law (federal family courts). There is also the concern in respect of those children who are the subject of temporary child protection orders in the State courts but the orders are not pursued by the child welfare authority in the State or Territory courts on the basis that the ‘relative’ is to apply to the federal family courts for parenting orders.<sup>116</sup>

2.92 Family violence issues also have to encounter the ‘bifurcated institutional framework’,<sup>117</sup> generated by the federal/state divide:

Fragmentation of the law on jurisdictional lines results in the possibility of differences of approach to similar problems. It may result in an unevenness in the development of facilities created for dealing with similar problems. It may lead to manoeuvring and the use of subterfuge as parties attempt to get themselves within a particular jurisdiction not otherwise open to them.

These effects may seem pretty unsatisfactory to anyone who is concerned that the best legal solutions and facilities should be available for dealing with problems which so closely affect the happiness of so many families and, particularly, the children.<sup>118</sup>

2.93 There is a danger, moreover, that issues concerning violence may fall into the cracks between the systems. As noted by the Family Law Council in December 2009:

more than one court may be involved in a particular family breakdown. Disputes cannot be neatly divided into private and public areas of law and parties will often have to institute or be engaged in proceedings in various legal forums to have all of their issues determined. ... The overlapping jurisdictions cause significant angst for the parties involved and considerable difficulties for the courts.<sup>119</sup>

2.94 The consequence of the division of powers means that ‘neither the Commonwealth nor the States’ jurisdiction provides a family unit with the complete suite of judicial solutions to address all of the legal issues that may impact on a family in respect of their children’.<sup>120</sup>

2.95 Throughout this Inquiry the Commissions heard about the fact of, and problems arising from, the fragmentation of jurisdiction. As a result, the effective protection of those who experience family violence is compromised by gaps arising as a result of the interaction between the jurisdictions.

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<sup>116</sup> Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 54–55.

<sup>117</sup> Family Law Council, *Family Law and Child Protection: Final Report* (2002), [2.2].

<sup>118</sup> L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [3.77].

<sup>119</sup> Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), [7.3.5].

<sup>120</sup> L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies, [7.3.2].

***Fragmented practice***

2.96 The fragmentation of the system has also led to a fragmentation of practice. A number of stakeholders in this Inquiry commented that the different parts of the legal framework dealing with issues of family violence operated in ‘silos’ and that this was the key problem in the system.<sup>121</sup> Although the laws utilised within each ‘silo’ might be perceived to operate effectively, or to require minor refinement and change, the problems faced by victims of violence required engagement with several different parts of the system. Consequently these people could be referred from court to court, agency to agency, with the risk that they may fall between the gaps in the system and not obtain the legal solutions—and the protection—that they require.<sup>122</sup>

2.97 The next chapter considers the framework for reform developed in this Inquiry to meet the problems of fragmentation considered in this chapter.

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121 For example: Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Victims of Crime Assistance League Inc NSW, *Submission FV 23*, 23 February 2010.

122 The system was described as like being on a ‘roundabout’: Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms: Summary Report* (2009), [4], 21.

## **3. Framework for Reform**

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### **Contents**

Introduction—the reform challenge	139
Principles of reform	140
Seamlessness	141
Accessibility	142
Fairness	142
Effectiveness	143
Framework of reform recommendations	143
Background	143
Reform response	144
One court to deal with family violence?	144
Expansion of federal jurisdiction to include child protection	146
Corresponding jurisdictions	148
Focus of reform	150

### **Introduction—the reform challenge**

3.1 This Inquiry focuses on areas of intersection and interaction between a wide number of laws, operating in different ways and in different spheres. There are federal as well as state and territory laws; criminal as well as civil laws. Some concern private law matters—between individuals; some concern public law matters—between individuals and the state. As noted in Chapter 2, where people who are experiencing family violence encounter the legal systems across the state and federal division of powers—and even within the state and territory systems alone—there are particular challenges.

3.2 For example, one family in which there is serious, ongoing controlling violence may need to go to three different courts in order to deal with that violence. The family is likely to commence proceedings in a magistrates court for a protection order. The conduct that led to the need for protection may constitute a criminal offence; and there may be a prosecution, often also in the magistrates court—but in more serious cases in the District (County) or Supreme Court. The violence may have alerted family, neighbours or the police to notify a child protection agency, which may commence care proceedings in a children’s court. At the same time, one of the parents may wish to see the children and commence proceedings in a family court for parenting orders governing the children’s living arrangements.

3.3 The impact on children may be especially severe, as reflected through the eyes of a nine-year old child speaking of the uncertainty of ongoing Family Court proceedings:

I felt worried that mum was going to go back and forth and back and forth and it wasn't going to stop ... [I felt] freaked out, I couldn't get to sleep I had nightmares, I was crying a lot ... [It was just all] horrible and frightening.<sup>1</sup>

3.4 The sense of being ‘bounced’ between systems was described by one contributor to this Inquiry as feeling ‘like a ball on a pool table’.<sup>2</sup> It is further compounded by gaps in law and gaps in practice. The laws often operate in what has been described as ‘silos’, with people potentially being bounced around and falling between the gaps between these various laws.<sup>3</sup> One women’s legal centre attributed the dropping away of complaints of family violence to such gaps:

The small numbers of women who do build the courage to report [family violence] then have to battle their way through the legal and court systems. In [our centre’s] experience, these systems have inherent gaps which ultimately fail to protect women. They fall through the cracks and are left feeling vulnerable and re-traumatised; the reason so many women give up.<sup>4</sup>

3.5 From the perspective of those dealing with family violence, such experiences may have a significant detrimental impact on safety. The object of this Inquiry is, therefore, to determine ‘what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and children’.

3.6 This Report contains 187 recommendations for reform. The recommendations reflect, on the one hand, the Government’s objectives with respect to the reduction of violence, particularly in relation to women and children, and, on the other hand, a framework of key principles for the Inquiry.

3.7 This chapter provides an outline of the key principles embodied in the recommendations for reform, followed by a summary of the overall framework of the recommendations in the light of the problems and challenges of the fragmentation of jurisdiction described in Chapter 2.

## **Principles of reform**

3.8 The Australian Government has identified a clear goal ‘to reduce all violence in our communities’, recognising that ‘whatever the form violence takes, it has serious and often devastating consequences for victims, their extended families and the

1 A Hay, ‘Child Protection and the Family Court of Western Australia: The Experiences of Children and Protective Parents’ (Paper presented at Child Sexual Abuse: Justice Response or Alternative Resolution Conference, Adelaide, 1-2 May 2003), 10.

2 Confidential, *Submission FV 49*, 5 May 2010.

3 Or on a ‘roundabout’ as described in the AIFS evaluation: Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms: Summary Report* (2009), [4], 21. This separation of practice or ‘silos’ was reflected, for example, in one submission to this Inquiry, where different committees of the one Law Society came to strongly divergent conclusions with respect to a number of matters raised in the Consultation Paper: Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

4 Hunter Women’s Centre, *Submission FV 79*, 1 June 2010.

community'.<sup>5</sup> A specific concern—and the immediate trigger—for the work of the National Council to Reduce Violence against Women and their Children, was that violence against women 'comes at an enormous economic cost'.<sup>6</sup> *The National Plan to Reduce Violence against Women* forms part of the Government response, in turn including the referral of the current Inquiry to the Commissions.

3.9 The objective of this Inquiry reflects the Government's objective—through recommendations for reform of legal frameworks—to improve safety for women and children in the context of family violence. In this context, the idea of 'frameworks' extends beyond law in the form of legislative instruments and includes education, information sharing and other matters. The overall touchstone throughout the chapters and recommendations, however, is one of improving safety.

3.10 The recommendations in this Report are underpinned by four specific principles or policy aims that relevant legal frameworks in this Inquiry should express: seamlessness, accessibility, fairness and effectiveness, as summarised below.

- (1) **Seamlessness**—to ensure that the legal framework is as seamless as possible from the point of view of those who engage with it.
- (2) **Accessibility**—to facilitate access to legal and other responses to family violence.
- (3) **Fairness**—to ensure that legal responses to family violence are fair and just, holding those who use family violence accountable for their actions and providing protection to victims.
- (4) **Effectiveness**—to facilitate effective interventions and support in circumstances of family violence.

### Seamlessness

3.11 The idea of 'seamlessness' is expressed in a number of ways in various reviews and discussions about responding to family violence. *Time for Action* identified, as one key 'outcome' area, that 'systems work together effectively',<sup>7</sup> which combines 'seamlessness' as an interaction of systems as well as 'effectiveness'.

3.12 At times, 'seamlessness' is expressed as an aspiration of having one court deal with the wide range of matters that can arise in relation to a family, where women and children are affected by family violence and child abuse. The approach to the idea expressed as 'one court' is considered further below in the framework for reform.

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5 Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009), 2.

6 Ibid.

7 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), Outcome 6.

3.13 At other times the idea of seamlessness may be seen, for example, in terms of:

- recommendations for consistency of definitions;<sup>8</sup>
- recommendations for greater sharing of information and facilitation of pathways between the various services, agencies and courts that are involved in family violence matters;<sup>9</sup>
- training programs, knowledge bases and professional development for all those in the various systems that deal with issues of family violence and child abuse;<sup>10</sup>
- coordination or integration of responses to family violence matters.<sup>11</sup>

3.14 From the point of view of those engaging with the legal frameworks in which issues of family violence and child abuse arise, the Commissions consider that the key focus for this Inquiry must be upon the experience of those participants—to see the system through their eyes. ‘Seamlessness’ in practice may involve a combination of each and every one of the elements identified so far, and to be considered throughout this Inquiry. It is a foundational policy principle driving the recommendations for reform contained in this Report.

### **Accessibility**

3.15 In the report, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (the Access to Justice Framework), the Access to Justice Taskforce of the Australian Government Attorney-General’s Department identifies ‘accessibility’ as a key principle: ‘Justice initiatives should reduce the net complexity of the justice system’.<sup>12</sup> It also includes the principle of ‘efficiency’, that ‘the justice system should deliver outcomes in the most efficient way possible, noting that the greatest efficiency can often be achieved without resorting to a formal dispute resolution process, including through preventing disputes’.<sup>13</sup>

### **Fairness**

3.16 *Time for Action* identified as one key ‘outcome’ area, that ‘responses are just’.<sup>14</sup> The Access to Justice Framework identifies two ‘access to justice principles’: ‘appropriateness’ and ‘equity’.<sup>15</sup> These are similar to the idea of ‘fairness’ and

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8 For example, Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Recs 1, 5. See also Chs 5–7.

9 For example, *Ibid*, Recs 4, 12. See also Ch 30.

10 For example, *Ibid*, Recs 2, 3. See also Ch 31.

11 See Ch 29 for a discussion of integrated responses generally.

12 Australian Government Attorney-General’s Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 8.

13 *Ibid*, 63.

14 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), Outcome 4.

15 Australian Government Attorney-General’s Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 62.

‘accessibility’. The ideas of being ‘fair and just’ and ‘providing protection’ should also include the idea of ‘respect’, which is also a key outcome in *Time for Action*.<sup>16</sup>

3.17 Fairness also reflects human rights principles—in particular, Australia’s obligations under international conventions, considered in Chapter 2. A key obligation concerns the right to minimum procedural guarantees in the case of criminal charges, especially relevant in the context of Part G of this Report, concerning sexual assault.

### Effectiveness

3.18 The Access to Justice Framework includes ‘effectiveness’ as one of its key principles:

The interaction of the various elements of the justice system should be designed to deliver the best outcomes for users. Justice initiatives should be considered from a system-wide perspective rather than on an institutional basis. All elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes, and maintaining and supporting the rule of law.<sup>17</sup>

3.19 *Time for Action* included as a specific outcome that ‘systems work together effectively’.<sup>18</sup>

## Framework of reform recommendations

### Background

3.20 The consequence of the division of powers discussed in Chapter 2 means that ‘neither the Commonwealth nor the States’ jurisdiction provides a family unit with the complete suite of judicial solutions to address all of the legal issues that may impact on a family in respect of their children’.<sup>19</sup>

3.21 This fragmentation of jurisdiction sits clearly within the Terms of Reference for this Inquiry. Put at its simplest:

more than one court may be involved in a particular family breakdown. Disputes cannot be neatly divided into private and public areas of law and parties will often have to institute or be engaged in proceedings in various legal forums to have all of their issues determined. ... The overlapping jurisdictions cause significant angst for the parties involved and considerable difficulties for the courts.<sup>20</sup>

16 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), Outcome 2.

17 Australian Government Attorney-General’s Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009), 8.

18 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), Outcome 6.

19 L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies, [7.3.2].

20 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), [7.3.5].

3.22 Throughout this Inquiry the Commissions have continued to hear about the fact of, and problems arising from, the fragmentation of jurisdiction—not only from those who work within the current system but also those who seek its protection. As a result, the effective protection of those who experience family violence is compromised by gaps arising as a result of the interaction between the jurisdictions. In consultations and submissions the Commissions have also heard that the problems involve not only a fragmentation of laws, but also a fragmentation of practice.

### **Reform response**

3.23 The challenge in this Inquiry is to suggest a practical way of achieving all of the goals articulated in the policy framework outlined above. That is, within the overall primary concern with safety, relevant legal frameworks should express seamlessness, accessibility, fairness and effectiveness. In this section the Commissions consider the options for reform and the proposition of ‘one court’, concluding that ‘one court’—as a concept rather than as a new or separate institution—embodies all of the policy goals identified for improving the interaction between the systems in practice in the interests of protecting the safety of those who experience family violence. In the section that follows, the concept of one court that informs the recommendations in this Report is explained.

#### **One court to deal with family violence?**

3.24 Would it be feasible to establish one court with a full range of jurisdiction to deal with the wide range matters arising in situations of family violence—a fully integrated court with the ability to deal with protection orders, child protection, family law, perhaps even criminal issues? Some jurisdictions have chosen this route.

3.25 An international example is the Specialist Domestic Violence Unit in the District of Columbia that includes:

a fully integrated court that handles civil, criminal, and family law matters in relation to disputes ‘where the parties are related by blood, legal custody, marriage, cohabitation, a child in common, or a romantic relationship’. The court hears protection order hearings and all misdemeanour criminal charges and, once a case has been brought to it, any family law matters involving the same parties.<sup>21</sup>

3.26 It might be argued that such a model would potentially have distinct benefits, including, for example:

- parties would not be shuttled from court to court;
- fewer court appearances;
- less cost;
- less repetition of evidence;

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<sup>21</sup> See Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), [20.72].

- quicker resolution of issues—if properly resourced;
- those experiencing family violence would be less likely to drop out of the system without the remedies they need for achieving safety;
- confidence in the ability of the legal system to respond to family violence would build;
- specialised judges, as well as specialised court staff, lawyers, prosecutors and specialised practice;
- premises with safety protection; and
- co-location of services—including legal and family violence support services.

3.27 In summary, it might be argued that this would, overall, satisfy clearly all of the guiding principles identified by the Commissions as the framework for reform in this Inquiry.

3.28 However, there are a number of very significant challenges to be met in practice with creating one court of the model suggested above:

- in the Australian context there is the constitutional division of power between the Commonwealth and the states described in Chapter 2; and
- the cost and practical challenges of establishing a completely new specialist family violence court would be very significant.

3.29 If these difficulties were overcome and the Australian Government created one federal family violence court, the states and territories would still provide many of the services relevant to safety—especially police and child protection services—and there would be questions as to how the new court would work with the existing specialist jurisdiction of the federal family courts.

3.30 Conversely, if the ‘one court’ were to be a state court, the consequences would also be significant. Even though the states have jurisdiction in relation to family violence protection orders, crime and child protection, if all family violence matters were to go to state courts, would the Australian Government then vacate the field of family law, leaving it to the states? It would hardly be sensible for family violence cases to be dealt with in a state court and family disputes not involving violence to be dealt with in a federal court. Such a move would create another gap in the system. Further, the expense of such a move for the states would be considerable and the specialist expertise in federal family courts in relation to violence could be lost.

3.31 The following section considers how to implement a ‘one court’ concept within the context of such limitations, reviewing two main options—the expansion of federal jurisdiction to include child protection; and the development of corresponding jurisdictions.

### **Expansion of federal jurisdiction to include child protection**

3.32 The option of expanding the jurisdiction of family courts to include certain child protection responsibilities reflects the fact that both systems share a primary focus on the best interests of the child. As noted by the Family Law Council in 2002, the ‘duplication of effort between state and federal systems’ is a matter of continuing concern. At that time the Council recommended that, to avoid such duplication,

a decision should be taken as early as possible whether a matter should proceed under the *Family Law Act* or under child welfare law with the consequence that there should be only one court dealing with the matter.<sup>22</sup>

3.33 The Family Law Council described this approach as the ‘One Court principle’,<sup>23</sup> although this idea of one court is more limited than that discussed above, involving a choice of jurisdiction rather than an amalgamation or expansion of jurisdiction. In 2009 the Council went further, recommending that:

The Attorney-General as a member of SCAG address the referral of powers to federal family courts so that in determining a parenting application federal family courts have concurrent jurisdiction with that of State Courts to deal with all matters in relation to children including where relevant family violence, child protection and parenting orders.<sup>24</sup>

3.34 The essence of this proposal is to expand the ability of federal family courts, allowing them to make child protection decisions. Due to the constitutional constraints discussed in Chapter 2, any expansion of federal jurisdiction would require: first, the referral of power to the Commonwealth; and secondly, the enactment of federal legislation pursuant to such referral. Child protection matters were not included in the referral of power that led to the introduction in 1995 of provisions in the *Family Law Act* applicable to ex-nuptial children as well as to children of marriages.<sup>25</sup> To be given jurisdiction in relation to child protection decisions would require a further referral, followed by the amendment of the *Family Law Act*.

3.35 Such a proposal also raises issues of the extent of the powers that should be given to family courts under such federal legislation. Would they replace state children’s courts and deal with *all* child protection matters, or would there be only a limited reference of powers allowing a family court to give parental rights to a child protection agency in cases where there was no other suitable carer? The Family Law Council suggested ‘concurrent jurisdiction’, but the matter is a complicated one. What cannot be achieved is the specific goal of the flawed cross-vesting scheme—namely to give federal courts jurisdiction *under state laws*.

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22 Family Law Council, *Family Law and Child Protection: Final Report* (2002), Rec 13.

23 Ibid.

24 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Rec 7. See also Family Law Council, *Family Law and Child Protection: Final Report* (2002).

25 *Family Law Reform Act 1995* (Cth). See Ch 2.

3.36 The benefits of a consolidation of jurisdiction, depending on the extent of any referral of powers, may be that:

- cases that involve both child protection issues and parenting issues could be dealt with in one court, perhaps accompanied by protection orders under federal law;
- for those families presenting in family courts, there would be greater seamlessness and accessibility—and safety.

3.37 Such a consolidation of jurisdiction would, however, have to meet a number of challenges, including that:

- family courts are federal and most services—including child protection and police—are at state level, with existing intersecting legislation and established processes between state law and state agencies;
- family courts would be making orders that affect the workload of state agencies—such as child protection agencies and the police;
- family courts and child protection agencies have different objectives and different focuses,<sup>26</sup> and there may be a lack of trust as a consequence: the Commissions were told in consultations that child protection agencies, and other services providers, may not have full confidence in family courts to make decisions that they consider safe for children;
- there would still be a gap in the system, requiring some families to go to a family court for child protection and parenting issues and to magistrates courts for family violence protection orders and criminal prosecutions.<sup>27</sup>

3.38 During this Inquiry the Commissions have heard of the difficulties that any referral of power would involve. As remarked by one Family Court judge during a cross-jurisdictional roundtable of judicial officers:

In an ideal world, the whole child protection and family violence jurisdiction should be national, under national legislation. Federal family courts would be the obvious courts to do this. However, this will not happen—it needs major constitutional change, a Commonwealth takeover of services and more resources.<sup>28</sup>

3.39 However, the theoretical attractiveness of a ‘one court’ approach, at least with respect to family law and child protection, was endorsed by the Chief Justice of the Family Court, Diana Bryant, and the Chief Federal Magistrate, John Pascoe in their submission to this Inquiry:

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26 Described in Ch 19 as ‘different planets’ and by one stakeholder as ‘parallel universes’: Legal Aid NSW, *Submission FV 219*, 1 July 2010.

27 At present, family courts can make protective orders—injunctions—although there are difficulties in practice of state police enforcing these orders. To meet such concerns, the Commissions include recommendations for improving the effectiveness of injunctions for personal protection: see Ch 17.

28 Judicial Officer Roundtable, *Consultation FVC 99*, Sydney, 20 May 2010.

One matter that requires detailed consideration is the feasibility of a unified family law and child protection system, whereby responsibility for private and public family law disputes lies with the federal government. It is appreciated that there are fundamental questions (including constitutional issues) associated with the adoption of such a system and a specific inquiry into unification would be warranted.<sup>29</sup>

3.40 Western Australia took a different approach from the other states by availing itself of the opportunity provided in the *Family Law Act* for the creation of a state family court exercising both federal and state jurisdiction.<sup>30</sup> In a submission to this Inquiry, National Legal Aid suggested that the pilot scheme proposed in Western Australia to integrate family law and child protection cases in the state family court could be used as a pilot for the extension of the jurisdiction of the children's courts in other states.<sup>31</sup>

### **Corresponding jurisdictions**

3.41 A further option, and the approach adopted in this Report, is to enable each existing court to provide as many solutions as possible, within the limits of practical reality and the constitutional division of powers. The underlying premise of this option is to work with the jurisdictions that presently exist and to make them more effective mirrors of the other. From the perspective of those who use the legal system, this approach maximises the likelihood that they can get all—or most—of the legal protections and services they need from the court they first approach, at least on an interim basis. The Commissions consider that this option is the most practical, and achievable, option for reforming legal frameworks to improve safety for those experiencing family violence, and is most likely to comply with the guiding principles identified above—provided that it is supported by the range of strategies included in the recommendations for reform throughout this Report.

#### ***State and territory courts***

3.42 State and territory magistrates courts already deal with family violence orders, criminal matters and, in children's courts, with child protection. They also have limited jurisdiction under the *Family Law Act*,<sup>32</sup> including to revive, vary, discharge or suspend an existing parenting order or injunction, where it affects the time spent with a child.<sup>33</sup> As noted in Chapter 2, such jurisdiction is conferred under s 77(iii) of the *Australian Constitution* and is a valid exercise of cross-vesting of jurisdiction from the Commonwealth. There is considerable experience and expertise, therefore, in dealing with a range of issues concerning family violence within the jurisdictional competence of state and territory magistrates courts.

3.43 It may therefore be that magistrates courts hold the best promise of providing 'one court' in practice, being able to deal with many legal issues raised for those

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29 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

30 *Family Court Act 1975* (WA), replaced by *Family Court Act 1997* (WA).

31 National Legal Aid, *Submission FV 232*, 15 July 2010.

32 *Family Law Act 1975* (Cth) s 69J—jurisdiction under pt VII in relation to children.

33 *Ibid* s 68R.

experiencing family violence. Indeed, key recommendations in this Report suggest that specialist family violence divisions or lists should be established or developed in magistrates courts with the aim of providing as close to a ‘one stop shop’ as possible. Magistrates courts in some states already have such specialist lists or divisions and thus the recommendations of the Commission build on established practice. These issues are considered in detail in Chapter 32.

3.44 There are, however, many practical and legal problems that arise in making magistrates courts a ‘one stop shop’. For example, while magistrates courts presently have the ability to vary a parenting order, they do not have jurisdiction to make an order, unless by consent.<sup>34</sup> While there is no constitutional barrier to vesting state courts with federal jurisdiction, there are many practical issues.

3.45 During the course of this Inquiry, the Commissions have heard that many magistrates are reluctant to use the family law powers they presently have, unless they have a practice background in family law.<sup>35</sup> The width of matters that magistrates must deal with already is very extensive, and adding family law to their workload adds to an already considerable burden. These issues are canvassed further in Chapter 17. The workload of magistrates courts is such that expanding the federal matters considered will not be manageable without increased resources and access to services. Increasing education, training and specialisation within magistrates courts, such as family violence lists and specialist magistrates, may address some concerns. Magistrates courts have the strongest geographical coverage of any court, but providing specialised services in rural and remote areas is a challenge. These issues are considered in detail in Chapter 32.

3.46 If the practical issues are overcome—and these are considerable—the Commissions consider that expanding the jurisdiction of state and territory magistrates by permitting them to make parenting orders on an interim basis may go a long way to defusing one of the key issues in dispute—namely parenting—at the same time as responding to immediate concerns, as well as easing the way to the family court to deal with more long term issues. However the Commissions acknowledge that the case for making such a recommendation needs to be carefully put, given the work in this area by the Family Law Council in 2004,<sup>36</sup> which led to the *removal* of the power to make ‘contact’ orders as they were then known in the context of family violence proceedings.<sup>37</sup> This is considered in Chapter 17.

3.47 An associated issue is whether the jurisdiction of state and territory children’s courts should also be expanded. Unless children’s courts are courts of summary jurisdiction, they are not currently within the reach of the conferred *Family Law Act* jurisdiction.<sup>38</sup> Would giving them such jurisdiction facilitate the idea of ‘one court’

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34 Ibid s 69N.

35 For example: Family Court Brisbane, *Consultation FVC 97*, Brisbane, 20 April 2010.

36 Family Law Council, *Review of Division 11—Family Violence* (2004), implementing the Kearney McKenzie & Associates, *Review of Division 11* (1998).

37 Family Law Council, *Review of Division 11—Family Violence* (2004), Rec 4.

38 *Family Law Act 1975* (Cth) s 69J(1)

proposed in this Report? In Chapter 19 the Commissions consider that giving children's courts power to hear parenting disputes may divert the courts' resources away from their core business in the care side of their jurisdiction—determining the protection needs of children—to the detriment of their work. From this practical perspective it follows that the conferral of family law jurisdiction on children's courts ought to be limited to situations where the jurisdiction of the children's courts is otherwise invoked. Even in such cases it might be argued that the specialisation of children's courts would be diluted by such additional jurisdiction. A further issue is how such expanded jurisdiction would articulate with the recommended specialist family violence lists or divisions in magistrates courts.

3.48 A further question concerns the exercise of criminal jurisdiction. This is not so much a matter of corresponding jurisdiction but one of improving interactions within existing state and territory frameworks and also supporting the use of specialised family violence lists in magistrates courts.

### ***Family courts***

3.49 What needs to be done in relation to family courts to improve the mirroring of jurisdiction anticipated in this option for reform? Given screening for family violence is 'core business' for federal family courts,<sup>39</sup> one obvious area for reform is in relation to the ability of family courts to provide protection in response to safety concerns<sup>40</sup>—through appropriate family violence protection mechanisms in the *Family Law Act*.

3.50 State and territory courts would still consider most of the urgent protection order matters, as they are more accessible and cheaper than family courts and have established experience and expertise in relation to protection orders. However the Commissions consider that, where family court proceedings are on foot and family violence is disclosed or becomes an issue, the family courts ought to have the ability to provide protection as close as possible to that available in state and territory courts. To this end the Commissions recommend that the existing framework for protection orders in the *Family Law Act* be amended so that breach of such orders is a criminal offence—parallel to a breach of a state and territory family violence protection order. While the Commissions have heard that these are underutilised provisions, the mirror principle embodied in this option for reform requires that they operate as closely as possible to the protection provisions available under state and territory legislation.

### **Focus of reform**

3.51 The recommendations in this Report can be viewed from two distinct perspectives—a systems perspective, and a participant perspective. The overarching, or predominant principle is that of seamlessness and to achieve this, both perspectives must be connected, to the greatest extent possible, within the constitutional and practical constraints of a federal system. This seamlessness is expressed in recommendations focused on improving legal frameworks and improving practice.

39 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), [10.2].

40 *Family Law Act 1975* (Cth) ss 68B, 114.

3.52 The improvement of legal frameworks will be achieved through:

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

3.53 The improvement of practice will be achieved through:

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

3.54 The Commissions reiterate that the range of recommendations in this Report are presented as a whole and that—given they are limited to recommendations about improving legal frameworks—they can only go a small part of the way to responding to family violence. The recommendations are of application across the state, territory and federal spheres and implementation will depend not only on the willingness and support of all relevant governments, but also on the development of integrated, supportive and specialist law and practice.



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## **Part B**

### **Family Violence: A Common Interpretative Framework**

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## **4. Purposes of Laws Relevant to Family Violence**

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### **Contents**

Introduction	155
Family violence legislation	157
Background	157
Purpose of family violence legislation	157
Achievement of objects	161
Guiding principles	161
Purpose of family violence protection orders	163
Family law	163
Historical policy underlying the <i>Family Law Act</i>	164
Policy behind the <i>Family Law Act</i> as amended since inception	168
Child protection law	170
Historical development of child protection law	170
The family and the state	171
Types of child protection orders	172
Purpose of child protection orders	173
Criminal law	174
Retribution	176
Deterrence	176
Rehabilitation	178
Incapacitation	179
Denunciation	180
Restoration	181
Victims' compensation	182
Victims' compensation schemes	182
Restitution orders	184
Compensation for tort claims	184
Migration legislation	185

### **Introduction**

4.1 In this Inquiry the Commissions have been asked to consider how family violence laws interact in practice with the criminal laws of the Commonwealth, states and territories, and with the *Family Law Act (1975)* (Cth). The interactions cross geographical jurisdictions, various areas of substantive law—family law, family violence law, criminal law and criminal procedure—and span criminal and civil jurisdictions, as well as private and public law.

4.2 This chapter discusses the underlying policy justifications for various laws relevant to family violence, including those specifically referred to in the Terms of Reference—namely family violence laws, family law, child protection laws and the criminal law—as well as victims’ compensation schemes and migration law. Victims’ compensation schemes are included in the analysis in this chapter because of their particular interaction with the criminal law, and because victims’ compensation is inextricably connected with an assessment of how legal frameworks can be improved to assist victims of family violence to navigate various jurisdictions. While, as noted in Chapter 1, there is a range of federal laws that intersect with family violence laws and other laws the subject of the Terms of Reference, the *Migration Regulations 1994* (Cth) are considered because their operation impacts on a group of women who are particularly vulnerable to family violence, due to the threat of deportation.<sup>1</sup>

4.3 An analysis of these policy considerations reveals that, while policy justifications differ, in some cases different statutory regimes share common aims. This discussion is a necessary prelude to consideration of the desirability of pursuing a common interpretative framework for what constitutes family violence across the different legislative schemes under consideration—an issue which is canvassed in Chapters 5 to 7. A key theme explored in this Part of the Report is balancing the need for statutory definitions of family violence to reflect the underlying purposes of various civil and criminal legislative schemes relevant to family violence, with the benefits that could flow from the adoption of a common interpretative framework.

4.4 A discussion of the underlying policy objectives of the various legislative schemes also serves as a general background to the discussion of specific interaction issues between family violence laws and the criminal law, and between family violence laws and the *Family Law Act*, which are considered in the following chapters in this Part.<sup>2</sup> Chapters 8 to 14 discuss interaction issues between family violence laws and criminal procedures and criminal laws, as well as the recognition of family violence in the criminal law. Chapters 15 to 18 discuss interaction issues between family violence laws and the *Family Law Act*, including various orders under the *Family Law Act*, such as parenting orders, property orders and injunctive relief.

4.5 The organisation of the chapters in this Part—addressing issues of interaction between specified legislative schemes—has been decided upon for convenience in writing, and to address the specific interactions of legal frameworks referred to in the Terms of Reference. As stated in Chapter 2, the Commissions recognise that, in practice, issues may not present themselves in such a siloed manner. Matters may involve interactions between multiple legal frameworks, and there may be different permutations of interactions between legal frameworks—such as interactions between family violence and child protection laws.

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1 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council’s Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), [2.5].

2 International conventions relevant to the legal framework governing family violence are discussed in Ch 2.

## Family violence legislation

### Background

4.6 Family violence legislation was enacted in most states and territories in the 1980s and 1990s as a response to growing recognition that existing legal mechanisms failed to protect victims—predominantly women—from family violence. Feminist critiques in the 1970s and 1980s, for example, highlighted the inability of the criminal justice system to protect women from future violence, as well as systemic institutional failure to tackle family violence.<sup>3</sup>

4.7 The discussion below considers first the purpose and objects of family violence legislation, followed by an analysis of the specific purpose of family violence protection orders.

### Purpose of family violence legislation

4.8 The purpose of family violence legislation may be found, for example, in the objects clauses of state and territory family violence legislation—though the degree of articulation and specificity of purposes varies.<sup>4</sup> Some family violence legislation also contain preambles or articulate specific principles that assist in identifying the policy underpinning the legislative scheme. The objects and principles set out in family violence legislation—and identified in second reading speeches—are addressed in turn below.

4.9 Objects that are expressly stipulated in family violence legislation—in varying language—include:

- ensuring, facilitating or maximising the safety and protection of persons, including children, who fear or experience family violence or are exposed to it;<sup>5</sup>
- reducing or preventing family violence and the exposure of children to the effects of family violence;<sup>6</sup>
- ensuring that people who use family violence accept responsibility for their conduct,<sup>7</sup> or promoting the accountability of those who use family violence for their actions;<sup>8</sup>

<sup>3</sup> B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 198 (citations omitted).

<sup>4</sup> For example, the Queensland legislation sets out one main purpose, whereas some other jurisdictions specify several purposes. Objects clauses are also discussed in Ch 7 and the Commissions make recommendations in this regard.

<sup>5</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(1)(a); *Family Violence Protection Act 2008* (Vic) s 1(a); *Domestic and Family Violence Protection Act 1989* (Qld) s 3A(1); *Domestic Violence and Protection Orders Act 2008* (ACT) s 6(b); *Domestic and Family Violence Act 2007* (NT) s 3(1)(a).

<sup>6</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(1)(b); *Family Violence Protection Act 2008* (Vic) s 1(b); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5(a); *Domestic Violence and Protection Orders Act 2008* (ACT) s 6(a); *Domestic and Family Violence Act 2007* (NT) s 3(1)(c).

<sup>7</sup> *Domestic and Family Violence Act 2007* (NT) s 3(1)(b).

<sup>8</sup> *Family Violence Protection Act 2008* (Vic) s 1(c). This purpose concerning accountability is similar to those expressed in the sentencing legislation of NSW and Victoria, which is discussed below. See also

- enacting provisions that are consistent with certain principles underlying the *Declaration on the Elimination of Violence against Women* and with the United Nations *Convention on the Rights of the Child*;<sup>9</sup>
- providing special police powers of arrest, detention and search in connection with issuing, serving and enforcing protection orders;<sup>10</sup> and
- further protecting persons suffering or witnessing family violence in the giving of evidence and the protection of identity.<sup>11</sup>

4.10 The Tasmanian legislation cites in its objects clause ‘the safety, psychological well-being and interests of people affected by family violence’ as paramount considerations in the administration of the Act.<sup>12</sup>

4.11 The family violence legislation of Western Australia does not have an objects clause, but instead sets out certain matters to be considered in relation to a protection order, from which certain objects can be implied.<sup>13</sup> As stated in the Second Reading Speech:

The first three [matters] are the primary considerations: that is, to protect the applicant from personal violence; secondly to prevent behaviour that could reasonably be expected to cause fear that the applicant will suffer personal violence ... the third prime consideration is ... the welfare of children.<sup>14</sup>

### ***Protection as the primary concern***

4.12 Significantly, some legislation and second reading speeches state an intention to prioritise the protection of victims of family violence as the main objective. For example, the Queensland family violence legislation provides that the main purpose of the Act is to provide safety and protection for victims of family violence, and it does not nominate any additional purposes.<sup>15</sup> In the Second Reading Speech for the Northern Territory family violence legislation, the Attorney-General stated that:

The primary objective of the bill is to ensure the safety of all people, including children, who experience domestic and family violence, and the second objective, to ensure that those who commit violence in their relationships must accept responsibility for their behaviour.<sup>16</sup>

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<sup>9</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(d) which states that intervention should be designed to encourage defendants to accept responsibility and take steps to avoid committing family violence.

<sup>10</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(1)(c), (d). These conventions are described in Ch 2.

<sup>11</sup> *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5(b).

<sup>12</sup> *Ibid* s 5(c).

<sup>13</sup> *Family Violence Act 2004* (Tas) s 3.

<sup>14</sup> *Restraining Orders Act 1997* (WA) s 12. Section 12 was amended in 2004 to insert a further paragraph (ba)—‘the need to ensure that children are not exposed to acts of family and domestic violence’.

<sup>15</sup> Western Australia, *Parliamentary Debates*, Legislative Assembly, 29 May 1997, 1219 (J McGinty), 3485.

<sup>16</sup> *Domestic and Family Violence Protection Act 1989* (Qld) s 3A(1).

<sup>16</sup> Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2007, 4846 (S Stirling—Attorney-General), 4846.

4.13 The Second Reading Speech for the Domestic Violence and Protection Orders Bill 2008 (ACT) also emphasised the object of protection:

The purpose of this act is to provide enforceable court orders to protect people who experience domestic violence and other people who have good reason to fear violence.

... People who experience violence require and deserve the assistance of our justice system to aid their protection. ...

It is well recognised from the significant body of research that has been undertaken in this field that many people who are subjected to this form of violence never report the offence to police. Recognising this, it is essential that the protection afforded to those in need under this act be readily available and accessible.<sup>17</sup>

4.14 Similarly, the Second Reading Speech for the Intervention Orders (Prevention of Abuse) Bill 2009 (SA) stresses the priority of protection:

In enacting these reforms, Parliament will be sending a clear message that it will not tolerate the use of violence to control or intimidate another person, particularly in a domestic setting; that it recognises and abhors the lasting psychological and emotional damage to children from exposure to such violence; that it expects perpetrators to accept full responsibility for their violent behaviour; *and that the paramount consideration is always the protection and future safety of the victims of abuse and the children who are exposed to it.*<sup>18</sup>

#### ***Other objectives revealed in second reading speeches***

4.15 A number of other objectives are also revealed in second reading speeches. For example, in the Second Reading Speech for the Northern Territory legislation, the Attorney-General stated that:

Another central objective of the legislation is to ensure minimal disruption to the lives of families affected by violence. There will be a new presumption when making orders in favour of an applicant with children in their care remaining in the family home.<sup>19</sup>

4.16 In the Second Reading Speech for the Intervention Orders (Prevention of Abuse) Bill 2009 (SA) the Attorney-General stated that the legislation

will also be offering perpetrators of domestic or personal abuse the means to deal with associated problems of substance abuse, mental health, problem gambling and anger control, in the expectation that they will then be able to reflect upon and appreciate

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17 Australian Capital Territory, *Parliamentary Debates*, Legislative Assembly, 7 August 2005, 3005 (S Corbell—Attorney-General, Minister for Police and Emergency Services), 3005–3006.

18 South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2009, 3937 (M Atkinson—Attorney-General), 3944 (emphasis added).

19 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2007, 4846 (S Stirling—Attorney-General), 4848. A similar intention is expressed in South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2009, 3937 (M Atkinson—Attorney-General), 3943. The *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(d) also expresses the principle that intervention should be designed to minimise disruption to protected persons and the children living with them.

the effects of their abusive behaviour on others, take responsibility for it and learn to treat other people, particularly those close to them, with respect and care.<sup>20</sup>

- 4.17 In the Second Reading Speech for the Family Violence Protection Bill 2008 (Vic), Ms Kirstie Marshall MP stated that:

This bill seeks to address two main issues: the attitude that family violence is a domestic matter and therefore not a crime worthy of response; and the need to ensure that the justice system itself does not inadvertently compound the devastating effects of family violence.<sup>21</sup>

#### ***Overlap with family law policy***

- 4.18 The policy behind some aspects of family violence legislation is to give paramount consideration to the best interests of the child—an approach that is consistent with that taken in family law in the context of parenting disputes.<sup>22</sup> This is specifically referred to in the Second Reading Speech for the Crimes (Domestic and Personal Violence) Bill 2007 (NSW) in a discussion of the provisions requiring the inclusion of children in protection orders.<sup>23</sup> It is also referred to in the Second Reading Speech for the Domestic and Family Violence Bill 2007 (NT) in the context of reforms which aim to ensure that children are protected from family violence and that their long-term development is not damaged by the experience of, or exposure to, family violence. It is stated that such reforms are ‘consistent with the principle of the best interests of the child contained in the *Convention on the Rights of the Child*.<sup>24</sup>

- 4.19 Another—perhaps less obvious—area of overlap between the policy objectives in family violence legislation and family law is revealed in the Second Reading Speech of the Domestic Violence (Family Protection) Bill 1989 (Qld), in which the Minister for Family Services emphasised the importance of the role of family in society, and the institution of marriage—echoing the language of art 23 of the International Covenant on Civil and Political Rights:<sup>25</sup>

No one should doubt that the family is the natural and fundamental unit in our society ... The widest possible protection and assistance needs to be given to the family unit and the institution of marriage ...

The Queensland Government is committed to doing all in its power to promote the family unit and strengthen and support its role. ...

20 South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2009, 3937 (M Atkinson—Attorney-General), 3944.

21 Victoria, *Parliamentary Debates*, House of Assembly, 21 August 2008, 3190 (K Marshall), 3195.

22 Family law policy is discussed separately below.

23 New South Wales, *Parliamentary Debates*, Legislative Council, 29 November 2007, 4652 (T Kelly—Minister for Lands, Minister for Rural Affairs, Minister for Regional Development, and Vice-President of the Executive Council), 4652.

24 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2007, 4846 (S Stirling—Attorney-General), 4846.

25 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976). See Ch 2.

Many victims of domestic violence have indicated that they do not wish to end their marriages. They just want the violence to stop. The proposed legislation may allow this to occur in those cases without the disintegration of the family unit.<sup>26</sup>

### Achievement of objects

4.20 Most family violence Acts state the manner in which they intend to achieve their specific objects, including statements about providing for the following:

- the making of protection orders by the court—or police where they are empowered to do so—to protect people from family violence or further family violence,<sup>27</sup> and to encourage those committing family violence to change their behaviour;<sup>28</sup>
- the registration of orders made in other jurisdictions;<sup>29</sup>
- the enforcement of protection orders;<sup>30</sup>
- an effective and accessible system of family violence protection orders—including those that are issued by police<sup>31</sup>—and access to courts that is as safe, speedy, inexpensive and simple as is consistent with justice;<sup>32</sup>
- the creation of offences for the contravention of family violence orders;<sup>33</sup>
- the issuing of associated orders relating to problem gambling and tenancy agreements;<sup>34</sup>
- special arrangements for witnesses in family violence protection proceedings;<sup>35</sup> and
- limitations on publishing reports about proceedings or orders under family violence legislation.<sup>36</sup>

### Guiding principles

4.21 Family violence legislation in NSW and Victoria sets out guiding principles and features of family violence, providing a contextual framework for the legislative response. The NSW legislation does so in its objects clause; and the Victorian

26 Queensland, *Parliamentary Debates*, Legislative Assembly, 15 March 1989, 3797 (C Sherrin—Minister for Family Services), 3797.

27 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 2(2); *Domestic and Family Violence Protection Act 1989* (Qld) s 3(2); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5(a); *Domestic and Family Violence Act 2007* (NT) s 3(2)(a).

28 *Domestic and Family Violence Act 2007* (NT) s 3(2)(a).

29 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5(a); *Domestic and Family Violence Act 2007* (NT) s 3(2)(b).

30 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5(a); *Domestic and Family Violence Act 2007* (NT) s 3(2)(c).

31 *Family Violence Protection Act 2008* (Vic) s 2(a).

32 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(2)(b).

33 *Family Violence Protection Act 2008* (Vic) s 2(b).

34 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5(a).

35 Ibid s 5(c).

36 Ibid.

legislation does so in its preamble. The family violence legislation of South Australia also contains principles which must be taken into account in determining both whether it is appropriate to issue a protection order and the terms of such an order.<sup>37</sup> In particular, the family violence legislation of those states highlights the following principles and features of family violence:

- it is unacceptable behaviour in all its forms,<sup>38</sup> and in any community or culture;<sup>39</sup>
- it is a fundamental violation of human rights;<sup>40</sup>
- that in responding to it, the justice system should treat the views of victims of family violence with respect;<sup>41</sup>
- it is predominantly committed by men against women and children;<sup>42</sup>
- it affects the entire community,<sup>43</sup> and occurs in all sectors of the community;<sup>44</sup>
- it extends beyond physical violence;<sup>45</sup>
- it may involve the overt or subtle exploitation of power imbalances and may consist of patterns of abuse over many years<sup>46</sup> or of isolated incidents;<sup>47</sup>
- it occurs in traditional and non-traditional settings;<sup>48</sup>
- children who are exposed to family violence—as victims or witnesses—are particularly vulnerable, and can suffer detrimental effects on their current and future physical, psychological and emotional wellbeing,<sup>49</sup> and
- it is best addressed through a coordinated legal and social response of assistance and prevention.<sup>50</sup>

37 Ibid s 10.

38 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3).

39 *Family Violence Protection Act 2008* (Vic) preamble.

40 Ibid.

41 Ibid.

42 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3).

43 *Family Violence Protection Act 2008* (Vic) preamble.

44 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3); *Family Violence Protection Act 2008* (Vic) preamble; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(a).

45 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3); *Family Violence Protection Act 2008* (Vic) preamble.

46 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3); *Family Violence Protection Act 2008* (Vic) preamble; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(b).

47 *Family Violence Protection Act 2008* (Vic) preamble; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10.

48 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3).

49 Ibid s 9(3); *Family Violence Protection Act 2008* (Vic) preamble. See also *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(c) which states that it is of primary importance to prevent family violence and to prevent children from being exposed to it.

50 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3).

4.22 The family violence legislation of the ACT states that family violence is ‘a particular form of interpersonal violence that needs a greater level of protection’.<sup>51</sup>

### Purpose of family violence protection orders

4.23 The purpose of family violence protection orders is to protect victims from *future* violence—typically by the imposition of conditions regulating the behaviour and movements of persons who have committed family violence. The focus on restraining future behaviour is similar to the granting of injunctive relief. The emphasis is on the immediate protection of victims, often as a response to a crisis situation, facilitated by legislative provisions for emergency orders or interim orders.

4.24 These objectives are evidenced in second reading speeches, as well as in family violence legislation. For example, the Second Reading Speech for the Restraining Orders Bill 1997 (WA) states that protection orders ‘play a central role in the legal response to domestic violence by affording what is intended to be ready access to legal protection for victims’.<sup>52</sup>

4.25 The family violence legislation of the ACT provides that, in deciding an application for a protection order, the paramount consideration is ‘the need to ensure that the aggrieved person, and any child at risk of exposure to domestic violence, is protected from domestic violence’.<sup>53</sup>

4.26 The ACT legislation, however, also provides that if a protection order is to be made it is one that must be the

least restrictive of the personal rights and liberties of the respondent as possible that still achieves the objects of the Act and gives effect to [the paramount consideration to ensure protection].<sup>54</sup>

4.27 In the Second Reading Speech for the South Australian legislation, the Attorney-General emphasised the policy underlying new police powers to issue interim protection orders:

This new police power, combined with improved powers to hold a defendant pending preparation and service of process and while making arrangements for the security of the victim, is designed to give victims and their children immediate protection from abuse without first needing to go to court, in circumstances where the alleged perpetrator can be served on the spot and is therefore instantly bound by the order.<sup>55</sup>

## Family law

4.28 The *Family Law Act* sets out the rights, duties, powers and liabilities of spouses and children, and provides for enforcement of those rights and liabilities as well as the

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51 *Domestic Violence and Protection Orders Act 2008* (ACT) s 6(a).

52 Western Australia, *Parliamentary Debates*, Legislative Council, 12 March 1997, 156 (P Foss—Attorney-General), 157.

53 *Domestic Violence and Protection Orders Act 2008* (ACT) s 7(1)(a).

54 *Ibid* s 7(2).

55 South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2009, 3937 (M Atkinson—Attorney-General), 3940. Police powers to issue protection orders are discussed in Ch 9.

dissolution of marriage.<sup>56</sup> The discussion below canvasses the historical policy behind the *Family Law Act* as first introduced, as well as the policy underlying the Act as amended since inception.

### **Historical policy underlying the *Family Law Act***

4.29 There are several policy strands underpinning the *Family Law Act*. These include a philosophy of no fault; promoting the best interests of the child; preserving the institution of marriage; promoting reconciliation; and protecting the notion of the family.

#### **No fault philosophy**

4.30 One of the main ideological foundations for the introduction of the *Family Law Act* was the removal of the previous requirement of fault for divorce and a move towards a ‘no-fault’ system for the dissolution of marriage.<sup>57</sup> As consultation conducted by the Senate Standing Committee on Constitutional and Legal Affairs in the early 1970s revealed, the community considered that the previous provisions were costly and protracted, and also involved indignity and humiliation to the parties because of the court’s inquiry into the breakdown of marriage.<sup>58</sup> Consequently, all inquiries as to fault were removed from the legislation.

4.31 The original *Family Law Act* did not expressly mention family violence, or the need to protect women and children from harm. In the Second Reading Speech of the Family Law Bill 1973 (Cth), the then Attorney-General, Lionel Murphy, said:

I have given a great deal of thought to whether there should be another ground to meet the cases such as where the husband repeatedly comes home drunk and beats up his wife and terrifies the children, if not beating them as well. The marriage may become intolerable for the wife, and yet she cannot physically separate from her husband because there is nowhere she can go ... however [an intolerable conduct] ground would of necessity contain an element of fault, and there would have to be an inquiry to satisfy the court that the respondent’s conduct was intolerable. This is what we are trying to avoid.<sup>59</sup>

4.32 Moreover, it appears that the government considered that there would be no need for an ‘intolerable conduct’ ground to address family violence because ‘the petitioner will be able to obtain the relief she wants in other ways’ through an application for an injunction.<sup>60</sup> The conduct that could potentially form the basis for an injunction was said to include molesting or ‘using insulting, indecent or humiliating language’ to or in front of the victim.<sup>61</sup>

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56 A Dickey, *Family Law* (5th ed, 2007), 43.

57 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), 29.

58 Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 640 (L Murphy—Attorney-General), 641.

59 Commonwealth, *Parliamentary Debates*, Senate, 13 December 1973, 2827 (L Murphy—Attorney-General), 2829. See also Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 640 (L Murphy—Attorney-General), 641.

60 Commonwealth, *Parliamentary Debates*, Senate, 13 December 1973, 2827 (L Murphy—Attorney-General), 2829.

61 Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 640 (L Murphy—Attorney-General), 641.

4.33 While the removal of fault considerations related to the grounds for dissolution of marriage, the ‘no-fault’ ideology influenced other provisions of the Act, the reasoning of the Family Court in its early days, and its reluctance to entertain an evaluation of conduct during marriage. The *Family Law Act* in its earliest form did not therefore deal specifically with family violence, except as a ground for an injunction. The Family Court, at its outset, was therefore not conceptually set up as a court that would deal with issues of family violence.

### ***Interests of the children***

4.34 From the beginning, the importance of the interests of children has been evident in the *Family Law Act*.<sup>62</sup> In the Second Reading Speech for the Family Law Bill the then Attorney-General stated that:

In custody matters the court is required by the Bill—as it is by the present Act—to regard the interests of the children as the paramount consideration.<sup>63</sup>

4.35 The original *Family Law Act* contained a provision that in custodial proceedings, the court was to regard the welfare of the child as the paramount consideration.<sup>64</sup> As outlined below, this policy has since evolved to one that advocates a consideration of the ‘best interests’ of children, reflecting the language of the *Convention on the Rights of the Child*, ratified by Australia on 17 December 1990.<sup>65</sup>

4.36 In addition, one of the principles that the Family Court has had to take into account since the inception of the Act is ‘the need to protect the rights of children and to promote their welfare’.<sup>66</sup>

### ***Preserving the institution of marriage***

4.37 Another principle that courts exercising family law jurisdiction have been required to consider in decision making since the inception of the Act is ‘the need to preserve and protect the institution of marriage as the union of a man and a woman to the exclusion of all others voluntarily entered into for life’.<sup>67</sup>

4.38 As stated by Dr Anthony Dickey:

The *Family Law Act* has a variety of functions, many of which are designed to support marriage and family life rather than put an end to them.<sup>68</sup>

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62 Ibid, 642.

63 Ibid.

64 *Family Law Act 1975* (Cth) as made in 1975 s 64(1)(a).

65 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [7.5]. The *Convention on the Rights of the Child* was particularly significant in shaping reforms to pt VII of the *Family Law Act* in the *Family Law Reform Act 1995* (Cth). See Ch 2.

66 *Family Law Act 1975* (Cth) s 43(1)(c). The protection of children reflects art 24 of the *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976). Although Australia did not ratify the covenant until 1980, the object of protecting children is consistent with the ICCPR and also art 25(2) of the earlier convention, *Universal Declaration of Human Rights*, 10 December 1948, (entered into force generally on 10 December 1948). See Ch 2.

67 *Family Law Act 1975* (Cth) s 43(1)(a).

68 A Dickey, *Family Law* (5th ed, 2007), 43.

4.39 After a consideration of Canadian and United Kingdom divorce legislation, the then Attorney-General stated in the Second Reading Speech for the Family Law Bill that:

whilst none of these laws was an entirely suitable precedent to be followed here, I am in agreement with the two criteria adopted by the English Law Commission for a good divorce law: that it should buttress, rather than undermine, the stability of marriage and, when a marriage has irretrievably broken down, it should enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness, distress and humiliation.<sup>69</sup>

4.40 However, as Professor Rosemary Hunter has noted, the policy of preserving the marital relationship presents some conceptual difficulties when the court is dealing with an issue such as family violence.<sup>70</sup>

### ***Reconciliation***

4.41 Closely connected to the goal of preserving the marital relationship is the aim of encouraging parties to reconcile. In the Second Reading Speech for the Family Law Bill, the Attorney-General stated that ‘the Bill recognises the desirability of reconciliation being kept in mind at all stages until the marriage is dissolved’,<sup>71</sup> but decided against a compulsory reconciliation conference because it would be ‘unacceptable to the Australian people’.<sup>72</sup> Since the commencement of the *Family Law Act*, courts exercising family law jurisdiction have been directed to consider ‘the means available for assisting parties to a marriage to consider reconciliation or the improvement of their relationship to each other and to their children’.<sup>73</sup>

### ***Protection of the notion of family***

4.42 One of the fundamental rights codified in the *International Covenant on Civil and Political Rights* is that ‘the family is the natural and fundamental group unit of society and is entitled to protection by society and the State’.<sup>74</sup> It was noted in the Second Reading Speech of the Family Law Bill that this statement underlies the provisions of the *Family Law Act*.<sup>75</sup> Section 43 of the Act provides that one of the overarching principles to be applied by the courts in their deliberations is

the need to give the widest possible protection and assistance to the family as the natural and fundamental group unit of society, particularly while it is responsible for the care and education of dependent children.<sup>76</sup>

69 Commonwealth, *Parliamentary Debates*, Senate, 13 December 1973, 2827 (L Murphy—Attorney-General), 2828.

70 R Hunter, ‘Narratives of Domestic Violence’ (2006) 28 *Sydney Law Review* 733, 760.

71 Commonwealth, *Parliamentary Debates*, Senate, 13 December 1973, 2827 (L Murphy—Attorney-General), 2829.

72 Ibid.

73 *Family Law Act 1975* (Cth) s 43(1)(d).

74 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 23.

75 Commonwealth, *Parliamentary Debates*, Senate, 3 April 1974, 640 (L Murphy—Attorney-General), 641. Australia did not, however, ratify the ICCPR until 1980.

76 *Family Law Act 1975* (Cth) s 43(1)(b).

4.43 While the term ‘family’ is seldom used explicitly in Australian law, it is apparent that the notion of the nuclear family—comprising a mother, father and their children—still underlies the *Family Law Act*.<sup>77</sup> This focus on the nuclear family may be, in part, due to the heads of Commonwealth legislative power under the *Constitution* in relation to marriage; divorce and matrimonial causes; and in relation thereto, parental rights, custody and guardianship of infants.<sup>78</sup> However, a growing number of families do not fit that pattern—including some Indigenous families and same-sex couples.

### **The public/private divide**

4.44 The *Family Law Act* has some ideological foundations in the well established principle of non-intervention in the private sphere of family life. Professor Stephen Parker remarked that:

The idea that we should distinguish between public and private spheres of life has been a central one in liberal political philosophy since the seventeenth century, although the roots of the idea can be traced back to Aristotle. In classical liberalism, the notion of a private sphere was a crucial part of the belief in limited government. There were certain parts of civil society in which the state had no business. And at the epicentre of the private sphere was the family; more specifically, the patriarchal family.<sup>79</sup>

4.45 The idea that the family is a ‘private’ space is a continuing theme in law—and especially family law.<sup>80</sup> As noted by Parker, the principle of non-intrusion into family life has its origins as far back as ancient Greek philosophy and the liberal philosophers developed the concept of a ‘private sphere’ in the 17th century.<sup>81</sup> Family law disputes are ‘private’ in the sense that they are disputes between two parties, and the state generally has no role in these disputes—apart from enacting the legislation that establishes the framework pursuant to which the disputes are to be resolved.<sup>82</sup>

4.46 This idea of family law as private is evident when the first Family Law Bill was introduced by the then Attorney-General:

It does not seem right to me that divorce itself should be an occasion for judicial intrusion. It may be different in custody, maintenance and property disputes, but even in those the parties should be encouraged to resolve their differences themselves.<sup>83</sup>

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77 B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 145.

78 *Australian Constitution* s 51(xxi), (xxii). The constitutional framework is discussed in Ch 2.

79 S Parker, ‘Rights and Utility in Anglo-Australian Family Law’ (1992) 55 *Modern Law Review* 311, 325–326.

80 See eg, T Altobelli, *Family Law in Australia: Principles and Practice* (2003), 50; M Thornton, ‘The Cartography of Public and Private’ in M Thornton (ed) *Public and Private: Feminist Legal Debates* (1995) 2; and R Graycar and J Morgan, *The Hidden Gender of Law* (2nd ed, 2002), ch 2 and references cited throughout.

81 B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 157, (citations omitted). See also *Ibid*, 159 for a synthesis of feminist critiques of the public/private dichotomy.

82 D Higgins and R Kaspiew, ‘“Mind the Gap...”: Protecting Children in Family Law Cases’ (2008) 22 *Australian Journal of Family Law* 235, 244. See also *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 17, set out in Ch 2.

83 Commonwealth of Australia, *Parliamentary Debates*, Senate, 1 August 1974, 758 (L Murphy—Attorney General), 760.

### **Policy behind the *Family Law Act* as amended since inception**

4.47 Despite a changing social context, many of the historical policies underpinning the *Family Law Act* still influence how it is applied. The principles in s 43 of the Act—noted above—still apply. In addition, a new principle was introduced by the *Family Law Reform Act 1995* (Cth) requiring consideration of the need to ensure safety from family violence,<sup>84</sup> reflecting a growing understanding of the detrimental impact of violence which found expression in the *Convention on the Elimination of All Forms of Discrimination Against Women* and the *Declaration on the Elimination of Violence against Women*.<sup>85</sup>

4.48 The *Family Law Act* does not have an objects clause specifying its overarching objects. Instead, particular provisions set out specific objects and principles in relation to: obligations to inform people about family services based outside the courts and about the court's processes and services;<sup>86</sup> the court's powers in relation to family services both in and outside of court;<sup>87</sup> children;<sup>88</sup> family violence;<sup>89</sup> orders and injunctions;<sup>90</sup> and superannuation interests.<sup>91</sup>

4.49 Of particular importance is the objects and principles provision in relation to children.<sup>92</sup> The paramount principle in children's matters is that of the best interests of the child.<sup>93</sup> To facilitate this, the following objects were introduced in 2006:

- (a) ensuring that children have the benefit of both parents having a meaningful involvement in their lives; and
- (b) protecting children from physical or psychological harm or being subjected to, or exposed to abuse, neglect or family violence.<sup>94</sup>

4.50 Importantly, the objects provision stresses 'meaningful' relationships, suggesting that the quality of time parents spend with their children is a significant factor.<sup>95</sup>

4.51 The primary considerations listed in pt VII reflect these objects.<sup>96</sup> In determining what is in a child's best interests, the court must have regard to the following primary considerations:

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84     *Family Law Act 1975* (Cth) s 43(1)(ca).

85     *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, [1983] ATS 9, (entered into force generally on 3 September 1981); *Declaration on the Elimination of Violence against Women* 20 December 1993, UN GAOR, A/RES/48/104, (entered into force generally on 23 February 1994).

86     *Family Law Act 1975* (Cth) s 12A.

87     Ibid s 13A.

88     Ibid s 60B.

89     Ibid s 68N.

90     Ibid s 90AA.

91     Ibid s 90MA. The *Family Law Act* does not codify the objects and principles behind the provisions relating to property and spousal maintenance.

92     Ibid s 60B.

93     Ibid s 60CA.

94     Ibid s 60B.

95     B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 242.

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
- (b) the need to protect the child from physical or psychological harm or from being subjected to, or exposed to, abuse, neglect or family violence.<sup>97</sup>

4.52 These objects reflect, on the one hand, the increased emphasis since 1996 on protecting families from violence and, on the other, the move towards shared parenting in 2006. The shared parenting amendments<sup>98</sup> were introduced following the 2003 *Every Picture Tells A Story* inquiry and the Report from the House of Representatives Standing Committee on Legal and Constitutional Affairs.<sup>99</sup>

4.53 The 2006 reforms sought to reflect the changing patterns of parenting, the transition of traditional roles and the fragmentation of family structures.<sup>100</sup> The amendments were supported by research from psychologists indicating that children benefit from a meaningful relationship with both parents.

4.54 There has been considerable controversy and debate over the issue of shared parenting. As noted in Chapter 1, in 2009, the Australian Institute of Family Studies completed an evaluation of the reforms introduced by the *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth).<sup>101</sup> The review by Professor Richard Chisholm, former Justice of the Family Court of Australia, of the practices, procedures and laws that apply in the federal family law courts in the context of family violence, also considered the impact of these reforms.<sup>102</sup> A number of submissions in this Inquiry were also critical of the reforms.<sup>103</sup>

4.55 Another significant change to principles introduced by the 2006 reforms was recognition of the importance of cultural heritage,<sup>104</sup> and indicating what this means for Indigenous children. For example, s 60B(3) of the *Family Law Act* provides that the right of an 'Aboriginal or Torres Strait Islander' child to enjoy culture includes the right to maintain connection with that culture and to have the support and opportunity to explore and develop a positive appreciation of that culture.

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96      *Family Law Act 1975* (Cth), s 60CC.

97      Ibid s 60CC(2)(a), (b).

98      Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth).

99      House of Representatives Standing Committee on Family and Community Affairs—Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003); House of Representatives Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Report on the Exposure Draft of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2005).

100     House of Representatives Standing Committee on Family and Community Affairs—Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003), 12–13.

101     Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009).

102     Australian Government Attorney-General's Department, *Family Courts Violence Review* (2009) <[http://www.ag.gov.au/www/agd.nsf/Page/Families\\_FamilyCourtsViolenceReview](http://www.ag.gov.au/www/agd.nsf/Page/Families_FamilyCourtsViolenceReview)> at 28 January 2010.

103     For example: Confidential, *Submission FV 52*, 28 May 2010; Confidential, *Submission FV 156*, 24 June 2010.

104     *Family Law Act 1975* (Cth) s 60B(2)(e).

## **Child protection law**

### **Historical development of child protection law**

4.56 The Supreme Court of each state and territory has a very wide power to make orders to protect the welfare of children, known as the *parens patriae* ('parent of the country') jurisdiction, the underlying premise of which is that the children in question have no other, or no other suitable, guardian. When the jurisdiction of the English Court of Chancery became vested in the Supreme Courts of the states and territories, the *parens patriae* jurisdiction was included as part of the inherent jurisdiction of the court.<sup>105</sup>

4.57 In addition to this inherent jurisdiction of the courts, from the mid-19th century, all state and territory governments legislated to secure the welfare of children by defining the circumstances in which children needed to be protected from neglect or abuse, and the ways in which young people might be treated as criminals.<sup>106</sup> By the end of the 19th century an 'increasingly pervasive protective attitude to children' was evident.<sup>107</sup>

4.58 The 'child rescue movement' initially took the form of charitable and philanthropic endeavours,<sup>108</sup> leading to the introduction of child protection legislation and the establishment of children's courts,<sup>109</sup> representing a large shift in the approach to children.

These developments were often motivated by revelations of severe cases of abuse or neglect, which spurred child welfare activists in the late 1800s and early 1900s to form rights and advocacy bodies including societies for the prevention of cruelty to children.<sup>110</sup>

4.59 Children's courts had two principal functions: child care and protection; and exclusive jurisdiction with respect to child offenders. By the 1970s all states and territories had introduced legislation to protect children.<sup>111</sup>

105 A Dickey, *Family Law* (5th ed, 2007), 287. For a fuller discussion of the historical background, see A Dickey, *Family Law* (4<sup>th</sup> ed, 2002), 389.

106 G Monahan and L Young (eds), *Children and the Law in Australia* (2008), [1.11] trace the ten principal Acts passed in Victoria over 90 years, from 1864 to 1933.

107 H Radi, 'Whose Child' in J Mackinolty and H Radi (eds), *In Pursuit of Justice: Australian Women and the Law 1788–1979* (1979) 119, 125. The difficulties a woman experienced in relation to custody cases with respect to her children are illustrated in, eg, *Ex parte Richardson* (1874) 12 SCR Eq 99.

108 The interest in rescuing children followed concerns for the prevention of cruelty to children: L Bromfield and P Holzer, *A National Approach for Child Protection: Project Report* (2008), prepared for the National Child Protection Clearinghouse, 12.

109 Seymour details the legislation establishing the first Children's Courts: J Seymour, *Dealing with Young Offenders* (1988), 76–87.

110 B Mathews, 'Protecting Children from Abuse and Neglect' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 204, [10.5].

111 The current legislation is: *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Children, Youth and Families Act 2005* (Vic); *Child Protection Act 1999* (Qld); *Children's Protection Act 1993* (SA); *Children, Young Persons and Their Families Act 1997* (Tas); *Children and Young People Act 2008* (ACT); *Care and Protection of Children Act 2007* (NT).

### The family and the state

4.60 The state, as *parens patriae*, and the family intersect in the arena of child protection. Child protection ‘intervention’ may place a parent in opposition to the state, expressed in terms of a parent ‘losing’ his or her children. As the state, through child protection agencies, is a principal ‘actor’, child protection law can be characterised as ‘public’ law, in contrast to the ‘private’ law of family law, considered above.

4.61 In the report, *Seen and Heard: Priority for Children in the Legal Process*, the ALRC and the Human Rights and Equal Opportunity Commission (now the Australian Human Rights Commission) considered the various theories about how the family and the state ought to relate with respect to children.<sup>112</sup>

4.62 The perspectives of intervention range from minimalist to interventionist, and include ideas about the role of the biological family. The minimalist position is reflective of the period of ‘father-right’,<sup>113</sup> and ideas of the ‘private sphere’ of the family.<sup>114</sup> Historically, children were considered essentially as the property of their father, a construction which lingers in the use of the pronoun ‘it’ often used to refer to a child.<sup>115</sup> For example, in the late 19th century case, *Re Agar-Ellis*, Bowen LJ remarked that:

To neglect the natural jurisdiction of the father over the child until the age of twenty-one would be really to set aside the whole course and order of nature, and it seems to me it would disturb the very foundation of family life.<sup>116</sup>

4.63 The interventionist approach seeks to ensure that ‘all children are provided with a right to caring adults who meet their needs’.<sup>117</sup> It reflects a stronger notion of children’s rights:

In this model, the state makes the decisions as to whom those adults should be. While the focus of this model is the child rather than the adults in the family, this model of intervention may overlook the strength of bonds between parent and child, even when the parent may be considered unsatisfactory. It also places too much faith in the value of state intervention, assuming that the agents of the state, such as social workers and

<sup>112</sup> Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997).

<sup>113</sup> Historically the father was the master of his household and, by the common law, had an ‘absolute right’ to his children: H Radi, ‘Whose Child’ in J Mackinolty and H Radi (eds), *In Pursuit of Justice: Australian Women and the Law 1788–1979* (1979) 119, 119. He had custody and guardianship and all other rights in relation to children and even on his death he could determine questions of guardianship in relation to the children of his marriage: *Eyre v Shaftesbury* (1722) 2 P Wms 103, 107. See further: A Powell and S Murray, ‘Children and Domestic Violence: Constructing a Policy Problem in Australia and New Zealand’ (2008) 17(4) *Social Legal Studies* 453.

<sup>114</sup> Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), [3.6]. See Ch 2 in relation to international conventions concerning the family.

<sup>115</sup> This renders the child even without gender. See, eg, the following discussion of the position of the child in Roman Law: J Tobin, ‘The Development of Children’s Rights’ in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 23, [2.2].

<sup>116</sup> *Re Agar-Ellis* [1883] 24 Ch D, 336.

<sup>117</sup> Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), [3.7].

judges, are capable of making sound and appropriate judgments that provide better outcomes for children.<sup>118</sup>

4.64 The importance of maintaining the biological family wherever possible is a third perspective:

State intervention is reserved for responding to problems within families, attempting to redress these so that the child can remain at home or at least in close contact with the family. Critics argue that this view may place too much emphasis on biological ties and that it does not differentiate between the interests, feelings and welfare of children and those of parents.<sup>119</sup>

4.65 Each of these perspectives is evident in different ways in the multiple facets of interaction between families and the state—articulated expressly or impliedly as ‘father-right’, ‘parents’ rights’, or ‘children’s rights’, which may be in conflict with each other:

There are basic personal interests at stake here, which may sometimes conflict, such as the interest of parents to have guardianship and custody of their children, and the interests of children to be safe and protected from certain types of harm. These conflicts raise difficult questions for child protection professionals, legislators, policymakers and courts. Within the broader questions are finer ones such as the unequal and possibly unfair application of certain provisions and outcomes to specific population groups, such as single parents, and parents with an intellectual disability or mental illness. As well, compounding these contentious problems are practical problems such as one of the most daunting issues facing all jurisdictions: the adequate supply and funding of service providers.<sup>120</sup>

4.66 The competing dynamics of child protection involve not only the question of parental responsibility as between parents, but also the question of when it is appropriate for the state to intervene into the historically ‘private’ space of the family—when children need to be rescued even from their own parents through the intervention of the state.

### **Types of child protection orders**

4.67 The kinds of orders in the child protection system are described by the Australian Institute of Health and Welfare, which undertakes a comprehensive annual review of state and territory child protection and support services:

Guardianship orders are sought through the court. They involve the transfer of legal guardianship to an authorised department or to an individual. By their nature, these orders involve considerable intervention in the child’s life and that of the child’s family, and are sought only as a last resort. Guardianship orders convey to the guardian responsibility for the welfare for the child (for example, regarding the child’s education, health, religion, accommodation and financial matters).

Custody orders generally refer to care and protection orders that place children in the custody of a third party. These orders usually involve child protection staff (or the

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118 Ibid.

119 Ibid, [3.8].

120 B Mathews, ‘Protecting Children from Abuse and Neglect’ in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 204, [10.32].

person who has been granted custody) being responsible for the day-to-day requirements of the child while the parent retains guardianship.<sup>121</sup>

4.68 Guardianship or custody orders in the context of child protection are different from the range of orders under the *Family Law Act*, which now uses the language of ‘parental responsibility’ and ‘the time a child is to spend with another person’.<sup>122</sup>

### Purpose of child protection orders

4.69 The central dynamic in both child protection under state and territory law, and parenting orders under the *Family Law Act* is that the best interests of the child are paramount.<sup>123</sup> However state and territory child protection legislation also provides that, subject to this principle, the legislation is to be administered so that where intervention is ordered it must be the least intrusive possible, including keeping the child with his or her family whenever possible.<sup>124</sup> The overall purpose of child protection intervention is therefore, through the action of the state, to provide measures to assist and support children and young people who are in need of protection.

4.70 A central and recurring theme is when it is appropriate for the state to intervene, and, further, what is the role of child protection services:

Child protection was originally set up to provide a crisis response to cases of severe abuse in which the state needed to intervene to protect the child. However, the crisis response is not appropriate for the majority of families who are referred to child protection departments as they are typically in need rather than in crisis. There will always be a role for a ‘forensic’ tertiary response in cases where there are serious protective concerns. However, the challenge facing the sector is to devise service responses that are better suited to addressing family support needs. Recognition of this fact is slowly bringing about change to the delivery of child protection and child and family welfare services both nationally and internationally.<sup>125</sup>

4.71 A child protection intervention is authorised where a court believes, on the balance of probabilities, that a child or young person<sup>126</sup> is in ‘need of care,’ ‘in need of protection,’ ‘in need of care and protection,’ ‘at risk,’ or ‘at risk of harm’ as variously described in the legislation of the states and territories. Assistance and support for these

121 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, 24.

122 *Family Law Act 1975* (Cth) pt VII div 2 and div 5 respectively. See Ch 15.

123 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(a); *Children, Youth and Families Act 2005* (Vic) s 10(1); *Child Protection Act 1999* (Qld) s 5(1); *Children and Community Services Act 2004* (WA) s 7; *Children’s Protection Act 1993* (SA) s 4(1)–3; Tas s 8(2)(a); *Children and Young People Act 2008* (ACT) s 11; *Care and Protection of Children Act 2007* (NT) s 9.

124 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(d); *Children, Youth and Families Act 2005* (Vic) s 10(3)(a); *Child Protection Act 1999* (Qld) s 5(2)(e); *Children and Community Services Act 2004* (WA) s 9(f); *Children’s Protection Act 1993* (SA) s 4(4); *Children, Young Persons and Their Families Act 1997* (Tas) s 8(2)(b); *Children and Young People Act 2008* (ACT) s 12(1)(d); *Care and Protection of Children Act 2007* (NT) s 8(3).

125 L Bromfield and P Holzer, *A National Approach for Child Protection: Project Report* (2008), prepared for the National Child Protection Clearinghouse, 15.

126 Some child protection laws distinguish between a child and a young person. For example, in the *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 3, a child is a person under 16 years and a young person is one between 16 and 18 years. In the ACT, a child is a person under 12 years and a young person is a person between 12 and 18 years: *Children and Young People Act 2008* (ACT) ss 11–12.

children and young people may be offered on an informal basis, by way of agreement with families, or by means of care proceedings initiated by the relevant child protection agency in children's courts. The legislative grounds for a child protection response are prescribed in the child protection statutes of each of the states and territories. They are broadly similar across all the jurisdictions, and include circumstances where the child or young person has been or is at risk of being abused or neglected.<sup>127</sup>

4.72 A child or young person who is exposed to family violence may be considered to be 'at risk' or in 'need of care and protection' justifying an intervention by the child protection agency. New South Wales and Tasmania prescribe 'domestic violence' as an express ground for intervention.<sup>128</sup> In other jurisdictions, intervention on the basis of family or domestic violence is permitted where the child or young person is at risk of being, psychologically or emotionally abused as a result of his or her exposure to the violence.<sup>129</sup>

## Criminal law

4.73 Where family law disputes are regarded as 'private' disputes, involving litigation between individual litigants, criminal law—like child protection law—is 'public' in the sense that the state has a clear role to play in the investigation and prosecution of offences. It has been said that the criminal law is designed to maintain the social order and to stipulate the fundamental requirements for a person's treatment of others.<sup>130</sup> It is difficult to identify a single underlying philosophy of the criminal law although central to the concept of criminality are the notion of individual culpability and the criminal intention for one's action.<sup>131</sup> As some criminal law academics have contended:

What we choose to call criminal law in fact comprises a number of different practices with a variety of rationales rather than a single principled response to diverse social behaviour. We have criminal *laws* rather than criminal *law*.<sup>132</sup>

4.74 Professor Andrew Ashworth has described the construction of the criminal law as 'unprincipled and chaotic' and

not the product of any principled inquiry or consistent application of certain criteria, but largely dependent on the fortunes of successive governments, on campaigns in the mass media, on the activities of various pressure groups, and so forth.<sup>133</sup>

127 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23(1)(c); *Children, Youth and Families Act 2005* (Vic) s 162(1)(c)–(f); *Child Protection Act 1999* (Qld) ss 9–10; *Children and Community Services Act 2004* (WA) s 28(2)(c); *Children's Protection Act 1993* (SA) s 6(2); *Children, Young Persons and Their Families Act 1997* (Tas) s 4; *Care and Protection of Children Act 2007* (NT) ss 14–16, 20; *Children and Young People Act 2008* (ACT) ss 151, 156.

128 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23(1)(d), 71(1)(e); *Children, Young Persons and Their Families Act 1997* (Tas) s 4(ba).

129 See, eg, *Care and Protection of Children Act 2007* (NT) s 4(3)(b).

130 S Talarico, 'What Do We Expect of Criminal Justice? Critical Questions of Sanction Policy, Sentencing Purpose and the Politics of Reform' (1979) 4 *Criminal Justice Review* 55, 55.

131 Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002), [2.9].

132 D Brown and others, *Brown, Farrier, Neal and Weisbrodt's Criminal Laws: Material and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006), 3.

133 A Ashworth, 'Is the Criminal Law a Lost Cause?' (2000) 116 *Law Quarterly Review* 225, 225–226.

4.75 Nonetheless, the following discussion describes some functions of the criminal law, particularly in the context of sentencing. Chapter 10 discusses the policy basis of a specific aspect of criminal procedure, namely bail.

4.76 Judicial pronouncements and legislative provisions have emphasised the protective role of the criminal law, particularly in seeking to protect innocent members of the community who are unable to protect themselves.<sup>134</sup> The South Australian sentencing legislation, for example, states that the primary objectives of the criminal law include protecting the safety of the community<sup>135</sup>—in particular, children—from sexual predators by ensuring that, in any sentence for an offence involving sexual exploitation of a child, paramount consideration is given to the need for deterrence.<sup>136</sup>

4.77 Punishment for past criminal conduct is an essential component of any criminal justice system. There is a significant amount of academic literature on the underlying justification for punishment, largely dominated by two theories. The utilitarian theory of punishment justifies punishment on the basis that its benefits outweigh its detrimental effects. Proponents of this theory consider that punishment has the potential to reduce crime.<sup>137</sup> On the other hand, the retributive theory of punishment justifies punishment as an appropriate moral response to the voluntary commission of an offence, regardless of its effects.<sup>138</sup>

4.78 To the extent that the criminal justice system integrates and considers restoration and rehabilitation—either at the sentencing stage or as a diversionary practice—the orientation is forward-looking, with an emphasis on prevention of further offending via treatment and healing.

4.79 Understanding the various purposes of sentencing is integral to a consideration of the policy basis of criminal laws.<sup>139</sup> When a person is sentenced for a family violence offence or for a breach of a protection order that sentence will be imposed in furtherance of specific objects.

4.80 Many state and territory sentencing acts expressly set out the purposes of sentencing.<sup>140</sup> The commonly cited purposes of sentencing are retribution, deterrence, rehabilitation, incapacitation, denunciation, and in more recent times, restoration. The sentencing acts of NSW and the ACT also specify that a purpose of sentencing is to make the offender accountable for his or her actions.<sup>141</sup>

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134 See, eg, *R v Collins; Ex parte Attorney-General (Qld)* [2009] QCA, [35].

135 *Criminal Law (Sentencing) Act 1988* (SA) s 10(1b).

136 *Ibid* s 10(4).

137 C Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (1987), 7.

138 *Ibid*, 46–47.

139 The ALRC considered the purposes of sentencing in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), ch 4. This section draws from that report.

140 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A; *Sentencing Act 1991* (Vic) s 5; *Penalties and Sentences Act 1992* (Qld) s 9; *Sentencing Act 1997* (Tas) s 3; *Crimes (Sentencing) Act 2005* (ACT) s 7; *Sentencing Act 1995* (NT) s 5.

141 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(e); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(e).

4.81 The main purposes of sentencing are considered below. The purposes of sentencing may sometimes conflict, but some purposes—such as retribution and deterrence—can be pursued simultaneously.

### **Retribution**

4.82 Retribution—often referred to as ‘punishment’ in legislation and case law—is derived from the retributive theory of punishment. It is the oldest theory of punishment based on concepts of vengeance and responsibility.<sup>142</sup> It is advocated in the ‘eye for eye’ principle in the Book of Leviticus in the Old Testament.<sup>143</sup>

4.83 Proponents of the retribution theory disagree about why offenders deserve to be punished. Some argue that it is to eliminate the unfair advantage the offender gained over other law abiding citizens by committing the offence; while others say that it is to satisfy a debt to society.<sup>144</sup> Those who advocate for ‘just deserts’ consider that offenders deserve to be punished but that the punishment should be proportionate to the gravity of the offence.<sup>145</sup>

4.84 A number of state and territory sentencing acts set out retribution as a sentencing purpose in varying language:

- to ensure that the offender is adequately punished for the offence;<sup>146</sup>
- to punish the offender to an extent or in a way that is just in all the circumstances;<sup>147</sup> or
- to ensure that the offender is adequately punished for the offence in a way that is just and appropriate.<sup>148</sup>

### **Deterrence**

4.85 Deterrence is derived from the utilitarian theory of punishment.<sup>149</sup> There is widespread support for the proposition that the mere existence of a criminal justice system has the effect of deterring persons from committing criminal offences.<sup>150</sup> This systemic effect is commonly referred to as ‘absolute deterrence’. Other forms of deterrence arise specifically in the context of sentencing, and describe the deterrent

142 S Talarico, ‘What Do We Expect of Criminal Justice? Critical Questions of Sanction Policy, Sentencing Purpose and the Politics of Reform’ (1979) 4 *Criminal Justice Review* 55, 55–56.

143 See Leviticus, 25: 17–22.

144 N Walker, *Why Punish?* (1991), 73–75.

145 A von Hirsch, *Doing Justice: The Choice of Punishments—Report of the Committee for the Study of Incarceration* (1976).

146 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(a).

147 *Penalties and Sentences Act 1992* (Qld) s 9(1)(a); *Sentencing Act 1995* (NT) s 5(1)(a). See also *Sentencing Act 1991* (Vic) s 5(1)(a) which is expressed in similar terms.

148 *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(a).

149 C Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (1987), 7–8.

150 See, eg, P Robinson and J Darley, ‘Does Criminal Law Deter? A Behavioural Science Investigation’ (2004) 24 *Oxford Journal of Legal Studies* 173, 173; N Demleitner and others, *Sentencing Law and Policy: Cases, Statutes and Guidelines* (2003), 10; P Robinson and J Darley, ‘The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best’ (2003) 91 *Georgetown Law Journal* 949, 951; N Walker, *Why Punish?* (1991), 15.

effect of the sentence both on the future behaviour of other people and of the offender. These types of deterrence are known respectively as general deterrence and specific deterrence.

### **General deterrence**

4.86 General deterrence assumes that offenders are rational and will therefore refrain from engaging in criminal conduct if the consequences of their actions are perceived to be sufficiently harsh. The assumption that offenders are rational—when some do not in fact undertake a rational analysis of their actions prior to committing an offence—is one basis upon which the effectiveness of general deterrence has been challenged.

4.87 In its 1988 report, *Sentencing*, the ALRC objected to general deterrence on the basis that it was unfair to punish one person by reference to the hypothetical crime of another.<sup>151</sup> However, in its report, *Same Time Same Crime: Sentencing of Federal Offenders*, the ALRC agreed that general deterrence is an established and legitimate purpose of sentencing, having regard to judicial pronouncements on the importance of general deterrence, and the purposes of sentencing articulated in other jurisdictions.<sup>152</sup>

4.88 A number of state and territory sentencing acts set out general deterrence as a purpose of sentencing. This is usually done in language to the effect that a purpose of sentencing is to prevent crime by deterring or discouraging other persons from committing the same or similar offences.<sup>153</sup> The South Australian sentencing legislation specifies the deterrent effect any sentence under consideration may have on other persons as a matter to which a court is to have regard in determining sentence, to the extent that it is relevant and known to the court.<sup>154</sup>

4.89 In sentencing for family violence offences the importance placed upon general deterrence will depend on the circumstances of particular cases. For example, in *R v Collins: Ex parte Attorney-General*, the Crown appealed against the inadequacy of sentence imposed on a 17 year old father for causing grievous bodily harm to his three and a half month old son.<sup>155</sup> In dismissing the appeal, the court made the following observations about general deterrence:

So far as general deterrence is concerned, this crime was not one of calculation but a spur of the moment explosion of anger and frustration. It is important here to keep steadily in mind that the respondent was little more than a child himself at the time of the offence. How the respondent came to find himself at the age of 17 years in the position of father to a three and half month old baby without the assistance of adult supervision and care was not satisfactorily explained. ... The social structure which should have been in place to prevent the appalling situation in which the care of the

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151 Australian Law Reform Commission, *Sentencing*, Report 44 (1988), [37].

152 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [4.29].

153 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b); *Sentencing Act 1991* (Vic) s 5(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(b); *Sentencing Act 1995* (NT) s 5(1)(c). See also *Sentencing Act 1997* (Tas) s 3(e)(i).

154 *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j).

155 *R v Collins; Ex parte Attorney-General (Qld)* [2009] QCA.

child was left to the respondent and the child's 16 year old mother were, lamentably, absent ...

In relation to general deterrence, I consider that the suggestion that juvenile fathers, similarly situated to the respondent, will be deterred by reflecting upon a custodial element in the sentence imposed on the respondent when they are minded to act violently towards an infant in their care out of tiredness, frustration and personal inadequacy is not so compelling as to persuade me that this consideration affords a 'reason of substance' to conclude that this Court should impose a sentence which includes a period of custody.<sup>156</sup>

4.90 Officers of the ALRC observed that in a particular case of family violence at Burwood Local Court, Sydney, general deterrence was said not to be a factor in sentencing because the family violence was said to be at the 'lower end' of the scale of seriousness and it was unlikely that the offender would re-offend.<sup>157</sup>

### ***Specific deterrence***

4.91 Specific deterrence seeks to prevent offenders from engaging in further criminal conduct by demonstrating to them the adverse consequences of their offending. Specific deterrence may be afforded greater emphasis when sentencing a repeat offender because there is an assumption that the previous sentence was ineffective in its deterrent effect.<sup>158</sup> Specific deterrence may not be as significant in circumstances where an offender is considered unlikely to reoffend, such as where an offender has demonstrated significant remorse.<sup>159</sup>

4.92 A number of state and territory sentencing acts set out specific deterrence as a sentencing purpose, usually in language to the effect that a purpose of sentencing is to prevent crime by deterring or discouraging the offender from committing the same or similar offence.<sup>160</sup> The South Australian sentencing legislation specifies the deterrent effect any sentence under consideration may have on the defendant as a matter that the court must have regard to in determining sentence, to the extent that it is relevant and known.<sup>161</sup>

### ***Rehabilitation***

4.93 Rehabilitation looks to identify and address the underlying causes of criminal conduct, by changing an offender's personality, attitudes, habits, beliefs, outlooks or

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156 Ibid, [34], [36].

157 *Court Observation: Burwood Local Court: Apprehended Violence Order/All Charges and Summons/Defended Hearings List*, 18 December 2009.

158 M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 32.

159 Ibid, 33.

160 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(b); *Sentencing Act 1991* (Vic) s 5(1)(b); *Penalties and Sentences Act 1992* (Qld) s 9(1)(c); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(b); *Sentencing Act 1995* (NT) s 5(1)(c). See also *Sentencing Act 1997* (Tas) s 3(e)(i).

161 *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(j).

skills to stop them from re-offending.<sup>162</sup> It is derived from the utilitarian theory of punishment.<sup>163</sup> Susette Talarico comments:

While retribution, deterrence and incapacitation are based on assumptions of free will, rationality and simple confinement, rehabilitation looks to the offender in a rather innovative and distinctly contemporary perspective. Assuming that criminal behaviour can be explained and predicted, rehabilitation focuses on a treatment approach to crime control.<sup>164</sup>

4.94 A number of state and territory sentencing acts set out rehabilitation as a purpose of sentencing in the following terms:

- to promote the rehabilitation of the offender;<sup>165</sup> or
- to establish conditions within which it is considered by the court that the rehabilitation of the offender may be facilitated.<sup>166</sup>

4.95 The Tasmanian sentencing legislation states that a purpose of the Act—as opposed to a purpose of sentencing—is to help prevent crime and promote respect for the law by allowing courts to impose sentences aimed at the rehabilitation of offenders.<sup>167</sup> The South Australian sentencing legislation specifies the rehabilitation of the offender as a matter that the court must have regard to in determining sentence, to the extent that it is relevant and known to the court.<sup>168</sup>

4.96 In sentencing for family violence offenders, courts have remarked on the offenders' prospects of rehabilitation,<sup>169</sup> and have suspended sentences on the basis that offenders will—among other things—undergo treatment.<sup>170</sup>

## Incapacitation

4.97 Incapacitation aims to restrain an offender in order to render him or her incapable of re-offending.<sup>171</sup> Imprisonment is one form of incapacitation. Other

162 See, eg, Victorian Sentencing Committee, *Sentencing* (1988), 79.

163 C Ten, *Crime, Guilt, and Punishment: A Philosophical Introduction* (1987), 7–8.

164 S Talarico, 'What Do We Expect of Criminal Justice? Critical Questions of Sanction Policy, Sentencing Purpose and the Politics of Reform' (1979) 4 *Criminal Justice Review* 55, 57–58 (citations omitted).

165 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(d); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(d).

166 *Sentencing Act 1991* (Vic) s 5(1)(c). See also *Penalties and Sentences Act 1992* (Qld) s 9(1)(b); *Sentencing Act 1995* (NT)s 5(1)(b) which are expressed in similar terms.

167 *Sentencing Act 1997* (Tas) s 3(e)(ii).

168 *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(m).

169 For example, in *R v Rindjarra* (2008) 191 A Crim R 171, [79], the trial judge commented that the offender's prospects were poor.

170 For example, in *R v Taylor (No 2)* [2008] ACTSC, [28] the offender's 12 month sentence of imprisonment for breach of a protection order was suspended on condition that he present himself for assessment for and, if found suitable, complete, the ACT Corrective Service Family Violence Program as well as any program deemed to be necessary for his rehabilitation by ACT Corrective Services.

171 M Bagaric, 'Incapacitation, Deterrence and Rehabilitation: Flawed Ideals or Appropriate Sentencing Goals?' (2000) 24 *Criminal Law Journal* 21, 24; A von Hirsch, 'The Problem of False Positives' in A von Hirsch and A Ashworth (ed) *Principled Sentencing: Readings on Theory and Policy* (1998) 88; S Talarico, 'What Do We Expect of Criminal Justice? Critical Questions of Sanction Policy, Sentencing Purpose and the Politics of Reform' (1979) 4 *Criminal Justice Review* 55, 56.

sentencing options that curtail an offender's liberty—such as the use of electronic surveillance to track an offender's movements—are also forms of incapacitation.

4.98 Collective incapacitation is the strategy of seeking to reduce crime by incapacitating more offenders, or incapacitating them for longer periods of time.<sup>172</sup> Selective incapacitation is the strategy of trying to identify, and then incapacitate, certain offenders who are likely to re-offend.<sup>173</sup> This strategy relies on predictions of future criminality—which have been criticised by some as inherently unreliable<sup>174</sup> and often erroneous.<sup>175</sup>

4.99 Provisions in sentencing legislation of a number of states and territories include the selective incapacitation of certain offenders.<sup>176</sup> In addition, a number of state and territory sentencing acts state that a purpose of sentencing is to protect the community from the offender.<sup>177</sup> The Western Australian sentencing legislation provides that a court must not impose a sentence of imprisonment unless it decides—among other things—that it is required to protect the community.<sup>178</sup>

### **Denunciation**

4.100 Denunciation is premised on the theory that a sentence can serve the purpose of communicating to the offender and the community the message that the law should not be flouted.<sup>179</sup> In this regard, denunciation performs an educative role. Further, a sentence that denounces the conduct of an offender represents a symbolic, collective statement of society's censure of the criminal conduct.<sup>180</sup> The public opinion to be taken into account is 'informed public opinion', as opposed to actual public opinion.<sup>181</sup> In *Inkson v the Queen*, Underwood J stated that:

The community delegates to the Court the task of identifying, assessing and weighing the outrage and revulsion that an informed and responsible public would have to criminal conduct.<sup>182</sup>

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172 D Weatherburn, *Law and Order in Australia: Rhetoric and Reality* (2004), 124–125.

173 Ibid, 125.

174 N Demleitner and others, *Sentencing Law and Policy: Cases, Statutes and Guidelines* (2003), 11; American Law Institute, *Model Penal Code: Sentencing Report* (2003), 32.

175 A von Hirsch, 'The Problem of False Positives' in A von Hirsch and A Ashworth (ed) *Principled Sentencing: Readings on Theory and Policy* (1998) 88, 99.

176 See, eg, *Sentencing Act 1991* (Vic) ss 18A, 18B (indefinite sentence for offender convicted of serious offences where there is a high probability that offender is a serious danger to the community); *Penalties and Sentences Act 1992* (Qld) s 163 (indefinite sentence for violent offender who poses a serious danger to the community); *Sentencing Act 1995* (WA) s 98 (indefinite sentences where a superior court is satisfied on balance of probabilities that offender, if released, would be a danger to society).

177 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(c); *Sentencing Act 1991* (Vic) s 5(1)(e); *Penalties and Sentences Act 1992* (Qld) s 9(1)(e); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(c); *Sentencing Act 1995* (NT) s 5(1)(e).

178 *Sentencing Act 1995* (WA) s 6(4).

179 N Walker, *Why Punish?* (1991), 26. See also *Ryan v The Queen* (2001) 206 CLR 267, [118].

180 N Walker, *Why Punish?* (1991), 31.

181 *Inkson v The Queen* (1996) 6 Tas R 1, 2.

182 Ibid, 16.

4.101 A consideration of informed public opinion cannot, however, lead to the imposition of a sentence that is contrary to law.<sup>183</sup>

4.102 A number of state and territory sentencing acts set out denunciation as a purpose of sentencing in the following terms:

- to denounce the conduct of the offender;<sup>184</sup>
- to manifest the denunciation by the court of the type of conduct in which the offender engaged;<sup>185</sup> and
- to make it clear that the community, acting through the court, denounces the sort of conduct in which the offender was involved.<sup>186</sup>

4.103 In sentencing offenders for family violence offences, courts have specifically referred to the need for denunciation.<sup>187</sup>

### **Restoration**

4.104 While there is no universally accepted definition of restorative justice, it is essentially an approach to crime that is principally concerned with repairing the harm caused by criminal conduct and addressing the underlying causes of criminality. In this regard, restoration integrates elements of rehabilitation.

4.105 Restorative justice initiatives in Australia are diverse and employed at different stages of the criminal justice process, including sentencing. Examples of such initiatives are victim-offender mediation, conferencing and circle sentencing. Restorative justice is considered in Chapter 23.

4.106 The sentencing legislation of some states and territories refers either to restorative aims or restorative initiatives. For example, the sentencing legislation of NSW and the ACT states that a purpose of sentencing is ‘to recognise the harm done to the victim of the crime and the community’.<sup>188</sup> The South Australian sentencing legislation mandates conferencing prior to the sentencing of Indigenous offenders. Victims of crime may choose to be present at such conferences.<sup>189</sup>

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183     *R v Nemer* (2003) 87 SASR 168, 171.

184     *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(f); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(f). See also *Sentencing Act 1997* (Tas) s 3(e)(iii) which provides that a purpose of the Act is to help prevent crime and respect for the law by allowing court to impose sentences that denounce the conduct of offenders.

185     *Sentencing Act 1991* (Vic) s 5(1)(d).

186     *Penalties and Sentences Act 1992* (Qld) s 9(1)(d). See also *Sentencing Act 1995* (NT) s 5(1)(d).

187     For example, see *R v Gazdovic* [2002] VSC, [28], [30] in relation to the sentencing for incitement to murder the offender’s wife and sister and incitement to intentionally cause serious injury to the offender’s brother-in-law.

188     *Crimes (Sentencing Procedure) Act 1999* (NSW) s 3A(g); *Crimes (Sentencing) Act 2005* (ACT) s 7(1)(g). See also *Sentencing Act 1997* (Tas) s 3(h) which provides that a purpose of the Act is to recognise the interests of victims of offences.

189     *Criminal Law (Sentencing) Act 1988* (SA) s 9C.

## **Victims' compensation**

4.107 The avenues of redress for compensation for victims of crime are not exclusively based on legislation.<sup>190</sup> Victims of crime—including victims of family violence—may be financially compensated in three ways: through an award of compensation in the civil courts, typically through a claim that a tort has been committed; through an order that an offender pay restitution or reparation to the victim, as part of the offender's sentence; and through a claim to a statutory compensation scheme in which awards are assessed and paid by the government.

4.108 Compensating victims of crime has been part of a wider social and legislative trend towards greater recognition of the importance of the interests of the victims of crime in the criminal process. The general philosophy underlying victims' compensation is expressed in the preamble to the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, adopted by the United Nations General Assembly in 1985, as a recognition that victims of crime and

frequently their families, witnesses and others who aid them, are unjustly subjected to loss, damage or injury and that they may, in addition, suffer hardship when assisting in the prosecution of offenders.<sup>191</sup>

4.109 The Declaration includes basic principles of restitution—that is, that offenders should pay for the costs of their crimes—and state compensation—that is, where such costs are not recoverable from offenders or elsewhere, states should endeavour to provide financial compensation to such victims and their families.<sup>192</sup> The principle of restitution underlies the power to sentence an offender by ordering restitution or reparation, as well as damages for tort, while the development of statutory compensation schemes has been driven by the principle of compensation. Although the different avenues for compensation share the general philosophy of recognition of the injustice that a victim should bear the losses of a crime, there are some distinctions between the purposes of those forms of compensation. These purposes are considered below.

## **Victims' compensation schemes**

4.110 All Australian states and territories have legislation establishing victims' compensation schemes. In some jurisdictions, such as Queensland and South Australia, these schemes are established in broader legislation that also encompasses other measures to support victims, such as the inclusion of fundamental principles of justice underlying the treatment of victims or the establishment of a levy upon offenders for the purposes of compensating victims.<sup>193</sup> In other jurisdictions, such as Victoria,<sup>194</sup> the legislation is concerned primarily with the establishment of a compensation scheme.<sup>194</sup>

190 Victims' compensation is discussed more fully in Ch 29.

191 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/34 (1985).

192 Ibid cl 8–9, 12.

193 *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA).

194 *Victims of Crime Assistance Act 1996* (Vic).

4.111 The legislation of NSW, Victoria, Queensland, South Australia and the Northern Territory includes provisions setting out statutory purposes and objects. Apart from the aim of establishing a compensation scheme (and other mechanisms under the legislation),<sup>195</sup> these objects clauses include the following purposes and objects (variously expressed):

- to provide assistance (or support and rehabilitation) to victims of crime;<sup>196</sup>
- to assist victims of crime to recover from the crime (and, in South Australia, ‘to advance their welfare in other ways’);<sup>197</sup> and
- to give statutory recognition to victims of crime and the harm that they suffer from criminal offending.<sup>198</sup>

4.112 The objects clauses also make clear that the awards under the compensation scheme are not intended to reflect the level of compensation to which victims of acts of violence may be entitled at common law or otherwise.<sup>199</sup> In addition to these common provisions, the Victorian and Queensland acts include the further objective of adding to, or complementing, other victims’ services and, in Victoria, the objective of ‘allow[ing] victims of crime to have recourse to financial assistance under this Act where compensation for the injury cannot be obtained from the offender or other sources’.<sup>200</sup>

4.113 As well as these statutory objectives, victims’ compensation schemes are seen as enhancing the efficacy of criminal justice systems by encouraging victims of crime to come forward and prosecute perpetrators.<sup>201</sup> Like restitution orders, victims’ compensation schemes provide a more informal and efficient forum than civil litigation.<sup>202</sup> They are also more effective in that victims have access to a pool of dedicated funds, whereas restitution from an offender depends upon the offender’s capacity to pay.

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195 The objects clauses, for example, commonly provide that it is an object or purpose of the Act to establish a victims’ compensation scheme and other associated schemes under the legislation. For example, in Queensland and South Australia, another ‘object’ is to set out principles of justice underlying the treatment of victims. These instrumental objects are not included in this summary.

196 *Victims of Crime Assistance Act 1996* (Vic) s 1(1). See also *Victims Support and Rehabilitation Act 1996* (NSW) s 3(a); *Victims of Crime Assistance Act 2006* (NT) s 3(a).

197 *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(a). See also *Victims of Crime Assistance Act 2009* (Qld) s 3(2)(a); *Victims of Crime Act 2001* (SA) s 3(c).

198 *Victims of Crime Act 2001* (SA) s 3(c). See also *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(b); *Victims of Crime Assistance Act 2009* (Qld) s 3(2)(b), (c).

199 *Victims of Crime Assistance Act 2009* (Qld) s 3(3). See also *Victims of Crime Assistance Act 2009* (Qld) s 1(3); *Victims of Crime Act 2001* (SA) s 3(d) (‘limited’ compensation).

200 *Victims of Crime Assistance Act 1996* (Vic) s 1(2)(c), (4); *Victims of Crime Assistance Act 2009* (Qld) s 3(2)(d).

201 L Finestone, ‘Crimes Compensation: A National Perspective’ in M Heenan (ed) *Legalising Justice for All Women: National Conference on Sexual Assault and the Law* (1996) 198, 199.

202 Ibid, 198–199.

## **Restitution orders**

4.114 In all Australian jurisdictions, except Western Australia, there is power to order—as a sentencing option—that an offender pay compensation for loss, injury or damage as a consequence of an offence.<sup>203</sup> In Western Australia, the power to order compensation is restricted to property damage or property offences.<sup>204</sup>

4.115 The ‘fundamental purpose’ of such powers is to give victims ‘easy access to civil justice’.<sup>205</sup> As Bell J has explained:

When an offender has been dealt with by the courts, the judge can be in a good position to consider the issue of compensating the victim. The factual circumstances relevant to compensation may have been fully or at least sufficiently established by the evidence led or the admissions made by the offender. It can be clear that the offender’s crime has caused loss or damage to the victim. Once the court receives evidence of the extent and value of such loss or damage, it can then expeditiously determine whether and what compensation to order. This saves the victim the time, expense, inconvenience and possible additional trauma of having to institute a civil proceeding. Not doing so may deprive the victim of ready access to just compensation, leaving them with an understandable sense of grievance.<sup>206</sup>

4.116 The making of restitution orders shares some philosophical underpinnings with the sentencing aim of restoration.

## **Compensation for tort claims**

4.117 The basic function of an award of damages in tort is:

to compensate the plaintiff for loss suffered as a result of the tort; the plaintiff is entitled to *restitutio in integrum*, that is, to be put in the position they would have been in had the tort not been committed.<sup>207</sup>

4.118 If a tort has been committed, victims of family violence, including sexual assault, may be able to seek damages from an offender. Such claims are largely governed by the common law and are pursued in the civil courts.

4.119 Along with this general purpose of restitution, individual torts may serve different purposes. Family violence most commonly gives rise to a claim in assault or battery. A battery is committed when a person directly and intentionally causes contact with the body of the victim without the latter’s consent.<sup>208</sup> An assault is committed when a person directly and intentionally threatens the victim in such a way that the victim reasonably apprehends imminent contact with his or her body by the person, or

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203 *Victims Support and Rehabilitation Act 1996* (NSW) ss 71, 77B; *Sentencing Act 1991* (Vic) s 85B; *Penalties and Sentences Act 1992* (Qld) s 35; *Criminal Law (Sentencing) Act 1988* (SA) s 53; *Sentencing Act 1997* (Tas) s 58; *Crimes (Sentencing) Act 2005* (ACT) s 18, ch 7; *Sentencing Act 1995* (NT) s 88.

204 See s 116 of the *Sentencing Act 1995* (WA), which defines ‘victim’ as a person who or which has suffered loss of or damage to his, her or its property as a direct or indirect result of the offence.

205 *RK v Mirik* (2009) 21 VR 623, [11].

206 *Ibid.*

207 F Trindade and P Cane, *The Law of Torts in Australia* (3rd ed, 1999), 511.

208 *Ibid.* 27.

something within the person's control.<sup>209</sup> Assault and battery are also criminal offences.<sup>210</sup> The fundamental principle underlying these torts is that every person's body is inviolable—that is, these torts protect the physical integrity of a person.<sup>211</sup>

4.120 Negligence, on the other hand, is directed to ensuring that persons do not behave carelessly or negligently, in such a way as to harm others. Negligence may arise in the context of family violence where, for example, a third party such as a parent fails to take reasonable care to ensure that a child is not subject to violence.

4.121 Compensation claims by way of tort are not easy methods of redress for victims of family violence, for a number of reasons.<sup>212</sup> This has been partly addressed through the power to order restitution and the development of statutory victims' compensation schemes.

## Migration legislation

4.122 The object of the *Migration Act 1958* (Cth) is expressed broadly as being to 'regulate in the national interest, the coming into, and presence in Australia, of non-citizens'.<sup>213</sup> Certain provisions of the *Migration Regulations 1994* (Cth) relate to family violence. These provisions permit certain persons applying for permanent residence in Australia to proceed with their application after the breakdown of their marriage or de facto relationship if they, or a member of their family, have experienced family violence at the hands of their partner.<sup>214</sup>

4.123 The family violence provisions were

introduced in response to community concerns that some partners might feel compelled to remain in abusive relationships rather than end the relationship and be forced to leave Australia.<sup>215</sup>

4.124 The Queensland Centre for Domestic and Family Violence Research reports that the vast majority of persons intended to be protected by these provisions are women,<sup>216</sup> and that the provisions were intended to respond to

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209 Ibid, 42.

210 In some jurisdictions, a summary conviction for an offence acts as a bar to any subsequent civil proceedings for the offence, and civil proceedings taken against a person for an offence act as a bar to subsequent criminal proceedings for the same offence: see, eg, *Crimes Act 1900* (NSW) s 556.

211 *Collins v Wilcock* [1984] 1 WLR, 1177. See also *Secretary, Department of Health and Community Services v JWB and SMB (Marion's Case)* (1992) 175 CLR 218, 253.

212 See also C Forster, 'Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions' (2004) 32 *University of Western Australia Law Review* 264, 271.

213 *Migration Act 1958* (Cth) s 4(1).

214 *Migration Regulations 1994* (Cth) Div 1.5; Department of Immigration and Citizenship, *Media Fact Sheet 38: Family Violence Provisions* (2009) <[www.immi.gov.au/media/fact-sheets/38domestic.htm](http://www.immi.gov.au/media/fact-sheets/38domestic.htm)> at 19 January 2010.

215 Department of Immigration and Citizenship, *Media Fact Sheet 38: Family Violence Provisions* (2009) <[www.immi.gov.au/media/fact-sheets/38domestic.htm](http://www.immi.gov.au/media/fact-sheets/38domestic.htm)> at 19 January 2010.

216 It is reported that the Department of Immigration and Citizenship's policy is that if the applicant is a male it is considered reasonable to refer a non-judicially determined claim of family violence unless there is 'strong evidence' that the claim is genuine: Immigration Advice and Rights Centre Inc, *IARC Client*

the incidence of abuse occurring in relationships where one partner was being sponsored for residence in Australia. Anecdotal and statistical evidence at the time revealed significant levels of verbal, emotional, social, racial, physical, sexual and financial abuse in spousal relationships occurring in this context.<sup>217</sup>

4.125 The National Council to Reduce Violence Against Women and their Children stated that:

Women who are sponsored by Australian citizens and residents are particularly vulnerable to abuse due to the threat of deportation. In the late 1980s and early 1990s, domestic violence practitioners became concerned about the number of repeat or serial sponsors who abused the women and then triggered their deportation. Predominantly, the concern related to the abuse of Filipino women by serial sponsors, although more recently concerns have increased about women sponsored from other countries such as Russia, Thailand, Indonesia and Fiji.<sup>218</sup>

4.126 Under the *Migration Regulations*, a person whose relationship ends after the person has applied for permanent residence will still be able to be considered for permanent residence if he or she can provide evidence of family violence that is acceptable under the Regulations.<sup>219</sup> The Regulations provide for both judicially and non-judicially determined claims of family violence.<sup>220</sup> In July 2010, the Australian Law Reform Commission received Terms of Reference for an Inquiry—following on from the current Inquiry—into the treatment of family violence in Commonwealth laws, including immigration laws. The issues arising under the *Migration Regulations* will be considered further in the context of that Inquiry.

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*Information Sheet 14A—The Family Violence Provisions* (2009) <[www.iarc.asn.au/publications/pdfs/familyViolence.pdf](http://www.iarc.asn.au/publications/pdfs/familyViolence.pdf)> at 12 April 2010.

217 Queensland Centre for Domestic and Family Violence Research, *The Domestic Violence Provisions in Migration Law* (2002) <[www.noviolence.com.au/migrationarticle.html](http://www.noviolence.com.au/migrationarticle.html)> at 19 January 2010.

218 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), [2.5] (citations omitted).

219 *Migration Regulations 1994* (Cth) pt 1, div 1.5.

220 *Ibid* pt 1, div 1.5.

## **5. A Common Interpretative Framework — Definitions in Family Violence Legislation**

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### **Contents**

Introduction	187
Concepts of family violence	188
Current definitions in family violence legislation	189
Linkage of definitions of family violence to criminal law	193
Types of conduct recognised as family violence	196
Submissions and consultations	201
A common definition or shared understanding of family violence?	201
Family violence as coercing or controlling behaviour	207
Need for a definition of family violence in NSW family violence legislation	210
Types of potentially relevant conduct	211
Linkage of definitions of family violence to criminal law	231
Commissions' views	234
Gender neutrality in definition	234
Core definition to describe context of family violence	234
Shared understanding of potentially relevant types of conduct	235
Need for a definition of family violence in NSW family violence legislation	236
Types of potentially relevant conduct	237
Linkage of definitions of family violence to criminal law	244

### **Introduction**

5.1 The Terms of Reference require the Commissions to consider reforms to legal frameworks which will improve the safety of victims of family violence. The definitions, and understanding, of family violence are key starting points.

5.2 This and the following chapter explore the meaning of family violence across different legislative schemes. Understanding what constitutes family violence—or domestic violence or domestic abuse as it is referred to in some jurisdictions—is integral to a consideration of interaction issues. Definitions of family violence in Australia vary widely across family violence legislation,<sup>1</sup> the *Family Law Act 1975* (Cth), the criminal law, and other types of legislation such as victims' compensation legislation and migration regulations. In addition, disciplines other than law—for

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1 An explanation of the Commissions' use of the terms 'family violence' and 'family violence legislation' is set out in Ch 1.

example, the social sciences, health and welfare service providers—may conceptualise family violence differently.

5.3 This chapter focuses on the definition of family violence in family violence legislation and considers the desirability of attaining a common understanding of what constitutes family violence across family violence legislation. Definitions form one limb of a common interpretative framework, complemented for example, by guiding principles and statutory objects, which are discussed in Chapter 7.

5.4 Chapter 6 considers the definition of family violence in other legislative schemes, including the *Family Law Act*, and in the criminal law—and, in particular, the relationship between the definitions in those schemes and in family violence legislation.

5.5 This and the following chapter consider whether it is appropriate or desirable to aim for a common understanding of what constitutes family violence across the different legislative schemes under consideration. This is considered in light of the underlying policy justifications for each of the legislative schemes, which are discussed in the preceding chapter.

## **Concepts of family violence**

5.6 There is no single nationally or internationally agreed definition of family violence. As noted in Chapter 2, the United Nations *Declaration on the Elimination of Violence against Women* defines violence against women as ‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life’.<sup>2</sup>

5.7 As the Australian Bureau of Statistics has noted, definitions of what constitutes family violence are inherently likely to differ across the legal sector, researchers and service providers. These definitions do not always necessarily align with community understandings, or victim and offender perspectives, of what constitutes family violence.<sup>3</sup>

5.8 Partnerships Against Domestic Violence—an Australian intergovernmental taskforce on family violence—adopted the following definition of family violence in 2003:

Domestic violence is an abuse of power perpetrated mainly (but not only) by men against women in a relationship or after separation. It occurs when one partner attempts physically or psychologically to dominate and control the other. Domestic violence takes many forms. The most commonly acknowledged forms are physical and sexual violence, threats and intimidation, emotional and social abuse and economic deprivation. Many forms of domestic violence are against the law.

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2 Declaration on the Elimination of Violence against Women 20 December 1993, UN GAOR, A/RES/48/104, (entered into force generally on 23 February 1994), art 1.

3 Australian Bureau of Statistics, *Conceptual Framework for Family and Domestic Violence* (2009).

For many indigenous people the term family violence is preferred as it encompasses all forms of violence in intimate, family and other relationships of mutual obligation and support.<sup>4</sup>

5.9 Conduct constituting family violence can encompass varying degrees of severity and take many forms—physical abuse, sexual abuse, damage to property, emotional abuse, social abuse, economic abuse, psychological abuse, and spiritual abuse. Whatever form family violence takes, a central feature is that it involves a person exercising control and power over the victim by inducing fear, for example by using threatening behaviour.<sup>5</sup> Definitions of family violence usually recognise that violence can constitute more than single ‘incidents’. It can involve ‘a continuum of controlling behaviour and violence, which can occur over a number of years’.<sup>6</sup>

5.10 While the definition of family violence may not appear to be a practically important issue, it is necessary to understand precisely what constitutes family violence in each of the state and territory jurisdictions in order to consider whether family violence laws interact with the *Family Law Act* or with the criminal law in any particular matter and, if they do, the nature of that interaction. The scope of the various definitions of family violence in family violence legislation may, in a particular case, mean that there will be no interaction with the *Family Law Act* or with the criminal law. For example, certain definitions cover conduct that may justify a protection order but the conduct does not amount to a criminal offence. Conversely, some definitions of family violence in family violence legislation are linked expressly to the criminal law, and result in an interaction between family violence and criminal legislative regimes at some level.

5.11 Critically assessing definitional issues is relevant to the important question of when it is appropriate for the law to intervene to provide protection or other forms of redress to victims. On the one hand, excessively narrow definitions of family violence might cause gaps in protection to victims. On the other, excessively broad definitions may detract from the significance of family violence or devalue the experience of its victims or—as noted by one stakeholder—promote the abuse of the protection order system.<sup>7</sup>

5.12 The discussion below focuses on the definition of family violence in family violence legislation.

## Current definitions in family violence legislation

5.13 Table A below provides a snapshot of variations in the definitions of family violence across the states and territories. The following discussion addresses various

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4 Partnerships Against Domestic Violence, *What is Domestic Violence?* (2003) cited in B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 179.

5 See, eg, National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 13–14.

6 Access Economics, *The Cost of Domestic Violence to the Australian Economy, Part I* (2004), 3.

7 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers.*

aspects of the state and territory definitions. Key differences include the extent to which definitions:

- are linked to criminal offences;
- capture non-physical violence;
- turn on the impact on the victim or the intent of the person committing family violence;<sup>8</sup> and
- capture abuse experienced by certain groups in the community—such as those from a culturally and linguistically diverse background,<sup>9</sup> the aged, persons with a disability and persons in same-sex relationships.

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<sup>8</sup> The *Intervention Orders (Prevention of Abuse) Act 2009* (SA) focuses on both impact and intent: s 8.

<sup>9</sup> An explanation of the Commissions' use of the phrase 'culturally and linguistically diverse' is set out in Ch 1.

Table A

	Assault	Sexual assault	Kidnap/deprive of liberty	Property damage	Harm animal	Economic abuse	Emotional/psych abuse *
NSW	✓	✓	✓	✓			
Vic	✓	✓	✓	✓	✓	✓	✓
Qld	Wilful injury	Indecent behaviour without consent		✓	Eg of wilful property damage		
WA	✓		✓	✓	Eg of property damage		✓
SA	Physical injury—result or intent	✓ Eg of emotional or psych abuse	Eg of emotional or psych abuse	✓ Result or intent	Eg of emotional or psych abuse	✓	✓
Tas	✓	✓	✓			✓	✓
ACT	✓ plus physical or personal injury	✓	✓	✓	✓(animal violence offence)		
NT	Eg of conduct causing harm	Eg of conduct causing harm		✓	✓	✓	

\* Psych = Psychological

In addition to the conduct captured in Table A, some types of threats constitute family violence in all jurisdictions; and specific criminal offences in NSW and the ACT also constitute family violence.

Table A

	Stalk	Intimidate/ coerce	Harass	Expose child to violence	Breach protection order
NSW	✓	✓	✓		✓
Vic		Eg of emotional abuse	Eg of emotional abuse	✓	
Qld		✓	✓		
WA	Pursuing with intent to intimidate	✓			
SA	Captured in examples of emotional or psych*abuse	Captured in examples of emotional/psych abuse plus denial of social/personal autonomy			
Tas	✓	✓			✓
ACT	✓		✓ or offensive conduct		✓
NT	✓	✓	Eg of intimidation		

\* Psych = Psychological

## Linkage of definitions of family violence to criminal law

### Linkage to state and territory criminal law

5.14 A key difference between definitions of family violence in family violence legislation is the extent to which those definitions are directly linked to specific criminal law offences. When family violence is defined by reference to criminal offences, the behaviour that constitutes family violence can form the basis for a protection order as well as a prosecution for a criminal offence, although the latter will require proof beyond reasonable doubt, instead of on the balance of probabilities.<sup>10</sup>

5.15 NSW family violence legislation does not define family violence. Rather it defines ‘domestic violence offence’ by referring specifically to 55 ‘personal violence’ offences in the *Crimes Act 1900* (NSW) where those offences are committed by persons in defined domestic relationships against other persons.<sup>11</sup> The offences include, for example, murder, manslaughter, wounding or causing grievous bodily harm with intent, assault, sexual assault, kidnapping, child abduction and destroying or damaging property. The list also includes narrower offences such as discharging a firearm with intent, causing bodily injury by gunpowder, not providing a wife with food, and setting traps.

5.16 Some of the ‘personal violence’ offences included in the definition of ‘domestic violence offence’ in the NSW family violence legislation have been repealed.<sup>12</sup> These historical offences are retained in the definition because such offences can be recorded on a person’s criminal record as ‘domestic violence offences’<sup>13</sup> and this has a number of important consequences.<sup>14</sup>

5.17 The NSW family violence legislation also provides that stalking, intimidation with intent to cause fear of physical or mental harm, and attempts to commit any specified offence can amount to ‘domestic violence’.<sup>15</sup>

5.18 The ACT family violence legislation sets out a general definition of ‘domestic violence’ which covers, for example, any conduct that causes physical or personal injury to a relevant person, or is harassing or offensive. The definition also provides that a ‘domestic violence offence’ is an offence against scheduled legislative provisions.<sup>16</sup> The scheduled offences cover a broad range of conduct. They include offences traditionally recognised as including forms of family violence, such as assault

10 Ch 8 discusses some differences between civil and criminal responses to family violence, and Ch 11 discusses the interaction between protection orders obtained under family violence laws and the criminal law.

11 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4.

12 Including *Crimes Act 1900* (NSW) ss 61B–E, 665A, 562ZG.

13 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 12.

14 Ibid s 12. The note to s 12 states, for example, that an indication in the charge for an offence that a person has committed a domestic violence offence will be relevant in bail proceedings. Further, the recording on a person’s criminal record that an offence is a ‘domestic violence offence’ is relevant to determining whether a person’s behaviour amounts to stalking or intimidation as previous behaviour constituting ‘domestic violence’ is taken into account.

15 Ibid s 4. ‘Intimidation’ is separately defined, and captures, for example, harassment or molestation.

16 *Domestic Violence and Protection Orders Act 2008* (ACT) s 13, sch 1.

and wounding, as well as offences that are less obviously related to family violence—such as causing bushfires, arson, trespass on government premises, and refusing or neglecting to leave government premises when directed.<sup>17</sup> Some of the scheduled offences recognised in the ACT as constituting family violence are not recognised as family violence offences in NSW.<sup>18</sup>

5.19 Other state and territory definitions of family violence pick up selected definitions of criminal law offences. For example, the Victorian family violence legislation provides that the definition of ‘assault’ is the same as the definition of assault in s 31 of the *Crimes Act 1958* (Vic).<sup>19</sup> Similarly, the Western Australian family violence legislation provides that various definitions, including those of ‘assault’, ‘intimidate’, ‘kidnapping or depriving the person of his or her liberty’ and ‘pursue’ are the same as the equivalent definitions in the *Criminal Code* (WA).<sup>20</sup>

5.20 In contrast to the approach of the NSW family violence legislation, other state and territory definitions largely describe conduct that constitutes family violence without linking that conduct to specific criminal offences or, where that conduct could constitute an offence, without defining the conduct or attempting to align the definitions with those used in the criminal law. While in these cases there may be an overlap between conduct constituting family violence for the purpose of obtaining a protection order and the conduct forming the basis for a criminal prosecution, the scope of the definition for the purposes of the protection order may be somewhat unclear. Specific examples of non-alignment of definitions or terminology across family violence legislation and the criminal law are discussed in Chapter 6.

5.21 In other cases, the conduct described as falling within the definition of family violence may not amount to a criminal offence—for example, emotional abuse—but may provide grounds for the making of a civil family violence protection order.<sup>21</sup> The Victorian legislation, for example, explicitly provides that ‘to remove doubt it is declared that behaviour may constitute family violence even if behaviour would not constitute a criminal offence’.<sup>22</sup>

#### ***Linkage to federal criminal law***

5.22 To the extent that family violence legislation links the definition of family violence to specific state or territory criminal offences—in the absence of a broader

17 Ibid sch 1. One stakeholder informed the Commissions that it did not think that the offences of causing bushfires, engaging in unreasonable obstruction in relation to the use of government premises; behaving in an offensive or disorderly manner while in or on government premises; and refusing or neglecting to leave government premises when directed had been used as the basis for obtaining a protection order: Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

18 For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4 does not categorise the offences of negligent driving and causing bushfires as family violence offences where those offences are committed by defined persons, whereas the *Domestic Violence and Protection Orders Act 2008* (ACT) does.

19 *Family Violence Protection Act 2008* (Vic) s 4.

20 *Restraining Orders Act 1997* (WA) s 6.

21 As noted below, economic abuse is defined as a form of family violence in some jurisdictions without being a criminal offence, whereas in Tasmania it is a criminal offence.

22 *Family Violence Protection Act 2008* (Vic) s 5(3).

definition of family violence, as is the case in NSW—it leaves no scope for the definition to capture conduct potentially falling within the ambit of federal offences.

5.23 There are, however, a number of federal offences which could potentially fall within the ambit of family violence and give rise to a protection order. For example, conduct such as threatening behaviour or harassment that can form the basis for a protection order can also fall within the ambit of the following federal offences:

- using a carriage service to make a threat;<sup>23</sup>
- using a carriage service to menace, harass or cause offence;<sup>24</sup>
- using a postal or similar service to make a threat,<sup>25</sup> and
- using a postal or similar service to menace, harass or cause offence.<sup>26</sup>

5.24 The Local Court of NSW has stated that state and federal laws probably most frequently overlap where a protection order is sought in respect of conduct that amounts to the abovementioned federal offences of using a carriage service to make a threat, or to menace, harass or cause offence.<sup>27</sup>

5.25 Another area of potential overlap is in relation to conduct constituting economic abuse. For example, coercing a family member to claim a social security payment is recognised as economic abuse amounting to family violence in some jurisdictions.<sup>28</sup> Such behaviour could also constitute offences under social security legislation as well as the *Criminal Code Act 1995* (Cth) relating to fraudulent conduct—such as obtaining a financial advantage by deception or making false or misleading statements in applications. In a submission to this Inquiry, National Legal Aid noted that:

Anecdotally, it is common for victims of family violence to disclose that they have been encouraged by the perpetrator to defraud Centrelink, and that, having done so, the perpetrator subsequently uses the fact of the offence to control them. In other cases, the financial abuse that is suffered by the victim causes them to commit offences of this kind to obtain money to feed the family.<sup>29</sup>

5.26 A less likely but nonetheless potentially relevant area where a federal offence could occur in a family violence context is sexual servitude, where the person committing the offence is in a defined family relationship with the victim.<sup>30</sup>

23     *Criminal Code* (Cth) s 474.15.

24     Ibid s 474.17.

25     Ibid s 471.11.

26     Ibid s 471.12.

27     Local Court of NSW, *Submission FV 101*, 4 June 2010.

28     See, eg, *Family Violence Protection Act 2008* (Vic) s 6. Such behaviour could also constitute harassment and intimidation.

29     National Legal Aid, *Submission FV 232*, 15 July 2010.

30     *Criminal Code* (Cth) ch 8 div 270. For example, a person whose conduct causes another person to enter into or remain in sexual servitude is guilty of an offence. Sexual servitude is the condition of a person who provides sexual services and who, because of the use of force or threats—including a threat to cause a person's deportation—is not free, for example, to cease providing sexual services. See generally *R v Tang* (2008) 237 CLR 1; B McSherry, 'Trafficking in Persons: A Critical Analysis of the New Criminal Code Offences' (2006) 18 *Current Issues in Criminal Justice* 385.

## **Types of conduct recognised as family violence**

5.27 The discussion below gives a snapshot of the various types of conduct that may comprise family violence across the state and territory jurisdictions.<sup>31</sup>

### ***Sexual assault***

5.28 Significantly, not every jurisdiction expressly refers to sexual assault in the definition of family violence—nor did the 1999 Model Domestic Violence Laws.<sup>32</sup> The Victorian Law Reform Commission (VLRC) recommended that the definition of family violence should include specific references to sexual forms of family violence.<sup>33</sup> The National Council to Reduce Violence Against Women and their Children also stated that ‘it is important that legislation *explicitly* acknowledges sexual offences as constituting domestic and family violence’.<sup>34</sup>

5.29 Where the definition of family violence recognises sexual assault as a form of family violence, the prominence it is given in the definition varies. For example, the general definition of ‘domestic violence’ in s 13 of the *Domestic Violence and Protection Orders Act 2008* (ACT) does not refer to sexual assault, although various sexual assault offences are included in sch 1, which lists all ‘domestic violence offences’. In the Northern Territory, sexual assault is cited in the definition as an example of conduct causing harm,<sup>35</sup> whereas in Tasmania it is cited as a category of conduct in its own right.<sup>36</sup> In Victoria behaviour that is sexually abusive is captured by the definition of family violence<sup>37</sup> and, in Queensland, the definition of family violence captures ‘indecent behaviour to the other person without consent’.<sup>38</sup>

5.30 Part G of this Report deals with sexual assault, and the ‘invisibility’ of sexual assault in family violence cases is discussed in Chapter 24.

### ***Economic abuse***

5.31 Only some jurisdictions include ‘economic abuse’ in their definition of family violence—namely Victoria, South Australia, Tasmania and the Northern Territory.

5.32 There are some differences in the precise formulations of economic abuse. It may include, for example:

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31 A more detailed examination of the types of family violence recognised is set out on a jurisdiction-by-jurisdiction basis in: Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009).

32 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 3(1). The Model Domestic Violence Laws project is discussed further in Ch 7.

33 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [4.39]–[4.43], Rec 15.

34 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 112.

35 *Domestic and Family Violence Act 2007* (NT) s 5(a).

36 *Family Violence Act 2004* (Tas) s 7(a)(i).

37 *Family Violence Protection Act 2008* (Vic) s 5(1)(a)(i).

38 *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1)(d).

- unreasonable controlling behaviour without consent that denies a person financial autonomy;
- withholding financial support reasonably necessary for the maintenance of a partner;
- coercing a partner to relinquish control over assets;
- unreasonably preventing a person from taking part in decisions over household expenditure or the disposition of joint property;
- coercing the person to claim social security payments; and
- preventing the person from seeking or keeping employment.<sup>39</sup>

5.33 There are differences in the extent to which the provisions require a particular intention on the part of the person engaging in economic abuse. Only the Tasmanian provision criminalises economic abuse, requiring that the person committing it has the intention unreasonably to control or intimidate his or her spouse or partner or cause mental harm, apprehension or fear in committing certain acts of economic abuse.<sup>40</sup>

5.34 Economic abuse is a particular form of violence that has been identified as used against older women. The Australian Domestic and Family Violence Clearinghouse has highlighted the problem of abuse of older women being ‘lost in the cracks’ between the family violence and elder abuse services systems.<sup>41</sup> It notes the serious under-reporting of violence against older women, noting a greater reluctance of older women to disclose personal matters.<sup>42</sup> Older women living alone may be more vulnerable to economic abuse by an adult child following the death of a partner.<sup>43</sup>

#### ***Emotional or psychological abuse***

5.35 Only some state legislation expressly refers to emotional or psychological abuse as a form of family violence. There are differences in the way these terms are defined—if they are defined at all.<sup>44</sup> More significantly, only the Tasmanian legislation makes emotional abuse (and intimidation) a criminal offence.<sup>45</sup> Professors Belinda Fehlberg and Juliet Behrens state that the Tasmanian provisions:

39 *Family Violence Protection Act 2008* (Vic) s 6; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(5); *Family Violence Act 2004* (Tas) ss 7, 8; *Domestic and Family Violence Act 2007* (NT) s 5. See also *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4 which provides a more limited offence of wilfully and without lawful excuse failing to provide a wife with necessary food, clothing or lodgings so that her life is endangered or her health seriously injured.

40 *Family Violence Act 2004* (Tas) s 8. The Commissions are not aware of any prosecution for economic abuse under the Tasmanian provision. The offence of economic abuse is discussed further in Ch 13.

41 L McFerran, *The Disappearing Age: A Discussion Paper on a Strategy to Address Violence Against Older Women* (2009), prepared for the Australian Domestic and Family Violence Clearinghouse, 2 (citations omitted).

42 Ibid, 2 (citations omitted).

43 Ibid, 3.

44 *Family Violence Protection Act 2008* (Vic) ss 5, 7; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(4); *Restraining Orders Act 1997* (WA) s 6; *Family Violence Act 2004* (Tas) s 7.

45 *Family Violence Act 2004* (Tas) s 9.

bring criminal law in line with the civil definition by creating new offences that fill the gap between the legal definitions of criminal conduct constituting offences such as assault and the non-physical, control based types of violence. This creation of special domestic violence offences is unique in Australia and was not, for example, proposed in the Model Domestic Violence Laws, nor by the Victorian Law Reform Commission, which focused instead on the grounds for obtaining a civil protection order.<sup>46</sup>

5.36 A 2008 review of the Tasmanian family violence legislation noted that, as at that time, no charge had been brought for emotional abuse and intimidation but that the ground had been used in support of applications for protection orders.<sup>47</sup>

5.37 Both the Victorian and South Australian family violence legislation defines emotional or psychological abuse as well as giving examples of such abuse. The Victorian family violence legislation defines emotional or psychological abuse as behaviour that ‘torments, intimidates, harasses or is offensive’.<sup>48</sup> Examples of such behaviour include racial taunts, threatening to disclose a person’s sexual orientation or to commit suicide, preventing a person from keeping family and cultural connections, and threatening to withhold a person’s medication.<sup>49</sup> The South Australian family violence legislation defines emotional or psychological harm as including mental illness, nervous shock, and distress, anxiety or fear that is more than trivial.<sup>50</sup> Examples of such conduct include threatening to institutionalise the person and threatening to withdraw care on which the person is dependent.<sup>51</sup>

5.38 In contrast, Western Australian family violence legislation includes ‘emotionally abusive conduct’, but neither defines nor gives examples of such conduct.<sup>52</sup>

5.39 Emotional abuse or intimidation under the Tasmanian legislation is defined as the pursuit of ‘a course of conduct that he or she knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear, in his or her spouse’.<sup>53</sup>

5.40 Other legislation refers to conduct that is intimidating,<sup>54</sup> harassing<sup>55</sup> or offensive.<sup>56</sup> Intimidation is defined variously to include conduct that: causes reasonable

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46 B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 206.

47 Urbis, *Review of the Family Violence Act 2004* (2008), prepared for the Department of Justice (Tas), 12. The offence of emotional abuse is discussed in Ch 13.

48 *Family Violence Protection Act 2008* (Vic) s 7.

49 Ibid.

50 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(3).

51 Ibid s 8(4).

52 *Restraining Orders Act 1997* (WA) s 6(1)(d).

53 *Family Violence Act 2004* (Tas) s 9.

54 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 6, 7; *Domestic and Family Violence Protection Act 1989* (Qld) s 11; *Restraining Orders Act 1997* (WA) s 6. *Restraining Orders Act 1997* (WA) s 6 provides that the definition of intimidation is the same as that in the *Criminal Code* (WA) s 338D.

55 *Domestic and Family Violence Protection Act 1989* (Qld) s 11; *Domestic Violence and Protection Orders Act 2008* (ACT) s 13.

56 *Domestic Violence and Protection Orders Act 2008* (ACT) s 13.

apprehension or fear;<sup>57</sup> a reasonable apprehension of injury<sup>58</sup> or violence to the person or the person's property;<sup>59</sup> has the effect of unreasonably controlling the person or causing mental harm;<sup>60</sup> causes physical harm;<sup>61</sup> prevents the person from doing any act that the person is lawfully entitled to do or compels the person to do an act that the person is legally entitled to abstain from;<sup>62</sup> and conduct that amounts to harassment or molestation.<sup>63</sup> Intimidation is usually included either as a subcategory of emotional abuse or as a ground of family violence in its own right. Similarly, in some cases harassment and offensive behaviour are treated as subcategories of emotional abuse or of intimidation, while in other cases they form an aspect of family violence in their own right.

#### ***Kidnapping or deprivation of liberty***

5.41 Most jurisdictions expressly include kidnapping or deprivation of liberty as a form of family violence.<sup>64</sup> The South Australian family violence legislation includes it as an example of abuse that results in emotional or psychological damage.<sup>65</sup>

5.42 The family violence legislation of Queensland and the Northern Territory does not include kidnapping or deprivation of liberty in their definitions of family violence. The Australian Government Solicitor (AGS) has expressed the view that kidnapping could constitute intimidation under those legislative schemes.<sup>66</sup>

#### ***Damage to property***

5.43 All of the states and territories, except Tasmania, specify damage to property as constituting family violence. The 2008 review of the Tasmanian family violence legislation stated:

Stakeholders did note the absence of property damage within s 7(a) [the definition of family violence]; which was reported to be a common feature of family violence incidents, and at present cannot be pursued under this Act.<sup>67</sup>

5.44 The Queensland family violence legislation provides that the damage to property must be 'wilful'.<sup>68</sup> The Domestic Violence Legislation Working Group remarked that the inclusion of the element of 'wilfulness' in the Queensland provision 'is more

57 *Restraining Orders Act 1997* (WA) s 6(4) picks up the definition of 'intimidate' in *Criminal Code* (WA) s 338D.

58 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7.

59 *Domestic and Family Violence Act 2007* (NT) s 6.

60 *Ibid* s 6.

61 *Criminal Code Act Compilation 1913* (WA) s 338D picked up by *Restraining Orders Act 1997* (WA) s 6(4).

62 *Ibid*.

63 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 7.

64 *Ibid* s 4(a) picking up *Crimes Act 1900* (NSW) s 86 (kidnapping), s 87 (child abduction); *Family Violence Protection Act 2008* (Vic) s 5(2); *Restraining Orders Act 1997* (WA) s 6; *Family Violence Act 2004* (Tas) s 7(a)(iii); *Domestic Violence and Protection Orders Act 2008* (ACT) s 13(1)(c) picking up *Crimes Act 1900* (ACT) s 37 (abduction of young person) and s 38 (kidnapping).

65 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(4)(b).

66 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.1.5].

67 Urbis, *Review of the Family Violence Act 2004* (2008), prepared for the Department of Justice (Tas), 11.

68 *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1)(b).

appropriate to criminal behaviour and unnecessarily complicates what is required to be proved'.<sup>69</sup>

### ***Injury to animals***

5.45 Most jurisdictions provide that injuring or killing an animal constitutes family violence. In Queensland, Western Australia and the Northern Territory, harm to an animal is included as a type of property damage.<sup>70</sup> The ACT legislation separates damage to property from conduct directed to a pet, and makes the latter family violence where it constitutes a defined animal violence offence.<sup>71</sup> The Victorian legislation, however, includes conduct that threatens or causes the death or injury of an animal, irrespective of whether the animal belongs to the relevant family member, where such conduct is aimed at dominating or coercing the family member.<sup>72</sup>

5.46 The other jurisdictions are silent on whether harm to animals constitutes family violence. Harm to animals may fall within the broader category of damage to property, but the Tasmanian legislation does not include damage to property in its definition of family violence. Harm to an animal may in some cases be covered by more general provisions such as emotional abuse.<sup>73</sup>

### ***Stalking***

5.47 Four jurisdictions expressly include stalking as conduct that constitutes family violence,<sup>74</sup> with three of those jurisdictions linking the conduct to the criminal offence of stalking.<sup>75</sup> The situation in the Northern Territory warrants special mention because of the disjunction between the civil and criminal definitions of stalking. This is discussed in Chapter 6.

5.48 Other jurisdictions do not expressly refer to stalking as conduct that may constitute family violence, but their definitions, to varying degrees, may encompass conduct that includes certain stalking behaviour.<sup>76</sup>

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69 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), 19.

70 *Domestic and Family Violence Protection Act 1989* (Qld) s 11; *Restraining Orders Act 1997* (WA) s 6; *Domestic and Family Violence Act 2007* (NT) s 5.

71 *Domestic Violence and Protection Orders Act 2008* (ACT) s 13(1)(b), (f); 13(3).

72 *Family Violence Protection Act 2008* (Vic) s 5. This approach is consistent with that proposed by the Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 3(1).

73 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.1.31].

74 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 13; *Family Violence Act 2004* (Tas) s 7(a)(iv); *Domestic Violence and Protection Orders Act 2008* (ACT) s 13, sch 1; *Domestic and Family Violence Act 2007* (NT) ss 5, 7.

75 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 4(b), 13; *Family Violence Act 2004* (Tas) s 7(a)(iv), linking to *Criminal Code* (Tas) s 192; *Domestic Violence and Protection Orders Act 2008* (ACT) s 13, sch 1, linking to *Crimes Act 1900* (ACT) s 35.

76 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.1.24]. For example, *Domestic and Family Violence Protection Act 1989* (Qld) s 11(c) gives examples of stalking behaviour to describe intimidation or harassment. Less explicit is the *Family Violence Protection Act 2008* (Vic) ss 5, 7 which generally refer to conduct that is threatening, tormenting, harassing or intimidating.

### **Exposure of children to violence**

5.49 Victoria is the only Australian jurisdiction where causing a child to witness or otherwise be exposed to the effects of family violence itself constitutes family violence.<sup>77</sup> The legislation in Western Australia, South Australia and the Northern Territory does not treat exposure of a child to family violence as constituting family violence but expressly allows for the making of protection orders to protect children from such exposure.<sup>78</sup>

5.50 The legislation in NSW provides that a child must be included in a protection order if the child is in a domestic relationship with the person subject to the order.<sup>79</sup>

5.51 Where jurisdictions have definitions that include emotional or psychological abuse, these may encompass the exposure of a child to family violence.<sup>80</sup>

### **Threats to commit acts of family violence**

5.52 In most jurisdictions the threat to commit certain acts of family violence also constitutes family violence.<sup>81</sup> In some jurisdictions threats to commit assault, cause physical injury, or damage property are included, but threats to intimidate or be emotionally abusive or engage in conduct amounting to stalking are not.<sup>82</sup> In other jurisdictions, however, threatening to commit non-physical violence—such as intimidation, stalking and economic abuse—are specifically included.<sup>83</sup>

### **Breach of protection orders**

5.53 In NSW, Tasmania and the ACT a breach of a protection order is included in the definition of family violence.<sup>84</sup>

## **Submissions and consultations**

### **A common definition or shared understanding of family violence?**

5.54 In the Consultation Paper, the Commissions put forward two alternative proposals concerning the definition of family violence across family violence legislation. One was that state and territory family violence legislation should contain

77 *Family Violence Protection Act 2008* (Vic) s 5. See also *Domestic Violence Act 1995* (NZ) s 3(3).

78 *Restraining Orders Act 1997* (WA) s 11B; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 7(1)(b); *Domestic and Family Violence Act 2007* (NT) s 18(2).

79 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 38. The court has discretion to vary such an order.

80 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.1.12].

81 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4(c); *Family Violence Protection Act 2008* (Vic) ss 5(1)(a)(iv), 5(2); *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1)(e); *Restraining Orders Act 1997* (WA) s 6(1)(f); *Family Violence Act 2004* (Tas) s 7 (a)(v); *Domestic Violence and Protection Orders Act 2008* (ACT) s 13(1)(d), (g); *Domestic and Family Violence Act 2007* (NT) s 5(f). *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(4) treats certain threatening behaviour as emotional or psychological abuse.

82 See, eg, *Restraining Orders Act 1997* (WA) s 6(f).

83 See, eg, *Domestic and Family Violence Act 2007* (NT) s 5(f).

84 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 4(c); *Family Violence Act 2004* (Tas) s 7; *Domestic Violence and Protection Orders Act 2008* (ACT) s 13(2).

the same definition of family violence covering specified physical and non-physical violence, with the definition of family violence in the *Family Violence Protection Act* 2008 (Vic) being used as a model. The other was that the definitions of family violence in state and territory family violence legislation should recognise the same types of physical and non-physical violence, including sexual assault, economic abuse, emotional or psychological abuse, kidnapping and deprivation of liberty, damage to property, harm or injury to an animal irrespective of whether the animal is technically the property of the victim, and exposure of children to violence.<sup>85</sup>

***Support for proposal and for Victorian definition to be used as a model***

5.55 There was overwhelming support for this proposal, although many stakeholders did not specify which of the two alternatives they preferred.<sup>86</sup> Specifically, there was strong support for the definition in the Victorian legislation to be used as a model.<sup>87</sup> For example, the Domestic Violence Prevention Council (ACT) submitted that its support for either of the two proposals

is strongly linked to the definition in the [Victorian legislation] being used as a model. Without this model as the aim, the states and territories with more progressive legislation could be at a disadvantage regarding the outcome of negotiations.<sup>88</sup>

5.56 The Victorian Government noted that the Victorian Department of Justice had received positive feedback on the definition contained in its legislation, when undertaking a six month review of the legislation, to June 2009. For example, the review found that:

- the expanded definitions of family violence to include the non-physical forms of violence are being used in support of applications for [protection] orders where other types of abuse have also been a feature of the violence; ... and

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85 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Proposal 4–1(a), (b). Each of the separate components of the definition was the subject of a discrete proposal, and is addressed separately below.

86 For example, Family Relationship Services Australia, *Submission FV 231*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

87 For example, The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010. However, the Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010 expressed a preference for the definition in the South Australian family violence legislation.

88 Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

- the changes to the definition within the Act are being utilised in Men's Behaviour Change Programs, as an opportunity to talk about the impact of family violence, such as the impact of controlling behaviours.<sup>89</sup>

5.57 The Magistrates' Court and the Children's Court of Victoria submitted that the definition of family violence in the Victorian family violence legislation had proved itself to be workable.

The introduction of the [Act] and, including this definition, has resulted in a significant increase (approximately 10 per cent) in the number of applications to the Courts for family violence [protection] orders. The definition encourages magistrates to broaden their thinking about the risks associated with the history and dynamics of the relationship between the applicant and the respondent.<sup>90</sup>

5.58 Family Relationship Services Australia noted that individuals seeking support from family and relationship services are often ambivalent about recognising and naming violence within their relationships, and that perhaps one of the reasons for this is 'because violence is seen as part of the family dynamic and not clearly identified as unacceptable behaviour'.<sup>91</sup>

The development of a model definition would ... be instructive for service systems and professionals working with families who are sometimes confronted with diverse community expectations and debate over what constitutes family violence. ... A clear definition would help professionals in their role of educating people and explaining service system responses.<sup>92</sup>

5.59 The Australian Domestic and Family Violence Clearinghouse expressed a preference for the definition in the South Australian family violence legislation to be adopted—because of its focus on harm, but stated that its alternative preference was the Victorian definition because it expanded the availability of orders 'to a wider range of abusive behaviours than does a purely conduct based definition'.<sup>93</sup>

5.60 Of those submissions that expressed a preference for one of the two alternative proposals, opinions were divided as to whether the definition should be the same or should be based on a common understanding.

#### ***Support for same definition***

5.61 Some stakeholders, including Indigenous legal service providers;<sup>94</sup> advocacy organisations;<sup>95</sup> legal aid;<sup>96</sup> service providers;<sup>97</sup> crisis accommodation services;<sup>98</sup>

89 Victorian Government, *Submission FV 120*, 15 June 2010.

90 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

91 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

92 Ibid.

93 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

94 For example, Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

95 For example, National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010.

96 For example, Legal Aid NSW, *Submission FV 219*, 1 July 2010.

97 For example, UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010.

98 For example, Confidential, *Submission FV 128*, 22 June 2010.

individuals associated with advocacy organisations;<sup>99</sup> and other individuals,<sup>100</sup> expressed a preference for a common definition. For example, the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service submitted:

The Service works across NT, SA and WA and so works within three different sets of legislation. If there was a consistent definition in the state and territory family violence legislation this would make it easier for the Service, especially where caseworkers work with clients from a state or territory that is not their primary area.

Aboriginal people in central Australia are very mobile, and move freely between communities in WA, SA and the NT. A consistent definition would mean that what constitutes family violence is the same in whatever community the violence occurs.<sup>101</sup>

5.62 Other reasons given in support of the same definition include that it would:

- assist 'families' experiences of procedural fairness, particularly if those experiences are complicated ... by relocation across state boundaries;<sup>102</sup>
- address difficulties faced by victims when attempting to register a protection order in another state or territory;<sup>103</sup>
- give greater clarity. The alternative of allowing for recognition of the same types of conduct that may constitute family violence 'would make the interpretation of these concepts open to broad interpretation';<sup>104</sup> and
- assist in enabling marginalised women to have enhanced access to legal protection—if the uniform definition to be applied were also broad.<sup>105</sup>

5.63 Support was sometimes expressed, however, with two broad qualifications: that the common definition should not be achieved by adopting the lowest common denominator,<sup>106</sup> and that it is not pursued simply for the sake of uniformity.<sup>107</sup>

#### *Opposition to same definition*

5.64 The Queensland Law Society specifically opposed a common definition on the basis that it could hamper innovative approaches to family violence.

Domestic and family violence is a topic that governments will keep wishing to legislate in response to. But it is a healthy part of the Australian Federation that

99 For example, C Pragnell, *Submission FV 70*, 2 June 2010.

100 For example, K Johnstone, *Submission FV 107*, 7 June 2010; A Harland, *Submission FV 80*, 2 June 2010.

101 Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

102 UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010.

103 Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

104 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

105 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010.

106 Northern Territory Police, *Consultation*, Darwin, 26 May 2010. See also The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010, in which the view was expressed that any definition adopted should not 'undermine the integrity' of a broad model definition; and Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010, in which the view was expressed that the definition must also be 'comprehensive'.

107 Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

different states and territories are able to respond to domestic and family violence in an experimental way to see what works and what does not work, with the benefit that states and territories are able to learn from each other and improve legislation to ensure that this violence is adequately tackled. This process of innovation should not be removed by adopting a uniform definition.<sup>108</sup>

#### ***Support for common shared understanding without the same definition***

5.65 Other stakeholders, however, including one state government;<sup>109</sup> National Legal Aid;<sup>110</sup> academics;<sup>111</sup> women's legal service providers;<sup>112</sup> general legal service providers;<sup>113</sup> rape crisis centres;<sup>114</sup> peak family violence bodies;<sup>115</sup> representative bodies of specialist domestic violence services;<sup>116</sup> advocacy coalitions;<sup>117</sup> councils for single mothers;<sup>118</sup> police bodies;<sup>119</sup> education providers;<sup>120</sup> those working with women with disabilities;<sup>121</sup> and individuals<sup>122</sup> expressed a preference for a definition based on a common understanding rather than a common definition. Reasons advanced included that:

- it would go some way to towards ensuring harmonisation of state and territory and Commonwealth laws;<sup>123</sup>
- developing a shared understanding of what constitutes domestic and family violence within and across jurisdictions is an important component for the development of integrated systems and responses;<sup>124</sup>
- it is more achievable<sup>125</sup>—attaining the same definition may be particularly difficult to realise in practice given that many jurisdictions have reviewed their family violence legislation in recent years;<sup>126</sup>

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108 Queensland Law Society, *Submission FV 178*, 25 June 2010.

109 Queensland Government, *Submission FV 229*, 14 July 2010.

110 National Legal Aid, *Submission FV 232*, 15 July 2010.

111 For example, J Stubbs, *Submission FV 186*, 25 June 2010.

112 For example, Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

113 For example, Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010.

114 Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

115 For example, Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

116 NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010.

117 For example, National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010.

118 National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

119 Police Association of New South Wales, *Submission FV 145*, 24 June 2010.

120 Education Centre Against Violence, *Submission FV 90*, 3 June 2010.

121 Women Working Alongside Women with Intellectual and Learning Disabilities Sexual Violence Prevention Association, *Submission FV 140*, 24 June 2010.

122 For example, Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 82*, 2 June 2010.

123 Queensland Government, *Submission FV 229*, 14 July 2010.

124 NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010.

125 N Ross, *Submission FV 129*, 21 June 2010.

126 Queensland Government, *Submission FV 229*, 14 July 2010.

- the political effort required to achieve a uniform definition may not be warranted, especially in light of the failure of the model laws proposed in the Model Domestic Violence Laws Report;<sup>127</sup>
- drafting a uniform definition acceptable to all state and territories would be a significant task and would risk limiting protection for victims of violence to the lowest common denominator;<sup>128</sup>
- there is merit in leaving room for states and territories to adapt definitions to meet local concerns, provided that there is agreement that the same types of physical and non-physical conduct are recognised;<sup>129</sup>
- a consistent approach across all jurisdictions would be useful, and recognition of protection orders between jurisdictions would provide better protection for women and children;<sup>130</sup> and
- it is more likely to capture the nuanced differences experienced by victims of family violence with a disability.<sup>131</sup>

5.66 National Legal Aid emphasised that such a common understanding should reflect contemporary understandings of family violence and include all behaviours that evidence-based research have found to be damaging.<sup>132</sup>

5.67 One stakeholder, while acknowledging that a uniform definition could support ‘consistency in implementation’ submitted that:

there are some varying circumstances in different states—for example, issues and nuances specific to ... Indigenous population[s] ... A core uniform definition with additional provisions as individual states and territories see fit would allow for geography/demographic specific issues. Alternatively, we would support [a definition based on a common understanding] to allow for jurisdiction specific examples in definitions.<sup>133</sup>

### ***Opposition to proposal***

5.68 Professor Patrick Parkinson expressed strong opposition to a common definition or shared understanding of family violence based on the Victorian definition for a variety of reasons, including:

- It takes characteristics of coercive controlling violence which represent interrelated aspects of women’s experience of control and treats them as

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127 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

128 Queensland Law Society, *Submission FV 178*, 25 June 2010. See also Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; NSW Women’s Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010.

129 J Stubbs, *Submission FV 186*, 25 June 2010.

130 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010.

131 Women Working Alongside Women with Intellectual and Learning Disabilities Sexual Violence Prevention Association, *Submission FV 140*, 24 June 2010.

132 National Legal Aid, *Submission FV 232*, 15 July 2010.

133 Confidential, *Submission FV 164*, 25 June 2010.

independent forms of ‘violence’ with applications outside of the context of coercion and control.

- An expansion of the definition of family violence could have very substantial net-widening effects, with the consequence that the courts may be distracted by the sheer numbers of allegations of violence from focusing both attention and resources on the areas where careful assessment and decisive intervention is most necessary.
- Any expansion of the definitions may have significant resource implications for state and territory magistrates’ courts.
- An expansion of the grounds for family violence orders may undermine efforts at reducing conflict between parents after separation without doing much to improve safety.
- There is a risk that certain forms of abuse will be extremely hard to define, being very reliant on personal opinion and subjective perception.<sup>134</sup>

5.69 Parkinson recommended an alternative formulation of family violence, which is considered separately below in the context of the discussion of family violence as coercing or controlling behaviour.

### Family violence as coercing or controlling behaviour

5.70 In the Consultation Paper, the Commissions asked whether the definition of family violence in state and territory family violence legislation, in addition to setting out the types of conduct that constitute family violence, should provide that family violence is violent, threatening behaviour or any other form of behaviour that coerces, controls or dominates a family member or causes that family member to be fearful.<sup>135</sup>

5.71 There was overwhelming support for this approach from a wide spectrum of stakeholders, including Indigenous legal and advocacy services; non-government organisations involved in the disability sector; legal service providers; courts; legal aid; victims’ groups; academics; crisis accommodation services; and individuals.<sup>136</sup> Various reasons were advanced in support including that:

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134 P Parkinson, *Submission FV 104*, 5 June 2010.

135 Consultation Paper, Question 4–1.

136 For example, National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Confidential, *Submission FV 198*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Victims of Crime Assistance League Inc NSW, *Submission FV 133*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010; Julia Farr Association, *Submission FV 103*, 4 June 2010; Confidential, *Submission FV 92*, 3 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

- ‘it is essential that the definition used is consistent with understanding the coercive control elements of family violence and shifts beyond the limited incident based approach commonly used in legal settings’;<sup>137</sup>
- it would assist women living in remote communities who are particularly vulnerable to controlling behaviour and find it difficult to break free from that control;<sup>138</sup>
- the inclusion of these matters is important to ensure that all aspects of an abusive relationship are caught by the legislation,<sup>139</sup> and assists in recognising the complexity of family violence;<sup>140</sup>
- understanding the dynamics of the use of power and control is critical to understanding family violence;<sup>141</sup> and such a definition would perform an educative role;<sup>142</sup>
- it allows new forms of behaviour to be included, provided that they meet this definition;<sup>143</sup>
- having a definition based on the dynamics and impact of family violence avoids the technicalities of definitions becoming an obstacle to protection, especially given that a common form of family violence is the use of strategies of intimidation and symbolic actions which have specific meaning for the victim but appear relatively harmless to others;<sup>144</sup>
- it acknowledges how family violence can result from situations where a person is increasingly dependent on support from family or others, and is therefore relevant to people living with a disability who can be particularly vulnerable to family violence;<sup>145</sup> and

<sup>137</sup> J Stubbs, *Submission FV 186*, 25 June 2010. Similar views were expressed in National Legal Aid, *Submission FV 232*, 15 July 2010 and Confidential, *Submission FV 184*, 25 June 2010.

<sup>138</sup> Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

<sup>139</sup> Confidential, *Submission FV 171*, 25 June 2010.

<sup>140</sup> Berry Street Inc, *Submission FV 163*, 25 June 2010.

<sup>141</sup> Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010. See also Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

<sup>142</sup> Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

<sup>143</sup> Legal Aid NSW, *Submission FV 219*, 1 July 2010. Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010 also submitted that it was appropriate to take a non-exhaustive approach to defining family violence.

<sup>144</sup> Confidential, *Submission FV 164*, 25 June 2010.

<sup>145</sup> Julia Farr Association, *Submission FV 103*, 4 June 2010.

- this approach is consistent with the definition in the Victorian family violence legislation, which has been reviewed and found to be working well in practice.<sup>146</sup>

5.72 It was also submitted that the definition should not capture the normal disciplinary actions of parents.<sup>147</sup>

5.73 On the precise wording of the definition, a partner violence counsellor submitted that:

Use of the term ‘dominate’ is superfluous when the words ‘coerces’ and ‘controls’ are also used. The range of meanings of the word ‘dominate’ is broad and it can constitute behaviour which is not necessarily harmful to another person, but which because it is conflated with coerces and controls, can be subject to misuse. It is more appropriate in the context of relationship dynamics and relationship counselling rather than in the context of family violence law.<sup>148</sup>

5.74 Two academics submitted that family violence should be defined more or less along these lines—that is, providing the overarching context for other aspects of the definition—rather than being an additional category in itself. Dr Jane Wangmann suggested that

the definition of family violence in civil protection order legislation should, in addition to setting out a non-exhaustive list of the types of behaviour falling under the purview of the legislation, explain the context of those acts by providing that ‘family violence is violent or threatening behaviour or any other form of behaviour that coerces, controls or dominates a family member or causes that family member to be fearful’ ...

For the civil protection order system to better respond to family violence—it needs to do more than simply respond to incidents of violence/abuse perpetrated by a person in a familial relationship. To remain focused on incidents creates the risk that civil protection order schemes: replicate the limitations of the criminal law; fail to acknowledge the way in which acts and behaviours are inextricably related; and fail to appreciate the way in which otherwise ‘minor’ events are in fact of critical concern to many women.

The context in which acts and behaviour take place takes on a heightened importance as legislative definitions are progressively broadened to include a range of non-physical and non-visible forms of abuse (for example, emotional abuse, verbal abuse, or economic abuse).<sup>149</sup>

5.75 Parkinson opposed a definition that would create ‘discrete categories of violence provable by reference to specific incidents or behaviours outside of a context of coercive, controlling violence or behaviour that causes someone to fear for their safety’, noting the significant net-widening effects of such an approach. He submitted that family violence should be defined as

146 Victorian Government, *Submission FV 120*, 15 June 2010. See also Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

147 For example, Confidential, *Submission FV 69*, 2 June 2010.

148 T McLean, *Submission FV 204*, 28 June 2010.

149 J Wangmann, *Submission FV 170*, 25 June 2010.

violent or threatening behaviour or any other form of behaviour, including sexual, economic or psychological abuse, which has the purpose of coercing, controlling or subjugating a family member or causing that family member to be fearful, or which is reasonable likely to have these consequences.<sup>150</sup>

5.76 The importance of context was also emphasised by Professor Patricia Easteal, who noted that:

Any one ‘incident’ is in actuality just a small part of a complex pattern of control and *cannot* be adequately understood nor its gravity measured in isolation from that background. At the centre is disempowerment and degradation.<sup>151</sup>

### **Need for a definition of family violence in NSW family violence legislation**

5.77 In the Consultation Paper, the Commissions proposed that the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) should be amended to include a definition of ‘domestic violence’ in addition to the current definition of ‘domestic violence offence’.<sup>152</sup> This proposal received widespread support.<sup>153</sup>

5.78 For example, Legal Aid NSW submitted that:

A single definition of domestic violence should be included in the Act. There are currently numerous definitions of domestic or family violence in various pieces of legislation in NSW but no comprehensive definition in the core legislative framework for domestic violence, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).<sup>154</sup>

5.79 The Women’s Domestic Violence Court Advocacy Service Network Inc (WDVCAS Network) also expressed the view that there was a need for a ‘single definition of domestic and family violence [to] form a core part of the legislative framework for addressing family violence’.<sup>155</sup> Both Legal Aid NSW and WDVCAS Network also supported a definition that recognises the gendered nature of family violence.<sup>156</sup>

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150 P Parkinson, *Submission FV 104*, 5 June 2010

151 P Easteal, *Submission FV 37*, 12 May 2010.

152 Consultation Paper, Proposal 4–2.

153 For example, Legal Aid NSW, *Submission FV 219*, 1 July 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; NSW Women’s Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Justice for Children, *Submission FV 177*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 92*, 3 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010 C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 68*, 1 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

154 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

155 Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

156 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

5.80 The Aboriginal Family Violence Prevention and Legal Service, in supporting the proposal, stated:

The current framing of family violence/personal violence in the NSW legislation is unwieldy to use in terms of being best placed to advise and define domestic violence and family violence. Reference only to offences can create a view in policing that domestic violence and family violence is only actionable where there is likely to be a police charge and it does not create a clear context for victims to be able to rely on police/court assistance in cases of threatening/coercive/controlling behaviour in the absence of assaults. A definition of domestic violence/family violence in the Act would assist this to change.<sup>157</sup>

5.81 A few stakeholders submitted that the NSW definition should use the terminology of ‘family violence’, for example, to be consistent with the terminology of the *Family Law Act 1975* (Cth).<sup>158</sup>

5.82 One stakeholder—the Australian Domestic and Family Violence Clearinghouse—thought the proposal was unnecessary ‘given that the NSW test for orders does not require a definition’.<sup>159</sup>

### Types of potentially relevant conduct

5.83 The discussion below canvasses stakeholder views on whether a range of behaviours is appropriate to include in the definition of family violence.

#### **Sexual assault**

5.84 In the Consultation Paper, the Commissions proposed that state and territory family violence laws should expressly recognise sexual assault in the definition of family violence.<sup>160</sup>

5.85 This proposal received overwhelming support,<sup>161</sup> with stakeholders submitting that:

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157 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

158 For example, A Harland, *Submission FV 80*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010.

159 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

160 Consultation Paper, Proposal 4–3.

161 For example, Family Relationship Services Australia, *Submission FV 231*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

- a large proportion of women experiencing family violence experience sexual assault as part of that violence;<sup>162</sup> yet casework experience suggests that many sexual assaults in intimate relationships go unreported, even where other forms of family violence are reported;<sup>163</sup>
- there appears to be a lot of unreported sexual assault that occurs in remote communities;<sup>164</sup>
- many victims do not recognise sexual assault by partners in the context of a domestic relationship as criminal or family violence, nor do police;<sup>165</sup>
- because sexual behaviour in an intimate relationship is ‘normal’, it may reduce the likelihood that third parties, including police officers and judicial officers, question the appropriateness of the behaviour;<sup>166</sup>
- sexual control and domination provides a veil of secrecy because the victim may not want to speak openly and freely about the parties’ sexual behaviour;<sup>167</sup>
- such a provision would assist in ‘shifting unhelpful social attitudes and myths around intimate partner sexual assault’ as ‘[u]nwilling submission to sexual demands in marriage is still viewed in many parts of society as part and parcel of a marriage relationship’;<sup>168</sup> and
- expressly recognising sexual assault as family violence may encourage reporting and lead to an increase, for example, in specific sexual assault support for victims.<sup>169</sup>

5.86 In particular:

- the Queensland Commission for Children and Young People and Child Guardian expressly supported the proposition that the Queensland family violence legislation be amended to recognise sexual assault;<sup>170</sup> and

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<sup>162</sup> Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

<sup>163</sup> Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010. See also Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

<sup>164</sup> Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

<sup>165</sup> Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

<sup>166</sup> Gosnells Community Legal Centre Inc, *Submission FV 56*, 31 May 2010.

<sup>167</sup> Ibid. See also Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

<sup>168</sup> National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010. Similar views were expressed in Confidential, *Submission FV 164*, 25 June 2010.

<sup>169</sup> Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010. See also National Legal Aid, *Submission FV 232*, 15 July 2010.

<sup>170</sup> Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010. The Queensland Law Society submitted that the reference to ‘indecent behaviour without consent’ in the definition of family violence in that state’s family violence legislation captured sexual offences against children where consent is not a defence: Queensland Law Society, *Submission FV 178*, 25 June 2010.

- Gosnells Community Legal Centre Inc expressly supported the proposition that the Western Australian family violence legislation be amended to recognise sexual assault to avoid any ambiguity for police officers, the judiciary and legal practitioners;<sup>171</sup> and
- The Domestic Violence Prevention Council (ACT) agreed that the ACT family violence legislation should include specific reference to sexual assault in the definition of family violence.<sup>172</sup>

5.87 The Department of Premier and Cabinet (Tas) supported the proposal but noted that:

unless there are practical systems in place to back up the legislation, the legislation itself is not going to improve results for victims of sexual assault.<sup>173</sup>

5.88 One stakeholder submitted that it was unnecessary to include sexual assault in the definition because it has long been recognised as a violent act by the courts.<sup>174</sup>

5.89 Some stakeholders submitted that the definition also needs to recognise sexual grooming behaviour.<sup>175</sup>

#### **Economic abuse**

5.90 In the Consultation Paper the Commissions proposed that state and territory family violence legislation should expressly recognise economic abuse in the definition of family violence.<sup>176</sup> This proposal received overwhelming support—including from groups representing the interests of Indigenous persons and those with a disability<sup>177</sup>—although a few stakeholders expressed dissent. Stakeholders who expressed support submitted, for example, that economic abuse:

171 Gosnells Community Legal Centre Inc, *Submission FV 56*, 31 May 2010.

172 Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

173 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

174 Confidential, *Submission FV 198*, 25 June 2010.

175 T Searle, *Submission FV 108*, 2 June 2010; Confidential, *Submission FV 96*, 2 June 2010.

176 Consultation Paper, Proposal 4–4.

177 For example, Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Family Relationship Services Australia, *Submission FV 231*, 15 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Disability Services Commission (WA), *Submission FV 138*, 23 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010; Confidential, *Submission FV 92*, 3 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; A Harland, *Submission FV 80*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; Gosnells Community Legal Centre Inc, *Submission FV 56*, 31 May 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

- is commonly used as a method of power and control within a family violence context, and has very serious impacts, including social isolation;<sup>178</sup>
- makes it very difficult for victims to leave abusive relationships because they are not able to access the funds needed to do so<sup>179</sup>;
- is often part of other abuse—such as sexual assault, where sexual services are demanded in return for household money;<sup>180</sup>
- is a common indicator of elder abuse;<sup>181</sup>
- may have an increased impact on people with a disability who may be vulnerable to economic exploitation, intimidation and abuse from carers, partners and other family members,<sup>182</sup> due to their dependence, having impaired decision-making capacity, and their not being afforded sufficient control of their finances by family members, proxies, or service systems;<sup>183</sup>
- is not adequately addressed in the family violence legislation of Western Australia, which fails to protect victims of such abuse, although in that state it is accepted amongst family violence case workers and service providers that economic abuse constitutes family violence, reflected in publications and information provided to victims;<sup>184</sup>
- should be included in the definition of family violence on the proviso that repeated, ongoing or persistent behaviour is required to be proved because ‘economic harm is unlikely to occur as a result of a single or occasional event’;<sup>185</sup> and
- may be difficult to prove—for example, one point in issue from the Tasmanian experience

is the extent to which it is reasonable to control a family member in certain ways, such as circumstances where one party takes control of the finances because the other party is a problem gambler or suffers from a mental illness or disability.<sup>186</sup>

5.91 A particular example of economic abuse in Indigenous communities in the Northern Territory was brought to the Commissions’ attention, namely ‘humbugging’—the practice of demanding money from relatives, often by the use of standover tactics. For example, one Indigenous family violence service submitted:

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178 For example, Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

179 Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010. A similar view was expressed by a victim of family violence: Confidential, *Submission FV 34*, 6 May 2010.

180 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

181 Confidential, *Submission FV 171*, 25 June 2010.

182 Disability Services Commission (WA), *Submission FV 138*, 23 June 2010.

183 Julia Farr Association, *Submission FV 103*, 4 June 2010.

184 Gosnells Community Legal Centre Inc, *Submission FV 56*, 31 May 2010.

185 T McLean, *Submission FV 204*, 28 June 2010.

186 National Legal Aid, *Submission FV 232*, 15 July 2010. Potential difficulties in enforcement were also noted in Police Association of New South Wales, *Submission FV 145*, 24 June 2010.

The Service receives many reports of women being made to give their money to their partners and other family members to buy alcohol and/or drugs (marijuana), and often with violence against the woman resulting from the consumption of the alcohol and/or drugs.

Economic abuse has also resulted in many of the ‘failure to thrive’ cases for children living in remote communities, which can then lead to children being removed by child protection authorities.<sup>187</sup>

5.92 The Magistrates’ Court and the Children’s Court of Victoria noted that, in their experience, it is rare for applicants for protection orders to rely on economic abuse alone—it is more often referred to in applications in association with other forms of controlling and coercive behaviour.<sup>188</sup> Those courts were unaware of any charges relating to breach of a protection order based on economic abuse alone.<sup>189</sup>

5.93 Women’s Legal Service Victoria noted the following case which involved economic abuse together with other forms of abuse:

In one instance, the inclusion of economic abuse was extremely relevant because the verbal, emotional and psychological abuse was heightened by the economic abuse. The protected persons were a mother and her disabled son, who were living in absolute squalor while the respondent father used all the family’s Centrelink payments for his ongoing addiction to drugs and alcohol. Having legislation that expressly recognised economic abuse, assisted the Magistrate to address the economic abuse. A notation was made in the order indicating that the respondent agreed to open a bank account for the protected person and to deposit a fortnightly specified amount for food and the maintenance of the home.<sup>190</sup>

5.94 The Commissions heard that protection orders have been obtained in the Northern Territory based on ‘humbugging’.<sup>191</sup> Further, the Queensland Law Society submitted that, although the family violence legislation of Queensland does not refer expressly to economic abuse in its definition of family violence, it is possible to obtain protection orders for economic abuse on the basis that such conduct constitutes ‘harassment’ or ‘intimidation’. It expressed the view, however, that in the reference to ‘harassment’ and ‘intimidation’

it would be useful to have an example which includes economic abuse so that it highlights specifically for police and magistrates that economic abuse is and can be an example of harassment or intimidation.<sup>192</sup>

187 Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010. The practice of ‘humbugging’ was also addressed in Confidential, *Submission FV 198*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010.

188 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010. A similar statement was expressed in Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010.

189 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

190 Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010.

191 Confidential, *Submission FV 198*, 25 June 2010.

192 Queensland Law Society, *Submission FV 178*, 25 June 2010.

5.95 A few stakeholders opposed the proposal on the basis that it would:

- ‘increase the criminalisation of Aboriginal people and would not serve the fundamental objective of addressing family violence’;<sup>193</sup> and
- broaden the scope for protection orders to be obtained for conduct not known or proscribed by the criminal law.<sup>194</sup>

5.96 The Law Society of NSW also opposed the proposal on the basis that it would be difficult to prove:

especially where the parties simply have different spending habits and attitudes towards saving and lifestyle. Economic abuse could be covered by intimidation if it can be proved to be used in an unacceptable controlling way. Otherwise the legislation is taking on the task of scrutinising and possibly criminalising the frugality of one party to a relationship.<sup>195</sup>

5.97 Parkinson opposed the inclusion of economic abuse as a discrete category of family violence outside of a context of coercive, controlling behaviour or behaviour that causes someone to fear for his or her safety.<sup>196</sup>

#### ***Emotional or psychological abuse***

5.98 In the Consultation Paper, the Commissions proposed that emotional or psychological abuse or intimidation or harassment should be recognised in the definition of family violence.<sup>197</sup> As outlined above, the Commissions’ general proposal about attaining a common understanding of the definition of family violence including specified non-physical violence received overwhelming support.

#### ***Use of examples***

5.99 In addition, the Commissions proposed that state and territory family violence legislation should include specific examples of emotional or psychological abuse or intimidation or harassment that illustrate acts of violence against certain vulnerable groups including: Indigenous persons; those from a culturally and linguistically diverse background; the aged; and those from gay, lesbian, bisexual, transgender and intersex communities.<sup>198</sup> The Consultation Paper noted that instructive models of such examples were included in the family violence legislation of Victoria and South Australia.

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193 North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010.

194 A Cannon, *Submission FV 137*, 23 June 2010.

195 Law Society of New South Wales, *Submission FV 205*, 30 June 2010. A Cannon, *Submission FV 137*, 23 June 2010 also referred to the complexities of proof.

196 P Parkinson, *Submission FV 104*, 5 June 2010.

197 Consultation Paper, Proposal 4–1, referring to conduct the subject of Proposal 4–5.

198 Ibid, Proposal 4–5.

5.100 This proposal received strong support,<sup>199</sup> although a few stakeholders expressed dissent.<sup>200</sup>

### **Support for the proposal**

5.101 Stakeholders that supported the proposal submitted, for example, that the inclusion of specific examples:

- could possibly assist in achieving more consistent responses from the justice system in relation to family violence;<sup>201</sup>
- provides clarity<sup>202</sup> and ‘an opportunity to expand the applicability of laws to disadvantaged groups whose experiences would otherwise be outside the realm of understanding of judicial officers’;<sup>203</sup>
- raises awareness of violence against disadvantaged groups and serves an important educative function;<sup>204</sup>
- would give police confidence that protection orders are appropriate in circumstances where there is not a physical altercation;<sup>205</sup> and
- allows for ‘sensitivity and accommodation of the specific circumstances of women in Indigenous communities and from other social groups’.<sup>206</sup> In particular, some stakeholders noted that threats to commit suicide are used by Indigenous persons who use violence as a form of coercion and control to stop victims from taking action against them.<sup>207</sup>

199 For example, Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; ACON, *Submission FV 119*, 15 June 2010; Julia Farr Association, *Submission FV 103*, 4 June 2010; Confidential, *Submission FV 92*, 3 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 37*, 12 May 2010.

200 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; P Parkinson, *Submission FV 104*, 5 June 2010; Confidential, *Submission FV 68*, 1 June 2010.

201 National Legal Aid, *Submission FV 232*, 15 July 2010.

202 For example, Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

203 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

204 For example, National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Disability Services Commission (WA), *Submission FV 138*, 23 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

205 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

206 Confidential, *Submission FV 164*, 25 June 2010.

207 For example, Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Confidential, *Consultation*, Darwin, 27 May 2010.

5.102 The educative role of such examples was also considered important. The Magistrates' Court and Children's Court of Victoria stated that the inclusion of specific examples has been very useful to magistrates in explaining to parties the range of behaviours that may constitute family violence. It has also been helpful to those interpreting legislation such as police, lawyers and court staff.<sup>208</sup>

5.103 In a joint submission, Domestic Violence Victoria and others submitted that:

In our experience it has been especially important to spell out in the legislation examples of family violence that impact particularly on victims from Indigenous, CALD and/or LGBTI communities, as well as on those who are aged or live with a disability, because despite the fact that these groups often suffer higher rates of violence than the rest of the population, violence that takes an emotional or psychological form is not commonly understood to fall under the legal definition of family violence, and therefore victims of such violence are under-served in policy and practice ...

Embedding acknowledgment of social context in legislation and policy has also assisted the development of a risk assessment framework used by service agencies. For example, in the two-week March 2009 period, police identified harm, ... threats or attempts by the perpetrator to commit suicide in 27 incidents (3%).<sup>209</sup>

5.104 ACON strongly supported the proposal, noting the unique aspects of same-sex violence, such as the 'use of societal homophobia as a tool of control' and the barriers of access to health and legal services due to fears of homophobia and breaches of confidentiality.

Recognising these unique aspects in legislation ... would enable a more socially inclusive sector so that clients who are from same-sex couple families can access the same services and legal protections that the broader community has access to.<sup>210</sup>

5.105 The Inner City Legal Centre submitted that issues concerning intersex communities should also be addressed. It agreed that listing specific examples of abuse would serve an educative function but cautioned that it could also limit the understanding of family violence for victims and service providers by excluding behaviours that 'are less understood or less overt'. It urged that any examples to be included be developed in consultation with key stakeholders in the gay, lesbian, bisexual, transgender and intersex communities.<sup>211</sup>

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208 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010. See also Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

209 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010 (citations omitted).

210 ACON, *Submission FV 119*, 15 June 2010; Confidential, *Submission FV 96*, 2 June 2010.

211 Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192*, 25 June 2010. National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010 also stated that members of vulnerable groups referred to should be consulted in relation to the appropriateness of the examples selected.

5.106 The Disability Services Commission (Western Australia) submitted that it would support the inclusion of examples of abuse particularly relevant to people with disability.<sup>212</sup>

It is the view of the Disability Services Commission that the definition of emotional or psychological abuse in the *Family Violence Protection Act 2008* (Vic) does not recognise the particular forms of emotional abuse commonly experienced by people with disability and that the examples given in the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) are too limited.

The Disability Services Commission supports the inclusion of the examples given in the consultation summary document as relevant to aged people or people with disability: ‘threatening to: institutionalise a person; withdraw care on which the person is dependent; withhold medication or prevent the person accessing medical equipment or treatment’. However, the term ‘prevent the person accessing medical equipment’ is not sufficiently inclusive to take account of the abuses commonly experienced by victims with disability. In addition to these examples the Disability Services Commission suggests including ‘prevent the person accessing aids and equipment used in the person’s daily life’.<sup>213</sup>

5.107 The One in Three Campaign noted the experience of men in its submission:

the evidence is incontrovertible that male victims of family violence face unique problems, just like other vulnerable groups. If specific vulnerable groups are to be detailed in legislation, male victims of family violence must surely be added as one of these groups.<sup>214</sup>

5.108 The Queensland Law Society submitted that there was no question that ‘harassment’ and ‘intimidation’ in the Queensland family violence legislation already included emotional or psychological abuse.<sup>215</sup>

#### ***Opposition to the proposal***

5.109 Stakeholders that opposed the proposal expressed the view that:

- the legislation should apply to everyone and that specific groups should not be identified,<sup>216</sup>
- specific examples ‘give little guidance to magistrates and judges dealing with the vast majority of intimate relationships in which allegations of psychological abuse may occur which do not involve indigenous families, closet gay partners, mixed race partners who are subject to racial taunts, elderly couples, where one is dependent on the other to provide medication, or others covered by these examples’.<sup>217</sup>

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212 A similar view was expressed in Julia Farr Association, *Submission FV 103*, 4 June 2010.

213 Disability Services Commission (WA), *Submission FV 138*, 23 June 2010.

214 One in Three Campaign, *Submission FV 35*, 12 May 2010.

215 Queensland Law Society, *Submission FV 178*, 25 June 2010.

216 Confidential, *Submission FV 68*, 1 June 2010.

217 P Parkinson, *Submission FV 104*, 5 June 2010.

- including ‘offensive’ behaviour within the definition of family violence, as is the case in Victoria and the ACT, is problematic;<sup>218</sup>
- the examples given did not constitute family violence—for example, the Law Society of NSW submitted that examples of repeated derogatory taunts, including racial taunts essentially amounted to ‘bad manners’, not family violence; and that threatening to disclose a person’s sexual orientation against the person’s wishes is not family violence, although it may possibly amount to defamatory conduct if the disclosure is untrue.<sup>219</sup>

5.110 A concern was expressed that the risk in including specific examples of emotional and psychological abuse in the legislation is that it will be used as defining ‘violence’ and as a criterion to be proved in order to obtain a protection order.<sup>220</sup> For example, the Queensland Government noted that some of the feedback received in the review of the Queensland family violence legislation ‘has suggested that the use of examples in legislation can operate to restrict the application and interpretation of the broader definition’.<sup>221</sup> Other stakeholders submitted however that this was not an issue of which they were aware. For example, the Queensland Law Society said that ‘it has not come to the attention of the [Society] that examples included in legislation are being used as anything other than as examples’.<sup>222</sup>

5.111 Many stakeholders supported the proposal on the basis that legislation made it clear that such examples are illustrative, not exhaustive.<sup>223</sup> Another stakeholder submitted that:

Care must be taken in providing illustrative examples of acts of violence against certain vulnerable groups. Such examples must be provided in general terms and not reference back to that particular disadvantaged group so as to avoid the risk of stereotyping. For example, coercing a person to claim social security payments may occur more so in a particular vulnerable group, however such an example must be made in general terms without reference back to that vulnerable group.<sup>224</sup>

5.112 One stakeholder supported the proposal on the basis that the inclusion of persons from vulnerable groups includes both males and females.<sup>225</sup>

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218 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; P Parkinson, *Submission FV 104*, 5 June 2010.

219 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

220 Queensland Law Society, *Submission FV 178*, 25 June 2010. A similar concern was expressed in Women’s Legal Service Brisbane, *Submission FV 223*, 2 July 2010.

221 Queensland Government, *Submission FV 229*, 14 July 2010.

222 Queensland Law Society, *Submission FV 178*, 25 June 2010. See also Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010, which stated that it did not have any examples of judicial officers and lawyers treating examples as exhaustive; and Confidential, *Submission FV 81*, 2 June 2010.

223 For example, FV 232, Berry Street Inc, *Submission FV 163*, 25 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

224 Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010.

225 T McLean, *Submission FV 204*, 28 June 2010.

5.113 While not commenting specifically on this proposal, the Australian Society of Social Workers submitted that a definition of family violence should include consideration of digital abuse or digital harassment, which it said

was an extension of verbal and/or emotional abuse transmitted via emails, instant messaging, mobile phone, voicemails, texts, ‘sexts’, [nude or sexually suggestive pictures sent via mobile phone or online] or social networking websites.<sup>226</sup>

5.114 It submitted that such ‘abuse by technology’ was particularly common among young people in relationships.<sup>227</sup>

#### *Appropriate use of emotional or psychological abuse category*

5.115 In the Consultation Paper, the Commissions proposed that the definition of family violence in state and territory family violence legislation should not require a person to prove emotional or psychological harm in respect of conduct, which by its nature could be pursued criminally—such as sexual assault.<sup>228</sup>

5.116 This proposal received very strong support.<sup>229</sup> In addition to supporting the reasons set out in the Consultation Paper,<sup>230</sup> other reasons advanced included: the difficulty in providing evidence of emotional or psychological abuse,<sup>231</sup> that requiring this to be proved in the circumstances amounted to ‘systemic abuse’,<sup>232</sup> that it was unnecessary;<sup>233</sup> illogical;<sup>234</sup> and that sexual assault constituted the most intimate abuse of an individual’s dignity, having an indisputable traumatic effect that should not have to be proved.<sup>235</sup>

226 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010.

227 Ibid.

228 Consultation Paper, Proposal 4–6.

229 For example, Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; Crossroads; T McLean, *Submission FV 204*, 28 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010; T Searle, *Submission FV 108*, 2 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 92*, 3 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 68*, 1 June 2010.

230 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

231 Confidential, *Submission FV 68*, 1 June 2010.

232 Confidential, *Submission FV 69*, 2 June 2010

233 Queensland Law Society, *Submission FV 178*, 25 June 2010.

234 Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010.

235 T Searle, *Submission FV 108*, 2 June 2010.

5.117 Submissions and consultations also noted the cultural and linguistic problems which arise in discussing emotional and psychological injury with Indigenous persons.<sup>236</sup> One Indigenous family violence service, for example, submitted that:

It is the Service's experience that Aboriginal women in remote communities do not seek or have access to psychologists/counsellors after a sexual assault. Further, Aboriginal women can have different coping mechanisms when dealing with sexual assault and may not want to speak to a psychologist/counsellor about what has happened to them.

Sexual assault is often not reported straight after it happens, especially for women living remotely, making it harder to link emotional harm to that incident.

Often our clients are in relationships perpetuated by constant violence and assault, so that it may be the case that a particular incidence of sexual assault may not result in provable emotional or psychological harm; however, this should not mean that the sexual assault is not abuse or that it is a less serious assault.<sup>237</sup>

5.118 The Queensland Law Society also submitted that:

for a person deprived of his or her liberty to have to prove emotional or psychological harm would appear to be burdensome, unnecessary, and might deter those from seeking protection when they might otherwise be entitled to it.<sup>238</sup>

5.119 In its submission, National Legal Aid expressed the opinion that the family violence legislation of South Australia is not likely to make it difficult for victims of sexual assault to obtain protection orders.<sup>239</sup>

#### ***Kidnapping or deprivation of liberty***

5.120 In the Consultation Paper, the Commissions proposed that the family violence legislation of Queensland and the Northern Territory should be amended to recognise kidnapping or deprivation of liberty expressly as a form of family violence.<sup>240</sup>

5.121 This proposal received widespread support, including from victims who recounted personal stories of having been kidnapped by their partners or of being detained for hours while being physically and emotionally abused and having the telephone removed from them.<sup>241</sup> One Indigenous family violence service submitted that it

236 For example, Central Australian Aboriginal Family Legal Unit and Central Australian Women's Legal Service, *Consultation*, Alice Springs, 28 May 2010.

237 Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

238 Queensland Law Society, *Submission FV 178*, 25 June 2010.

239 National Legal Aid, *Submission FV 232*, 15 July 2010. As noted above, *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(4)(a) includes sexual assault as an example of conduct that could result in emotional or psychological harm.

240 Consultation Paper, Proposal 4–7.

241 For example, J Stubbs, *Submission FV 186*, 25 June 2010; Justice for Children, *Submission FV 177*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Ngaanyatjarru

receives reports from women saying that they are unable to leave the house or reports that a woman has been forced to travel to another community by her current or expartner and it needs to be clear that this is a form of family violence with serious consequences.<sup>242</sup>

5.122 Both the Queensland Law Society and National Legal Aid submitted that, while not referring specifically to kidnapping or deprivation of liberty, the definition of family violence in the Queensland family violence legislation already captured conduct of this kind by including conduct that constituted harassment or intimidation.<sup>243</sup> However, the Queensland Law Society submitted that it

would support the Commissions' view that the definition of 'domestic violence' in the Queensland Act should specifically refer to kidnapping and deprivation of liberty.<sup>244</sup>

5.123 Women's Legal Service Queensland and the Queensland Government also expressed the view that the existing definition was broad enough to capture kidnapping. However, Women's Legal Service Queensland did not disagree with the Commissions' proposal, and the Queensland Government noted that the proposal will be considered in the review of the Queensland family violence legislation.<sup>245</sup>

5.124 National Legal Aid expressed the view that kidnapping or deprivation of liberty would be considered to be family violence under ss 5 and 6 of the Northern Territory family violence legislation, but that 'the proposed amendment would provide clarification and was supported'.<sup>246</sup>

5.125 Other stakeholders that supported the proposal submitted that:

- depriving a victim of liberty was an integral form of control;<sup>247</sup>
- there is a high incidence of unlawful imprisonment of partners and children by the use of threats and intimidation;<sup>248</sup> and
- many women are kept prisoners in their homes during prolonged incidences of family violence and some women are not allowed out of the house to shop, work or interact with others.<sup>249</sup>

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Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; T Searle, *Submission FV 108*, 2 June 2010; Confidential, *Submission FV 96*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Confidential, *Submission FV 68*, 1 June 2010; Confidential, *Submission FV 34*, 6 May 2010.

242 Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

243 National Legal Aid, *Submission FV 232*, 15 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

244 Queensland Law Society, *Submission FV 178*, 25 June 2010.

245 Queensland Government, *Submission FV 229*, 14 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

246 National Legal Aid, *Submission FV 232*, 15 July 2010.

247 M Condon, *Submission FV 45*, 18 May 2010.

248 C Pragnell, *Submission FV 70*, 2 June 2010.

249 Confidential, *Submission FV 77*, 2 June 2010.

### ***Damage to property***

5.126 In the Consultation Paper, the Commissions proposed that the family violence legislation of Tasmania should be amended to recognise damage to property and threats to commit such damage as a form of family violence.<sup>250</sup>

5.127 This proposal was supported by the great majority of stakeholders that addressed it,<sup>251</sup> including a number of legal service providers,<sup>252</sup> services providing accommodation for family violence victims;<sup>253</sup> and victims who recounted personal stories about extensive damage to property, including damage committed in front of children, as well as damage occasioned to their cars—such as the cutting of tyre valves.<sup>254</sup>

5.128 For example, stakeholders stated that damage to property is an example of violent coercive behaviour;<sup>255</sup> that it is harmful behaviour that is used to inflict fear;<sup>256</sup> and is used as a standover tactic.<sup>257</sup> The Queensland Law Society supported the inclusion of damage to property in the definition of family violence:

- That recognition has been in the Queensland legislation since its inception. It is recognition of the use of violence towards property in relationships where one party might, for example:
  - punch or kick a hole in the wall;
  - throw a phone smashing it, preventing the other party from telephoning the police for safety;
  - hit a car;
  - poison plants;
  - smash a windscreen;
  - kick the family pet.<sup>258</sup>

5.129 However, the Department of Premier and Cabinet (Tas) submitted that:

In relation to damage to property and threats to damage property, the reason why this is not included in the definition of family violence in the Tasmanian legislation is that

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250 Consultation Paper, Proposal 4–8.

251 For example, National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 37*, 12 May 2010.

252 For example, Confidential, *Submission FV 183*, 25 June 2010; Confidential, *Submission FV 92*, 3 June 2010.

253 For example, Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 89*, 3 June 2010.

254 For example, Confidential, *Submission FV 69*, 2 June 2010.

255 Confidential, *Submission FV 96*, 2 June 2010

256 F Hardy, *Submission FV 126*, 16 June 2010.

257 Confidential, *Submission FV 89*, 3 June 2010.

258 Queensland Law Society, *Submission FV 178*, 25 June 2010.

it is adequately covered by the inclusion of threats in [s] 7(a)(ii) and emotional abuse or intimidation in [s] 7(b)(ii).

Emotional abuse or intimidation, defined in [s] 9, includes a course of conduct that a person knows is likely to have the effect of unreasonably controlling or intimidating or causing mental harm, apprehension or fear in his or her spouse or partner. Obviously, damaging property, including jointly-owned property and property that belongs to someone other than the victim, is sufficient to fall within this definition.

It is noted that this definition circumvents the common problem identified with other jurisdictions, in that children, pets and property to which the victim may be attached yet doesn't own, may not be covered by that legislation.<sup>259</sup>

5.130 One stakeholder submitted that the definition should not capture damage to property inflicted by the owner of that property.<sup>260</sup>

### ***Injury to animals***

5.131 In the Consultation Paper, the Commissions proposed that the family violence legislation of NSW, Queensland, Western Australia, and Northern Territory should be amended to ensure that their definitions of family violence capture harm or injury to an animal, irrespective of whether that animal is technically the property of the victim.<sup>261</sup>

5.132 This proposal was supported by the great majority of stakeholders, including victims of family violence who recounted personal stories of having pets threatened, stolen and tortured; and legal service providers who reported cases of violence against pets as a form of violence against their clients.<sup>262</sup> For example, one legal service provider recounted an incident of a dog having its throat slit in front of a victim after she refused to have sex with her partner,<sup>263</sup> and another stated that victims have wanted to withdraw applications for protection orders because of the fear that pets would be harmed.<sup>264</sup>

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259 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

260 Confidential, *Submission FV 152*, 24 June 2010.

261 Consultation Paper, Proposal 4–9.

262 For example, National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; T McLean, *Submission FV 204*, 28 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; T Searle, *Submission FV 108*, 2 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 92*, 3 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 69*, 2 June 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 37*, 12 May 2010.

263 Confidential, *Submission FV 81*, 2 June 2010.

264 Confidential, *Submission FV 183*, 25 June 2010.

5.133 Stakeholders submitted that:

- animal abuse is closely linked to family violence;<sup>265</sup>
- threats against animals is a very common form of violence,<sup>266</sup> a powerful way to maintain control over victims<sup>267</sup> and, in particular, causes fear in victims that they or their children will be treated in a similar way;<sup>268</sup>
- threats to harm pets and the infliction of injury to pets is a form of violent, coercive and abusive behaviour irrespective of who owns the pets, as anyone in the family can become attached to pets;<sup>269</sup> and
- research connected with the RSPCA's Safe Beds for Pets Program has indicated that a significant number of victims of family violence do not report the violence or are lured back home for fear that their animals will be harmed.<sup>270</sup>

5.134 Toni McLean, a partner violence counsellor, submitted that:

It is appropriate to include harm to an animal in family violence legislation when the animal belongs to any member of the family or has a close association with the family, eg a wild bird which does not belong to the family but is sometimes fed by the family; or if any animal is harmed with the intent of frightening family members or conveying a threat to family members.

Such behaviour demonstrates the ability and willingness of a person to carry that act out to cause fear in family members that the act will be carried out on the animal or the family member.<sup>271</sup>

5.135 In relation to the definition of family violence in the Queensland family violence legislation, the Queensland Commission for Children and Young People and Child Guardian submitted that:

The definition relating to 'wilful damage to the other person's property' would not capture situations where a respondent harms or kills a pet or animal which does not belong to the aggrieved, but is intended to frighten or intimidate him/her. For example, if an animal is not owned by the aggrieved, but the respondent knows that harming the animal (a stray dog or the respondent's own pet, for example) would intimidate or cause fear in the applicant.

To ensure these types of acts are captured under the Queensland legislation, the Commission recommends that the definition be extended to include instances where a

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265 Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

266 Confidential, *Submission FV 171*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010.

267 K Greenland, *Submission FV 161*, 25 June 2010.

268 For example, Confidential, *Submission FV 89*, 3 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Confidential, *Submission FV 34*, 6 May 2010; Confidential, *Submission FV 32*, 4 May 2010.

269 Confidential, *Submission FV 96*, 2 June 2010. See also T Searle, *Submission FV 108*, 2 June 2010.

270 A Greenaway, *Submission FV 234*, 15 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

271 T McLean, *Submission FV 204*, 28 June 2010.

respondent commits any act of harm or damage with an intention to intimidate or cause fear in the applicant.<sup>272</sup>

5.136 The Queensland Government stated that the issue of ownership of property in general will be considered in the review of the Queensland family violence legislation.<sup>273</sup>

5.137 However, a few stakeholders opposed the proposal on the basis that:

- animal cruelty should be dealt with by animal cruelty laws;<sup>274</sup> and
- there are already criminal sanctions available for offences such as cruelty to animals—for example s 530 of the *Crimes Act 1900* (NSW)—and that there should not be a separate offence for cruelty to animals committed in the context of a domestic relationship.<sup>275</sup>

5.138 Parkinson opposed injury to animals as a discrete category of violence outside of a context of coercive, controlling violence or behaviour that causes someone to fear for their safety.<sup>276</sup>

#### ***Exposure of children to violence***

5.139 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should include in the definition of family violence exposure of children to family violence as a category of violence in its own right.<sup>277</sup>

5.140 Stakeholder views on this proposal were divided between those who supported<sup>278</sup> or ‘strongly’ supported the proposal;<sup>279</sup> and those who expressed strong

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272 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

273 Queensland Government, *Submission FV 229*, 14 July 2010.

274 Better Care of Children, *Submission FV 72*, 24 June 2010.

275 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

276 P Parkinson, *Submission FV 104*, 5 June 2010.

277 Consultation Paper, Proposal 4–10.

278 For example, Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Justice for Children, *Submission FV 177*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 92*, 3 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Confidential, *Submission FV 68*, 1 June 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 37*, 12 May 2010.

279 For example, National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Berry Street Inc, *Submission*

concerns or dissent<sup>280</sup>—principally because of the unintended consequences which might result if it were implemented.

5.141 Reasons given in support included:

- this would ‘draw an important link to matters before the Family Court where an offender is seeking unsupervised access to children’;<sup>281</sup>
- too often a violent spouse is not seen as a violent parent;<sup>282</sup>
- first-hand accounts of victims of violence of the detrimental impact on their children of having been exposed to violence;<sup>283</sup>
- there is evidence that children who experience and are exposed to family violence are far more likely to use violence or become victims in the future;<sup>284</sup>
- exposing children to violence amounts to emotional abuse;<sup>285</sup>
- the inclusion of exposure of children to violence in the definition of family violence in Victoria ‘assists the court to focus on the safety of children in violent relationships both in terms of their physical safety but also their psychological well-being’ and the examples in the Act are useful in addressing the misconception that children are not affected by violence if they are not physically present on each occasion when it occurs;<sup>286</sup> and
- there is a ‘significant chance that some parents will reconsider their behaviour once they understand how it impacts on their children’.<sup>287</sup>

5.142 The use of the terminology of ‘being exposed to’ violence, as opposed to ‘witnessing’ violence was also specifically supported.<sup>288</sup>

5.143 The Queensland Law Society stated in its submission that:

Regrettably, some magistrates have been reluctant to include children on protection orders even when, for example, the father punched the mother in the face whilst she was holding the baby.

Children are the most vulnerable members of society and there ought to be the most stringent measures put in place to ensure their protection.

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*FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Confidential, *Submission FV 81*, 2 June 2010.

280 For example, J Stubbs, *Submission FV 186*, 25 June 2010; J Wangmann, *Submission FV 170*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

281 Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010. A similar view was expressed in Confidential, *Submission FV 183*, 25 June 2010; Confidential, *Submission FV 92*, 3 June 2010.

282 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

283 Confidential, *Submission FV 160*, 24 June 2010; Confidential, *Submission FV 69*, 2 June 2010.

284 Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. The issue of intergenerational violence was also raised in Confidential, *Submission FV 128*, 22 June 2010.

285 Confidential, *Submission FV 96*, 2 June 2010.

286 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

287 N Ross, *Submission FV 129*, 21 June 2010.

288 For example, Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

There are [two] views though as to whether provisions that require the Magistrate, where it has been found that there has been family violence and a protection order is to be made, to automatically include a standard order requiring the perpetrator of violence not to commit acts of domestic violence to the children and to be of good behaviour towards them, would achieve these ends or whether there would be even greater resistance to the making of violence orders in the first place. There does appear to be a need to better educate Magistrates and Family Law Court Judicial Officers as to how violence within the household impacts on children and why orders might contain some better safeguards for children.<sup>289</sup>

5.144 The Commissioner for Victims' Rights (South Australia) generally agreed with the proposal and also submitted that children should have the right to fair representation in appropriate cases.<sup>290</sup>

5.145 In the Consultation Paper, the Commissions expressed an interest in hearing views about whether such a proposal would have negative effects for mothers who are victims of family violence and are held accountable for not protecting children from violence at a time when they are under intense pressure.<sup>291</sup> The Aboriginal Family Violence Prevention and Legal Service, in supporting the proposal, noted the negative consequences for women in a child protection context:

The adoption of this clause in Victoria has led to a very significant shift in the way Courts view family violence with respect to children. In our experience it has made it significantly more common for Courts to make protection orders to protect children from abusive parents and create a safer environment within which to start family law proceedings/negotiations. However, it has also raised issues ... where women who are victims of family violence have been then required to prove to child protection authorities that their victimisation does not harm their children.

... For many Koori women the results have been that they are held accountable for violent action of their partners and experience negative consequences via child protection involvement and child removal despite having taken all legal measures to ensure safety (e.g. called police, got an intervention order, separated from partner). It is critical that culturally appropriate services such as the FVPLS program are available to assist where child protection investigation follows ... FVPLS Victoria is also urging a review of the manner in which DHS child protection approaches family violence—the punitive as opposed to supportive attitude toward victim parents (generally mothers) is extremely problematic and results in outcomes not in the child's best interests. Detailed family violence training for DHS child protection workers is needed.<sup>292</sup>

5.146 Many stakeholders expressed support on the proviso that persons who use violence are made accountable for their violence and not the parent victims, on the

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289 Queensland Law Society, *Submission FV 178*, 25 June 2010.

290 Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

291 Consultation Paper, [4.83].

292 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010. Wurringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010 supported the proposal in principle but also expressed similar concerns, citing statistics from Community Services NSW (now part of the Department of Human Services) that show that 30% of children in out-of-home care were identified as Aboriginal.

basis of their failing to keep the children safe.<sup>293</sup> For example, Women's Legal Service Queensland submitted that 'best practice guidelines [should be] developed and implemented to ensure priority is on protection of all victims and risk of mother blaming is minimised'.<sup>294</sup> Family Relationship Services Australia, while strongly endorsing the Commissions' preliminary views on this issue, submitted that 'provisions need to avoid any implication that a parent who is the victim of violence could be held responsible for failing to protect children from the violence of the other parent'.<sup>295</sup>

5.147 Other stakeholders expressed reservations or opposition to the proposal principally because of current child protection practices in focusing on mothers to protect their children from violence or face their actual or threatened removal.<sup>296</sup> For example, the National Council of Single Mothers and their Children Inc, while supporting the intent of the proposal, expressed concern that an unintended consequence could be the 'criminalising 'of women for failing to protect their children 'although there is systemic failure to protect and support women'.<sup>297</sup>

5.148 The Queensland Commission for Children and Young People and Child Guardian, while acknowledging the importance of courts dealing with exposure of children to family violence, expressed the following reservations about this being a category of violence in its own right:

- there would be no additional benefit from listing it as a separate category of violence as the act of family violence that a child is exposed to would itself be grounds to apply for a protection order and would have to be established in any event to determine whether or not a child was exposed to it;
- it puts specific focus on children being harmed as a result of a parent being unable to protect them from exposure to such harm, which may increase the reluctance of women from reporting family violence for fear of child protection intervention; and
- it may put undue pressure on children and young people and draw them into the court proceedings, particularly if this ground is solely relied upon by an applicant when seeking a protection order.<sup>298</sup>

5.149 The Queensland Commission expressed the view that children being exposed to family violence should be an express legislative factor the courts must take into account when deciding what protection orders and conditions to make.<sup>299</sup> Wangmann suggested that the negative impact of violence on children could be recognised in other

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293 For example, Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

294 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

295 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

296 For example, National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; J Wangmann, *Submission FV 170*, 25 June 2010.

297 National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

298 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

299 Ibid.

ways—such as a preamble—rather than providing for orders to be made in such circumstances:

This does not mean that there may not be appropriate circumstances when such orders should be made—and thus perhaps we should look at the ways in which a primary victim's protection order can be extended to cover other people (children or other relatives) in appropriate circumstances.<sup>300</sup>

5.150 An Indigenous family violence service noted concern about the potential for the proposal to further victimise Indigenous women living in remote communities and subject them to blame for exposing their children to violence.<sup>301</sup>

5.151 In opposing the proposal, Professor Stubbs referred to research conducted by Bragg that concluded that the majority of family violence victims are not bad, ineffective or abusive parents, although family violence is one of a multitude of stressors that can negatively influence parenting. The research stated that many victims are supportive, nurturing parents who are able to mediate the impact of their children's exposure to violence. In light of this, Stubbs submitted:

It is inappropriate to treat children who have been exposed to family violence as a single category. It is better to have some mechanism that encourages children to be listed as a protected party on a protection order where needed.<sup>302</sup>

5.152 Parkinson raised a drafting issue with Proposal 4–10 of the Consultation Paper, stating that it confused exposure to violence with violence itself, creating a definition which did not make sense.<sup>303</sup>

### **Linkage of definitions of family violence to criminal law**

#### *Linkage to state or territory criminal law*

5.153 In the Consultation Paper, the Commissions proposed that where state or territory family violence legislation sets out specific criminal offences that form conduct constituting family violence, there should be a policy reason for the categorisation of each such offence as a family violence offence. To this end, the Commissions proposed that the governments of NSW and the ACT should review the offences categorised as 'domestic violence offences' in their respective family violence legislation with a view to (a) ensuring that such categorisations are justified and appropriate; and (b) ascertaining whether or not additional offences ought to be included.<sup>304</sup>

5.154 The Commissions also proposed that, incidental to such review, s 44 of the *Crimes Act 1900* (NSW)—which deals with the failure to provide any wife, apprentice servant or insane person with necessary food, clothing or lodgings—should be

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300 J Wangmann, *Submission FV 170*, 25 June 2010.

301 Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

302 J Stubbs, *Submission FV 186*, 25 June 2010.

303 P Parkinson, *Submission FV 104*, 5 June 2010.

304 Consultation Paper, Proposal 4–11.

amended to ensure that its underlying philosophy and language are appropriate in a modern context.<sup>305</sup>

5.155 There was widespread support among stakeholders for both the general and specific proposals.<sup>306</sup> Reasons for supporting the general proposal included concern that perceptions of serious criminal offences such as murder, attempted murder and sexual assault are not linked to the family violence context in which they occur. Having such offences outlined in family violence legislation highlights that they occur in the family violence context.<sup>307</sup>

5.156 Legal Aid NSW also submitted that ‘policy reasons need to be broadly stated to ensure that they are not used in court proceedings or as part of legislative interpretation to argue that a specific act of violence does not constitute a family violence offence’.<sup>308</sup>

5.157 The specific proposal about amending s 44 of the *Crimes Act 1900* (NSW) was supported on the basis that ‘contemporary straightforward language assists all those who deal with issues in the legislation’,<sup>309</sup> and that the current language was ‘inherently offensive’,<sup>310</sup> and should be gender neutral.<sup>311</sup> In addition, the National Association of Services Against Sexual Violence submitted:

Sexual violence is rooted in concepts of patriarchy. The endorsement or retention of patriarchal attitudes in any form in legislation is unhelpful to the transformation of society away from its patriarchal traditions and assists with greater understanding and applicability in a modern context.<sup>312</sup>

5.158 The Commissions understand that the Apprehended Violence Legal Issues Coordinating Committee (NSW) is considering a request by the NSW police for an expansion of the list of offences covered by s 4 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) to incorporate other offences which may be committed in

305 Ibid, Proposal 4–12.

306 For example, Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Confidential, *Submission FV 128*, 22 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 81*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 68*, 1 June 2010. Proposal 4–11 was also supported by Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

307 Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

308 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

309 Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

310 K Johnstone, *Submission FV 107*, 7 June 2010.

311 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010. A similar view was expressed in T McLean, *Submission FV 204*, 28 June 2010.

312 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

the context of family violence—such as break, enter and commit serious indictable offence.<sup>313</sup>

#### **Linkage to federal criminal law**

5.159 In the Consultation Paper, the Commissions proposed that the definition of family violence in state and territory family violence legislation should be broad enough to capture conduct the subject of potentially relevant federal offences in the family violence context—such as sexual servitude.<sup>314</sup>

5.160 Most submissions endorsed this proposal.<sup>315</sup> Stubbs said this proposal would mean a protection order could be made in relevant circumstances.<sup>316</sup>

5.161 The Local Court of NSW supported this proposal because, in NSW, ‘domestic violence offence’ is defined largely by reference to state criminal laws. A person’s criminal record is marked with ‘domestic violence offences’, and this has certain outcomes. Therefore:

In the interests of consistency, in the Court’s view it is important that a Commonwealth offence committed in the context of a family relationship should be clearly identifiable on a person’s criminal record as a ‘domestic violence offence’.<sup>317</sup>

5.162 The Commonwealth Director of Public Prosecutions (CDPP) submitted that while it was ‘conceivable that Commonwealth offences may be committed in a family violence context’, state and territory offences were more relevant. It submitted that Commonwealth grooming and procuring offences and sexual servitude offences are unlikely to be committed by an intimate partner or family member.<sup>318</sup> But the CDPP recognised that federal offences relating to using a carriage service to make a threat or to menace, or to harass or cause offence, could be committed in the context of family violence.<sup>319</sup> The Queensland Law Society stated that, in its view,

in light of the daily experience of police and the courts, that the current legislation in Queensland adequately captures relevant federal offences in the family violence context.<sup>320</sup>

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313 Apprehended Violence Legal Issues Coordinating Committee, *Submission FV 228*, 12 July 2010.

314 Consultation Paper, Proposal 5–1.

315 For example, National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010.

316 J Stubbs, *Submission FV 186*, 25 June 2010.

317 Local Court of NSW, *Submission FV 101*, 4 June 2010.

318 Commonwealth Director of Public Prosecutions, *Submission FV 76*, 2 June 2010.

319 Ibid.

320 Queensland Law Society, *Submission FV 178*, 25 June 2010.

## **Commissions' views**

### **Gender neutrality in definition**

5.163 Definitions of family violence should be gender-neutral. As any person can be a victim of family violence or use family violence, family violence legislation must be capable of operating to protect all victims of violence—whether female or male—and to prevent further commission of violence by anyone—whether female or male. However, as discussed in Chapter 7, it is appropriate and important for state and territory family violence legislation to contain a provision that explains the features and dynamics of family violence, including that while anyone can be a victim of family violence or use family violence it is predominantly committed by men.

### **Core definition to describe context of family violence**

5.164 The Commissions note the conclusion of the AGS in *Domestic Violence Laws in Australia* that the family violence legislation of states and territories

does not appear to be ‘substantially different’ across the jurisdictions in respect of crucial matters such as ... the types of conduct that may constitute domestic violence.<sup>321</sup>

5.165 Nonetheless, the Commissions consider that there are some key differences that ought to be addressed. The Commissions agree with the following recommendation made by the United Nations Department of Economic and Social Affairs Division for the Advancement of Women:

Legislation should include a comprehensive definition of domestic violence, including physical, sexual, psychological and economic violence.<sup>322</sup>

5.166 However, the Commissions are persuaded by arguments that the definition of family violence needs to describe the context in which acts take place—rather than merely listing specific incidents of violence or abuse. The imperative to provide a contextual background in the definition of family violence is heightened by the recommended broadening of the definition to include non-physical forms of violence, particularly emotional and economic abuse.

5.167 The Commissions are of the view that family violence should be defined in state and territory family violence legislation as violent or threatening behaviour or any other form of behaviour that coerces or controls a family member or causes that family member to be fearful—the approach recommended by the Victorian Law Reform Commission in its 2006 Report.<sup>323</sup> As discussed further below, the definition should then set out a non-exhaustive list of types of physical and non-physical behaviour that may fall within this definition. The Commissions note that there was strong support among stakeholders for the definition of family violence in the Victorian family

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321 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [1.16].

322 United Nations Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women* (2009), [3.4.2.1].

323 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 14.

violence legislation—which includes both physical and non-physical violence—to be used as a model.

5.168 Emphasising the coercive, controlling nature of family violence and how it engenders fear serves an important educative function, as well as a dual pragmatic function. First, it allows new behaviours—including seemingly ‘minor’ events which may have a particular significance to victims—to be included, provided that they meet this definition. As stated by one stakeholder, having a definition based on the dynamics and impact of family violence avoids the technicalities of definitions becoming obstacles to protection, especially given that a common form of family violence is the use of strategies of intimidation and symbolic actions which have specific meaning for the victims, but may appear relatively harmless to others.

5.169 Secondly, it can filter out instances of abuse committed outside the context of controlling or coercive behaviour—for example, by excluding verbal abuse committed by men or women in the course of an intimate relationship or acts of violent resistance by victims, where such abuse or resistance does not engender fear or does not form part of a pattern of controlling or coercive behaviour. To focus only on discrete incidents of violence devoid of context risks the civil protection order scheme replicating the limitations of the criminal law in responding to family violence.<sup>324</sup> It further risks trivialising the meaning of family violence and having the definition being co-opted and misused in contexts to which it was never intended to apply.

### Shared understanding of potentially relevant types of conduct

5.170 The Commissions note varying stakeholder views about whether the definition of family violence should be the same across state and territory family violence legislation, or merely share a common understanding of what constitutes family violence. The Commissions have taken a hybrid approach to this issue. The Commissions consider that it is desirable for the *contextual core* of the definition of family violence—as described above—to be consistent across state and territory jurisdictions. However, insofar as the definition should include a non-exhaustive list of examples of specific types of physical and non-physical types of conduct that may fall within the concept of family violence, the Commissions consider that it may be more pragmatic and feasible for each state and territory family violence statute to reflect a common understanding of such conduct. Examples of such conduct need not necessarily be drafted in precisely the same terms. As illustrated by the discussion of the purposes of family violence legislation and protection orders in Chapter 4, the underlying purposes of family violence legislation across the states and territories are substantially similar,<sup>325</sup> so the adoption of a shared understanding of what may constitute family violence is uncontroversial.

5.171 The Commissions acknowledge that drafting a uniform definition acceptable to all states and territories may be a significant task, and that the model definition

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324 See Ch 13.

325 Though the extent to which such purposes are articulated in objects clauses differ, and this is the subject of Rec 7–4.

proposed in the Model Domestic Violence Laws Report was not adopted.<sup>326</sup> The protection of victims of violence should not be compromised by achieving a consistent definition, if consistency represents the lowest common denominator. However, the Commissions consider that it is more achievable for the states and territories to agree to a consistent core definition together with a shared understanding of conduct that may meet that definition, than it is for the states and territories to agree on an entirely uniform definition. For example, in illustrating particular types of conduct that may constitute family violence, states and territories should have the flexibility to incorporate specific types of examples that accommodate local or demographic-specific issues.

5.172 Advocating a standard core definition, together with a shared understanding of particular conduct that may comprise family violence, across states and territories has a number of advantages. These include: playing a significant educative role in communicating with clarity what family violence is to those within the legal system, as well as the broader community; forming an important component for the development of integrated systems and responses and thereby improving seamlessness—including for service providers who assist mobile Indigenous people who move freely across communities in Western Australia, South Australia and the Northern Territory—and assisting in the recognition of protection orders across state and territory borders.

5.173 Importantly, it will also facilitate equality of treatment of victims of family violence—by ensuring that they are able to access protection order schemes to protect them from similar types of violence—irrespective of which state or territory they reside in or may flee to. It will address the unsatisfactory situation that victims of violence can only presently seek protection for certain types of violence if they live in a particular jurisdiction that recognises that violence as family violence.<sup>327</sup>

5.174 The Commissions express views on particular family violence legislative schemes, and certain elements of the definition of family violence, below.

### **Need for a definition of family violence in NSW family violence legislation**

5.175 The NSW family violence legislation is notable in its omission to define ‘domestic violence’—although it defines a ‘domestic violence offence’. The Commissions reiterate the view, previously expressed by the NSW Law Reform Commission, that there should be a definition of ‘domestic violence’ in the NSW family violence legislation which should include reference to psychological harm.<sup>328</sup> It is important for the definition to capture conduct which, of itself, may not amount to a criminal offence, expanding the circumstances in which victims of violence may seek protection.

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326 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 3, 18–23.

327 In Ch 6, the Commissions set out further benefits of promoting a common understanding of family violence across family violence legislation and other legislative schemes.

328 See New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report 103 (2003), [4.14]–[4.22].

5.176 The Commissions note that there was considerable support for the proposal that the *Crimes (Domestic and Personal Violence) Act 2007* should be amended to include a definition of ‘domestic violence’ in addition to the current definition of ‘domestic violence offence’. However, the Commissions make no separate recommendation about the NSW family violence legislation in this regard. The need for that state’s legislation to contain a particular definition of family violence is now contained within the ambit of Recommendation 5–1, set out below—which sets out how all state and territory family violence legislation should define family violence, and the types of conduct that may constitute family violence.

### Types of potentially relevant conduct

#### *Sexual assault and other sexually abusive behaviour*

5.177 In the Commissions’ view, sexual assault should be expressly recognised in the definitions of family violence in the family violence legislation of each state and territory. Specifically including sexual assault in the definitions may go some way to addressing the general ‘invisibility’ of sexual assault as a form of family violence, and may encourage increased reporting of sexual violence within a family violence context. It may also assist in addressing unhelpful social attitudes surrounding sexual assault in intimate partner relationships.<sup>329</sup>

5.178 The Commissions agree with the conclusions of the VLRC in this regard that:

Including sexual forms of family violence in the definition serves two main purposes. First, it makes it clear to family violence victims that they do not have to endure sexual assault, that it is not considered acceptable in our society and that legal protection is available. Secondly, it educates the community about sexual violence within family relationships and that it is unacceptable.<sup>330</sup>

5.179 In addition, the definition of family violence should include other sexually abusive behaviour—which may fall short of an assault. Including other sexually abusive behaviour has the advantage of capturing other potentially relevant behaviour—including conduct the subject of federal offences, such as sexual grooming or sexual servitude.

5.180 The definition of family violence in the family violence legislation of Western Australia should be amended as it does not expressly recognise sexual assault or other sexually abusive behaviour. The general definition of ‘domestic violence’ in s 13 of the ACT family violence legislation should also be amended to include express reference to sexual assault and sexually abusive behaviour, even though various offences of sexual assault are included in sch 1 as ‘domestic violence’ offences. Finally, the Queensland Government may wish to consider whether the current reference to ‘indecent behaviour without consent’ adequately captures sexual assault and all forms of sexually abusive behaviour—including those that may be the subject of state and federal offences.

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329 The ‘invisibility’ of sexual assault in family violence cases is discussed in Ch 24.

330 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), 103.

***Economic abuse***

5.181 Economic abuse should be expressly recognised in the definitions of family violence in the family violence legislation of each state and territory. This will necessitate amendment to the family violence legislation of NSW, Queensland, and Western Australia.

5.182 The Commissions consider that particular stakeholder concerns about extending the definition to recognise economic abuse are met by the Commissions' recommendation to place economic abuse in the context of coercive or controlling behaviour or behaviour which causes fear.

5.183 Economic abuse has particular impacts on older persons, those with a disability and Indigenous persons—particularly through the practice of ‘humblebugging’. Ideally, legislation should set out examples of economic abuse. Such examples help to educate judicial officers, lawyers and those engaging with the legal system. The family violence legislation of Victoria, South Australia and the Northern Territory provide instructive models in this regard. Examples given may be tailored to meet the exigencies of local jurisdictions.

5.184 The Commissions also recommend that s 44 of the *Crimes Act 1900* (NSW)—a ‘domestic violence offence’ dealing with failure to provide any wife, apprentice, servant or insane person with necessary food, clothing or lodgings—should be amended to ensure that its underlying philosophy and language are appropriate in a modern context.<sup>331</sup> The Commissions consider that the proposed inclusion of economic abuse in the family violence legislation of NSW may be more appropriate.

***Emotional and psychological harm/abuse***

5.185 The Commissions note the various formulations of emotional or psychological abuse—or conduct that ‘intimidates’ or ‘harasses’—referred to in the family violence legislation of the states and territories. While specific descriptions of this type of behaviour might vary, the Commissions consider that, at the least, the emphasis should be on a shared understanding that emotional and psychological abuse may fall within the broader proposed definition of family violence. Placing such behaviour in the context of behaviour that is threatening, coercive, controlling or engenders fear will ensure that this category of violence is not open to misuse. In particular, it will address concerns expressed by stakeholders that the inclusion of offensive conduct in the absence of such context is problematic.

5.186 While stalking can be an example of emotional or psychological abuse, the Commissions consider that, for the sake of clarity, stalking should be identified separately as behaviour which may constitute family violence. This is, in any event, consistent with the approach taken in four jurisdictions.

5.187 ***Use of legislative examples.*** The Commissions endorse the recommendation made by the VLRC that the definition of family violence ‘should be broad enough to

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<sup>331</sup> See Rec 5–5 below. For example, the archaic reference to ‘insane persons’ is inappropriate.

include abuses specific to certain groups in the community'.<sup>332</sup> The category of violence covering emotional or psychological abuse or intimidation is one that, in particular, is likely to have differing impacts on various groups in the community. It is therefore desirable that the family violence legislation of each state and territory include examples of such conduct that would affect diverse groups in the community. Such examples should be developed in consultation with these groups.

5.188 Examples of such conduct, as they affect various groups, may include:

- threatening to: institutionalise a person; withdraw care on which the person is dependent; withhold medication or prevent the person accessing necessary treatment or aids and equipment used in the person's daily life—potentially relevant to aged persons and those with a disability or illness;
- racial taunts; and preventing a person from making or keeping connections with the person's family, friends or culture, including cultural or spiritual ceremonies or practices—potentially relevant to migrants, Indigenous people and persons from culturally and linguistically diverse backgrounds; and
- threatening to disclose a person's sexual orientation against the person's wishes—relevant to those from the gay, lesbian, bisexual, transgender and intersex communities.

5.189 Highlighting such examples in legislation will serve an important educative function, and may assist in achieving more consistent responses from the justice system in response to family violence. However, the Commissions agree with the views expressed by Women's Legal Service Victoria that, to the greatest extent possible, such examples must be provided in general terms and without reference to specified groups. For example, while threatening to withhold medication or care may occur more often in family relationships involving aged persons or those with a disability, it can also occur in any other family relationship where one person in that relationship falls ill and is dependent on the other for a period of time. Similarly, while the Commissions have heard that threats to commit suicide—as a means of coercion and control as opposed to a genuine cry for help—occur in the context of Indigenous family relationships, they can also occur more broadly.

5.190 In addition, although the Commissions make no formal recommendation in this regard, they consider that there is merit in legislation providing examples of emotional abuse committed via technological means, such as harassment in the forms of constant texting, cyber-bullying, and 'sexting'. The South Australian family violence legislation provides potentially useful examples in this regard, including publishing or transmitting offensive material by means of the internet in such a way that the offensive material will be found by, or brought to the attention of, the person.<sup>333</sup>

5.191 Family violence legislation should make it clear that examples of conduct which may constitute emotional or psychological abuse are illustrative and not exhaustive.

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332 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 11.

333 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(4)(i). See also s 8(4)(j).

Failure by judicial officers to interpret such express legislative intent is appropriately addressed by judicial and legal education.

5.192 *Appropriate use of emotional or psychological abuse category.* In some circumstances it will be appropriate for a person to have to establish that certain conduct constituted emotional or psychological harm. However, the definition of family violence in state and territory family violence legislation should not require a person to prove emotional or psychological harm in respect of conduct against the person which, by its nature, could be pursued criminally.

5.193 For example, the definition of ‘abuse’ in the South Australian family violence legislation focuses on either the impact of harm to a victim or the intention of the person engaging in family violence. Sexual assault is included as an example of conduct that could result in emotional or psychological harm.<sup>334</sup>

5.194 The Commissions are concerned that requiring a person to prove emotional or psychological harm as the result of sexual assault adds a further evidentiary burden. In particular, cultural and linguistic problems may arise in discussing emotional and psychological injury with Indigenous persons. Proof of emotional harm following sexual assault is not necessary for a criminal prosecution—nor ought it to be to obtain a protection order. The very fact of sexual assault should fall within conduct constituting family violence, without the need to prove that such conduct had a certain effect on the victim.

5.195 The same arguments apply to depriving a person of his or her liberty, which is also cited as an example of conduct that could cause emotional or psychological harm in the South Australian legislation.<sup>335</sup>

#### ***Kidnapping or deprivation of liberty***

5.196 The Commissions consider that state and territory family violence legislation should include kidnapping and deprivation of liberty as examples of conduct which may constitute family violence. Depriving a person of liberty is an integral form of control. Persons may be deprived of their liberty in circumstances where they have not been kidnapped. For the sake of clarity, the definition of family violence in the family violence legislation of Queensland and the Northern Territory, in particular, should include kidnapping and deprivation of liberty.

#### ***Damage to property***

5.197 In the Commissions’ view, damage to property should be expressly included as a type of conduct which may meet the broader definition of family violence. As stated in the review of the Tasmanian family violence legislation, property damage is a common feature of family violence incidents. Damage to property may be an example of violent threatening behaviour or of conduct which is used to inflict fear—but equally

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334 Ibid s 8(4)(a).

335 Ibid s 8(4)(b).

there may be one-off instances of damage to property which do not fall within the broader definition of family violence because of an absence of context.

5.198 Specifically, the Commissions consider that damage to property should be included as a potential example irrespective of whether the victim owns or jointly owns the property that is damaged. For example, if a person violently smashes a chair against a wall in the presence of a spouse or child, and that conduct causes fear, it is irrelevant that the person who smashed the chair owns the chair. The South Australian family violence legislation provides a useful model in this regard, making it clear that property covers not only property that is owned by the victim but also property in his or her possession or otherwise used or enjoyed.<sup>336</sup>

5.199 The Commissions note that property damage is recognised in most Australian jurisdictions—including the Commonwealth<sup>337</sup>—as a potential form of family violence and that the Commissions’ recommendation will necessitate amendment to the family violence legislation of Tasmania.

### ***Injury to animals***

5.200 State and territory family violence legislation should include causing injury or death to an animal, such as a family pet—irrespective of whether the animal is the property of the victim—as an example of conduct which may constitute family violence. The Commissions consider that there is merit in distinguishing harm to animals from damage to property, particularly in light of research which indicates the particular impacts on victims’ behaviours arising from fear of an animal being harmed.

5.201 Causing injury or harm to an animal can either be included as an example of conduct, in itself, capable of falling within the broader definition of family violence—the Commissions’ preferred approach—or it can be included as an example of conduct which is emotionally abusive.

5.202 It appears that the family violence legislation of the following jurisdictions will need to be amended to capture harm to animals which may not technically be the property of the victim:

- NSW—its legislation does not refer to such harm, nor does it contain the category of emotional or psychological abuse, nor an expanded definition of property either in s 7—which refers to intimidation—or insofar as it picks up property offences in the *Crimes Act 1900* (NSW) s 195, which refers to property ‘belonging to another’.
- Queensland—its legislation only specifically refers to wilful damage to the other person’s property—including his or her pet—and does not contain a category of emotional or psychological abuse.<sup>338</sup>

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336 Ibid s 8(2)(d).

337 *Migration Regulations 1994* (Cth) reg 1.21(1). See Ch 6.

338 *Domestic and Family Violence Protection Act 1989* (Qld) s 11.

- Western Australia—its legislation links harm to an animal to property belonging to the victim, and although it contains a category covering emotional abuse, it requires such abuse to be ‘ongoing’.<sup>339</sup> One or two instances of killing or injuring a family pet may not qualify as ‘ongoing’.
- Northern Territory—its legislation allows for injury or death of an animal either on the basis that it damages the victim’s property or intimidates the victim by causing reasonable apprehension of harm to his or her property.<sup>340</sup>

5.203 The Commissions note that some stakeholders opposed the proposal in the Consultation Paper on the basis that animal cruelty should be dealt with by animal cruelty laws or that there should not be a separate offence for cruelty to animals committed in the context of a domestic relationship. However, the issue of punishing someone for cruelty to an animal is separate from that of defining the type of conduct which may constitute family violence for the purpose of obtaining a protection order to protect the person against future violence.

#### ***Exposure of children to violence***

5.204 The Commissions are of the view that family violence legislation should acknowledge the detrimental impact of family violence on children. In Chapter 7 the Commissions recommend that family violence legislation should expressly acknowledge these effects in a provision setting out the nature, features and dynamics of family violence.<sup>341</sup>

5.205 The Commissions note that stakeholders were divided on the issue of whether exposing children to violence should be included in the definition of family violence. In particular, there was a concern about the potential negative effects of making victims of violence accountable for not protecting their children from violence.

5.206 On balance, the Commissions consider that the definition of family violence in family violence legislation should expressly acknowledge that exposing a child to the effects of family violence by using violence is itself a form of family violence and that other steps should be taken to address concerns about implementation. Practices of child protection authorities—which may focus on a punitive, as opposed to supportive approach to victim parents of family violence—should not compromise the fundamental objective to protect vulnerable children from the damaging effects of family violence.<sup>342</sup> Rather, such concerns need to be addressed by practical measures designed to bring about cultural change in the way child protection workers deal with family violence—including detailed family violence training and changes in policies, practices and procedures. Moreover, family violence legislation should make it clear that a child is exposed to the effects of family violence by the behaviour of the person using violence and not the failure of a victim parent to protect that child from such exposure.

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339 *Restraining Orders Act 1997 (WA) s 6.*

340 *Domestic and Family Violence Act 2007 (NT) s 5(b), 6(1)(b)(ii).*

341 Rec 7–2.

342 The interaction between child protection laws and family violence laws is discussed in Ch 19.

5.207 Exposure of children to family violence encompasses more than just witnessing family violence. Indeed the terminology of ‘witnessing’ may be problematic in the sense that it may have a tendency to downplay the fact that children are living with the reality of family violence. The Victorian family violence legislation provides instructive examples of behaviour that causes a child to hear or witness or otherwise be exposed to family violence,<sup>343</sup> which judicial officers have stated have been useful in addressing the misconception that children are not affected by violence if they are not physically present when it occurs. These include the child comforting or providing assistance to a family member who has been physically abused by another family member, and being present when police officers attend an incident involving physical abuse of a family member by another family member.

5.208 Including this category of conduct in the definition of family violence will play an important educative role not only for judicial officers and lawyers but, as one submission suggested, for family members who care for children who may be prompted to re-evaluate their behaviour once they understand how it impacts on children. In Victoria the inclusion of this category in the definition of family violence has assisted the court to focus on the physical safety and psychological wellbeing of children. In many cases exposing children to the effects of violence will also amount to emotional and psychological abuse

5.209 In making this recommendation, the Commissions have been persuaded by the considerable amount of research documenting the fact that exposure of children to family violence causes long-term emotional, psychological, physical and behavioural issues. The National Council’s report, *Time for Action*, noted that:

Children and young people exposed to sexual assault and domestic and family violence experience anger, sadness, shame, guilt, confusion, helplessness and despair. Children do not need to be physically present when violence occurs to suffer negative consequences. Living in an environment where violence occurs is extremely damaging to children and there is little difference in outcomes for children whether they see the violence or not.

Living with domestic and family violence can directly affect infants, causing negative developmental, social, emotional and behavioural consequences. At a time of rapid neurological growth, an infant’s development may be compromised by exposure to ongoing violence, whether or not they are the target of the violence. Infants may have symptoms typical of post-traumatic stress.<sup>344</sup>

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<sup>343</sup> Family Violence Protection Act 2008 (Vic) s 5.

<sup>344</sup> National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council’s Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 40 (citations omitted).

5.210 The research of Emma Bevan and Dr Daryl Higgins, for example, concluded that:

Physical abuse and witnessing family violence significantly predicted psychological spouse abuse and trauma symptomatology, with witnessing family violence individually predicting the two outcomes.<sup>345</sup>

5.211 Family law judgments have also referred to the dangers of children being exposed to violence. For example, in *M v M*, Mullane J referred to the risk of injury and fear, as well as the risk that children will learn from the abusive behaviour and ultimately treat it as acceptable.<sup>346</sup> In *T v N*, Moore J referred to the ‘abundance of research from social scientists about the highly detrimental effect upon young children of exposure to violence and the serious consequences such experiences have for their personality formation’ and went on to catalogue such effects.<sup>347</sup>

5.212 In addition, the Commissions note that Maurine Pyke QC’s review of South Australian domestic violence laws in 2007 identified, as an option for reform, amending the definition of family violence to include causing or allowing a child to see or hear family violence, or putting or allowing the child to be put at real risk of such exposure.<sup>348</sup>

### **Linkage of definitions of family violence to criminal law**

5.213 The Commissions note that family violence legislation in both NSW and the ACT sets out certain offences which are ‘domestic violence offences’. These jurisdictions will need to review the categorisation of these offences in light of the Commissions’ proposed definition of family violence. If offences are to be categorised as family violence offences, they must fall within the definition of family violence. It appears to the Commissions that there are two categories of offences in this regard—those that will *always* be family violence offences when committed against a family member; and those that *may or may not* amount to family violence, depending on the circumstances.

5.214 Many offences against the person—such as assault, sexual assault, inflicting actual bodily harm—are inherently violent and would meet the broader definition of family violence that has been proposed. Other offences against the person—including kidnapping, forcible confinement and stalking—invariably involve behaviour that is either threatening, coercive or controlling or would engender fear—and would also meet the broader definition of family violence that has been proposed.

5.215 However, there are many offences categorised as ‘domestic violence offences’ which are not essentially offences against a person and, in respect of which, it is difficult to conclude unequivocally that all commissions of such an offence ‘directed’ at a family member will amount to family violence. For example, the ACT legislation

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345 See, E Bevan and D Higgins, ‘Is Domestic Violence Learned? The Contribution of Five Forms of Child Maltreatment to Men’s Violence and Adjustment’ (2002) 17(3) *Journal of Family Violence* 223, 241.

346 *M v M* (2000) FLC ¶93–006, [94].

347 *T v N* (2003) 31 Fam LR 257, [36].

348 M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007), [18.2].

includes ‘trespass on government premises’ as a ‘domestic violence offence’. A person may trespass on government premises with a view to seeing or contacting a family member. However, it is conceivable that a person could do this outside of the context of threatening, controlling behaviour. Similarly, a person may behave in an offensive or disorderly manner while in or on government premises—a ‘domestic violence offence’ in the ACT—in circumstances where that behaviour is ‘directed’ to a family member on those premises. However, it is conceivable that the person’s behaviour—perhaps due to drunkenness or stupidity—is devoid of any elements of coercion or control.

5.216 A final example is the offence of negligent driving, which is a ‘domestic violence offence’ in the ACT. A person may engage in negligent driving as a way of exercising control over a family member and cause that family member to be fearful—although such behaviour if it is driven by this intent is more likely to be more than mere negligence. However, it is equally possible that a person may drive negligently while there is another family member in the car due to lapse of concentration, poor judgment, fatigue or inebriation, in the absence of threatening or coercive behaviour—and it is possible, that the passenger is not afraid because he or she is drunk or not indisposed to thrill-seeking behaviour. Equally, the passenger may be afraid of the person’s driving skills without being, in any way, afraid of the person.

5.217 For the above reasons, the Commissions consider that it is problematic to describe criminal offences that are *not* inherently offences against a person—such as the examples described above—as family violence offences on the somewhat contrived basis that they were committed *against*, or *directed to*, a person in a defined relationship.

5.218 Where states and territories adopt the approach of designating certain offences as family violence offences, they should also give consideration to including relevant federal offences. However, the Commissions consider that apart from specified offences against a person, it is problematic to attempt to catalogue each and every state, territory and federal offence which could potentially arise in a family violence context. Perhaps an easier way would be for family violence legislation to specify that when an offence, other than an offence against a person, is committed in a family violence context—with specific reference to the definition of family violence—then a judicial officer can classify that offence as a family violence offence.

5.219 The Commissions remain of the view expressed in the Consultation Paper that, in reviewing designated state and territory offences, state and territory governments should ascertain whether any offences require updating or amending. In particular, the language and philosophy of s 44 of the *Crimes Act 1900* (NSW) concerning legal liability and failure to provide ‘any wife, apprentice, or servant or any insane person with necessary food, clothing, or lodging’ is archaic and should be amended.

5.220 Finally, the Commissions consider that, in light of their proposed definition of family violence which places potential behaviours in context, there is no need to make a separate recommendation that the definition of family violence in state and territory family violence legislation should be broad enough to capture conduct the subject of

potentially relevant federal criminal behaviour. If such behaviour is violent or threatening, coercive or controlling or causes fear, it will fall within the definition. As noted above, the specific inclusion of sexually abusive behaviour as a category of behaviour falling within the broader definition will capture potentially relevant federal sexual offences such as sexual servitude or those relating to grooming and procuring.

**Recommendation 5–1** State and territory family violence legislation should provide that family violence is violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.

**Recommendation 5–2** State and territory family violence legislation should include examples of emotional and psychological abuse or intimidation and harassment that illustrate conduct that would affect—although not necessarily exclusively—certain vulnerable groups including: Indigenous persons; those from a culturally and linguistically diverse background; the aged; those with a disability; and those from the gay, lesbian, bisexual, transgender and intersex communities. In each case, state and territory family violence legislation should make it clear that such examples are illustrative and not exhaustive of the prohibited conduct.

**Recommendation 5–3** The definition of family violence in state and territory family violence legislation should not require a person to prove emotional or psychological harm in respect of conduct against the person which, by its nature, could be pursued criminally.

**Recommendation 5–4** The governments of NSW and the ACT should review the offences categorised as ‘domestic violence offences’ in their respective family violence legislation with a view to:

- (a) ensuring that the classification of such offences falls within the proposed definition of family violence in Rec 5–1; and
- (b) considering the inclusion of relevant federal offences committed in a family violence context, if they choose to retain such a classification system.

**Recommendation 5–5** Incidental to the review of ‘domestic violence offences’ referred to in Rec 5–4, s 44 of the *Crimes Act 1900* (NSW)—which deals with the failure to provide any wife, apprentice, servant or insane person with necessary food, clothing or lodgings—should be amended to ensure that its underlying philosophy and language are appropriate in a modern context.



# **6. Other Statutory Definitions of Family Violence**

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## **Contents**

Introduction	249
Criminal law	250
Interaction of definitions: family violence laws and criminal laws	250
Definitions of specific acts that may constitute family violence	257
Family law	265
Definition of family violence in the <i>Family Law Act</i>	265
Interaction of definitions: family violence laws and the <i>Family Law Act</i>	267
Typologies of violence	280
Victims' compensation	284
Migration legislation	286
Summary and effect of Commissions' overall approach	289

## **Introduction**

6.1 This chapter considers the meaning of family violence in legislative schemes other than family violence laws, namely the criminal law, the *Family Law Act 1975* (Cth), victims' compensation legislation and migration legislation. In particular, it considers whether it is appropriate or desirable to aim for a common understanding of what constitutes family violence across the different legislative schemes under consideration in light of the underlying policy justification for each of the legislative schemes, which are discussed in Chapter 4.

6.2 An analysis of these policy considerations reveals that while policy justifications differ, in some cases different statutory regimes share common aims. A key theme is therefore balancing the need for synergies between the definition of family violence in a particular legislative scheme and the purposes of that scheme, with the benefits that could flow from the adoption of a common interpretative framework across different legislative schemes.

6.3 The appropriateness or desirability of a commonly shared understanding of family violence across various legislative schemes is also discussed in the context of the relationship between, and interactions of, definitions of family violence in family violence legislation, the criminal law, and the *Family Law Act*.

## Criminal law

6.4 Chapter 5 discusses the extent of linkage between current definitions of family violence in family violence laws and the criminal law. The following discussion addresses interaction issues between the definitions or terminology in family violence laws and criminal laws:

- in the limited circumstances where criminal laws define ‘family violence’; and
- where each law defines a particular type of conduct that may constitute family violence, such as stalking or assault.

### Interaction of definitions: family violence laws and criminal laws

6.5 There are limited examples of definitions of ‘family violence’ or ‘domestic violence’ in the criminal laws of Australia. One area where the criminal law has defined ‘family violence’ is in the context of defences to homicide.<sup>1</sup> This is the case under the *Crimes Act 1958* (Vic) and the *Criminal Code* (Qld).<sup>2</sup> A consideration of this legislation raises the broader question of how family violence should be defined where it is referred to expressly in criminal law provisions.

#### *Victorian criminal legislation*

6.6 Section 9AH of the *Crimes Act 1958* (Vic) confirms the potential relevance of evidence of family violence to cases of murder,<sup>3</sup> defensive homicide<sup>4</sup> and manslaughter.<sup>5</sup> It does not operate as a separate defence in itself, but provides that evidence of family violence may be relevant in the context of homicide defences—including self-defence and duress.<sup>6</sup> The section provides guidance about particular facts in issue to which evidence of family violence may be relevant, and the types of evidence that may be relevant.<sup>7</sup>

6.7 ‘Violence’ is defined more narrowly in s 9AH of the *Crimes Act 1958* than it is under the family violence legislation. In the *Crimes Act*, it is defined to include physical abuse, sexual abuse, psychological abuse—including intimidation, harassment, damage to property, and certain threats—and causing a child to see or hear certain types of abuse, or putting a child at real risk of seeing or hearing that abuse. It is narrower than the definition of violence in the family violence legislation, as it does not include economic abuse or the more general category of behaviour that in any other

<sup>1</sup> The issue of whether family violence should be a defence to homicide is discussed in Ch 14.

<sup>2</sup> Both Acts provide that a number of acts of violence may meet the threshold of the relevant definition even though some or all of those acts when viewed in isolation may appear to be minor or trivial: *Crimes Act 1958* (Vic) s 9AH(5); *Criminal Code* (Qld) s 304B(4).

<sup>3</sup> *Crimes Act 1958* (Vic) s 9AC.

<sup>4</sup> Ibid s 9AD.

<sup>5</sup> Ibid s 9AE.

<sup>6</sup> Ibid s 9AE(2).

<sup>7</sup> Section 9AH is discussed in detail in Ch 14.

way controls or dominates the person and causes the person to feel fear for his or her or a family member's safety or wellbeing.<sup>8</sup>

6.8 The definition of family violence adopted in the *Crimes Act 1958* in 2005 is the same as that in New Zealand. It was introduced in response to a recommendation made by the Victorian Law Reform Commission (VLRC) in its report on defences to homicide in 2004.<sup>9</sup> In a later report in 2006, the VLRC recommended that the definition should include economic abuse.<sup>10</sup> This led to the inclusion of a broad definition of family violence in the *Family Violence Protection Act 2008* (Vic), following amendments to the *Crimes Act 1958*. Therefore, while the definition in the *Crimes Act* is narrower, this is a result of timing rather than a deliberate intention to introduce a definition of family violence that is more limited than that in Victoria's family violence legislation.<sup>11</sup>

### ***Queensland criminal legislation***

6.9 During the course of this Inquiry, Queensland introduced the *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld), which commenced on 16 February 2010. The Act amends the *Criminal Code* (Qld) to insert a new partial defence to murder—‘killing in an abusive domestic relationship’.<sup>12</sup>

6.10 The provision is discussed in detail in Chapter 14. For present purposes, it is sufficient to note that the defence applies where the deceased had committed ‘serious acts of domestic violence’ against the accused person in the course of an ‘abusive domestic relationship’. As the term ‘domestic violence’ is defined by reference to the *Domestic and Family Violence Protection Act 1989* (Qld),<sup>13</sup> the term has the same meaning under civil and criminal legislation.<sup>14</sup>

6.11 The distinguishing factor in the criminal legislation is the requirement for the relevant acts of ‘domestic violence’ to be ‘serious’ in order for the defence to apply. The Queensland Attorney-General, the Hon Cameron Dick, stated in the Second

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8     *Family Violence Protection Act 2008* (Vic) s 5.

9     Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), 321–322.

10    Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Recs 15, 16.

11    At the time, Victoria's family violence legislation was the *Crimes (Family Violence) Act 1987*, which did not contain a definition of family violence. The VLRC in its report on defences to homicide stated that it had chosen to adopt as a model for the definition of family violence the definition used in the *Domestic Violence Act 1995* (NZ), which had received some support in consultations on its inquiry into family violence: Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), 334–335.

12    *Criminal Code* (Qld) s 304B.

13    *Criminal Code* (Qld) s 304B(2)(b).

14    As noted in Ch 5, ‘domestic violence’ is defined in the *Domestic and Family Violence Protection Act 1989* (Qld) s 11 as any of the following acts committed against another person, if a domestic relationship exists between the two persons: wilful injury; wilful damage to the other person’s property; intimidation or harassment; indecent behaviour towards the other person without consent; and threatening to commit any of these acts.

Reading Speech that the term ‘serious’ has been left deliberately undefined as a matter for the jury to determine in the circumstances of individual cases.<sup>15</sup>

### ***Submissions and consultations***

6.12 In the Consultation Paper, the Commissions proposed that the definitions of family violence in state or territory family violence and criminal legislation—in the context of defences to homicide—should align, irrespective of whether the criminal legislation limits the availability of defences to homicide in a family violence context to cases involving ‘serious’ family violence.<sup>16</sup>

6.13 The Commissions made a second proposal in respect of definitional alignment between the Victorian criminal and family violence legislation: that the definition of family violence in s 9AH of the *Crimes Act 1958* (Vic) should be replaced with the definition of family violence in s 5 of the *Family Violence Protection Act 2008* (Vic). In the alternative, the Commissions proposed that the definition of family violence in s 9AH of the *Crimes Act 1958* (Vic) should be amended to include economic abuse.<sup>17</sup>

6.14 Overall, stakeholders strongly supported alignment of the definitions of family violence in civil and criminal legislation, in respect of defences to homicide. In the Victorian context, most stakeholders who commented on the form of alignment favoured the uniform application of the definition of family violence in s 5 of the *Family Violence Protection Act 2008* (Vic) to both civil and criminal laws.

### ***The principle of definitional alignment***

6.15 The majority of stakeholders who considered the proposal supported alignment of the definitions of family violence in civil and criminal legislation, in the context of homicide defences.<sup>18</sup> Most did not advance reasons for their positions. However,

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15 Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3669 (C Dick—Attorney-General and Minister for Industrial Relations), 3670.

16 Consultation Paper, Proposal 4–13.

17 Ibid, Proposal 4–13.

18 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 125*, 20 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal and A Hopkins, *Submission FV 36*, 12 May 2010; Confidential, *Submission FV 32*, 4 May 2010.

several broad themes emerged from those submissions providing reasons. These stakeholders submitted that definitional alignment between civil and criminal legislation within individual states and territories would:

- facilitate a consistent understanding of the nature and dynamics of family violence between civil and criminal jurisdictions and, consequently, promote a consistent legal response;<sup>19</sup>
- avoid confusion where there are overlapping civil and criminal processes arising from the same conduct;<sup>20</sup> and
- facilitate a nationally consistent approach to defining family violence across criminal and civil jurisdictions in all states and territories.<sup>21</sup>

6.16 The Australian Domestic and Family Violence Clearinghouse, however, opposed the principle of definitional alignment, on the basis that civil and criminal laws perform different functions and are underpinned by different policy objectives which ought to be reflected in separate definitions of family violence.<sup>22</sup> Two other stakeholders opposed the principle of definitional alignment without explanation.<sup>23</sup>

6.17 In responding to the Commissions' proposal for alignment of the definitions of family violence in civil and criminal legislation in the context of homicide defences—irrespective of whether the latter limits the availability of relevant homicide defences to cases involving 'serious' family violence—some stakeholders commented on the interpretation of the term 'serious'. Several stakeholders emphasised that an assessment of the severity of family violence requires a thorough understanding of the dynamics of family violence and, in particular, patterns of abuse comprising both criminal and non-criminal conduct.<sup>24</sup>

#### ***Definitional alignment in Victorian legislation***

6.18 The majority of stakeholders commenting on the issue of definitional alignment in the Victorian context supported alignment of the definitions of family violence in the criminal and family violence legislation.<sup>25</sup> However, most submissions did not

19 National Legal Aid, *Submission FV 232*, 15 July 2010; The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; A Cannon, *Submission FV 137*, 23 June 2010; F Hardy, *Submission FV 126*, 16 June 2010.

20 Queensland Government, *Submission FV 229*, 14 July 2010.

21 Confidential, *Submission FV 171*, 25 June 2010.

22 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010. The purposes and objectives of criminal and civil laws are discussed in Ch 4.

23 Confidential, *Submission FV 162*, 25 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010.

24 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; Confidential, *Submission FV 69*, 2 June 2010.

25 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Women's Legal Service Brisbane, *Submission FV 223*, 2 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Confidential, *Submission FV 183*, 25 June

comment expressly on the preferable form of alignment—that is, whether the definition of family violence in s 9AH of the *Crimes Act 1958* (Vic) should be replaced by the definition in s 5 of the *Family Violence Protection Act 2008* (Vic), or whether the existing definition in the criminal legislation should be amended to incorporate economic abuse.

6.19 Of those submissions commenting on the form of alignment, the majority supported the replacement of the definition in the criminal legislation with that of the family violence legislation.<sup>26</sup> In a joint submission, Domestic Violence Victoria and others commented that adding economic abuse to the *Crimes Act* definition would not address other inconsistencies between the definitions, including the broader definition of ‘family member’ in the family violence legislation.<sup>27</sup> The Magistrates’ Court and Children’s Court of Victoria commented that the definition in the family violence legislation provides ‘a comprehensive and workable model’.<sup>28</sup>

#### *Commissions’ views*

##### *Homicide defences—definitional consistency ‘in-principle’*

6.20 The Commissions consider that there are two key reforms to be achieved in relation to the definition of family violence for the purposes of homicide defences. First, the Commissions consider that there is considerable merit in a jurisdiction’s family violence legislation and criminal legislation adopting a core definition of family violence, together with a shared understanding of particular conduct that may comprise family violence.<sup>29</sup> The Commissions consider that such an approach would promote a consistent understanding of the nature and dynamics of family violence between civil and criminal jurisdictions and, in turn, a consistent legal response.

6.21 Secondly, the Commissions maintain their view expressed in the Consultation Paper that, where state or territory criminal legislation recognises family violence as

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2010; N Norris, *Submission FV 176*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; R Smith, *Submission FV 135*, 22 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 125*, 20 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 68*, 1 June 2010; P Easteal and A Hopkins, *Submission FV 36*, 12 May 2010; Confidential, *Submission FV 34*, 6 May 2010.

26 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

27 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

28 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

29 The Commissions’ approach to defining family violence for the purposes of family violence legislation is the subject of Rec 5–1.

relevant to a defence to homicide, family violence should be defined in the same way that it is defined in family violence legislation.<sup>30</sup> Taken together, these reforms achieve alignment of a revised definition of family violence in civil and criminal contexts within a jurisdiction. These matters are the subject of Recommendation 6–1 below.

6.22 The Commissions acknowledge the preference of some stakeholders for a nationally consistent approach to defining family violence across criminal and civil jurisdictions in all states and territories. As mentioned in Chapter 5, the Commissions have emphasised the need for a consistent core definition together with a shared understanding of what constitutes family violence across civil and criminal jurisdictions in all states and territories, rather than national uniformity of definitions.<sup>31</sup> The Commissions consider, however, that there is a stronger case for uniformity of the definition of family violence across an individual state or territory’s family violence and criminal laws, than is the case across all states and territories. That is, criminal and family violence legislation should adopt—in the same terms—the core definition and common understanding of conduct that may constitute family violence outlined in Recommendation 5–1. One particular advantage of such definitional uniformity *within* an individual state or territory is that it would clearly convey a legislative intention for a consistent interpretation of family violence across criminal and civil jurisdictions.

6.23 In arriving at this view, the Commissions have considered whether the differing policy objectives of protection order regimes in civil laws and homicide defences in criminal laws warrant a more restrictive definition of family violence in the context of homicide defences. On balance, the Commissions consider that the different policy objectives of the relevant laws are not compromised by the adoption of a common understanding of family violence. Rather, the different policy objectives of the relevant laws may be addressed by placing emphasis, where necessary, on the *seriousness* of family violence in individual cases, rather than excluding categorically certain types of violence.

6.24 In the Commissions’ view, it is appropriate that the degree of severity of family violence capable of being relied upon as a defence to homicide is higher than that which may be required to obtain a protection order. For example, the partial defence of killing in an abusive domestic relationship in the *Criminal Code* (Qld) s 304B makes express provision for this approach in limiting the availability of the defence to cases involving ‘serious’ family violence. Similarly, where evidence of family violence is relevant to a defence of general application, the issue of severity of violence will most likely be a matter for the trier of fact to assess in individual cases. For instance, in the context of self-defence, the issue of severity will be one of the factors considered by the jury in determining whether the accused had reasonable grounds for believing that his or her conduct was necessary for self-preservation.

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30 Consultation Paper, Proposal 4–13.  
31 Rec 5–1.

6.25 In this respect, the Commissions acknowledge stakeholder comments on the interpretation of the severity of family violence in individual cases. The Commissions agree that an assessment of the severity of family violence in the context of homicide defences requires an appreciation of the nature and dynamics of family violence on the part of judicial officers, juries and legal representatives. This matter is considered further in Chapter 14 on homicide defences, and in Chapter 31 on education and training.

#### ***Homicide defences—definitional consistency in Victoria***

6.26 In the Commissions' view, the Victorian family violence and criminal legislation would benefit from a consistent definitional approach to family violence—in accordance with the core definition of family violence and the inclusive list of behaviours in Recommendation 5–1. The fact that the Victorian criminal legislation has a narrower definition in its family violence legislation appears a matter of the timing of particular legislative amendments and not a deliberate policy choice for a narrower definition in the criminal law.

6.27 The Commissions consider that definitional consistency would enhance the effectiveness of the legislative guidance about the potential relevance of family-violence related evidence in s 9AH of the *Crimes Act*. In particular, it would expressly draw attention to the wider range of behaviours recognised in contemporary understandings of family violence. Accordingly, the Commissions consider that the definition of family violence in s 9AH of the *Crimes Act* should be replaced with the consistent core definition and the inclusive list of behaviours in Recommendation 5–1. That is, family violence should be defined as violent or threatening behaviour or any other form of behaviour that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include, but is not limited to, the list of behaviours contained in Recommendation 5–1(a)–(i). This matter is addressed in Recommendation 6–1 below. The combined effect of Recommendations 5–1 and 6–1 is, therefore, that s 5 of the *Family Violence Protection Act* should be amended to incorporate the definitional approach outlined in Recommendation 5–1, and that s 9AH of the *Crimes Act* should be amended to mirror s 5 of the *Family Violence Protection Act* as amended.

6.28 Given that the core definition of family violence in Recommendation 5–1 emphasises the context in which family violence should be defined—and the Victorian family violence legislation does not currently do so—the Commissions consider that adding ‘economic abuse’ to the current definition of s 9AH of the *Crimes Act*<sup>32</sup> would not achieve the desired outcome. The Commissions also acknowledge stakeholder comments that adding ‘economic abuse’ to the current definition of family violence in s 9AH of the *Crimes Act* may not resolve inconsistencies between the definitions of ‘family member’ in family violence and criminal legislation. The Commissions address this matter separately in Chapter 14.

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32 Consultation Paper, Proposal 4–14.

***Definitional consistency between family violence and criminal legislation beyond the context of homicide defences?***

6.29 Homicide defences are one instance in which existing criminal laws have made express reference to family violence. The Commissions acknowledge that states and territories may, in future, enact family-violence specific provisions in their criminal legislation—for example, new offences or sentencing factors that refer expressly to family violence.

6.30 The Commissions consider the policy underlying the potential creation of new family-violence specific offences and sentencing factors in Chapter 13. In light of the Commissions' views on the substantive policy issues articulated in that chapter, no recommendations are made in respect of future definitional consistency issues beyond the context of homicide defences. The Commissions consider that offences and sentencing may raise distinct issues about the boundaries of criminal law that may require consideration in further detail, should jurisdictions choose to pursue these options. For example, in creating a sentencing factor in respect of the commission of an offence as part of a broader course of family-violence related conduct, it would be necessary to consider whether the definition of family violence should encompass uncharged or non-criminal conduct in addition to other charged conduct. These matters are discussed further in Chapter 13.

**Definitions of specific acts that may constitute family violence**

6.31 As mentioned in Chapter 5, some state and territory family violence legislation incorporates certain criminal offences in their definitions of family violence. For example, the Victorian legislation provides that the definition of 'assault' for the purposes of family violence is the same as the definition of assault in s 31 of the *Crimes Act 1958* (Vic).<sup>33</sup> Similarly, the Western Australian legislation provides that various definitions, including those of 'assault', 'intimidate', 'kidnapping or depriving the person of his or her liberty', and 'pursue', are the same as the equivalent definitions in the *Criminal Code* (WA).<sup>34</sup>

6.32 In some instances, acts constituting family violence are defined differently in family violence and criminal legislation. In some cases, differences in definitions are attributable to the particular objectives of the civil protection order regime and the criminal law. In other cases, however, the justification for differences in definitions is not immediately apparent. In these instances, such differences may produce anomalous outcomes or cause confusion to family violence victims or their legal representatives. Some specific examples are outlined below, as are the Commissions' recommendations to address such anomalies and improve clarity.

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33      *Family Violence Protection Act 2008* (Vic) s 4.  
34      *Restraining Orders Act 1997* (WA) s 6.

### ***'Domestic violence'—Queensland***

#### ***'Wilful injury'***

6.33 The definition of 'domestic violence' in s 11 of the *Domestic and Family Violence Protection Act 1989* (Qld) includes 'wilful injury'.<sup>35</sup> This raises issues of the interaction of this provision with that of common assault in s 245 of the *Criminal Code* (Qld). The definition in the latter provision includes striking, touching, moving or otherwise applying force of any kind to another person. It does not specifically require an injury. Accordingly, the civil law definition of 'wilful injury' appears to be more restrictive than the criminal law definition of assault.

#### ***Indecent behaviour without consent***

6.34 The definition of 'domestic violence' in s 11 of the *Domestic and Family Violence Protection Act 1989* (Qld) also includes 'indecent behaviour to the other person without consent'. However, there are some sexual offences in the *Criminal Code* (Qld) to which consent is not a defence—for example, sexual offences against children or other persons who lack legal capacity to consent to sexual conduct. The scope of the definition of 'domestic violence' in the family violence legislation means that a person may not be able to obtain a protection order—for example, on behalf of a child—in circumstances where criminal redress may be available. However, one Queensland stakeholder disagreed with this analysis and suggested that:

Magistrates in Queensland are well aware that those under 16 (or 18 in respect of anal sex) are not, as a matter of law, able to consent, so that consent is not an issue in dealing with sexual offences against children in domestic violence proceedings.<sup>36</sup>

### ***Stalking—Northern Territory***

6.35 'Stalking' is defined differently—and in some respects more narrowly—under the *Domestic and Family Violence Act 2007* (NT) than it is for the purpose of delineating conduct constituting a criminal offence under the *Criminal Code* (NT). As mentioned in Chapter 5, the *Domestic and Family Violence Act 2007* (NT) defines stalking as engaging in any of the following forms of conduct on at least two separate occasions with the intention of causing harm to the person, or causing him or her to fear harm:

- intentionally following the person; or
- intentionally watching, or loitering in the vicinity of, or intentionally approaching, the place where the person lives, works or regularly goes for a social or leisure activity.<sup>37</sup>

6.36 Under the s 189 of the *Criminal Code* (NT), relevant stalking behaviour extends to a broader range of conduct—for example, telephoning or sending electronic

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35 The definition of 'domestic violence' also relevantly includes wilful damage to the other person's property: *Domestic and Family Violence Protection Act 1989* (Qld) s 11(1)(b).

36 Queensland Law Society, *Submission FV 178*, 25 June 2010.

37 *Domestic and Family Violence Act 2007* (NT) s 7.

messages to the victim, interfering with property in the victim's possession and giving offensive material to the victim. As these behaviours are not included in the definition of stalking in the *Domestic and Family Violence Act 2007* (NT), a victim seeking a protection order to restrain such conduct must rely upon the operation of a number of different sections of the Act which identify and define conduct constituting 'domestic violence'.<sup>38</sup>

6.37 For example, 'intimidation' is listed as a type of conduct constituting 'domestic violence' in s 5 of the *Domestic and Family Violence Act 2007* (NT). It is defined in s 6 as 'harassment', or any conduct that causes a reasonable apprehension of violence to the person or damage to his or her property, or any conduct that has the effect of unreasonably controlling the person or causes him or her mental harm. 'Harassment' is not a defined term, however examples provided in s 6 include the regular and unwanted contacting of the person—including by mail, phone, text messages, fax, the internet or another form of electronic communication. Section 6 further provides that a relevant consideration in determining whether a person's conduct amounts to intimidation is the existence of a pattern of conduct, especially domestic violence.

6.38 A further difference in the civil and criminal definitions of 'stalking' is that the *Criminal Code* (NT) allows for a combination of behaviours to constitute stalking, in addition to repeated instances of the same conduct. Under the *Domestic and Family Violence Act 2007* (NT), a victim would have to identify other forms of domestic violence in s 5 in order to achieve recognition of a combination of abusive behaviours.

6.39 These differences mean that, in the Northern Territory, to obtain a protection order in respect of conduct that is, or is capable of being, the subject of a criminal prosecution for stalking, such conduct must be capable of falling within other—and potentially multiple—forms of conduct recognised as 'domestic violence' under the *Domestic and Family Violence Act 2007* (NT).

#### ***Emotional or psychological harm, mental harm—South Australia***

6.40 In the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) one of the categories of abuse is that which causes, or is intended to cause, 'emotional or psychological harm'. Such harm is defined as including:

- mental illness;
- nervous shock; and
- distress, anxiety or fear, that is more than trivial.<sup>39</sup>

38 As mentioned in Ch 5, s 5 of the *Domestic and Family Violence Act 2007* (NT) defines 'domestic violence' by reference to types of conduct, including causing harm, property damage, intimidation, stalking, economic abuse and attempts to engage in such conduct.

39 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(3). A list of examples of acts that may constitute emotional or psychological harm is provided in s 8(4).

6.41 However, the distinction between emotional and psychological harm is not readily apparent on the face of the family violence legislation. The inclusive list of ‘emotional or psychological harm’ in s 8 does not distinguish between the two types of harm, nor does the provision expressly refer to, or adopt, any corresponding criminal law concepts, which are discussed below.

6.42 *The Criminal Law Consolidation Act 1935* (SA) uses the term ‘mental harm’ for the purposes of offences relating to causing harm<sup>40</sup> or serious harm,<sup>41</sup> or creating a risk thereof.<sup>42</sup> It defines ‘harm’ as meaning ‘physical or mental harm (whether temporary or permanent).’<sup>43</sup> ‘Mental harm’ is, in turn, defined as ‘psychological harm and does not include emotional reactions such as distress, grief, fear or anger unless they result in psychological harm’.<sup>44</sup> The term ‘psychological harm’ is undefined.

6.43 Notwithstanding that the family violence legislation is silent on issues of consistency of terminology with the criminal legislation, it appears that ‘emotional harm’ is intended to include harm that falls short of ‘psychological harm’ for the purposes of the criminal legislation.<sup>45</sup> However, in conflating psychological and emotional harm in the illustrative lists in s 8, the family violence legislation does not provide practical guidance on distinguishing between the two forms of harm.

6.44 For example, it is unclear whether proof of ‘mental illness’ or ‘nervous shock’—for the purposes of obtaining a protection order—would qualify as proof of ‘mental harm’ for the purposes of a criminal prosecution for an offence in the nature of causing harm—assuming that proof is established beyond reasonable doubt. Similarly, it is open to argument as to whether ‘distress, anxiety or fear that is *more than trivial*’ under the family violence legislation could result in ‘psychological harm’ and thus fall within the definition of ‘mental harm’ under criminal legislation. The absence of a statutory definition of ‘psychological harm’ in the criminal legislation means that—even if an intention to align terminology or concepts between family violence and criminal legislation may be inferred from the family violence legislation—the criminal law terminology does not offer a straightforward means of distinguishing between forms of harm.

6.45 As the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) had not commenced at the time of writing, it remains to be seen whether the interaction between definitions proves to be problematic in practice for victims and their legal representatives involved in both civil family violence and criminal proceedings.

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40 Ibid s 24.

41 Ibid s 23.

42 Ibid s 29.

43 *Criminal Law Consolidation Act 1935* (SA) s 21. The definitions of ‘harm’ and ‘mental harm’ appear to be based broadly upon the definition in the *Model Criminal Code*: See Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Non-Fatal Offences Against the Person* (1998), cl 5.1.1.

44 *Criminal Law Consolidation Act 1935* (SA) s 21.

45 Government of South Australia, *Submission FV 227*, 9 July 2010.

**Consultation Paper**

6.46 In the Consultation Paper, the Commissions proposed that state and territory governments should review their family violence and criminal legislation to ensure that the interaction of terminology would not prevent a person obtaining a protection order in circumstances where a criminal prosecution could be pursued.<sup>46</sup>

6.47 The Commissions also made specific proposals for the review or amendment of aspects of the family violence and criminal legislation of Queensland, South Australia and the Northern Territory, namely that:

- the definition of stalking in the *Domestic and Family Violence Act 2007* (NT) s 7 should be amended to include all stalking behaviour referred to in the *Criminal Code* (NT) s 189;<sup>47</sup>
- the Queensland government should review the inclusion of the concepts of ‘wilful injury’ and ‘indecent behaviour without consent’ in the definition of ‘domestic violence’ in s 11 of the *Domestic and Family Violence Protection Act 1989* (Qld) in light of how these concepts might interact with the *Criminal Code* (Qld);<sup>48</sup> and
- the South Australian government should review whether the interaction of the definition of ‘emotional or psychological harm’ in the definition of ‘abuse’ in s 8 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) and ‘mental harm’ in s 21 of the *Criminal Law Consolidation Act 1935* (SA) is likely to confuse victims and their legal representatives involved in both civil family violence and criminal proceedings.<sup>49</sup>

**Submissions and consultations**

6.48 Most stakeholders supported the general principle that a victim of family violence should not be precluded from obtaining a protection order in circumstances where a criminal prosecution is open, without commenting as to detail.<sup>50</sup> As outlined below, however, there was a divergence of views about the operation of specific

46 Consultation Paper, Proposal 4–15.

47 Ibid, Proposal 4–15(a).

48 Ibid, Proposal 4–15(b).

49 Ibid, Proposal 4–16.

50 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; Confidential, *Submission FV 198*, 25 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; A Brunacci, *Submission FV 97*, 4 June 2010; Confidential, *Submission FV 89*, 3 June 2010; Confidential, *Submission FV 88*, 2 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

provisions in the Queensland, Northern Territory and South Australian criminal and family violence legislation.

#### **'Domestic violence'—Queensland**

6.49 There was general consensus among stakeholders that the references in the Queensland family violence legislation to 'wilful injury' and 'indecent behaviour ... without consent' are or may be problematic.<sup>51</sup> The Queensland Commission for Children and Young People and Child Guardian commented that the term 'wilful injury' is 'too restrictive' in that it does not capture the broader types of behaviours under the definition of common assault in the *Criminal Code* (Qld). The Commission submitted that 'wilful injury' should be replaced with a term consistent with common assault in the *Criminal Code* (Qld).<sup>52</sup>

6.50 Similarly, the Queensland Government commented on the importance of ensuring that

current definitions do not lend themselves to a restrictive interpretation of behaviours which would otherwise be regarded as acts constituting domestic violence. In particular, the requirement to demonstrate wilfulness or lack of consent may in some cases place a heavy burden on victims.<sup>53</sup>

6.51 The Queensland Government stated that it would consider the approaches taken in the family violence legislation of other jurisdictions—together with input from consultations undertaken as part of its current review of the *Domestic and Family Violence Prevention Act 1989* (Qld)—'with a view to capturing all of the behaviours that are considered to reflect the current understanding of domestic and family violence'.<sup>54</sup>

6.52 However, as noted above, the Queensland Law Society submitted that the reference to 'indecent behaviour ... without consent' may not necessarily require amendment, on the basis that consent is not an issue when dealing with persons who, as a matter of law, are unable to give consent.<sup>55</sup>

#### ***Stalking—Northern Territory***

6.53 Stakeholders who addressed the issue unanimously supported the Commissions' proposal that the definition of stalking in the *Domestic and Family Violence Act 2007* (NT) should be amended to include all stalking behaviour referred to in the *Criminal Code* (NT).<sup>56</sup> Two stakeholders observed that—while the family violence legislation is

51 Queensland Government, *Submission FV 229*, 14 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

52 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

53 Queensland Government, *Submission FV 229*, 14 July 2010.

54 Ibid.

55 Queensland Law Society, *Submission FV 178*, 25 June 2010.

56 National Legal Aid, *Submission FV 232*, 15 July 2010; Confidential, *Submission FV 164*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Confidential, *Submission FV 128*, 22 June 2010.

capable of recognising stalking behaviour through the operation of several different sections—the proposed amendments would improve clarity.<sup>57</sup>

#### ***Emotional or psychological harm, mental harm—South Australia***

6.54 Two South Australian stakeholders considered that the interaction of the definition of ‘emotional or psychological harm’ in the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) and ‘mental harm’ in s 21 of the *Criminal Law Consolidation Act 1935* (SA) would be unlikely to confuse victims and their legal representatives involved in both civil family violence and criminal proceedings.<sup>58</sup> In addition, the Government of South Australia submitted that:

As a matter of policy it is appropriate that the civil intervention order provisions cover a wider ambit of conduct—ie, causing ‘emotional harm’—and that the criminal provisions are more confined—to effects that can be more objectively proven with medical/psychiatric evidence. Whilst the interaction between the definitions may prove to be problematic in practice, it appears clear that the civil legislation encompasses emotional harm that does not amount to psychological harm, while the criminal legislation specifically excludes it.<sup>59</sup>

#### ***Commissions’ views***

##### ***Interaction of terminology between family violence and criminal legislation***

6.55 In terms of policy, it is not justifiable to have a definition of family violence in family violence legislation that may preclude or potentially make it more difficult for a victim to obtain a protection order than for a prosecution to be commenced, in circumstances which warrant prosecution.<sup>60</sup> Family-violence related conduct that is sufficiently serious as to warrant a criminal law response should be recognised under civil protection order schemes in clear and straightforward terms.

6.56 In the Commissions’ view, the best way of ensuring such recognition is the express alignment of corresponding terminology or concepts across family violence and criminal legislation. In particular, where the definition of family violence in a state or territory’s family violence legislation includes concepts recognised in that jurisdiction’s criminal legislation—such as stalking or kidnapping—the family violence legislation should expressly adopt the criminal law definitions of those concepts.<sup>61</sup>

6.57 For example, a preferable approach to recognising stalking behaviours in the Northern Territory family violence legislation may be to define the term ‘stalking’ in

57 National Legal Aid, *Submission FV 232*, 15 July 2010; Confidential, *Submission FV 164*, 25 June 2010.

58 National Legal Aid, *Submission FV 232*, 15 July 2010 citing the comments of the Legal Services Commission of South Australia, Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010.

59 Government of South Australia, *Submission FV 227*, 9 July 2010.

60 See, eg, the concepts of ‘wilful injury’ and ‘indecent behaviour ... without consent’ as part of the definition of ‘domestic violence’ under the *Domestic and Family Violence Protection Act 1989* (Qld) s 11, and the definitions of ‘stalking’ and ‘intimidation’ under the *Domestic and Family Violence Act* (NT) ss 6, 7. See also, Rec 6–2.

61 See Rec 6–3.

s 7 by reference to, or consistently with, the definition of stalking in the *Criminal Code*. This approach would obviate the need to characterise stalking-related behaviours under multiple provisions in the family violence legislation. In addition, it would simplify the application process for self-represented victims.

6.58 Similarly, in Queensland, those aspects of the definition of ‘domestic violence’ in the *Domestic and Family Violence Prevention Act 1989* (Qld) referring to ‘wilful injury’ and ‘indecent behaviour without consent’ should be amended to reflect the broader behaviours captured by the criminal law definition of assault, and relevant criminal offences in respect of indecent behaviours that do not involve an element of consent. The Commissions note the intention of the Queensland Government to consider this issue as part of its current review of the family violence legislation.

6.59 The Commissions acknowledge, however, that there may be occasion for family violence legislation to recognise broader categories of conduct than those recognised at criminal law, given the different objectives of the criminal laws and the civil protection order regimes. For example, it is appropriate—as a matter of policy—for definitions of family violence in family violence legislation to recognise ‘emotional harm’ as conduct falling short of the criminal law concept of ‘psychological harm’.

6.60 However, this approach should be made clear in family violence legislation. In particular, where family violence legislation refers to ‘emotional and psychological harm’ as a form of family violence,<sup>62</sup> it should expressly identify that ‘psychological harm’ takes its criminal law meaning, and that ‘emotional harm’ captures conduct that is less than ‘psychological harm’.

**Recommendation 6–1** State and territory criminal legislation—to the extent that it refers to the term ‘family violence’ in the context of homicide defences—should adopt the same definition as recommended to be included in state and territory family violence legislation (Rec 5–1). That is, ‘family violence’ should be defined as violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;

62 See, eg, *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8.

- (h) causing injury or death to an animal irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h) above.

**Recommendation 6–2** State and territory family violence and criminal legislation should be reviewed to ensure that the interaction of terminology or definitions of conduct constituting family violence would not prevent a person from obtaining a protection order in circumstances where a criminal prosecution could be pursued.

**Recommendation 6–3** Where the definition of family violence in state or territory family violence legislation includes concepts recognised in that state or territory criminal legislation—such as stalking, kidnapping and psychological harm—family violence legislation should expressly adopt the criminal law definitions of those concepts.

## Family law

### Definition of family violence in the *Family Law Act*

6.61 The *Family Law Act* distinguishes between ‘family violence’ and abuse of a child. The same conduct in relation to a child, however, may constitute both family violence and child abuse.<sup>63</sup> Family violence is defined to mean

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.

Note: 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.<sup>64</sup>

6.62 This definition of ‘family violence’ is a semi-objective definition, as it requires reasonableness—an objective element—but also requires the decision maker to place themselves in the position of the potential victim—a subjective element.<sup>65</sup> This is stricter than the purely subjective test for family violence which previously existed under s 60D of the *Family Law Act*.<sup>66</sup> The definition is also narrower in some respects than the definitions in state and territory family violence legislation.

<sup>63</sup> Child protection is discussed in Part E.

<sup>64</sup> *Family Law Act 1975* (Cth) s 4(1).

<sup>65</sup> B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 215.

<sup>66</sup> Ibid, 215. Section 60D previously defined family violence as ‘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 to fear for, or to be reasonably apprehensive about, his or her personal wellbeing or safety’.

6.63 Objective definitions of family violence have been criticised on the basis that ‘it is essentially a contradiction in terms to apply the notion of reasonableness to the experience of fear, and to do so fails to understand the psychological impact of violence, particularly in situations where there has been a history of control’.<sup>67</sup> Conduct that causes a victim to fear for his or her safety may seem benign to an outsider. Dr Elspeth McInnes of the National Council of Single Mothers and their Children gave the following example to the Senate Legal and Constitutional Legislation Committee:

We had a case where a mother detailed how her ex partner had brutally murdered the family pet, a cat, in front of the child and the mother. It was in an episode of high agitation and aggression and he had threatened that this would happen to other family members who defied him. He used to like to send kitten cards to the child and the mother when she was attending court. Everybody would look at that on the outside and say ‘Isn’t that nice, he’s sending a lovely card with a kitten’. But the message was ‘remember the cat’.<sup>68</sup>

6.64 Women’s Legal Services Australia submitted to the *Family Courts Violence Review* (Chisholm Review) that the definition of ‘family violence’ in the *Family Law Act* should be broadened to reflect better the nature and dynamics of family violence as a pattern of behaviour, including by removing the objective element of the reasonableness test.<sup>69</sup>

There is a tendency to see family violence as a series of incidents, when in fact it is a pattern of behaviour that involves the use of violence as a tool of power and control. Victims of family violence learn to ‘read’ the perpetrator of violence and know what is coming next. It may appear to an outsider that a specific incident should not ‘reasonably’ cause the victim to fear for their safety, but her experience tells her otherwise.<sup>70</sup>

6.65 A number of other stakeholders also submitted to the Chisholm Review that the definition of ‘family violence’ in the *Family Law Act* was too narrow, including National Legal Aid, which submitted that ‘an expanded and more prescriptive definition’, similar to the one in the Victorian family violence legislation, should be adopted.<sup>71</sup>

6.66 The Family Law Council in its December 2009 advice to the Australian Government Attorney-General recommended that the *Family Law Act* define ‘family violence’ in the same way that it has been defined under the Victorian family violence legislation,<sup>72</sup> noting that this approach would remove the objective element contained in the definition.<sup>73</sup>

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67 Ibid, 215.

68 Senate Standing Committee on Legal and Constitutional Affairs—Parliament of Australia, *Inquiry into the Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2006), [3.97].

69 Comment on ALRC Family Violence Online Forum: Women’s Legal Service Providers.

70 Ibid.

71 R Chisholm, *Family Courts Violence Review* (2009), 143.

72 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 25, Rec 1.

73 Ibid, 26.

6.67 Abuse in relation to a child in the *Family Law Act* is defined to mean:

- (a) an assault, including a sexual assault, of the child which is an offence under a law, written or unwritten, in force in the State or Territory in which the act constituting the assault occurs; or
- (b) a person involving the child in a sexual activity with that person or another person in which the child is used, directly or indirectly, as a sexual object by the first-mentioned person or the other person, and where there is unequal power in the relationship between the child and the first-mentioned person.<sup>74</sup>

6.68 Significantly, the Family Violence Strategy of the Family Court of Australia acknowledges that the definition of ‘family violence’ in the *Family Law Act* is too narrow to meet the objectives of the Strategy, which are to ensure that effective measures are identified, implemented and monitored in the management of matters involving family violence and the protection from harm of the Court’s clients, their children and staff.<sup>75</sup> As a result, the Family Violence Committee—which was established in early 2002 to review and reformulate the Family Court’s policy framework on family violence<sup>76</sup>—adopted ‘a more comprehensive definition of the elements of violence’:

Family violence covers a broad range of controlling behaviours, commonly of a physical, sexual, and/or psychological nature, which typically involve fear, harm, intimidation and emotional deprivation. It occurs within a variety of close interpersonal relationships, such as between spouses, partners, parents and children, siblings, and in other relationships where significant others are not part of the physical household but are part of the family and/or are fulfilling the function of family.<sup>77</sup>

6.69 Dr Rae Kaspiew notes that differences in legislative definitions and practice-based definitions risk potentially inconsistent approaches in legal and family dispute resolution processes.<sup>78</sup> In particular, ‘they may militate against the development of a coherent understanding of violence being applied across different practice contexts’.<sup>79</sup>

### **Interaction of definitions: family violence laws and the *Family Law Act***

6.70 As discussed in Chapter 4, the *Family Law Act* requires courts exercising jurisdiction under the Act to have regard to a number of principles, one of which is the

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74     *Family Law Act 1975* (Cth) s 4.

75     Family Court of Australia, *Family Violence Strategy* (2004–2005), 1. The Strategy addresses five key areas: information and communication, safety, training, resolving the dispute, and making the decision.

76     Ibid, 1.

77     Ibid, 3 (citation omitted). The Commissions were informed in consultation that, in practice, the Strategy is adopted by both the Family Court of Australia and the Federal Magistrates Court: Federal Magistrates Court, *Consultation*, Sydney, 3 February 2010.

78     R Kaspiew, ‘Family Violence in Children’s Cases under the Family Law Act 1975 (Cth): Past Practice and Future Challenges’ (2008) 14 *Journal of Family Studies* 279, 287. The risk of potentially inconsistent approaches to conceptualising family violence for the purpose of resolving family law disputes contradicts the principles of seamlessness and fairness, underlying the Commissions’ approach to this Inquiry, as discussed in Ch 3.

79     Ibid, 287.

need to ensure safety from family violence, as defined in the Act.<sup>80</sup> There are a number of other provisions which require family courts to consider family violence. Insofar as family courts have to decide what is in a child's best interests, a 'primary' consideration is the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.<sup>81</sup> An 'additional' consideration is any family violence involving the child or a member of the child's family.<sup>82</sup> On its face, this means that family courts are potentially considering family violence in much narrower terms than the generally broader conceptualisations under state and territory family violence legislation.

6.71 However, while the definition of 'family violence' in the *Family Law Act* is comparatively narrow, the definition of 'family violence order' captures orders—including interim orders—made under prescribed laws of a state or territory to protect a person from family violence.<sup>83</sup> This is important because family courts are bound to consider family violence orders that apply to a child or a member of the child's family in ascertaining what is in a child's best interests, but only if they are final or contested.<sup>84</sup> In addition, in making parenting orders, family courts have to ensure that the order is consistent with any family violence order and does not expose a person to an unacceptable risk of family violence.<sup>85</sup>

6.72 The prescribed laws under sch 8 of the *Family Law Regulations 1984* (Cth)<sup>86</sup> cover: state and territory family violence legislation; other Acts that confer jurisdiction on courts to make family violence orders and; at least in one case,<sup>87</sup> an Act that confers jurisdiction on courts to make restraint orders outside the boundaries of the family violence context as defined in that state's family violence legislation.<sup>88</sup>

6.73 This means that family courts have to take family violence orders 'as they are', that is, orders based on the particular definitions and the grounds for obtaining those orders in the particular state or territory jurisdiction. In other words, in practice, family courts may be required to consider a conceptualisation of family violence that is broader than that envisaged under the *Family Law Act*. In cases where a person appearing before a family court has an existing final or contested protection order, the differences in definitions between the state or territory and federal scheme may have little effect. Further, in ascertaining what is in a child's best interests, a family court has broad discretion to consider any other fact or circumstance that the court thinks is

<sup>80</sup> *Family Law Act 1975* (Cth) s 43(1)(ca). In this chapter, the term 'family courts' is used to refer to courts exercising jurisdiction under the *Family Law Act*, including the Family Court, Federal Magistrates Court, and state and territory courts exercising family law jurisdiction.

<sup>81</sup> *Ibid* s 60CC(2)(b).

<sup>82</sup> *Ibid* s 60CC(3)(j). There is some debate about the significance of the 2006 amendments to the *Family Law Act* which introduced 'primary' and 'secondary' considerations. See Ch 16 for discussion of how the Family Courts Violence Review, undertaken by Professor Richard Chisholm (the Chisholm Review), recommended this distinction be dealt with.

<sup>83</sup> *Ibid* s 4.

<sup>84</sup> *Ibid* s 60CC(3)(k).

<sup>85</sup> *Ibid* s 60CG.

<sup>86</sup> *Family Law Regulations 1984* (Cth) sch 8.

<sup>87</sup> *Justices Act 1959* (Tas).

<sup>88</sup> *Family Violence Act 2004* (Tas) s 4 (definition of 'family relationship').

relevant,<sup>89</sup> which may extend to a consideration of violence falling outside the parameters of the definition of family violence in the *Family Law Act*.

6.74 However, it appears to the Commissions that there may be unjustified anomalies in the treatment of family violence issues, which turn on whether a party to family law proceedings who is a victim of family violence has, in fact, obtained a state or territory protection order.<sup>90</sup> Consider the following hypothetical:

#### Hypothetical

A is from Victoria and is involved in family law proceedings concerning the determination of parenting orders. A has obtained a final family violence protection order under the Victorian family violence legislation on the grounds of a pattern of economic abuse. In making a parenting decision under the *Family Law Act*, a family court is bound to consider that final order.

B is from Victoria and is also involved in family law proceedings concerning the determination of parenting orders. B never applied for, and therefore never obtained a protection order under Victorian family violence legislation, even though B has suffered family violence, including economic abuse. In making a parenting decision under the *Family Law Act*, the Family Court is bound to consider family violence—and given the absence of a state protection order, B—unlike A—will need to satisfy the semi-objective test in s 4 of the *Family Law Act*. If B does not satisfy that test, the Family Court may not be bound to consider the family violence suffered by B—although it may do so in its broad discretion if it considers the conduct constituting the claim to be a relevant fact or circumstance that it should take into account.

C is from New South Wales and is involved in family law proceedings concerning the determination of parenting orders. Under New South Wales family violence legislation C was not able to obtain a family violence protection order on the basis of suffering economic abuse, even though she suffered such abuse over a period of years. In order for C's claim of family violence to be considered by the Family Court, C—unlike her counterpart A in Victoria—will need to satisfy the semi-objective test in s 4 of the *Family Law Act*. If C fails to satisfy this test, the Family Court is not bound to consider the family violence suffered by C, although it may do so in its broad discretion if it considers the conduct constituting the claim to be a relevant fact or circumstance that it should take into account.

89      *Family Law Act 1975* (Cth) s 60CC(3)(m).

90      The role of protection orders in making parenting orders is discussed in Ch 16.

### ***Submissions and consultations***

#### ***Interactions in practice***

6.75 In the Consultation Paper, the Commissions asked what effect in practice the different definitions between family violence in the *Family Law Act* and in state and territory family violence legislation have in matters before federal family courts:

- (a) where a victim who has suffered family violence has (i) obtained a state or territory protection order or (ii) has not obtained such an order; and
- (b) on the disclosure of evidence or information about family violence.<sup>91</sup>

6.76 The Commissions also asked whether the broad discretion given to courts exercising jurisdiction under the *Family Law Act* and the approach taken in the Family Court of Australia's Family Violence Strategy overcome, in practice, the potential constraints posed by the definition of 'family violence' in the *Family Law Act*.<sup>92</sup>

6.77 Many submissions which addressed these questions focused on broader concerns about how federal family courts deal with evidence of family violence. It was submitted that:

- 'disclosure of family violence is most likely to be met with disbelief, [and] a minimisation of any harm caused';<sup>93</sup>
- 'the existence of current protection orders, or attempts to obtain one, is largely ignored';<sup>94</sup> as is other evidence of family violence—such as police reports and witness testimony;
- federal family courts have not recognised protection orders, particularly in cases where no charges and convictions were laid or where the respondent to a protection order had consented to the protection order without admissions;<sup>95</sup> and
- 'when there are no protection orders, it can be even more difficult for victims of family violence to demonstrate what they have experienced' as the federal family courts 'take little notice of descriptions of family violence in ... affidavits or ... applications for protection orders'.<sup>97</sup>

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91 Consultation Paper, Question 4–4.

92 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 4–5.

93 Confidential, *Submission FV 96*, 2 June 2010.

94 T Searle, *Submission FV 108*, 2 June 2010. See also Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010, which expressed the view that protection orders are 'routinely ignored/devalued/downplayed'.

95 C Pragnell, *Submission FV 70*, 2 June 2010.

96 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

97 Ibid.

6.78 Women's Legal Service Queensland stated that 'the issue is much bigger than definitions':

Domestic violence, how victims and perpetrators may present and the relevance of domestic violence is not well understood in the family law system. Consistent definitions would help, but also training, guidance in the Family Law Act on domestic violence and evidence that may be produced and use of domestic violence experts/reports.<sup>98</sup>

6.79 Justice for Children submitted that family courts seem to prefer evidence of physical violence over emotional or psychological violence.<sup>99</sup> A similar point was made by the Aboriginal Family Violence Prevention and Legal Service, which submitted that the definition of family violence in the Victorian family violence legislation was better than that in the *Family Law Act* because it focused beyond physical and sexual violence.

In the Family Court unless alleging physical and sexual violence, the family violence generally is not taken seriously—verbal abuse in particular. Often both parties will allege the other is verbally abusive. In a recent family report—the ATSI mother was unable to talk to the report writer about the physical violence she had experienced—(which is a separate issue)—but when she spoke about the verbal abuse the report writer was dismissive of it. This would have further impeded the ability of the mother to expand on the physical violence. (She had given evidence of physical violence in a detailed affidavit).<sup>100</sup>

6.80 Other submissions also reported that the differences in definition did have an impact.<sup>101</sup> For example, one legal service provider submitted:

In cases where there is actually third party evidence about family violence, the weight that different judicial officers place on certain evidence based on how certain information falls under the different definitions of family violence actually can be quite different. Therefore, consistency in terms of the definition of 'family violence' would be beneficial to all proceedings.<sup>102</sup>

6.81 Peninsula Community Legal Centre submitted that, in practice, the differences in definition cause a number of problems:

In PCLC's experience, in practice, the difference between the definition of family violence in the Victorian legislation and the definition of family violence within the *Family Law Act 1975* (Cth) causes several problems. In situations where an order has been obtained, often [by] consent without admission, the federal family courts review only the final order and not whether there has been any finding of the alleged violence or risk. This creates potential problems, where the existence of a protective order may serve to unfairly restrict contact between children and a parent or alternatively, may expose a child to risk by way of unsuitable living arrangements. ...

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98 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

99 Justice for Children, *Submission FV 148*, 24 June 2010.

100 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

101 For example, Confidential, *Submission FV 183*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

102 Confidential, *Submission FV 183*, 25 June 2010.

Where no protective order has been obtained and violence is alleged, such allegations can be dismissed by the federal family courts, as lacking validity for want of evidence.<sup>103</sup>

6.82 In contrast, the Queensland Law Society, which agreed that the definition of family violence in the *Family Law Act* is too narrow to meet the objectives of the Family Court's Family Violence Strategy, submitted that the differences in definition between the Queensland and federal legislative schemes have little effect.

In practice, if a survivor of violence asserts in Family Law Act proceedings that he or she has been the subject of violence, then in properly prepared material he or she will not merely rely upon the existence of a protection order but will set out what violence has occurred so that it can be properly taken to account as evidence before the Federal Magistrates or Family Court.<sup>104</sup>

6.83 However, most stakeholders who addressed the issue considered that the broad discretion given to courts exercising family law jurisdiction and the approach taken in the Family Court's Family Violence Strategy did not, in practice, overcome the potential constraints posed by the definition of family violence in the *Family Law Act*,<sup>105</sup> and some of these stressed the need for common definitions across the legislative schemes.<sup>106</sup> For example, women's legal services submitted that:

- ‘no strategy will influence all members of the Court ... and the only way to ensure proper exercise of discretion is to enshrine it in legislation’;<sup>107</sup> and
- ‘the legislation is a means of educating the community about the law and these benefits of including a definition should not be overlooked’.<sup>108</sup>

6.84 Crossroads Community Care Centre Inc, in expressing the view that the identified constraints were not overcome in practice, submitted that the exercise of discretion is ‘usually conservative’ and ‘economic abuse, psychological abuse and threats are routinely ignored’.<sup>109</sup>

6.85 A small number of stakeholders considered that the broad discretion given to courts exercising family law jurisdiction and the approach taken in the Family Court's

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103 Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

104 Queensland Law Society, *Submission FV 178*, 25 June 2010.

105 Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 82*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 40*, 14 May 2010. One academic expressed the view that it ‘probably did not overcome the potential constraints’: N Ross, *Submission FV 129*, 21 June 2010.

106 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010.

107 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

108 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

109 Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010.

Family Violence Strategy did, in practice, overcome the potential constraints posed by the definition of family violence in the *Family Law Act*,<sup>110</sup> while others said that this was the case ‘sometimes’.<sup>111</sup>

6.86 An extension of the definition of family violence in the *Family Law Act* has consequences for the current legislative scheme. Under s 61DA(2), the presumption of equal shared responsibility does not apply where there is family violence. Federal Magistrate Dr Altobelli argues that the fact that *any* family violence falling within the definition in s 4 of the Act rebuts the presumption is both a strength and a weakness. The strength is signalling the unacceptability of any family violence; the weakness is fettering the judiciary’s ability to craft appropriate parenting orders in the best interests of children.<sup>112</sup> He stated that:

[t]o fail to differentiate family violence can be as harmful to victims of violence, and their children, as it could be to children who are denied otherwise safe and meaningful relationships with parents who have perpetrated certain types of violence.<sup>113</sup>

6.87 This is linked to a consideration of the typologies of violence, discussed below.

#### ***Expanding definition***

6.88 In the Consultation Paper, the Commissions expressed the view that the definition of family violence in the *Family Law Act* is too narrow, and proposed that it should be expanded to include specific reference to certain physical and non-physical violence, including: sexual assault, economic abuse, emotional or psychological abuse, kidnapping or deprivation of liberty, damage to property, harm or injury to an animal irrespective of whether the victim owns the animal, and exposure of children to family violence. The Commissions cited the definition in the Victorian family violence legislation as a model.<sup>114</sup> In effect, the Commissions proposed that there be a shared understanding of what constitutes family violence across family violence legislation and the *Family Law Act*.

6.89 The majority of stakeholders who addressed this issue supported the proposal.<sup>115</sup> Reasons given include that it would ‘reflect established social research’ and assist in

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110 Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 78*, 2 June 2010.

111 Confidential, *Submission FV 183*, 25 June 2010. A similar view was expressed in K Johnstone, *Submission FV 107*, 7 June 2010.

112 T Altobelli, ‘Family Violence and Parenting: Future Directions in Practice’ (Paper presented at Australasian Institute of Judicial Administration Family Violence Conference, Brisbane, 2 October 2009), 43.

113 Ibid, 43.

114 Consultation Paper, Proposal 4–17.

115 For example, National Legal Aid, *Submission FV 232*, 15 July 2010; Family Relationship Services Australia, *Submission FV 231*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; N Norris, *Submission FV 176*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010;

educating parties about what constitutes family violence.<sup>116</sup> In particular, stakeholders expressed support for consistent definitions of family violence in legislation.<sup>117</sup> For example, the Magistrates' Court and Children's Court of Victoria submitted:

We believe that more consistent definitions of family violence would assist in the prevention of family violence because they avoid confusion about what does and does not constitute behaviour that is, at a minimum, unacceptable. Consistency allows courts to send clearer messages about what constitutes prohibited behaviour.<sup>118</sup>

6.90 A community legal service expressed the view that consistent definitions should go some way to alleviate particular problems identified in the Consultation Paper arising from the interaction between family violence legislation and the *Family Law Act*, which could affect the treatment of victims depending on whether or not they had obtained a state or territory protection order.<sup>119</sup>

6.91 Stakeholders also specifically supported the inclusion of non-physical violence,<sup>120</sup> and for the Victorian definition to be used as a model<sup>121</sup>—for example, on the basis that it has proved ‘workable and successful’.<sup>122</sup> Professor Patricia Easteal supported the proposal and submitted that the ‘more examples and detail [to be included in the definition] the better’.<sup>123</sup> Also in support, one legal service provider noted that ‘there are safety catches in place to prevent abuse of broad definitions by perpetrators’.<sup>124</sup>

6.92 Professor Patrick Parkinson opposed the proposal. As discussed in Chapter 5, Parkinson expressed concerns about the expansion of the definition of family violence to the extent that it would create ‘discrete categories of violence provable by reference to specific incidents or behaviours outside of a context of coercive, controlling violence or behaviour that causes someone to fear for their safety’, noting the significant net-widening effects of such an approach. He submitted that family violence should be defined as

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Police Association of New South Wales, *Submission FV 145*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; T Searle, *Submission FV 108*, 2 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 40*, 14 May 2010.

116 The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010.

117 For example, National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

118 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

119 Confidential, *Submission FV 171*, 25 June 2010.

120 For example, NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; Confidential, *Submission FV 77*, 2 June 2010.

121 For example, NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; F Hardy, *Submission FV 126*, 16 June 2010.

122 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

123 P Easteal, *Submission FV 40*, 14 May 2010.

124 Confidential, *Submission FV 164*, 25 June 2010.

violent or threatening behaviour or any other form of behaviour, including sexual, economic or psychological abuse, which has the purpose of coercing, controlling or subjugating a family member or causing that family member to be fearful, or which is reasonably likely to have these consequences.<sup>125</sup>

6.93 Toni McLean—a partner violence counsellor—also appears to oppose the proposal, insofar as its aim is to include in the *Family Law Act* a definition that is as consistent as possible with that in family violence legislation.

The understanding of family violence for the purposes of the Family Court must be different from and more nuanced than the definition of family violence for the purposes of family violence and/or criminal legislation. The latter is focused on maintaining the safety of real or perceived victims of a particular kind of harmful behaviour in a ‘snapshot’ moment when the menace has occurred or is reasonably expected to be about to occur; and police officers could not be reasonably expected to conduct a lengthy investigation before taking further action. That is, police officers are responding to a ‘snapshot’ of a situation. The Family Court, however, is not making decisions about individual events, but rather about long term situations, consistent with viewing a whole ‘film’ rather than a single snapshot.<sup>126</sup>

#### ***Removal of reasonableness test***

6.94 In the Consultation Paper, the Commissions proposed that the definition of family violence in the *Family Law Act* should be amended by removing the semi-objective test of reasonableness.<sup>127</sup>

6.95 The overwhelming majority of stakeholders who addressed this issue, including a number of legal service providers, advocacy organisations and family violence related service providers who made confidential submissions, supported the proposal.<sup>128</sup> Support was principally expressed because of the unsatisfactory way the reasonableness test could operate.

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125 P Parkinson, *Submission FV 104*, 5 June 2010.

126 T McLean, *Submission FV 204*, 28 June 2010.

127 Consultation Paper, Proposal 4–18. The Commissions noted that a consultation with some federal magistrates suggests that the reasonableness requirement has little practical impact.

128 For example, Family Relationship Services Australia, *Submission FV 231*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; N Norris, *Submission FV 176*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 78*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

6.96 In addition to expressing support for the views expressed in the Consultation Paper,<sup>129</sup> stakeholders also submitted that:

- ‘reasonable’ in the family law is open to discretion at times to the detriment of women and children’s safety;<sup>130</sup>
- the test of ‘reasonableness’ is flawed because, in most cases, a male judge will be deciding the ‘reasonableness’ of a female’s fear and what is ‘reasonable’ to fear is a ‘culturally loaded measure, that when poorly applied can minimise women’s experience of fear’;<sup>131</sup>
- the concept of reasonableness is vague and ‘leaves litigants confused and unsure as to what the Court requires, also leaving [it] open to broad interpretation by [judicial officers] and legal representatives’;<sup>132</sup> and
- the note at the end of the definition of ‘reasonableness’ is ‘unclear’.<sup>133</sup> A community legal service asked:

Does this mean for example, that a person with [post-traumatic stress disorder (PSTD)] caused by family violence needs to experience his or her fear as the reasonable person would, or the way a reasonable PTSD sufferer would?<sup>134</sup>

6.97 In addition, in a joint submission, Domestic Violence Victoria and others expressed support

in the interests of victim protection, consistency and reducing complexity for victims and other non-perpetrator parties pursuing Family Court matters.<sup>135</sup>

6.98 Women’s Legal Services submitted that it supports a review of the definition of family violence that includes consideration of the removal of the test of reasonableness:

The test was introduced as part of the 2006 reforms in the absence of any identified need to amend the definition in this way. We believe that the objective test was included in the definition to respond to apparent concerns about the making of ‘false allegations’ of family violence and was, at the time, a highly inappropriate policy response to this issue which has no empirical basis.<sup>136</sup>

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129 For example, Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

130 Berry Street Inc, *Submission FV 163*, 25 June 2010.

131 K Johnstone, *Submission FV 107*, 7 June 2010.

132 NSW Women’s Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010.

133 Confidential, *Submission FV 171*, 25 June 2010.

134 Ibid.

135 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

136 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

6.99 However, the Department of Premier and Cabinet (Tas) submitted that:

Anecdotally, the objective test of reasonableness is not drastically affecting outcomes because the objective test does tend to be applied as if the objective person has been through the experiences of the victim (which is only sensible).<sup>137</sup>

6.100 The One in Three Campaign submitted that it concurred with the views expressed in the Chisholm Review that: the correct interpretation of the requirement of reasonableness would take the context into account; the inclusion of the concept of reasonableness has merit; and the question is whether it has been in fact interpreted in ways that is unfair to victims.<sup>138</sup>

6.101 Another stakeholder expressed neither support nor opposition for the proposal, but suggested:

If the test of reasonableness remains, it should be used such that it considers the context and history of the behaviour that is under question, and should be used to test the validity or otherwise of the fears of the victim with regard to his/her safety and that of the children. If it is limited to a ‘snapshot’ of an event, and does not include consideration of the whole ‘film’, then it is not a reasonable test.<sup>139</sup>

### ***Commissions’ views***

#### ***Expanding definition***

6.102 It is unacceptable that differences in definitions across family violence legislation and the *Family Law Act* may result in different treatment of persons suffering similar types of family violence.

6.103 The Commissions maintain the view expressed in the Consultation Paper that the definition of family violence in the *Family Law Act* is too narrow. In particular, the Commissions consider that it is important that the definition expressly recognise that certain types of non-physical conduct—including economic abuse and psychological abuse—may fall within the wider definition of family violence. In this regard, the Commissions note the views of some stakeholders that federal family courts may favour evidence of physical violence over non-physical violence.

6.104 The Commissions are strongly of the view that there should be a consistent understanding of what constitutes family violence across federal family law, and state and territory family violence legislation. In this regard, the Commissions note stakeholder opinions that current definitional constraints in the *Family Law Act* are not always—or best—overcome by the exercise of discretion, or with regard to the Family Court of Australia’s Family Violence Strategy.

6.105 To this end, the Commissions recommend that the same core definition of family violence that is recommended for family violence legislation should also be adopted in the *Family Law Act*. That is, family violence should be given a definition that describes the context in which acts take place. Family violence should be defined

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137 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

138 One in Three Campaign, *Submission FV 35*, 12 May 2010.

139 T McLean, *Submission FV 204*, 28 June 2010.

as violent or threatening behaviour, or any other form of behaviour that coerces or controls a family member or causes that family member to be fearful—the approach recommended by the VLRC in its 2006 Report.<sup>140</sup> The definition should then set out non-exhaustive types of physical and non-physical behaviour that may fall within this definition, as outlined in Recommendation 6–4 below, mirroring the same types of conduct—including sexual assault, economic abuse and emotional abuse—that the Commissions have recommended be addressed in family violence legislation.<sup>141</sup> A summary of the key benefits of having a common core definition of family violence together with a shared understanding of what may fall within that definition across family law and family violence legislation is set out at the end of this chapter.

6.106 The Commissions consider that the definition that is recommended will assist in educating those engaged in the family law system about the complexities and nuances of family violence.

#### ***Removal of reasonableness test***

6.107 The Commissions remain of the view expressed in the Consultation Paper that the semi-objective test of reasonableness should be removed from the definition of family violence in the *Family Law Act* on the basis that it is inappropriate to apply a test of reasonableness to the experience of fear in determining whether conduct is violent. To do so ignores the psychological impact of family violence, especially within the context of a controlling relationship.<sup>142</sup>

6.108 The Commissions' approach is consistent with that taken by the Family Law Council in its December 2009 advice to the Australian Government Attorney-General.<sup>143</sup> As above, the Council recommended that the *Family Law Act* define 'family violence' in the same way that it has been defined under the Victorian family violence legislation,<sup>144</sup> noting that this approach would remove the objective element contained in the definition.<sup>145</sup>

6.109 The Chisholm Review recommended that, if the Australian Government did not adopt its recommendations about reforming the shared parenting provisions, then it should

strengthen the provisions of the Act relating to family violence, including more detail about the nature and consequences of family violence, and that it consider in this connection adapting some of the provisions of the Victorian or other state and territory legislation relating to family violence.<sup>146</sup>

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140 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 14.

141 Rec 5–1.

142 This view is expressed in the context of defining family violence. However, as discussed in Ch 7, it is appropriate to adopt a reasonableness test in ascertaining whether there are grounds for obtaining a protection order—given the preventative focus of issuing such an order.

143 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009).

144 Ibid, 25, Rec 1.

145 Ibid, 26.

146 R Chisholm, *Family Courts Violence Review* (2009), Rec 3.6.

6.110 The Commissions note, however, that the Chisholm Review took a different stance on the removal of the reasonableness requirement, expressing the view that the

correct interpretation of the requirement of reasonableness would take the context into account, and ask whether a person in the victim's position, having experienced the history of violence, and knowing the meaning [for example, of a particular gesture] would have a reasonable fear ... [and that] the inclusion of the concept of reasonableness has merit, and the question is whether it has in fact been interpreted in ways that are unfair to victims.<sup>147</sup>

6.111 The Chisholm Review stated that the information available before it did not indicate that the definition had in fact malfunctioned in that way, and did not recommend removal of the 'reasonableness' requirement. The Review did, however, state that 'further consideration should be given to this issue if more relevant information comes to light about the operation of the definition in practice'.<sup>148</sup>

6.112 As discussed above, the Commissions consider that the definitions of family violence in family violence legislation and the *Family Law Act* should be consistent. The Commissions, therefore, do not make a separate recommendation about the removal of the reasonableness test from the definition of family violence in the *Family Law Act*—given that the definition that they have recommended does not include the test of reasonableness.

#### **Cultural change**

6.113 Changes in definition cannot in themselves bring about cultural change in attitudes towards violence. One stakeholder has expressed concern about the extent to which family violence is referred to as 'conflict' or 'entrenched conflict' in the family law system, including in the case law.<sup>149</sup> There is room for improvements in judicial and legal education in this regard. The Commissions endorse the recommendation made by the Chisholm Review that:

The Government, the family law courts and other agencies and bodies forming part of the family law system consider ways in which those working in the family law system might be better educated in relation to issues of family violence.<sup>150</sup>

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147 Ibid, 147.

148 Ibid.

149 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers*. See also *Eddy v Weaver* [2009] FMCAfam, [4], [122], [123].

150 R Chisholm, *Family Courts Violence Review* (2009), Rec 4.3. Training and education are addressed generally in Ch 31.

**Recommendation 6–4** The *Family Law Act 1975* (Cth) should adopt the same definition as recommended to be included in state and territory family violence legislation (Rec 5–1). That is, ‘family violence’ should be defined as violent or threatening behaviour, or any other form of behaviour, that coerces or controls a family member or causes that family member to be fearful. Such behaviour may include but is not limited to:

- (a) physical violence;
- (b) sexual assault and other sexually abusive behaviour;
- (c) economic abuse;
- (d) emotional or psychological abuse;
- (e) stalking;
- (f) kidnapping or deprivation of liberty;
- (g) damage to property, irrespective of whether the victim owns the property;
- (h) causing injury or death to an animal, irrespective of whether the victim owns the animal; and
- (i) behaviour by the person using violence that causes a child to be exposed to the effects of behaviour referred to in (a)–(h).

## Typologies of violence

6.114 An issue that arises in considering the parameters of the legislative definition of family violence in the *Family Law Act* is whether it is feasible for the Act to differentiate between types of family violence.

6.115 Since the 1980s social scientists—including the American sociologist Dr Michael Johnson—have developed various theories to describe different types of family violence.<sup>151</sup> The typologies generally reflect the proposition that family violence committed by men, and that committed by women, have different meanings and impacts. These typologies have been the subject of extensive debate. The following five typologies have been identified:

- coercive controlling violence—also referred to as intimate or patriarchal terrorism;
- common couple violence—also referred to as situational couple violence;
- violent resistance;

<sup>151</sup> Others who have written in this area include Kathleen Ferraro, Peter Jaffe and Nancy der Steegh. See, eg, N Ver Steegh and C Dalton, ‘Report from the Wingspread Conference on Domestic Violence and Family Courts’ (2008) 46 *Family Court Review* 454.

- separation-instigated violence; and
- mutual violent control.

6.116 The typologies do not purport to deal with other types of violence, such as violence against children, or family violence within Indigenous communities.<sup>152</sup>

#### ***Coercive controlling violence***

6.117 Coercive controlling violence has control at its core. Johnson describes it as ‘a product of patriarchal traditions of men’s rights to control ‘their’ women’ and

as a form of terroristic control of wives by their husbands that involves the systematic use of not only violence but economic subordination, threats, isolation and other control tactics.<sup>153</sup>

6.118 Johnson claims that ‘patriarchal terrorism’ is almost exclusively committed by men against women<sup>154</sup>—an assertion which the One In Three Campaign has disputed in a submission to this Inquiry.<sup>155</sup>

6.119 Other features of this category of violence are that the violence usually escalates and that the victim rarely fights back or stops fighting back after initial attempts to do so.<sup>156</sup> Dr Joan Kelly and Johnson comment that it is not atypical for victims of this category of violence to report that the psychological effect of their experience is worse than the physical impact.<sup>157</sup>

#### ***Common couple/situational violence***

6.120 Common couple/situational violence is not characterised by the dynamics of power and control. It arises from specific situations or arguments. It usually involves less serious forms of violence compared to coercive controlling violence. Kelly and Johnson state that this form of violence is used by both men and women. It is less likely to escalate over time, and is more likely to cease after separation.<sup>158</sup>

#### ***Violent resistance***

6.121 Violent resistance describes the situation where a spouse uses violence—but not control—in response to coercive controlling violence. This type of violence is said to be almost entirely engaged in by women.<sup>159</sup>

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152 B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 196.

153 M Johnson, ‘Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women’ (1995) 57 *Journal of Marriage and Family* 283, 285, cited in B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 194.

154 M Johnson, ‘Patriarchal Terrorism and Common Couple Violence: Two Forms of Violence Against Women’ (1995) 57 *Journal of Marriage and Family* 283, 286.

155 One in Three Campaign, *Submission FV 35*, 12 May 2010.

156 B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 195 (citation omitted).

157 J Kelly and M Johnson, ‘Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Intervention’ (2008) 46 *Family Court Review* 476, 483.

158 Ibid, 485–488.

159 Ibid, 484–485.

### ***Separation-instigated violence***

6.122 As its name suggests, separation-instigated violence is violence instigated by the separation of an intimate couple where there was no prior history of violence in the relationship or in other settings.<sup>160</sup> Kelly and Johnson comment that this type of violence represents an ‘atypical and serious loss of psychological control’; that it is unlikely to occur again; and that those who use it ‘are more likely to acknowledge their violence rather than use denial’.<sup>161</sup>

6.123 A 2009 study by Parkinson and others found that of 181 parents in Australia who had been involved in parenting disputes after separation:

While there were certainly some histories of severe pre-separation violence, for a majority of respondents, the basis for the family violence order was post-separation conflict, without any reported history of violence in the course of their cohabitation.<sup>162</sup>

### ***Mutual violent control***

6.124 Mutual violent control refers to situations where both partners use violence to control the other. Johnson and Professor Kathleen Ferraro note that this type of violence is rare and that not much is known about its dynamics.<sup>163</sup>

### ***Role of typologies in law***

6.125 There are issues about whether such typologies have any role to play in legal frameworks and, if they do, what that role should be. Altobelli advocates the use of typologies of family violence espoused by social scientists such as Johnson, Kelly and Dr Peter Jaffe to enable more nuanced judicial responses to family violence in crafting parenting arrangements which are not only child-focused but also protect victims and children.<sup>164</sup> He stresses the importance of considering the context of violence, noting that the definition of family violence in the *Family Law Act* focuses on conduct having a certain effect, irrespective of context.<sup>165</sup> Altobelli relies, in part, on Professor Nancy Ver Steegh’s following hypothetical to support the case for differentiation:

Consider a situation where partner A slaps partner B. First imagine that when the incident takes place there is no prior history of physical violence or of other abusive behaviours between A and B. Then imagine that, although this incident is the first instance of physical violence, A has previously undermined B’s efforts to seek employment, denigrated B’s parenting in front of the children, and isolated B from her

160 T Altobelli, ‘Family Violence and Parenting: Future Directions in Practice’ (Paper presented at Australasian Institute of Judicial Administration Family Violence Conference, Brisbane, 2 October 2009), 17.

161 J Kelly and M Johnson, ‘Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Intervention’ (2008) 46 *Family Court Review* 476, 487–488.

162 P Parkinson, J Cashmore and J Single, *Post-Separation Conflict and The Use of Family Violence Orders* (2009) 1, 10.

163 M Johnson and K Ferraro, ‘Research on Domestic Violence in the 1990s: Making Distinctions’ (2000) 62 *Journal of Marriage and the Family* 948, 950.

164 T Altobelli, ‘Family Violence and Parenting: Future Directions in Practice’ (Paper presented at Australasian Institute of Judicial Administration Family Violence Conference, Brisbane, 2 October 2009), 20.

165 Ibid, 13, 42.

family and friends. Then imagine a situation where A broke B's nose the week before and A is threatening to kill B and harm their children. The act of slapping is the same in each situation but the outcome and consequences are very different.<sup>166</sup>

6.126 Altobelli notes the dangers in the differentiation process:

The consequences of inaccurate differentiation are potentially serious. At one end of the spectrum there is the risk of endangering victims and their children. At the other end there is the danger of unnecessarily restricting parental contact with children.<sup>167</sup>

6.127 These typologies have been the subject of criticism and debate. For example, Fehlberg and Behrens, while acknowledging that the typologies provide useful ways of thinking about violence, also caution that they may tend to oversimplify a complex problem, particularly if they are applied in a legal setting.

There are potential dangers with taking it further. Its use in actual legal application could justify the adoption of an unhelpful set of dichotomies, in which violence is classified as 'common couple' violence and therefore not harmful, or 'patriarchal terrorism' and therefore harmful.<sup>168</sup>

6.128 Dr Jane Wangmann also cautions against the incorporation of the typologies into the legal system, including on the basis that the categories 'may inadvertently reinforce current myths about [family] violence'.<sup>169</sup>

#### **Submissions and consultations**

6.129 In the Consultation Paper, the Commissions expressed the view that while the typologies developed by social scientists may have a role to play in enhancing understanding about the potential dynamics of different types of family violence, it is inappropriate for such typologies to be translated into legislative frameworks.<sup>170</sup>

6.130 Two stakeholders expressed diverse views on this issue. Wangmann submitted that:

at present, the use of such typologies is premature at *any stage* in the legal process—whether as a screening tool for primary dispute resolution, to guide legal practitioners, or in judicial education. These are also important stages of the legal process—particularly given the very small number of family law cases that reach a final determination—and as such, questions about the appropriateness of applying typologies extends well beyond whether they are to be incorporated in legislation.

We need to be cautious about the advocacy for the use of typologies at these pre-court stages—such typologies are still not well understood, they are open to considerable misunderstanding and misapplication, and thus have the potential to greatly impact on how cases are perceived and dealt with by lawyers, family relationship centres and

166 N Ver Steegh and C Dalton, 'Report from the Wingspread Conference on Domestic Violence and Family Courts' (2008) 46 *Family Court Review* 454.

167 T Altobelli, 'Family Violence and Parenting: Future Directions in Practice' (Paper presented at Australasian Institute of Judicial Administration Family Violence Conference, Brisbane, 2 October 2009), 19.

168 B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 196.

169 J Wangmann, "'She Said ..." "He said ..." : Cross Applications in NSW Apprehended Domestic Violence Order Proceedings', *Thesis*, University of Sydney, 2009, 48.

170 Consultation Paper, [4.160].

judicial officers. It is worth noting that even Michael Johnson notes that the development and application of these typologies are in their ‘infancy’.<sup>171</sup>

6.131 Conversely, the One in Three Campaign submitted that such typologies should be reflected in legislative frameworks:

Without typologies embedded into legislative frameworks, we would rely simply upon judicial education processes to capture critical distinctions between different types, contexts and severities of violence. It is simply inappropriate for all ‘family violence’ to be lumped together when the effects, dynamics and outcomes for victims and children from different types, contexts and severities of violence differ so widely.<sup>172</sup>

#### ***Commissions’ views***

6.132 The Commissions welcome further research on the typologies of violence that captures the depth and range of experiences of family violence—particularly in light of concerns that have been expressed about their relative under-development and potential for misunderstanding. The Commissions consider that, in time, the typologies may have a role to play in enhancing understanding about the potential dynamics of different types of family violence.

6.133 However, it is inappropriate for such typologies to be translated into legislative frameworks. First, the task of defining the typologies with any degree of certainty and precision appropriate for legislative application is fraught with difficulties. Secondly, legislative inclusion of the typologies could lead to a rigid and artificial hierarchy and, as noted by one stakeholder, could lead to misapplication. The Commissions remain of the view that the definition of family violence in the *Family Law Act* should not distinguish family violence on the basis of typologies. Judicial officers should retain a broad discretion to deal with matters on their facts in the best interests of children.<sup>173</sup> However, there is no reason why, in appropriate cases, expert evidence should not be received about typologies of violence which may assist the exercise of judicial discretion.

### **Victims’ compensation**

#### ***Definition of family violence in victims’ compensation legislation***

6.134 Most victims’ compensation Acts do not define family violence. Compensation is generally triggered by a nexus to a criminal act and a consequent injury or death.<sup>174</sup> The victims’ compensation schemes in NSW and the Northern Territory, however, expressly define or refer to family violence, as set out below.

6.135 The *Victims Support and Rehabilitation Act 1996* (NSW) expressly recognises ‘domestic violence’ as a compensable ‘act of violence’. It also recognises ‘domestic

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171 J Wangmann, *Submission FV 170*, 25 June 2010 (citations omitted).

172 One in Three Campaign, *Submission FV 35*, 12 May 2010.

173 As discussed in Ch 7, to assist in the development of a common interpretative framework, the *Family Law Act* and each of the family violence Acts of the states and territories should contain a section setting out the features and dynamics of family violence.

174 Victims’ compensation schemes are discussed in Ch 29.

violence injuries' as compensable injuries, as well as injuries arising from the intimidation and stalking of a person within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) in apparent contravention of a protection order.

6.136 The *Victims Support and Rehabilitation Act* defines a 'domestic violence offence' as a personal violence offence within the meaning of the *Crimes (Domestic and Personal Violence) Act* against persons in defined relationships.<sup>175</sup> The definition of 'domestic violence' is therefore linked to that in the family violence legislation of NSW. The definition does not include, for example, economic or emotional abuse, as these are not recognised under the *Crimes (Domestic and Personal Violence) Act*.

6.137 The *Victims of Crime Assistance Regulations* (NT) defines when a victim suffers 'domestic violence injuries' in the following way:

- (1) A victim suffers domestic violence injuries if:
  - (a) the victim suffers 1 or more injuries as a direct result of:
    - (i) a violent act involving a pattern of abuse, committed by an offender with whom the victim is in a domestic relationship; or
    - (ii) a violent act of unlawful stalking under section 189 of the Criminal Code in contravention, or apparent contravention, of a domestic violence order; or
    - (iii) a combination of violent acts mentioned in subparagraphs (i) and (ii) if committed by the same offender; and
  - (b) the injuries are more than transient or trifling, though they need not be serious.<sup>176</sup>

6.138 The Regulations also define a 'pattern of abuse' and link the definitions of 'domestic relationship' and 'domestic violence order' to the definitions of those terms in the *Domestic and Family Violence Act 2007* (NT).

#### *Commissions' views*

6.139 As discussed in Chapter 4, the purpose of victims' compensation schemes include providing assistance to victims of crime, supporting them in recovering from crime, and giving statutory recognition to the harm that they suffer from criminal offending.

6.140 It would therefore be inappropriate for legislation establishing victims' compensation schemes to adopt definitions of family violence used in family violence legislation to the extent that those definitions include conduct that does not constitute a criminal offence—such as emotional abuse or economic abuse.<sup>177</sup> The adoption of a definition that captures non-criminal conduct would clearly be in direct conflict with the purposes of such schemes, as they are currently framed.

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<sup>175</sup> *Victims Support and Rehabilitation Act 1996* (NSW) sch, cl 7A.

<sup>176</sup> *Victims of Crime Assistance Regulations* (NT) reg 5.

<sup>177</sup> These are offences in Tasmania.

6.141 The Commissions note that they have recommended that the NSW family violence legislation should be amended to include a wider definition of family violence, which may capture conduct that is not necessarily a criminal offence.<sup>178</sup> The Commissions do not propose, however, that this extended definition of family violence be applied in the context of the NSW victims' compensation legislation, which awards victims for injuries resulting from a criminal act.

6.142 However, there are other ways that legislation governing victims' compensation schemes can be amended to allow victims of family violence to be better compensated for their injuries. These options are discussed in Chapter 29.

## **Migration legislation**

6.143 Under the *Migration Regulations 1994* (Cth), 'relevant family violence' is defined as conduct, whether actual or threatened towards:

- (a) the alleged victim; or
- (b) a member of the family unit of the alleged victim; or
- (c) a member of the family unit of the alleged perpetrator; or
- (d) the property of a member of the family unit of the alleged victim; or
- (e) the property of a member of the family unit of the alleged perpetrator

that causes the alleged victim to reasonably fear for, or to be reasonably apprehensive about, his or her own wellbeing or safety.<sup>179</sup>

6.144 The focus of the definition is therefore not on categorising certain types of conduct—such as physical or emotional abuse—but rather on the effect of conduct on the victim. In this regard, the definition has a similar approach to that of 'family violence' adopted in the *Family Law Act*.

6.145 For emotional abuse to qualify as family violence under the *Migration Regulations*, it must be considered to have been serious enough to cause fear or apprehension for the person's wellbeing or safety. Acts that only have the 'effect of causing diminution of a person's feeling of well being' will not suffice.<sup>180</sup>

## **Submissions and consultations**

6.146 In the Consultation Paper, the Commissions asked how the application of the definition of 'relevant family violence' in the *Migration Regulations 1994* (Cth) is working in practice.<sup>181</sup> The Commissions foreshadowed that information received in

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178 Rec 5–1.

179 *Migration Regulations 1994* (Cth) reg 1.21(1). The purpose of these regulations is discussed in Ch 4.

180 *Helmsesi* [2002] MRTA 5231; *Malik v Minister for Immigration and Multicultural Affairs* (2000) 98 FCR 291; P Easteal, 'Violence Against Women in the Home: Kaleidoscopes on a Collision Course?' (2003) 3 *Queensland University of Technology Law and Justice Journal* 1, 18. Compare *Wright* [2001] MRTA 6123 where emotional and financial deprivation, and manipulation were considered because they caused fear or apprehension, and not just reduced wellbeing.

181 Consultation Paper, Question 4–6.

answer to this issue may be used in any further inquiry by the ALRC into the treatment of family violence in federal legislative schemes.<sup>182</sup>

6.147 Stakeholders stressed the particular vulnerability to coercion and control of victims whose migration status is uncertain due to factors such as: isolation; language barriers; lack of family or other support; unfamiliarity with the legal process;<sup>183</sup> systemic barriers in accessing information and legal support;<sup>184</sup> cultural values which might emphasise keeping quiet about spousal abuse;<sup>185</sup> fear or mistrust of police; and concerns about potential racism and prejudice.<sup>186</sup> In particular, they noted that women who have temporary visa status ‘have no access to income, medical or housing benefits’,<sup>187</sup> and are often threatened with deportation or withdrawal of sponsorship.<sup>188</sup>

6.148 The Magistrates’ Court and Children’s Court of Victoria submitted that it had ‘little insight’ into how the definition is working in practice, but noted that:

allegations are regularly made in family violence protection applications of threats to revoke visas or migration support, to ‘send a person home’ and respondents regularly suggest applicants have ‘made up’ allegations of family violence to circumvent migration regulations.<sup>189</sup>

6.149 Some stakeholders submitted that the definition was not working well in practice,<sup>190</sup> with one stakeholder stating that this was ‘partly because of the attitudes of [judicial officers] that victims are only seeking permanent residence’.<sup>191</sup> National Legal Aid, for example, raised the following concerns about the application of the definition in practice:

The *Migration Regulations 1994* (Cth) establish a procedure for non-judicially determined claims of family violence which involves referral to an ‘independent expert’ if the decision maker is not satisfied that an applicant has suffered relevant family violence. The independent expert’s opinion about whether the applicant has suffered relevant family violence, if lawfully made, is then binding on the decision maker. In Legal Aid NSW experience, there have been some cases in which independent experts have formed the opinion based on their notion of what constitutes family violence rather than applying the definition of ‘relevant family violence’ set out in the Regulations.<sup>192</sup>

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182 Ibid, [4.177].

183 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010. See also Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

184 Migrant Women’s Emergency Support Service trading as Immigrant Women’s Support Service, *Submission FV 61*, 1 June 2010.

185 P Easteal, *Submission FV 39*, 14 May 2010. See also Migrant Women’s Emergency Support Service trading as Immigrant Women’s Support Service, *Submission FV 61*, 1 June 2010.

186 P Easteal, *Submission FV 39*, 14 May 2010.

187 Confidential, *Submission FV 77*, 2 June 2010.

188 Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 77*, 2 June 2010.

189 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

190 Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 77*, 2 June 2010; P Easteal, *Submission FV 39*, 14 May 2010.

191 Justice for Children, *Submission FV 148*, 24 June 2010.

192 National Legal Aid, *Submission FV 232*, 15 July 2010.

6.150 Stakeholders also noted the difficulties that victims face in meeting the evidentiary requirements of the *Migration Regulations* to prove family violence.<sup>193</sup> The Victorian Government, for example, submitted:

Whilst noting that the review of the migration legislation is outside the terms of reference of this Inquiry, Victoria supports the issues highlighted by the Commission in the report and considerations for reform to this legislation ... A particular issue that has been raised by Victorian stakeholders is that of ensuring access to the family violence provisions of the *Migration Regulations 1994* ...

For instance, the evidence requirements to prove domestic and family violence for the purposes of the [regulations] can be difficult for some women experiencing such abuse. Evidence can be judicial or non-judicial. Judicial evidence usually requires a final civil law protection order.

Research points to a high level of under-reporting of domestic and family violence, especially among immigrant and refugee women, and few proceed right through the court process. This would suggest that many immigrant and refugee women would have difficulty meeting the judicial evidence requirement of the regulations.<sup>194</sup>

6.151 Other stakeholders addressed the content of the definition itself, submitting that the current definition:

- ‘is too narrow and should be broadened to reflect current understandings of family violence including having the reasonableness test removed,’<sup>195</sup>
- should reflect the broader definition used in the Victorian family violence legislation,<sup>196</sup> or align more generally with the definition in the *Family Law Act* and all state and territory definitions of family violence;<sup>197</sup> and
- is problematic in its inclusion of the term ‘relevant’, as this is out of step with other state, territory and federal definitions of family violence,<sup>198</sup> and appears to suggest that ‘relevance’ of violence is determined according to culture.<sup>199</sup>

6.152 One stakeholder expressly agreed with the view expressed by the Commissions in the Consultation Paper that the family violence provisions would be better placed in the *Migration Act* rather than the regulations.<sup>200</sup>

#### ***Commissions’ views***

6.153 The Commissions note the concerns expressed by stakeholders in relation to both the content and application of the definition of family violence in the *Migration Regulations*. The Commissions’ tend to the view that the definition of family violence

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193 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; Migrant Women’s Emergency Support Service trading as Immigrant Women’s Support Service, *Submission FV 61*, 1 June 2010.

194 Victorian Government, *Submission FV 120*, 15 June 2010.

195 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

196 Ibid; Berry Street Inc, *Submission FV 163*, 25 June 2010.

197 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

198 Education Centre Against Violence, *Submission FV 90*, 3 June 2010.

199 Confidential, *Submission FV 78*, 2 June 2010.

200 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

in the *Migration Regulations* is too narrow and should align with the definition the Commissions recommend be adopted in family violence legislation, the *Family Law Act* and the criminal law.

6.154 The Government may wish to reconsider the appropriateness of locating the family violence provisions—which affect the lives and safety of a particularly vulnerable group in our society—in regulations, where they are currently housed, as opposed to primary legislation. Such provisions may be more appropriately placed in the *Migration Act 1958* (Cth).

6.155 However, the Commissions make no formal recommendations in this regard, noting that reform of migration legislation is outside the Commissions' Terms of Reference. In the Consultation Paper the Commissions expressed the view that the Australian Government should initiate an inquiry into how family violence is treated in federal legislative schemes not falling within the present Terms of Reference.<sup>201</sup> In July 2010, the Australian Government announced that it would ask the ALRC to review the impact of Commonwealth laws—including migration laws—on victims of family violence.<sup>202</sup> The material received by the Commissions in this Inquiry concerning the family violence provisions of the *Migration Regulations*, including the definition of family violence, will therefore be considered more fully by the ALRC in its follow-on inquiry on family violence.

## **Summary and effect of Commissions' overall approach**

6.156 The Commissions note the substantial stakeholder support for consistent definitions across different legislative frameworks. The overall effect of the Commissions' approach, reflected in Recommendations 5–1 to 5–5 and 6–1 to 6–4, is that there should be the same core definition of family violence which describes the context in which behaviour takes place, as well as a shared common understanding of the types of conduct—both physical and non-physical—that may fall within the definition of family violence in the following legislation:

- state and territory family violence legislation;
- the *Family Law Act*;
- the criminal law—in the limited circumstances where ‘family violence’ is defined in the context of defences to homicide; and
- potentially, the *Migration Regulations*.

6.157 The Commissions remain of the view that conduct is either family violence or it is not. That is not to say that all types of conduct that constitute family violence should be criminalised, nor that family violence should be given the same treatment in the various legal frameworks under consideration. In each case, the severity and context of particular family violence may carry varying weight in different legal proceedings,

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201 Consultation Paper, [1.73]–[1.74].

202 T Plibersek, ‘Government Launches Two New Anti-Domestic Violence Initiatives’ (Press Release, 16 July 2010).

depending on the reasons for advancing evidence of family violence and the purposes of the respective legal frameworks.

6.158 The Commissions do not consider that the adoption of the same core definition of family violence, together with a shared common understanding of the types of conduct that may constitute family violence—including, as proposed in Chapter 7, a common understanding of the features and dynamics of family violence—in any way compromises the objects and purposes of the legislative schemes that are the subject of this approach.<sup>203</sup> It is imperative that common definitions of family violence are supported by a consistent and shared understanding of the concepts that underlie them.

6.159 The Commissions consider that significant systemic benefits would flow from the adoption of a common interpretative framework, across different legislative schemes, promoting the foundational policy principles of seamlessness and effectiveness underlying the approach to reform advocated by this Inquiry.<sup>204</sup> It would also deliver benefits to victims. Currently, a victim of family violence involved in multiple proceedings has to contend with the fact that conduct recognised in one jurisdiction as family violence may not necessarily be recognised as such in another. One stakeholder noted that this may not only cause confusion but may ‘even feel like systemic abuse’.<sup>205</sup>

6.160 The adoption of a common understanding of family violence is likely to have a positive flow-on effect in the gathering of evidence of family violence for use in more than one set of proceedings. This is likely to be of practical importance given the frequency, for example, of family violence allegations in the federal family courts,<sup>206</sup> and the frequent overlap of family law proceedings and protection order proceedings.

6.161 Such adoption is also likely to overcome the potential for family violence to be treated differently in family law proceedings depending on whether or not a party to those proceedings—who is a victim of family violence—has, in fact, obtained a state or territory protection order.

6.162 Another significant benefit of adopting a commonly shared understanding of family violence is that it will facilitate the registration and enforcement of protection orders under the proposed national registration of family violence orders scheme.<sup>207</sup>

6.163 In addition, it will facilitate the capture of statistics about family violence based on a commonly shared understanding of family violence, thereby providing more

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203 The purposes of the various legislative schemes relevant to family violence are discussed in Ch 4. As noted above, the Commissions do not propose to apply this approach to legislation establishing victims' compensation schemes.

204 See Ch 3.

205 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers.*

206 A 2007 study found that more than half of the cases in the Federal Magistrates Court and the Family Court involved allegations of violence: L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies, vii.

207 This scheme is discussed in Ch 30.

useful and comparable data upon which policies to address family violence can be advanced.<sup>208</sup>

6.164 The Commissions also consider that the adoption of a commonly shared understanding of what constitutes family violence will complement the recommendations made by the Family Law Council to establish a common knowledge base regarding family violence.<sup>209</sup>

6.165 The Commissions agree with the views expressed by the Magistrates' Court and Children's Court of Victoria that adopting consistent definitions of family violence across different legislative schemes allows the courts to send clear messages about what constitutes family violence.

6.166 In particular, the Commissions consider that their approach of recommending a core definition of family violence which emphasises the context in which family violence occurs—as opposed to focusing on discrete incidents of violence devoid of a context—should play a significant role in minimising the risk of litigation abuse—especially in the vexatious use of cross applications for protection orders.

6.167 Finally, the Commissions consider that there is stronger case for uniformity of the definition of family violence across an individual state or territory's family violence and criminal laws, in the limited circumstances where family violence is defined in the context of defences to homicide. Uniformity of the definition *within* an individual state or territory—as opposed to a core definition with a shared understanding of what constitutes family violence—has the advantage of clearly conveying a legislative intention for a consistent interpretation of family violence across criminal and civil jurisdictions. Moreover, this will also facilitate the proper recognition in the criminal law of the broad ambit of family violence, as discussed in Chapter 14, in the context of defences to homicide.

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208 Australian Bureau of Statistics, *Conceptual Framework for Family and Domestic Violence* (2009).

209 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), pt 6.



## **7. Other Aspects of a Common Interpretative Framework**

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### **Contents**

Introduction	293
Model provisions reflecting best practice	294
Guiding principles and a human rights framework	295
Principles	295
Features of family violence	300
Purposes	308
Grounds for obtaining a protection order	318
Acts-based tests	318
Effect on the victim	319
Act and effect	320
Options for reform	320
Persons protected	330
Indigenous concepts of family	336
Carers	337

### **Introduction**

7.1 There are two levels of establishing a common interpretative framework to address family violence in state and territory family violence legislation and the *Family Law Act 1975* (Cth). One level sets up a shared understanding across family violence legislation and the *Family Law Act* of what constitutes family violence—as discussed in Chapter 5 and 6—as well as a shared understanding of the nature, features, and dynamics of family violence across these schemes. The other level—and the principal focus of this chapter—is to foster a common interpretative framework across state and territory family violence legislation through the enactment of provisions which complements consistent definitions of family violence. These provisions are those which address: guiding principles containing express reference to a human rights framework, features of family violence, purposes of family violence legislation and grounds for a protection order.

7.2 This two-pronged approach in establishing a common interpretative framework is likely to lead to considerable systemic benefits and improved outcomes for victims of family violence, including those who are involved in multiple sets of proceedings under family violence legislation and the *Family Law Act 1975*. It may also benefit judicial officers, with improved ease and effectiveness of decision making and interpretation of laws.

7.3 This chapter also addresses equality of treatment for victims of family violence across jurisdictions in relation to the practical application of family violence legislation, including grounds for obtaining protection orders, and persons eligible for protection orders. While equality of treatment is important in itself, fostering consistency regarding the circumstances in which persons are covered by family violence legislation also complements a common understanding of family violence.

## **Model provisions reflecting best practice**

7.4 As the Terms of Reference require the Commissions to consider interaction of laws, pursuing model family violence laws as a specific task is beyond the scope of this Inquiry. It is not feasible to seek consistency on all aspects of family violence legislation—nor is consistency across the board on all issues necessarily desirable, especially if consistency were achieved by implementing provisions which represent the lowest common denominator. However, the Commissions consider that there are key areas of family violence laws which are relevant to the establishment of a common interpretative framework. Guiding principles, objects, grounds for obtaining a protection order, and persons protected are inextricably linked to the achievement of a consistent response by using a common interpretative framework, and are considered in this chapter. The effect of targeting these discrete areas is to establish an irreducible core of best practice in family violence laws.

7.5 Not all states and territories have dedicated family violence legislation—in the sense that some legislation that deals with family violence also deals with obtaining protection orders for other forms of personal violence. Where there is dedicated family violence legislation across the jurisdictions, it varies substantially in its detail and scope. For example, the Victorian and ACT legislation comprises 272 and 217 provisions respectively,<sup>1</sup> while the South Australian and Tasmanian legislation comprises 42 and 44 provisions respectively.<sup>2</sup> In addition, there is variation in family violence legislation as to:

- the range of persons who are able to avail themselves of the protection of such orders;
- the extent to which guiding objects and principles are set out in the legislation;<sup>3</sup>
- the extent to which police are obliged by legislation to take action where family violence is suspected;
- the grounds for making an order;<sup>4</sup>
- whether or not police have the power to issue orders themselves;

1 Family Violence Protection Act 2008 (Vic); Domestic Violence and Protection Orders Act 2008 (ACT).

2 Intervention Orders (Prevention of Abuse) Act 2009 (SA); Family Violence Act 2004 (Tas).

3 Objects and principles are discussed in Ch 4 and below.

4 Grounds for obtaining an order are discussed below.

- the power to make family violence notices or protection orders in criminal proceedings;
- the penalties that attach to a breach of an order; and
- the types of conditions that may be included in protection orders concerning counselling and rehabilitation programs for those who use violence.<sup>5</sup>

7.6 In 1999, the Domestic Violence Legislation Working Group—comprising Commonwealth, state and territory officials—published the Model Domestic Violence Laws Report, which contained model laws dealing with protection orders.<sup>6</sup> The model laws project was not pursued, and was subject to some criticism by Professor Rosemary Hunter and Professor Julie Stubbs on the ground that it appeared to focus simply on resolving inconsistencies.<sup>7</sup> There is also a concern that model laws should not impose standards that are of the lowest common denominator.

7.7 By way of comparison, the United States has a Model Code on Domestic and Family Violence that was not designed to provide a uniform code that would create consistency between the states.<sup>8</sup> Its purpose was to provide a model that states could use and consider when contemplating reforms to their domestic and family violence laws. The Code is described as a ‘public policy statement’ and a ‘framework’ and the Code’s drafters note each chapter and section ‘can be independently assessed and accepted or modified’.<sup>9</sup>

## Guiding principles and a human rights framework

7.8 Definitions form only one limb of an interpretative framework—principles form another.<sup>10</sup> The Model Domestic Violence Laws Discussion Paper was criticised by Hunter and Stubbs for failing to include a set of guiding principles.<sup>11</sup> Most family violence legislation does not set out guiding principles or address the specific features of family violence. This section discusses principles and features in turn.

### Principles

7.9 There is some precedent in family violence legislation—and criminal laws<sup>12</sup>—for the articulation of principles to guide legislative interpretation and to educate those

5 See Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [2.1.34], Ch 3. Police powers to issue orders are discussed in Ch 9 and the making of protection orders in criminal proceedings, and conditions attached to protection orders are discussed in Ch 11.

6 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999).

7 R Hunter and J Stubbs, ‘Model Laws or Missed Opportunity?’ (1999) 24 *Alternative Law Journal* 12, 16.

8 National Council of Juvenile and Family Court Judges (US), *Family Violence: A Model State Code: Model Code on Domestic and Family Violence* (1994).

9 Ibid, v–vi. Many states have relied heavily upon the Code when making and amending their family violence laws—National Council of Juvenile and Family Court Judges (US), *Family Violence: Legislative Update* (1997); National Council of Juvenile and Family Court Judges (US), *Family Violence: Legislative Update* (1996). The Code has not, however, led to a significantly greater level of harmonisation of law.

10 Definitions are discussed in Ch 5.

11 R Hunter and J Stubbs, ‘Model Laws or Missed Opportunity?’ (1999) 24 *Alternative Law Journal* 12, 12.

12 *Crimes Act 1958* (Vic) s 37B. See also Ch 25.

applying or engaging with the law. As discussed in Chapter 4, the family violence legislation of Victoria sets out in its preamble a number of principles, including that:

- non-violence is a fundamental social value that must be promoted;
- family violence is a fundamental violation of human rights and is unacceptable in any form; and
- family violence is not acceptable in any community or culture.<sup>13</sup>

7.10 While the NSW family violence legislation does not expressly state that family violence is a fundamental violation of human rights, it clearly places protection from family violence in a human rights framework by stating that its objects are to enact provisions consistent with certain principles underlying the *Declaration on the Elimination of Violence against Women* and the United Nations *Convention on the Rights of the Child*.<sup>14</sup>

7.11 In the Consultation Paper, the Commissions proposed that the family violence legislation of each state and territory should contain guiding principles, which should include express reference to a human rights framework. The Commissions noted that the preamble to the *Family Violence Protection Act 2008* (Vic) provides an instructive model. The Commissions proposed that the principles should refer expressly to relevant international conventions such as the *Declaration on the Elimination of Violence against Women*, and the *Convention on the Rights of the Child*.<sup>15</sup>

### **Submissions and consultations**

7.12 The majority of stakeholders who addressed the issue agreed with this proposal.<sup>16</sup> Stakeholders identified a number of benefits of incorporating principles,

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13 Family Violence Protection Act 2008 (Vic) preamble.

14 Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 9(1). See *Declaration on the Elimination of Violence against Women* 20 December 1993, UN GAOR, A/RES/48/104, (entered into force generally on 23 February 1994); *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990). International conventions are discussed in Ch 2.

15 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Proposal 4–21.

16 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; WESNET—The Women’s Services Network, *Submission FV 217*, 30 June 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic

including fostering a common approach to family violence<sup>17</sup> and the educative function of guiding principles.<sup>18</sup> The Magistrates' Court and Children's Court of Victoria described the inclusion of guiding principles in the Victorian legislation as a 'helpful development', which courts can use as a guide to interpreting legislation.<sup>19</sup>

7.13 The Queensland Government—which conducted consultations in its 2010 review of the Queensland family violence legislation—referred to the benefit of principles in assisting judicial officers and practitioners to interpret legislation. It further stated that principles articulate key policy directions. However, the Government cautioned against excessively prescriptive principles, 'as this could have an unintended consequence of limiting the interpretation of the legislation by the courts'.<sup>20</sup>

7.14 A number of stakeholders emphasised the importance of guiding principles in highlighting family violence as a human rights issue.<sup>21</sup> For example, the Australian Association of Social Workers stated that a human rights perspective provides a consistent framework to conceptualise and address family violence.<sup>22</sup> The Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service argued that:

It is important that guiding principles in family violence legislation be linked to a human rights framework, so it is clear that human rights are the fundamental rights

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Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Women With Disabilities Australia, *Submission FV 143*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Confidential, *Submission FV 125*, 20 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010; Confidential, *Submission FV 109*, 8 June 2010; T Searle, *Submission FV 108*, 2 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Julia Farr Association, *Submission FV 103*, 4 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010; Confidential, *Submission FV 34*, 6 May 2010.

17 UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010.

18 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

19 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

20 Queensland Government, *Submission FV 229*, 14 July 2010.

21 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

22 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010.

that underpin the legislation and that violence against Aboriginal women cannot and should not be minimised by cultural arguments.<sup>23</sup>

7.15 Some stakeholders expressed a preference for principles incorporated within the body of the legislation, rather than within the preamble, on the basis that the latter would have greater directive status.<sup>24</sup>

7.16 A number of stakeholders identified other international human rights instruments that should be included in the principles. These were the:

- *Convention on the Elimination of All Forms of Discrimination against Women;*<sup>25</sup>
- *Convention on the Rights of Persons with Disabilities;*<sup>26</sup>
- *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power;*<sup>27</sup>
- *Declaration on the Rights of Indigenous Peoples;*<sup>28</sup>
- *International Covenant on Civil and Political Rights;*<sup>29</sup>
- *International Covenant on Economic, Social and Cultural Rights;*<sup>30</sup>

23 Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

24 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

25 *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, [1983] ATS 9, (entered into force generally on 3 September 1981); Women With Disabilities Australia, *Submission FV 143*, 24 June 2010; F Hardy, *Submission FV 126*, 16 June 2010.

26 *Convention on the Rights of Persons with Disabilities*, 30 March 2007, [2008] ATS 12, (entered into force generally on 3 May 2008); Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Women With Disabilities Australia, *Submission FV 143*, 24 June 2010; Julia Farr Association, *Submission FV 103*, 4 June 2010.

27 *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, UN GAOR, 40th sess, 96th plen mtg, UN Doc A/RES/40/34 (1985); Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

28 *Declaration on the Rights of Indigenous Peoples*, 13 September 2007, GA Res 61/295, UN Doc A/RES/47/1; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

29 *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976); Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

30 *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966, [1976] ATS 5, (entered into force generally on 03 January 1976); Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Women With Disabilities Australia, *Submission FV 143*, 24 June 2010.

- *International Convention on the Elimination of all Forms of Racial Discrimination;*<sup>31</sup> and
- *Universal Declaration of Human Rights.*<sup>32</sup>

7.17 A few submissions opposed incorporating reference to the *Declaration on the Elimination of Violence against Women* in guiding principles on the basis that this would promote assumptions that, in cases of family violence, men are offenders and women are victims.<sup>33</sup>

7.18 The Queensland Law Society—while supporting the proposal—also submitted that principles should be inclusive of all victims of family violence. It noted that a feature of family violence is that victims underreport its incidence, and stated that

the preamble should be written in an inclusive way so that those who have been subject to domestic and family violence are not discouraged from seeking protection.<sup>34</sup>

#### ***Commissions' views***

7.19 The Commissions consider that the family violence legislation of each state and territory should contain guiding principles, which should include express reference to a human rights framework. The preamble to the *Family Violence Protection Act 2008* (Vic) provides an instructive model. The Commissions consider that the principles contained in the preamble to the Victorian legislation are informative and inclusive, without being over-prescriptive—although the principles should also be placed in a human rights framework.

7.20 The adoption of guiding principles across family violence legislation will serve an educative function, and aid the interpretation of the legislation. Guiding principles will also complement the recommended adoption of a consistent core definition of family violence and a shared understanding of the types of behaviour that may constitute family violence.

7.21 The Commissions do not have a preference for whether guiding principles should be located in a preamble or elsewhere in family violence legislation. A preamble may be taken into account and given the same weight as sections when interpreting legislation.<sup>35</sup> The Commissions take a non-prescriptive approach in this regard, and consider drafting of such provisions to be a matter for states and territories.

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31 *International Convention on the Elimination of All Forms of Racial Discrimination*, 7 March 1966, [1975] ATS 40, (entered into force generally on 04 January 1969): Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

32 *Universal Declaration of Human Rights*, 10 December 1948, (entered into force generally on 10 December 1948): T McLean, *Submission FV 204*, 28 June 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

33 T McLean, *Submission FV 204*, 28 June 2010; Family Voice Australia, *Submission FV 75*, 2 June 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

34 Queensland Law Society, *Submission FV 178*, 25 June 2010.

35 D Pearce and R Geddes, *Statutory Interpretation in Australia* (5th ed, 2000), [4.39].

7.22 The principles should refer to or draw upon all applicable international human rights instruments. The endorsement of a human rights framework is particularly relevant, for example, for Indigenous peoples and for those from culturally diverse backgrounds, by reinforcing that customary laws or cultural practices do not override the rights of family members to be safe and live free from violence—and indeed, free from fear, a freedom which has been referred to as the ‘forgotten freedom’.<sup>36</sup>

7.23 The Commissions consider that reference to a human rights framework is also particularly relevant to women. It is important that family violence legislation explicitly acknowledges women’s right to live free from family violence, particularly in the context of government acceptance of statistics which indicate that victims of family violence are predominantly—although not exclusively—female. This issue is discussed further in the next section of this chapter.

### **Features of family violence**

7.24 As discussed in Chapter 4, the family violence Acts in NSW, South Australia and Victoria, to varying degrees, set out some of the features and dynamics of family violence, including:

- its gendered nature—that is, that it is predominantly committed by men against women, children and other vulnerable persons;
- the detrimental impact it has on children;
- the fact that it occurs in all areas of society—irrespective of location, socio-economic status, age, culture, gender, sexual identity, ethnicity or religion; and
- that it may involve overt or subtle exploitation of power imbalances and may consist of isolated incidents or patterns of behaviour.<sup>37</sup>

7.25 However, apart from recognising the damaging effects of violence on children, and the fact that it occurs in all areas of society, the legislation in these jurisdictions does not mention that family violence also has a particularly damaging impact on other groups in society, such as: Indigenous persons; those from a culturally and linguistically diverse (CALD) background; gay, lesbian, bisexual, transgender and intersex persons; older people; and people with disabilities.<sup>38</sup>

7.26 In the Consultation Paper, the Commissions proposed that the family violence legislation of each state and territory should contain a provision that explains the nature, features and dynamics of family violence—including its gendered nature, detrimental impact on children, and the fact that it can involve exploitation of power

<sup>36</sup> J Spigelman, ‘The Forgotten Freedom: Freedom From Fear’ (Paper presented at Sydney University Law School Distinguished Speakers Program 2009, Sydney, 17 November 2009).

<sup>37</sup> See *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(3); *Family Violence Protection Act 2008* (Vic) preamble; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(a)–(c).

<sup>38</sup> See, eg, National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council’s Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 18.

imbalances, and occur in all sectors of society. The Victorian and NSW family violence legislation were cited as instructive models.<sup>39</sup>

7.27 In addition, the Commissions proposed that, just as the NSW and Victorian family violence legislation highlights the particularly damaging impact on children of exposure to family violence, family violence legislation should also acknowledge the particularly damaging impact of family violence on other groups in society including: Indigenous persons; those from a CALD background; those from the gay, lesbian, bisexual and transgender community; older people; and people with disabilities.<sup>40</sup> Some persons may fall within multiple categories.

7.28 The *Family Law Act* refers many times to family violence, but apart from the definition, there are no provisions which further explain the nature of family violence. In the Consultation Paper, the Commissions proposed that the *Family Law Act* should include a section detailing the features, dynamics and nature of family violence.<sup>41</sup>

### **Submissions and consultations**

7.29 The majority of stakeholders who responded to this proposal supported including a provision on the features about family violence in family violence legislation.<sup>42</sup> A number of stakeholders emphasised the importance of consulting with

39 Consultation Paper, Proposal 4–22.

40 Ibid, Proposal 4–22.

41 Ibid, Proposal 4–23.

42 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Family Relationship Services Australia, *Submission FV 231*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; WESNET—The Women's Services Network, *Submission FV 217*, 30 June 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Women With Disabilities Australia, *Submission FV 143*, 24 June 2010; Disability Services Commission (WA), *Submission FV 138*, 23 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Confidential, *Submission FV 125*, 20 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; ACON, *Submission FV 119*, 15 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Julia Farr Association, *Submission FV 103*, 4 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 68*, 1 June 2010; Queensland Commission for Children and Young People

the relevant groups regarding the inclusion and the drafting of provisions,<sup>43</sup> particularly to ensure that categories of vulnerable groups are not inadvertently omitted.<sup>44</sup> National Legal Aid did not support the proposal on the basis that these were matters more appropriate for education and training rather than legislative provisions.<sup>45</sup>

7.30 Stakeholders expressed a range of views with respect to the particular features of family violence suggested for inclusion. These are considered in turn.

#### *Gendered nature of family violence*

7.31 Stakeholders expressed differing views in response to the Commissions' proposal that the gendered nature of family violence should be included in the description of the nature of family violence. While some stakeholders specifically referred to the importance of an explicit statement regarding the gendered nature of family violence,<sup>46</sup> others opposed the incorporation of such a provision.<sup>47</sup>

7.32 Some stakeholders argued that family violence is not a gendered issue, because a significant proportion of family violence involves male victims and female offenders. They cited numerous reports and statistics to support this position.<sup>48</sup> Further, a few stakeholders expressed concern that legislative provisions describing family violence as gendered may operate to the disadvantage of male victims.<sup>49</sup> The Department of Premier and Cabinet (Tas)—while supporting the proposal—also considered that ‘there is a risk of further marginalising male victims of family violence and inadvertently reducing the already low probability that they will come forward’.<sup>50</sup>

7.33 Some stakeholders argued that incorporating such a provision would amount to ‘gender profiling’, and would create a presumption that men as a class are more likely to use family violence, and women are more likely to suffer family violence.<sup>51</sup>

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and Child Guardian, *Submission FV 63*, 1 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 39*, 14 May 2010; Confidential, *Submission FV 34*, 6 May 2010.

43 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

44 National Legal Aid, *Submission FV 232*, 15 July 2010.

45 Ibid.

46 Legal Aid NSW, *Submission FV 219*, 1 July 2010, Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

47 T McLean, *Submission FV 204*, 28 June 2010; R Smith, *Submission FV 135*, 22 June 2010; A Brunacci, *Submission FV 97*, 4 June 2010; Family Voice Australia, *Submission FV 75*, 2 June 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

48 T McLean, *Submission FV 204*, 28 June 2010; R Smith, *Submission FV 135*, 22 June 2010; Family Voice Australia, *Submission FV 75*, 2 June 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

49 T McLean, *Submission FV 204*, 28 June 2010; R Smith, *Submission FV 135*, 22 June 2010; A Brunacci, *Submission FV 97*, 4 June 2010; Family Voice Australia, *Submission FV 75*, 2 June 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

50 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

51 R Smith, *Submission FV 135*, 22 June 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

**Groups particularly affected by family violence**

7.34 Two stakeholders expressly stated their support for including in the principles an acknowledgment of groups that may be particularly affected by family violence.<sup>52</sup> For example, ACON stated that introducing illustrative examples of same-sex family violence into legislation is important, as it has

unique aspects that set it apart from other forms of domestic violence. These unique aspects include using societal homophobia as a tool of control (including the threat of ‘outing’) and the barriers of access to services such as health and justice services due to fears of homophobia and breaches of confidentiality.<sup>53</sup>

7.35 In a joint submission, Domestic Violence Victoria and others noted that the Commissions should include the intersex community among the groups for whom family violence may have a particular impact.<sup>54</sup>

**Family Law Act**

7.36 Stakeholders also overwhelmingly supported the proposal that the *Family Law Act* should include a provision detailing the features, dynamics and nature of family violence.<sup>55</sup> Stakeholders considered that it would provide guidance to courts, and

52 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Women With Disabilities Australia, *Submission FV 143*, 24 June 2010; Disability Services Commission (WA), *Submission FV 138*, 23 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; P Easteal, *Submission FV 39*, 14 May 2010.

53 ACON, *Submission FV 119*, 15 June 2010.

54 They also commented that it is more appropriate to use the plural ‘communities’ in referring to gay, lesbian, bisexual, transgender and intersex communities, rather than the singular ‘community’: Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

55 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Family Relationship Services Australia, *Submission FV 231*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; NSW Women’s Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; N Norris, *Submission FV 176*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic

others involved in family law matters,<sup>56</sup> and perform an important educative function.<sup>57</sup> Moreover, the Magistrates' Court and Children's Court of Victoria stated that 'it is preferable for legislative provisions of this nature to be as consistent as possible across jurisdictions'<sup>58</sup>—a view endorsed by several other stakeholders.<sup>59</sup>

### **Commissions' views**

7.37 In the Commissions' view, state and territory family violence legislation should contain provisions setting out the nature, features and dynamics of family violence, including that: it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported, and it has a detrimental impact on children. The provision should also address the gendered nature of family violence, discussed below. The preamble to the *Family Violence Protection Act 2008* (Vic) and s 9(3) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) provide instructive models in this regard.

7.38 Coupled with guiding principles, provisions setting out the nature, feature and dynamics of family violence provide a contextual framework for judicial decision-making. Such provisions also serve an important educative function, and should complement the training and education of judicial officers, lawyers and the police. However, the incorporation of a provision explaining the features of family violence should not be considered a substitute for education and training, but should be part of what is considered in judicial education. The Commissions' recommendation regarding this provision is part of a package of recommendations to facilitate a common understanding of family violence across the community, victims of family violence and the legal sector.<sup>60</sup>

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Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 125*, 20 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; T Searle, *Submission FV 108*, 2 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 92*, 3 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; A Harland, *Submission FV 80*, 2 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010, Confidential, *Submission FV 69*, 2 June 2010; Confidential, *Submission FV 68*, 1 June 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 37*, 12 May 2010.

56 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 183*, 25 June 2010.

57 Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 69*, 2 June 2010.

58 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

59 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; T Searle, *Submission FV 108*, 2 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010.

60 See Chs 16 and 31.

***Gendered nature of family violence***

7.39 The Commissions note the extensive research and statistics on family violence. While *Time for Action* acknowledges that men can be victims of intimate partner violence, it states that ‘overwhelmingly sexual assault and domestic and family violence is perpetrated by men against women’.<sup>61</sup> Where state and territory governments accept statistics indicating that family violence is predominantly used by men against women, this should be reflected in the principles of family violence legislation.

7.40 Anyone may be a victim of violence, and family violence is unacceptable in any circumstances. It is important that family violence legislation does not operate to marginalise male victims. The Commissions consider that state and territory family violence legislation should contain a provision that explains the nature, features and dynamics of family violence including that: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men.

7.41 The Commissions consider it is appropriate to address the predominantly gendered nature of family violence in provisions detailing its nature, features and dynamics—and in guiding principles generally. By contrast, definitions should be gender-neutral, because the law should apply equally to both sexes, and should provide a mechanism for protection or redress regardless of the sex of the victim or the person using violence.

***Groups particularly affected by family violence***

7.42 The Commissions further recommend that family violence legislation should refer to the particular impact of family violence on: Indigenous persons; those from a CALD background; those from the gay, lesbian, bisexual, transgender and intersex communities; older persons; and people with disabilities. Highlighting the impact of violence on these groups complements the Commissions’ recommendation that family violence legislation include examples of emotional or psychological abuse that would affect diverse groups in the community.<sup>62</sup> The combined effect of these recommendations may assist in the challenging task of ensuring that experiences of family violence of such groups are properly recognised across the legal system.

7.43 The Commissions do not formulate precisely how the legislative provisions might refer to the impacts of family violence on diverse groups. These should be developed in consultation with the groups affected. The formulation may also be informed by the processes recommended by the Family Law Council to establish a common knowledge base about family violence.<sup>63</sup>

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61 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 29.

62 See Rec 1–2.

63 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), pt 6.

7.44 By way of illustration, some of the issues that may be referred to by family violence legislation include the following:

- the fact that there is a disproportionate level of family violence among Indigenous communities, and the particular dynamics of Indigenous family violence such as violence within extended kinship networks;<sup>64</sup>
- the barriers faced by victims from CALD backgrounds, including communication and language difficulties, and cultural barriers such as beliefs about traditional gender roles and the importance of the family;<sup>65</sup>
- the features of elder abuse—that it commonly consists of economic abuse, as well as the withholding of medication, involuntary social isolation, and neglect;<sup>66</sup>
- the particular problems faced by victims with disabilities because of their dependence on others for support, the compounding effect of their disability on their lack of power and control in a relationship, and the fact that their disability is exploited by their abusers;<sup>67</sup> and
- the problems faced by those from the gay, lesbian, bisexual, transgender and intersex communities—including the fear of homophobia, transphobia, intersexphobia, the fear of being ‘outed’ and the fear of discrimination from the legal system due to their gender or sexual orientation.<sup>68</sup>

#### *Family Law Act*

7.45 In the Commissions’ view, the *Family Law Act* should also be amended to include a provision detailing the nature, features and dynamics of family violence. This would complement the recommended approach of adopting a standard core definition of family violence across the family law and family violence legislative schemes. As family violence is a critical factor in many cases before federal family courts, it is essential that judicial officers, lawyers and parties share a common understanding of its nature, features and dynamics. Further, a common understanding facilitates a seamless approach across jurisdictions.

7.46 The Commissions note that this position is consistent with an alternative recommendation made by the family courts violence review undertaken by Professor Richard Chisholm (the Chisholm Review) for the provisions in the *Family Law Act*

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64 P Memmott, R Stacy, C Chambers and C Keys, *Violence in Indigenous Communities* (2001), prepared for the Crime Prevention Branch, Australian Government Attorney-General’s Department, 1.

65 Department for Community Development (WA), *A Review of Literature Relating to Family and Domestic Violence in Culturally and Linguistically Diverse Communities in Australia* (2006), 49–50.

66 D Bagshaw, S Wendt and L Zannettino, *Preventing the Abuse of Older People by Their Family Members* (2009), prepared for the Australian Domestic and Family Violence Clearinghouse, 5.

67 G Hauge, R Thiara, A Mullender and P Magowan, *Making the Links: Disabled Women and Domestic Violence Final Report* (2008), prepared for Women’s Aid (UK), 13–14.

68 Inner City Legal Centre—Safe Relationships Project, *Submission FV 17*, 13 January 2010.

referring to family violence to be strengthened by including more detail about the nature and consequences of family violence.<sup>69</sup>

7.47 The Commissions recognise that—unlike state and territory family violence legislation—the prevention of family violence is not the primary focus of the *Family Law Act*, although it is a significant concern in parenting disputes.<sup>70</sup> The Act is principally concerned with the rights, duties, powers and liabilities between spouses and children, and provides for enforcement of those rights and liabilities and the dissolution of marriage.<sup>71</sup> Moreover, the broad range of persons who may avail themselves of protection under family violence legislation may never have cause to be a party to family law proceedings.

7.48 Therefore, the focus of the provisions recommended by the Commissions reflects the different purposes of the legislative schemes. The Commissions consider it essential that both state and territory courts and federal family courts have a thorough understanding of the nature of family violence, and therefore it is desirable that the provisions setting out the nature, features and dynamics of family violence in the *Family Law Act* should mirror the provisions of state and family legislation as far as possible.

7.49 In federal family courts, judicial understanding of family violence is informed by the *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (Best Practice Principles).<sup>72</sup> The Best Practice Principles incorporate some detail regarding the features of family violence, and the effect that family violence may have on children. The Commissions note that the Chisholm Review commented on the material included in the Best Practice Principles, and suggested various changes.<sup>73</sup> The Commissions consider that, in any forthcoming review of the Best Practice Principles, the federal family courts should have regard to the principles, nature, features and dynamics of family violence as expressed in Recommendations 7–1 and 7–2.

**Recommendation 7–1** State and territory family violence legislation should contain guiding principles, which should include express reference to a human rights framework, drawing upon applicable international conventions.

<sup>69</sup> R Chisholm, *Family Courts Violence Review* (2009), Rec 3.6.

<sup>70</sup> See Ch 15.

<sup>71</sup> A Dickey, *Family Law* (5th ed, 2007), 43.

<sup>72</sup> Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (2009). For further discussion of the Best Practice Principles, see Chs 15 and 17.

<sup>73</sup> R Chisholm, *Family Courts Violence Review* (2009). Chapter 1 sets out the background to the Chisholm Review.

**Recommendation 7–2** State and territory family violence legislation should contain a provision that explains the nature, features and dynamics of family violence including: while anyone may be a victim of family violence, or may use family violence, it is predominantly committed by men; it can occur in all sectors of society; it can involve exploitation of power imbalances; its incidence is underreported; and it has a detrimental impact on children. In addition, family violence legislation should refer to the particular impact of family violence on: Indigenous persons; those from a culturally and linguistically diverse background; those from the gay, lesbian, bisexual, transgender and intersex communities; older persons; and people with disabilities.

**Recommendation 7–3** The *Family Law Act 1975* (Cth) should be amended to include a similar provision to that in Rec 7–2 explaining the nature, features and dynamics of family violence.

## Purposes

7.50 Objects clauses which set out the purposes of family violence legislation are another important limb in achieving a common interpretative framework across the states and territories.

7.51 The various purposes of family violence legislation and the extent to which they are addressed in objects clauses are discussed in Chapter 4. Most family violence legislation contains object clauses. While the Western Australian legislation does not include an objects clause, it has a provision which sets out certain matters to be considered by the court when deciding whether to make a protection order, from which certain objects can be implied.<sup>74</sup>

7.52 Of those Acts that have objects clauses, the degree of articulation and specificity of identified objects differs. While most objects clauses set out the various purposes of family violence legislation, the Queensland legislation only sets out the purpose of ensuring the safety and protection of persons in particular relationships. The objects clause in the Tasmanian legislation is also relatively brief, in contrast with the family violence legislation of other states and territories. The Act highlights that ‘in the administration of [the] Act, the safety, psychological wellbeing and interests of people affected by family violence are the paramount considerations’.<sup>75</sup>

7.53 The objects clauses in most family violence legislation do not currently include a purpose aimed at increasing responsibility or accountability for those who use family

<sup>74</sup> *Restraining Orders Act 1997* (WA) s 12. Section 12 was amended in 2004 to insert a further paragraph (ba): ‘the need to ensure that children are not exposed to acts of family and domestic violence’.

<sup>75</sup> *Family Violence Act 2004* (Tas) s 3.

violence.<sup>76</sup> In contrast, most jurisdictions—apart from Queensland, Western Australia and Tasmania—express a purpose of reducing or preventing family violence and the exposure of children to such violence.

7.54 A potential purpose of family violence legislation is to ensure minimal disruption to the lives of families affected by violence. The expression of such a purpose is linked to the making of exclusion orders—that is, orders that exclude a person who has used family violence from a residence shared with the victim.<sup>77</sup> Courts have power to make exclusion orders in a number of state and territory jurisdictions. Research indicates that ‘there is a low utilisation of exclusion conditions in protection orders’ and that this may be attributed partly to ‘judicial unease’ in using them because of concern for the hardship of those who use family violence.<sup>78</sup>

7.55 A purpose about minimal disruption does not appear in the objects clause of family violence legislation of any state or territory. However, in the Second Reading Speech for the *Domestic and Family Violence Bill 2007* (NT), the Attorney-General stated that:

Another central objective of the legislation is to ensure minimal disruption to the lives of families affected by violence. There will be a new presumption when making orders in favour of an applicant with children in their care remaining in the family home.<sup>79</sup>

7.56 While the *Domestic and Family Violence Act 2007* (NT) does not expressly refer to minimal disruption, it includes a presumption that the protection of a victim and children living with a victim is best achieved by them continuing to live in their home.<sup>80</sup>

7.57 In Victoria, courts are required to consider the desirability of minimal disruption, although this consideration is not identified as an express purpose of the legislation. The court is required to consider making an exclusion order when making a protection order.<sup>81</sup> In doing so, the court must have regard to a number of factors, including the desirability of ensuring minimal disruption to the victim and any child living with the victim.<sup>82</sup>

76 Provisions of this kind are included in *Domestic and Family Violence Act 2007* (NT) s 3(1)(b); *Family Violence Protection Act 2008* (Vic) s 1(c). See also *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(d), which states that intervention should be designed to encourage defendants to accept responsibility and take steps to avoid engaging in family violence.

77 Exclusion orders are discussed in Ch 11.

78 See K Wilcox and L McFerran, ‘Staying Home, Staying Safe’ (2009) 94 *Reform* 24; L McFerran, *Taking Back the Castle: How Australia is Making the Home Safer for Women and Children* (2007) prepared for the Australian Domestic & Family Violence Clearinghouse.

79 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2007, 4846 (S Stirling—Attorney-General), 4848. A similar intention is expressed in the South Australia, *Parliamentary Debates*, House of Assembly, 10 September 2009, 3937 (M Atkinson—Attorney-General), 3943 and the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(1)(d) also expresses the principle that intervention should be designed to minimise disruption to protected persons and the children living with them.

80 *Domestic and Family Violence Act 2007* (NT) s 20.

81 *Family Violence Protection Act 2008* (Vic) s 82(1).

82 Ibid s 82(2)(a).

7.58 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should articulate core purposes, including the following aims:

- (a) to ensure or maximise the safety and protection of persons who fear or experience family violence;
- (b) to ensure that persons who use family violence accept responsibility—or are made accountable—for their conduct; and
- (c) to reduce or prevent family violence and the exposure of children to family violence.<sup>83</sup>

7.59 The Commissions asked whether there are any other ‘core’ purposes that should be expressly recognised in family violence legislation of each of the states and territories. In particular, the Commissions asked whether family violence legislation should articulate a purpose about ensuring minimal disruption to the lives of families affected by violence.<sup>84</sup>

### *Submissions and consultations*

#### *Objects clauses in family violence legislation*

7.60 The majority of stakeholders supported the proposal for family violence legislation to specify core purposes, as well as the proposed core purposes.<sup>85</sup>

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83 Consultation Paper, Proposal 4–25.

84 Ibid, Question 4–8.

85 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; N Norris, *Submission FV 176*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Confidential, *Submission FV 125*, 20 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; A Harland, *Submission*

Stakeholders outlined the benefits of implementing core common purposes in enhancing consistency in decision-making,<sup>86</sup> consistency across jurisdictions and the facilitation of a national approach to family violence.<sup>87</sup> The Magistrates' Court and Children's Court of Victoria stated that the articulation of core purposes has been useful in the Victorian legislation.<sup>88</sup>

7.61 No stakeholders opposed the inclusion of core purposes in family violence legislation. Almost all stakeholders who supported the inclusion of core common purposes also supported the specific purposes proposed by the Commissions.

7.62 Stakeholders expressed a range of views about various aspects of the proposed clauses in general and with respect to the specific state and territory provisions. These are considered below.

#### ***Wording of core purposes***

7.63 Some stakeholders expressed concerns about the wording of the proposed purposes. For example, the Department of Premier and Cabinet (Tas) expressed concern with the drafting of (a): 'to ensure or maximise the safety and protection of persons who fear or experience family violence'. It noted that anybody could fear family violence, and suggested the alternative wording: 'to ensure or maximise the safety and protection of persons who are at risk of or experience family violence'.<sup>89</sup>

7.64 The Commissioner for Children (Tas) stated that difficulties arise with the wording of (b): 'to ensure that persons who use family violence accept responsibility—or are made accountable—for their conduct'. The Commissioner stated that taking responsibility for family violence is a matter for an individual, and is not something that can be enforced by courts.<sup>90</sup>

#### ***Minimal disruption***

7.65 Stakeholders expressed a variety of viewpoints on whether a purpose about minimal disruption should be included in family violence legislation. A number of stakeholders supported the inclusion of such a purpose.<sup>91</sup> For example, the Disability

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FV 80, 2 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010 Confidential, *Submission FV 68*, 1 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 37*, 12 May 2010.

86 UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010, The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010.

87 Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

88 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

89 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

90 Commissioner for Children (Tas), *Submission FV 62*, 1 June 2010.

91 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria,

Services Commission (Western Australia) referred to the barriers facing victims of family violence who have a disability—or whose children have a disability—in leaving the family home:

laws that support victims to remain safely in the home may be more viable for people with disability, and including a purpose about ensuring minimal disruption to victims will go some way to furthering this.<sup>92</sup>

7.66 Several stakeholders submitted that a purpose about minimal disruption should clearly relate to the lives of the victims of family violence, rather than to the lives of those who use family violence.<sup>93</sup> Some stakeholders also expressed concern that a principle of minimal disruption should not operate to compromise the safety of victims and their children.<sup>94</sup>

7.67 Some stakeholders opposed or expressed reservations about including a principle about ensuring minimal disruption.<sup>95</sup> The Victorian Government, for example, pointed out that action

may be in the best interests of women and children but may have a large impact on their lives, both due to referral to refuge and through their participation in the criminal and civil justice system. The inclusion of the term ‘minimal disruption’ may be interpreted to mean ‘minimal action’.<sup>96</sup>

7.68 In a joint submission, Domestic Violence Victoria and others referred to the provisions regarding minimal disruption in Victorian family violence legislation. While Victorian courts are to take the desirability of minimising disruption into account in making exclusion orders, they are also required to have regard to a number of other specified factors and—more generally—all circumstances of the case.<sup>97</sup> The stakeholders argued that this approach is more appropriate, as it does not pre-empt

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<sup>92</sup> Submission FV 173, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Disability Services Commission (WA), *Submission FV 138*, 23 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Confidential, *Submission FV 109*, 8 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 37*, 12 May 2010.

<sup>93</sup> Disability Services Commission (WA), *Submission FV 138*, 23 June 2010.

<sup>94</sup> National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

<sup>95</sup> Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

<sup>96</sup> Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Confidential, *Submission FV 198*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 128*, 22 June 2010.

<sup>97</sup> Victorian Government, *Submission FV 120*, 15 June 2010.

<sup>97</sup> *Family Violence Protection Act 2008* (Vic) s 82(2).

consideration of the circumstances of individual cases with a core purpose favouring exclusion.<sup>98</sup>

#### ***Other core purposes***

7.69 Some stakeholders proposed other objectives to be considered as core common purposes. The Law Society of NSW, for example, stated that a principle articulating the right to a fair trial should be included as a purpose of family violence legislation.<sup>99</sup> Similarly, National Legal Aid and Legal Aid NSW stated that the core purposes must ‘operate in the context of the fundamental right of a defendant to a fair trial’.<sup>100</sup>

7.70 Some stakeholders suggested purposes about supporting and encouraging the agency and independence of victims of family violence,<sup>101</sup> and treating their views with respect,<sup>102</sup> should be included.

7.71 Several stakeholders submitted that the protection of children should be included as a core purpose.<sup>103</sup> The Queensland Commission for Children and Young People and Child Guardian suggested a purpose of ‘enabling persons who experience or fear family violence to protect their children from experiencing or being exposed to family violence’.<sup>104</sup> It commented that the articulation of such a purpose would assist parents who experience family violence to protect their children and, in doing so, avoid the future involvement of child protection agencies.

7.72 Other stakeholders suggested restraint in the specification of further core purposes. Women’s Legal Services NSW argued that it is

important that protection order legislation does not become too complex to be applied in practice. In our experience, in busy courtrooms magistrates may not follow all aspects of the legislation.<sup>105</sup>

7.73 The Australian Domestic and Family Violence Clearinghouse and National Legal Aid cautioned against making legislative provisions too complex.<sup>106</sup> In a joint submission, Domestic Violence Victoria and others stated that there is probably no

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98 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

99 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

100 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010.

101 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010.

102 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

103 Queensland Law Society, *Submission FV 178*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

104 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

105 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

106 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; National Legal Aid, *Submission FV 232*, 15 July 2010.

need for further core purposes,<sup>107</sup> while the Magistrates' Court and Children's Court of Victoria described the core purposes in Victoria as 'succinct and sufficient'.<sup>108</sup>

#### ***Objects clause in Western Australian family violence legislation***

7.74 In the Consultation Paper, the Commissions proposed that the *Restraining Orders Act 1997* (WA) should be amended to include an objects clause.<sup>109</sup> The majority of stakeholders who commented on this proposal expressed their support.<sup>110</sup> For example, the Gosnells Community Legal Centre stated that including an objects clause would guide interpretation of the legislation and foster consistency in decision making.<sup>111</sup> Two further submissions—while not wishing to comment on the laws of Western Australia—stated 'in principle' agreement to the inclusion of objects clauses.<sup>112</sup>

#### ***Objects clause in Queensland family violence legislation***

7.75 In the Consultation Paper, the Commissions proposed that the objects clause in the *Domestic and Family Violence Protection Act 1989* (Qld) should be amended to specify core purposes, other than the existing main purpose of providing for the safety and protection of persons in particular relationships.<sup>113</sup>

7.76 Stakeholders who commented on this proposal overwhelmingly were in support.<sup>114</sup> The Queensland Government noted that, while an objects clause is not specifically referred to in the Queensland consultation paper on the review of the

107 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

108 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

109 Consultation Paper, Proposal 4–24.

110 Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 89*, 3 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Gosnells Community Legal Centre Inc, *Submission FV 56*, 31 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

111 Gosnells Community Legal Centre Inc, *Submission FV 56*, 31 May 2010.

112 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

113 Consultation Paper, Proposal 4–26(a).

114 National Legal Aid, *Submission FV 232*, 15 July 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 68*, 1 June 2010; M Condon, *Submission FV 45*, 18 May 2010; P Eastal, *Submission FV 37*, 12 May 2010.

*Domestic and Family Violence Protection Act 1989* (Qld), its consultation on legislative principles involves a consideration of other provisions which could make reference to the purposes and objectives of the legislation.<sup>115</sup>

#### ***Objects clause in Tasmanian family violence legislation***

7.77 In the Consultation Paper, the Commissions proposed that the objects clause in the *Family Violence Act 2004* (Tas) should be amended to specify more clearly the core purposes of the Act.<sup>116</sup> All stakeholders who commented on this proposal were in support.<sup>117</sup> The Department of Premier and Cabinet (Tas) considered that amending the objects clause may assist judicial officers in applying objectives to specific cases.<sup>118</sup>

#### ***Commissions' views***

##### ***Objects clauses in family violence legislation***

7.78 The articulation of core common purposes across state and territory family violence legislation is a critical pillar of a common interpretative framework complementing the inclusion of guiding principles—as well as a shared understanding of family violence—across jurisdictions. Objects clauses serve an important educative function, and enhance consistency in decision making. It is essential that they are given some prominence in family violence legislation.

7.79 The Commissions consider that there should be a cluster of core purposes that are commonly acknowledged and articulated across each of the states and territories. The Commissions recommend that these purposes address the following aims:

- (a) to ensure or maximise the safety and protection of persons who fear or experience family violence;
- (b) to prevent or reduce family violence and the exposure of children to family violence; and
- (c) to ensure that persons who use family violence are made accountable for their conduct.

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115 Queensland Government, *Submission FV 229*, 14 July 2010.

116 Consultation Paper, Proposal 4–26(b).

117 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; Confidential, *Submission FV 68*, 1 June 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 37*, 12 May 2010.

118 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

***Wording of core purposes***

7.80 It is not necessary for objects clauses in family violence legislation to express purposes using precisely the same wording, nor is there a need for every purpose in one jurisdiction to be replicated in the others. In expressing the core purposes, the Commissions do not intend to set out a prescriptive formulation. The detailed drafting of core purposes is a matter for state and territory governments.

7.81 The Commissions note the submission of the Commissioner for Children (Tas), who expressed concerns about the wording of the following proposed core purpose:

to ensure that persons who use family violence accept responsibility—or are made accountable—for their conduct.<sup>119</sup>

7.82 The Commissions agree that family violence legislation can make persons who use family violence accountable for their behaviour, but it cannot *ensure* that they accept responsibility for their conduct, although judicial officers exercising their powers under the legislation may attempt to do so.

***Minimal disruption as a core purpose***

7.83 The Commissions note the concerns of some stakeholders in relation to the inclusion of a purpose regarding minimal disruption in family violence legislation. Appropriate steps to ensure the safety and wellbeing of victims of family violence may require action which leads to disruption and upheaval of their lives. In some cases, it may be safer for victims of family violence to leave the home than to remain.<sup>120</sup> A legislative purpose favouring minimal disruption therefore may not operate to the benefit of victims in all circumstances. The Commissions are concerned that, as submitted by the Victorian Government, including the term ‘minimal disruption’ may be interpreted to mean ‘minimal action’.<sup>121</sup> There are more appropriate ways to encourage judicial officers to consider making exclusion orders than including a purpose about minimal disruption in family violence legislation, including the measures recommended in Chapter 11.

***Other core purposes***

7.84 The Commissions do not wish to be overly prescriptive of the purposes that should be included in state and territory family violence for two reasons. First, the Commissions note the concerns expressed by some stakeholders regarding the complexity that may result from including numerous purposes. Secondly, the Commissions consider that states and territories should have flexibility to articulate additional purposes in addition to core ones. For example, one purpose that may be considered by states and territories is a purpose relating to treating the views of victims

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119 Consultation Paper, Proposal 4–25(b).

120 See also Ch 11.

121 Victorian Government, *Submission FV 120*, 15 June 2010.

of family violence with respect. Alternatively, this could be located in the principles of the legislation, as in Victorian family violence legislation.<sup>122</sup>

7.85 The Commissions do not consider that it is necessary to recommend that a core purpose of family violence legislation is to ensure the right of an accused person to a fair trial. The primary purpose of family violence legislation is to provide protection from future violence, including in situations where the conduct constituting family violence is not criminal. The right of an accused to a fair trial is a crucial component of the rule of law, and is a principle which underpins the Australian legal system. However, it is unnecessary to articulate the right in family violence legislation which is primarily aimed at protecting persons from future family violence as a civil law matter.

7.86 The Commissions note that some stakeholders suggested that a core purpose should include the protection of children. This purpose is accommodated by recommending that a core purpose of family violence legislation is to reduce or prevent family violence and the exposure of children to family violence. In addition, the other two recommended core purposes—dealing with maximising the safety and protection of persons who fear or experience family violence and ensuring the accountability of those who use family violence—will have considerable direct and indirect benefits in protecting children from violence. Further, the Commissions also recommend that definitions of family violence in family violence legislation include the exposure of children to the effects of family violence.<sup>123</sup>

#### ***Objects clauses in family violence legislation: Western Australia, Queensland and Tasmania***

7.87 The Commissions' general recommendation regarding objects clauses applies to all state and territory family violence legislation. The Commissions, therefore, do not make separate recommendations regarding the family violence legislation of Western Australia, Queensland and Tasmania. However, the Commissions consider the following amendments should be made:

- the *Restraining Orders Act 1997* (WA) should be amended to include an objects clause;
- the objects clause in the *Domestic and Family Violence Protection Act 1989* (Qld) should be amended to specify core purposes, other than the existing main purpose of providing for the safety and protection of persons in particular relationships; and
- the objects clause in the *Family Violence Act 2004* (Tas) should be amended to specify more clearly the core purposes of the Act.

7.88 The objects clauses in the Queensland, Tasmanian and Western Australian family violence legislation should include core purposes recommended by the Commissions.

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122 *Family Violence Protection Act 2008* (Vic) preamble (d).

123 Rec 5–1(i).

**Recommendation 7–4** State and territory family violence legislation should articulate the following common set of core purposes:

- (a) to ensure or maximise the safety and protection of persons who fear or experience family violence;
- (b) to prevent or reduce family violence and the exposure of children to family violence; and
- (c) to ensure that persons who use family violence are made accountable for their conduct.

## Grounds for obtaining a protection order

7.89 While the grounds for obtaining protection orders differ across state and territory family violence legislation, there are two broad approaches to setting a threshold for obtaining a protection order, which are considered below. In all jurisdictions, the court has discretion not to make a protection order, even if the grounds for the order have been met.

### Acts-based tests

7.90 One approach is to focus on the commission of past family violence. Victoria<sup>124</sup> and Queensland<sup>125</sup> take this approach, but also require proof that the person who used family violence is likely to do so again.

7.91 Tasmania takes a similar approach of focusing both on past and future conduct, except rather than using the terminology of the person using violence being ‘likely to commit’ family violence again, it uses the terminology that the person ‘may again commit’ family violence.<sup>126</sup> ‘May’, on its face, suggests a less stringent test than ‘likely’, implying possibility rather than probability. The Second Reading Speeches for the Tasmanian family violence legislation do not indicate why the terminology of ‘may’ was preferred to ‘likely’—or indeed if it was an intentional choice. The Commissions are not aware of any cases that have judicially considered this aspect of the provision.

7.92 Hunter and Stubbs have criticised the approach of requiring a victim to prove likelihood of further family violence:

This represents a significant hurdle for complainants, particularly those who, in order to ensure their safety, have separated from their violent partner. Some magistrates

<sup>124</sup> *Family Violence Protection Act 2008* (Vic) s 74. This issues is considered in Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), 112–113. Rec 19 focused solely on expanding the existing grounds to accommodate the proposed expanded definition of family violence.

<sup>125</sup> *Domestic and Family Violence Protection Act 1989* (Qld) s 20.

<sup>126</sup> *Family Violence Act 2004* (Tas) s 16(1).

have difficulty understanding why women remain fearful after separation, when as they see it, the parties are unlikely to have any future contact with each other.<sup>127</sup>

7.93 The ACT also relies on an acts-based test, however it alone allows for a protection order to be made on the basis that the person against whom it is sought has used family violence.<sup>128</sup> There is no requirement to prove that family violence may again occur.

### Effect on the victim

7.94 The second broad approach focuses on the effect on the victim. In NSW, a person must have reasonable grounds to fear, and must in fact fear, the commission of a personal violence offence. Thus, both an objective and subjective test are applied. The subjective test of fear is not, however, required to be met in certain cases. These include if the protected person is a child or of below average intelligence. Importantly, another exception is where the victim has been subjected to past family violence by the person against whom the order is sought, and there is a likelihood that the person using violence will do so again, and the court is satisfied that the making of the order is necessary in the circumstances.<sup>129</sup> The Northern Territory legislation only requires an objective standard of fear.<sup>130</sup>

7.95 Hunter and Stubbs have expressed the view that a test requiring reasonable apprehension of fear has some advantages over a test focusing on past conduct and likelihood of repetition:

This approach is preferable in that it does not require waiting for a violent act to occur before an order can be made, and is in line with the preventive function of the protection order.<sup>131</sup>

7.96 Chief Justice James Spigelman of the NSW Supreme Court, writing extracurially, notes that the concept of freedom from fear has disappeared from legal discourse:

This is regrettable because the most significant impact on personal freedom occurs through the mechanism of fear, rather than through actual direct interference with such freedom. ...

The most effective, indeed the most common, form of interference with freedom arises from the self-imposed restraint on behaviour because of the threat of adverse consequences if the behaviour is engaged in. Furthermore, the restraint on the behaviour is greater, indeed almost always much greater, than would occur on the basis of calculation of the probability of those consequences actually occurring. ...

Once it is accepted that protection of human rights requires not only the prevention of direct interference, but also a response to the threat of interference, then freedom from fear can be seen to inhere in most of the human rights protected by international

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127 R Hunter and J Stubbs, ‘Model Laws or Missed Opportunity?’ (1999) 24 *Alternative Law Journal* 12, 14.

128 *Domestic Violence and Protection Orders Act 2008* (ACT) s 46(1).

129 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 16.

130 *Domestic and Family Violence Act 2007* (NT) s 18.

131 R Hunter and J Stubbs, ‘Model Laws or Missed Opportunity?’ (1999) 24 *Alternative Law Journal* 12, 14.

instruments and domestic provisions. Such freedom is not, itself, a freestanding right. It should, however, be recognised as a critical dimension of other rights.<sup>132</sup>

7.97 The South Australian family violence legislation articulates the test as reasonable grounds to ‘suspect’—rather than ‘fear’—that the relevant person will commit an act of abuse, and that making an order is appropriate in all the circumstances.<sup>133</sup>

7.98 In no state or territory does family violence legislation rely on grounds for the making of protection orders which consist of a subjective test alone—for example, a subjective test of fear.

### **Act and effect**

7.99 Western Australia, in effect, adopts both approaches in the alternative. That is, a court can make a protection order either because there has been past violence and there is the likelihood of future violence, or because the victim has reasonable grounds to fear violence. In each case, the court has to be satisfied that the granting of the order is appropriate in the circumstances.<sup>134</sup> The approach of adopting both tests in the alternative is in accordance with the approach ultimately recommended by the Domestic Violence Legislation Working Group in drafting Model Domestic Violence Laws.<sup>135</sup>

### **Options for reform**

7.100 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should adopt the same grounds for obtaining a protection order.<sup>136</sup> The Commissions also proposed that grounds for obtaining a protection order should not require proof of likelihood of repetition of family violence, unless such proof is an alternative to a ground that focuses on the impact of the violence on the person seeking protection.<sup>137</sup>

7.101 The Commissions presented four options for consistent grounds for obtaining a protection order. The options reflected the Commissions’ preference for grounds that focus on the effect on the victim, and the exclusion of grounds that rely solely on proof of likelihood of repetition of violence. The Commissions asked stakeholders for their views on which of the following grounds should be adopted by the states and territories:

- a test similar to that in NSW—which includes an objective test of fear, and a subjective test with the latter capable of being excluded in certain circumstances;

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132 J Spigelman, ‘The Forgotten Freedom: Freedom From Fear’ (Paper presented at Sydney University Law School Distinguished Speakers Program 2009, Sydney, 17 November 2009), 4–6.

133 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 6.

134 *Restraining Orders Act 1997* (WA) s 11A.

135 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 14(1).

136 Consultation Paper, Proposal 4–27.

137 Ibid, Proposal 4–28.

- a test similar to that in the Northern Territory, which imposes only an objective test of fear;
- a test similar to that adopted in South Australia, which imposes an objective test of suspicion that the relevant person will use violence plus a requirement that the court is satisfied that making the order is appropriate in all the circumstances; or
- an approach similar to that in Western Australia and advocated in the Model Domestic Violence Laws—that is, adopting as alternatives a test that focuses on past conduct and likelihood of repetition, and the objective test of fear.<sup>138</sup>

### **Submissions and consultations**

#### **Consistent grounds for protection orders**

7.102 The majority of stakeholders supported the proposal that state and territory family violence legislation should adopt consistent grounds for obtaining a protection order.<sup>139</sup> The Magistrates' Court and Children's Court of Victoria and Legal Aid NSW considered that this would address cross-jurisdictional issues when victims of family violence move interstate.<sup>140</sup> The Queensland Government submitted that harmonising the grounds for protection orders across state and territory jurisdictions is particularly relevant in the context of the proposed national scheme to register protection orders across all states and territories.<sup>141</sup>

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138 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 4–9.

139 National Legal Aid, *Submission FV 232*, 15 July 2010; Queensland Government, *Submission FV 229*, 14 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; WESNET—The Women's Services Network, *Submission FV 217*, 30 June 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; Confidential, *Submission FV 198*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010 Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010 F Hardy, *Submission FV 126*, 16 June 2010; Confidential, *Submission FV 125*, 20 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; T Searle, *Submission FV 108*, 2 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 92*, 3 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 89*, 3 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 68*, 1 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 37*, 12 May 2010; Confidential, *Submission FV 34*, 6 May 2010.

140 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010.

141 Queensland Government, *Submission FV 229*, 14 July 2010.

7.103 The Magistrates' Court and Children's Court of Victoria and Legal Aid NSW pointed to the benefit of consistency across jurisdictions in interpretation and enforcement of legislation. The Magistrates' Court and Children's Court of Victoria submitted that:

there is very little case law in family violence and it would be helpful to have a body of common law across the country that assisted judicial officers in interpreting and applying this and other aspects of family violence legislation.<sup>142</sup>

7.104 A number of stakeholders—while supporting the proposal—expressed concern that harmonising the grounds in state and territory family violence legislation should not be achieved by retreating to the lowest common denominator, resulting in diminished protection for victims.<sup>143</sup>

#### *Likelihood of repetition test*

7.105 Most stakeholders who commented agreed with the proposal that the grounds for obtaining a protection order should not require proof of likelihood of repetition of family violence, unless such proof is an alternative to a ground that focuses on the impact on the violence on the person seeking protection.<sup>144</sup> One stakeholder considered that the test is inappropriate, given the nature of family violence, in particular that it occurs in the context of a relationship and is generally ongoing.<sup>145</sup> Another submission stated that a single instance of family violence may be sufficient to prompt reasonable fear of further violence.<sup>146</sup>

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142 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

143 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

144 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; Confidential, *Submission FV 198*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; K Greenland, *Submission FV 161*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Confidential, *Submission FV 125*, 20 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 89*, 3 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 68*, 1 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

145 K Greenland, *Submission FV 161*, 25 June 2010.

146 Confidential, *Submission FV 198*, 25 June 2010.

7.106 Some stakeholders referred to the difficulties of proving likelihood of repetition.<sup>147</sup> The Aboriginal Family Violence Prevention and Legal Service Victoria (AFVPLS) and the Magistrates' Court and Children's Court of Victoria argued that it may be particularly difficult to prove in circumstances where there has been serious family violence in the past, but no violence during the term of a previous protection order or for a considerable period.<sup>148</sup>

7.107 The Magistrates' Court and Children's Court of Victoria commented that proving likelihood of repetition may be problematic when parties have separated, despite a history of violence and the victim being in fear. The courts—which currently apply a likelihood of repetition test—agreed it would be

assisted by the inclusion of an additional ground for obtaining a protection order, that is, a ground that focuses on the impact of the violence on the person seeking protection.<sup>149</sup>

7.108 The Department of Premier and Cabinet (Tas) and National Legal Aid submitted that there are circumstances in which it may be reasonable for a person to fear family violence, despite family violence toward that person not having previously occurred.<sup>150</sup> The Queensland Government noted that, in the review of Queensland family violence legislation, some stakeholders suggested that the requirement to prove repetition of family violence should be removed from the Act.<sup>151</sup>

7.109 The Queensland Law Society did not support the proposal, arguing that the likelihood of repetition test in the Queensland legislation should be retained. It submitted that the test is not onerous, and provides an appropriate balance between protecting victims and properly scrutinising applications for protection orders. The Law Society submitted that the likelihood of repetition test provides a safeguard against spurious applications, including cross applications by respondents who have used family violence:

If the ‘fear’ test proposed by the Commissions were to be adopted in Queensland, then it is likely that orders which are currently not capable of being made in Queensland due to the safeguard of the ‘likely’ test will be made resulting in more orders being made in cross applications brought by violent husbands.<sup>152</sup>

#### ***Preferred grounds for protection orders***

7.110 Stakeholders were divided over which grounds for obtaining a protection order should become standard across the states and territories, with all options presented by the Commissions receiving some support.

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147 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 96*, 2 June 2010.

148 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

149 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

150 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010.

151 Queensland Government, *Submission FV 229*, 14 July 2010.

152 Queensland Law Society, *Submission FV 178*, 25 June 2010.

7.111 Two stakeholders—Legal Aid NSW and the Law Society of NSW—preferred a test that includes both objective and subjective elements.<sup>153</sup> However, other stakeholders expressed concern about the inclusion of a subjective test of fear. The Department of Premier and Cabinet (Tas) and the Legal Aid Commission of Tasmania stated that such a test could prevent police from applying for a protection order where victims state they are not fearful of a person who has used family violence, but where police have good reason to expect violent conduct may occur. This may be of particular concern where children may be exposed to family violence.<sup>154</sup> The Legal Aid Commission of Tasmania pointed out that ‘this could also have implications for the involvement of child protection authorities in ensuring the safety of affected children’.<sup>155</sup>

7.112 The Queensland Law Society also criticised grounds based on a subjective test, referring to applications for protection orders where a person genuinely held fears, but the fears were misplaced. It provided an example in which a woman sought an application against her husband. The wife’s fear of her husband was ‘genuine, albeit misplaced, due to her psychiatric condition’. It argued that on the basis of a subjective test of fear, an order may have been made against the husband in these circumstances.<sup>156</sup>

7.113 Other stakeholders opposed grounds based on fear, as they considered that due to sex-role conditioning, men are less likely to admit that they are fearful.<sup>157</sup> The One in Three Campaign further stated that fear ‘is a subjective term which is easily misused by persons with malicious intent’ and expressed a preference for the South Australian grounds, which avoid reference to fear.<sup>158</sup>

7.114 Many stakeholders considered that the broad grounds provided by the Western Australian family violence legislation most appropriate.<sup>159</sup> AFVPLS preferred these

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153 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

154 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010.

155 National Legal Aid, *Submission FV 232*, 15 July 2010.

156 Queensland Law Society, *Submission FV 178*, 25 June 2010.

157 T McLean, *Submission FV 204*, 28 June 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010. One in Three Campaign, *Submission FV 35*, 12 May 2010.

158 Confidential, *Submission FV 198*, 25 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; N Ross, *Submission FV 129*, 21 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 125*, 20 June 2010; Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Confidential, *Submission FV 109*, 8 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

grounds on the basis that one of the alternative tests within these grounds did not refer to an objective standard of reasonableness.<sup>160</sup>

7.115 Professor Patricia Easteal also commented that including the term ‘reasonable’ in the grounds is problematic.<sup>161</sup> In contrast, one stakeholder noted that incorporating an objective test of fear—that is, one that invokes a reasonableness test—may restrict abuse of process and can ‘knock down vexatious applications’.<sup>162</sup>

#### ***Commissions’ views***

##### ***Consistent grounds for protection orders***

7.116 The Commissions consider that each state and territory should have consistent grounds for making a protection order. In furthering the improvement of safety through legal frameworks, it is unacceptable that victims suffering similar experiences of abuse in different jurisdictions may have varying chances of obtaining a protection order based on the legislative threshold for the granting of orders in their jurisdiction.

7.117 Consistent grounds in state and territory legislation also complement the Commissions’ recommended approach for a common interpretative framework, comprising core definitions of family violence, as well as a consistent approach with regard to guiding principles and a common understanding of the nature and feature of family violence. Just as there should be a common understanding of what constitutes family violence, so should there be a common understanding of when the law should step in to provide protection.

7.118 Adopting consistent grounds across states and territories is also important in the context of the Australian Government’s commitment to the establishment of a scheme for the national registration of protection orders. Such a scheme would allow protection orders to be enforced across state and territory borders.<sup>163</sup> It is incongruous if thresholds for obtaining protection orders are variable across jurisdictions, where the orders themselves are enforceable in each state and territory. A scheme for the national registration for protection orders is discussed in more detail in Chapter 30.

7.119 A disparity in the grounds for obtaining a protection order across the states and territories is also relevant to the issue of whether family violence laws are capable of interacting with the *Family Law Act*. Consider the following hypothetical:

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160 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

161 P Easteal, *Submission FV 37*, 12 May 2010. Ch 6 discusses criticisms of the semi-objective test of reasonableness in the definition of family violence in the *Family Law Act*.

162 Confidential, *Submission FV 164*, 25 June 2010.

163 Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009). See Ch 1.

**Hypothetical**

Victim A resides in the ACT. She was physically assaulted by her partner. She applies for a protection order and has to prove that her partner assaulted her. She has photographic evidence of the injuries sustained in the assault, as well as the corroborating evidence of a neighbour. The court grants the application. The order is later made final. Victim A is also involved in family law proceedings seeking custody of her children. The Family Court has to consider the protection order made in her favour.

Victim B resides in Queensland. She also was physically assaulted by her partner. She applies for a protection order and has to prove that her partner assaulted her and that he is likely to do so again. She has photographic evidence of the injuries sustained in the assault, as well as the corroborating evidence of a friend.

She gives evidence that her partner is likely to assault her again, based on her knowledge that when he is under considerable stress at work he ‘takes it out on her’. She leads evidence that similar types of assault occurred two years before, when her partner was also under considerable financial and work stress. Her partner contests the application, expressing remorse and providing evidence that he has enrolled in an anger management course. The court does not grant the application. Victim B is also involved in family law proceedings seeking custody of her child. Unlike the case of Victim A, there is no protection order to which the Family Court must have regard.

7.120 In Chapter 17, the Commissions recommend that, in determining the best interests of the child in making a parenting order in family law proceedings, the court should consider any family violence involving the child or a member of the child’s family, including evidence given or findings made in any protection order proceedings. This recommendation is aimed at amending the existing provision, which requires courts to take into account final or contested protection orders only.<sup>164</sup> If implemented, it should help to address some concerns and problems that arise for victims of family violence from the interaction of the *Family Law Act* and family violence legislation.

7.121 However, the Commissions also consider that the existence of a protection order should act as a flag to federal family courts that family violence is an issue in the proceedings before the court. Consequently, even if the Commissions’ abovementioned recommendation is implemented, the existence of inconsistent grounds for obtaining protection orders across the states and territories may result in inequality of treatment of parties before federal family courts. That is, some victims may not have been able to obtain a protection order which may act as such a ‘flag’ to the existence of family violence, in circumstances where victims in other jurisdictions have this advantage.

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<sup>164</sup> Rec 17–1.

***Likelihood of repetition test***

7.122 The Commissions have concerns about an approach that requires proof of likelihood of repetition, due to the evidentiary hurdle that this may present to victims.

7.123 The likelihood of repetition should not be the sole ground for obtaining a protection order in family violence legislation. The purpose of a protection order should be anticipatory and preventative—capable of protecting persons before an act of family violence occurs. Further, the Commissions note concerns that proving likelihood of repetition may be difficult for victims in some circumstances, particularly if some time has elapsed since the latest incident of family violence due to, for example, persons who used family violence spending time in prison, or the existence of previous protection orders.

7.124 In the Commissions' view, the requirement to prove that a person is 'likely to commit' or 'may commit' family violence imposes a further burden on the victim which is not imposed on victims who must establish reasonable fear or reasonable suspicion. As noted by Hunter and Stubbs, proving likelihood of repetition may be difficult for victims, particularly those who have separated from their partner. Further, acts-based tests require victims to wait for an act of family violence to occur, and do not facilitate the preventative nature of family violence legislation.<sup>165</sup>

7.125 The Commissions therefore consider that the grounds for obtaining a protection order under state and territory legislation should not require proof of likelihood of repetition of family violence. However, there is a place for a likelihood of repetition test as an alternative ground in family violence legislation, as discussed below.

7.126 While there was widespread support for the proposal that family violence legislation should not specify grounds for obtaining a protection order that requires a proof of likelihood test, the Commissions do not consider it necessary to make a separate recommendation in this regard. Recommendation 7–5 sets out the grounds to obtain a protection order which should be adopted by state and territory family violence legislation. The Commissions consider that the ambit of this Recommendation reflects that state and territory family violence legislation should not require a proof of likelihood test to be met as grounds to obtain a protection order.

***Rejection of acts-based tests***

7.127 The commission of past violence test in the ACT family violence legislation does not constitute a suitable ground for obtaining a protection order for two reasons. First, this test is not adequately preventative or anticipatory, as it requires an act of family violence to occur before a person meets the requirements to obtain a protection order. Secondly, this test does not attempt to consider whether or not a person is actually in need of future protection, which is the primary function of family violence legislation. To frame the grounds so widely is to allow, for example, the indiscriminate

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165 R Hunter and J Stubbs, 'Model Laws or Missed Opportunity?' (1999) 24 *Alternative Law Journal* 12, 14.

granting of protection orders against victims in cross applications where a victim may have resisted violently, but where the primary aggressor does not need protection.<sup>166</sup>

#### ***Rejection of subjective fear test***

7.128 Reliance on a subjective test of fear was not suggested by the Commissions as a potential option for consistent grounds in the Consultation Paper. The purposes of family violence legislation do not include protecting persons from an unfounded fear of family violence. Family violence legislation must include a mechanism to test applications and ensure that an order is appropriate for a person's protection. This mechanism is not provided by a subjective test as it includes no criteria to assess subjective fears, such as whether fears are reasonably held, or if future family violence is likely.

7.129 The Commissions have concerns about grounds that incorporate a subjective test in addition to an objective test. The Commissions consider that the requirement that a person in fact fears family violence may lead to gaps in protection in some circumstances. A person who is at risk of family violence, but does not have or express fear, may not be adequately protected by legislation. Some victims may not express fear due to concerns about retaliation. Some stakeholders noted that the requirements of the subjective test may particularly affect male victims, who may be reluctant to admit to fear.

7.130 The Commissions do not consider that the exceptions in the NSW legislation to the application of the subjective test are sufficient to protect victims of family violence. In cases where a victim has previously experienced family violence—but does not have or express fear—the court applies a proof of likelihood of repetition test, in addition to a further test that the order is necessary in the circumstances. These two elements combine to form an unduly onerous test. Further, the exceptions to proving the subjective test of fear do not capture persons at risk of violence where family violence has not previously occurred.

7.131 This gap in protection may extend to children who have been—or are at risk of being—exposed to the effects of family violence. Further, victims who do not fear family violence may find themselves unable to comply with the advice of child protection agencies to obtain protection orders. Ineligibility for a protection order may leave such families vulnerable to more intrusive intervention by child protection agencies.

7.132 Consequently, in the Commissions' view, the objective test of fear is appropriate without the requirement that the person, in fact, fears family violence. Eliminating the subjective test of fear provides greater protection to persons at risk of family violence who may not fear or may not express their fear of future violence.

7.133 Further, the Commissions prefer an objective test of fear to an objective test of suspicion. Grounds based on fear—including an objective test of fear—are focused

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166 See Ch 9 for discussion on identifying the primary aggressor.

primarily on the impact on the victim. The test evaluates the potential behaviour of the person who may use family violence through the effect on the victim. In contrast, the test of reasonable suspicion does not focus exclusively on the impact on the victim. To illustrate, anyone may suspect certain future behaviour given certain factors. To fear future conduct is a more personal and emotive response.

7.134 Freedom from fear is a central human rights component of family violence legislation, complementing the right to personal security.<sup>167</sup> Chief Justice Spigelman has identified legislation relating to protection orders as ‘the most important mechanism directed to the dimension of fear in express terms’.<sup>168</sup> In applying for a protection order a victim is, in effect, seeking not only protection from violence but also freedom from fear. The Commissions consider that a test based on reasonable fear should form one of the alternative grounds for obtaining a protection order.

7.135 The Commissions note the concerns of some stakeholders about the inclusion of the term ‘reasonable’ in grounds for a protection order. The Commissions acknowledge that including an objective test in the definition of family violence is not appropriate, as discussed in Chapter 6. However, the Commissions consider that objective grounds as a legislative threshold for a protection order provides the necessary mechanism to test applications, while also providing accessible protection for victims of violence. This mechanism is necessary to deal effectively with applications that are not genuine, as well as applications by persons who fear violence without due cause.

7.136 The Commissions consider that broad grounds should be available to persons who have experienced or are at risk of family violence. The objective test of fear should be complemented by an alternative ground that focuses on past conduct and likelihood of repetition. Persons who have experienced family violence retain the option of satisfying the future likelihood of repetition test where there is no evidentiary hurdle to doing so. Where meeting this test may cause difficulties, persons should have the option of relying on the objective test of fear. A test with appropriate alternative grounds provides broad coverage for the protection of persons who have experienced or are at risk of family violence, and preserves those persons’ access to the Commissions’ preferred test—the objective test of fear.

**Recommendation 7–5** State and territory family violence legislation should adopt the following alternative grounds for obtaining a protection order. That is:

- (a) the person seeking protection has reasonable grounds to fear family violence; or
- (b) the person he or she is seeking protection from has used family violence and is likely to do so again.

<sup>167</sup> For a discussion of the right to personal security and freedom from fear, see J Spigelman, ‘Violence against Women: The Dimensions of Fear and Culture’ (2010) 84 *Australian Law Journal* 372.

<sup>168</sup> Ibid, 379.

## **Persons protected**

7.137 In order for a person to obtain a protection order under family violence legislation, that person needs to be in a defined relationship with the person engaging in violence. This section discusses the relationships covered by family violence legislation across the states and territories, and considers whether there should be greater consistency in response to persons protected generally, and in relation to certain categories of relationships—Indigenous concepts of family, members of culturally recognised family groups, and carers.

7.138 The United Nations Department of Economic and Social Affairs Division for the Advancement of Women has recommended that family violence legislation should apply at a minimum to:

individuals who are or have been in an intimate relationship, including marital, non-marital, same sex and non-cohabiting relationships; individuals with family relationships to one another; and members of the same household.<sup>169</sup>

7.139 Relationships covered by family violence legislation across the jurisdictions differ in some key respects. Table A below sets out a summary of the relationships that are covered across the jurisdictions.

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169 United Nations Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women* (2009), 26.

Table A

	Spouse	Partner (not married) (incl same sex)	Intimate personal relationship	Child	Relative	Indigenous	Carer	Other relationships
NSW	✓	✓	✓	definition of relative includes son, daughter etc but definition does not expressly refer to child	✓ defined categories	✓	✓	✓ live in same household; long-term residents in same residential facility at same time
Vic	✓	✓	✓	linked to residence or child of intimate relationship	✓ defined categories	✓ included in definition of relative	✓ where relationship is family-like	✓ any person regarded as family member
Qld	✓ includes either biological parent		✓ engaged also whether or not sexual if dated and lives enmeshed.	✓ included in definition of relative	✓ by blood or marriage (non-exhaustive examples )	✓ referred to as an example of people who may have a wider concept of relative	✓ informal care relationships-defined	✓ definition of relative includes person whom relevant person regards as a relative or vice versa eg members of certain communities with NESB and people with particular religious beliefs
WA	✓	✓ (de facto)	✓	✓ linked to residence or guardianship	Concept of 'related' is defined	'related' is defined to consider cultural, religious and social background		✓ personal relationship of a domestic nature where lives interrelated and actions affect the other
SA	✓	domestic partners	✓	✓ linked to custody, guardianship, loco parentis role, residence	✓ by blood, marriage, domestic partnership, adoption	✓	✓ unpaid care relationships	members of some other culturally recognised family group

Table A continued

	Spouse	Partner (not married) (incl same sex)	Intimate personal relationship	Child	Relative	Indigenous	Carer	Other relationships
Tas	✓	✓ significant relationships as defined						
ACT	✓ domestic partner	✓ domestic partner	✓ intimate relation other than domestic partnership—not linked to living in same household	✓ child of domestic partner or former domestic partner—no other restriction on this	✓ sets out defined categories plus anyone else who could reasonably be considered to be a relative	✓ included as example of anyone else who could reasonably be considered to be a relative		✓ definition of relative includes anyone else who could reasonably be considered to be a relative
NT	✓	✓ de facto	✓ whether or not sexual if dating or if engaged	covered by reference to relative	✓ examples of relatives given. Non exhaustive list	✓ included in definition of relative	✓	any person who has or had custody or guardianship or right of access to another person. Ordinarily or regularly lives or has lived with other person or someone else who is in family relationship with other person or is or has been in family relation with a child of other person

7.140 Family violence legislation in the Northern Territory expressly includes dating relationships, as does the Queensland legislation where the lives of the parties are or have been enmeshed.<sup>170</sup> While same sex relationships are not expressly included in most family violence legislation, the language of the Acts does not exclude same sex couples.<sup>171</sup>

7.141 Most state and territory family violence legislation includes relatives within their ambit—although the class of persons is variously defined. Some jurisdictions recognise violence between persons who live together in the same household (that is, without being in a relationship) as family violence.<sup>172</sup> Other jurisdictions recognise meaningful personal relationships between people outside conventional definitions. In Victoria, a family member can include any person whom the relevant person regarded as being like a family member having regard to the circumstances of the relationship.<sup>173</sup> In Western Australia, a ‘personal relationship of a domestic nature in which the lives of the persons are, or were, interrelated and the actions of one person affects or affected, the other person’ is within the scope of the family violence legislation.<sup>174</sup>

7.142 The Tasmanian *Family Violence Act 2004* covers the narrowest range of relationships, in that it applies only to spouses and unmarried couples.<sup>175</sup> The legislation does not cover relations between parents and children, persons and ancestors, or siblings. Persons in these types of relationships and other relatives can seek restraining orders under the *Justices Act 1959* (Tas), but the grounds for obtaining a restraining order under this Act are more limited than those under the family violence legislation.<sup>176</sup> In addition, the penalties for breaching restraining orders under the *Justices Act* are significantly lower than those that attach to breaches of an order under the family violence legislation.<sup>177</sup> In effect, this means that people in certain family relationships are given less protection from violence by the law than others.

7.143 The 2008 *Review of the Family Violence Act 2004* referred to criticisms by some stakeholders that the definition was too narrow to capture

the range of relationships which should attract the protection of the Act; and that the definition of family relationship should be sufficiently broad to cover all intimate

170 *Domestic and Family Violence Protection Act 1989* (Qld) s 12A(2); *Domestic and Family Violence Act 2007* (NT) s 11(2). The Australian Bureau of Statistics has reported on the incidence of sexual assault and stalking in the context of dating relationships. Australian Bureau of Statistics, *Women’s Safety Australia* (1996) 6, 67.

171 Section 9(2) of the *Family Violence Protection Act 2008* (Vic) provides that the gender of persons is irrelevant for the purpose of determining whether those persons are domestic partners. Section 15 of the *Domestic Violence and Protection Orders Act 2008* (ACT) refers to s 169 of the *Legislation Act 2001* (ACT), which provides that persons may be in a domestic partnership whether they are ‘of a different or same sex’.

172 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5(d); *Domestic and Family Violence Act 2007* (NT) 9(d). See also *Domestic Violence Act 1995* (NZ) s 4(1)(c).

173 *Family Violence Protection Act 2008* (Vic) s 8(3).

174 *Restraining Orders Act 1997* (WA) s 4(2).

175 *Family Violence Act 2004* (Tas) ss 4, 7, referring to the *Relationships Act 2003* (Tas) s 4.

176 See *Justices Act 1959* (Tas) s 106B—for example, economic abuse and emotional abuse are not covered.

177 Compare *Ibid* s 106I (10 penalty units, imprisonment for six months) with *Family Violence Act 2004* (Tas) s 35 (tiered penalties depending on number of offences—imprisonment for up to five years).

personal relationships ... people who are ordinarily members of the household and family relationships which reflect the extent of kinship within Indigenous and culturally and linguistically diverse communities.<sup>178</sup>

7.144 In the Consultation Paper, the Commissions proposed that the Tasmanian Government should review the operation of the *Family Violence Act 2004* (Tas) and the *Justices Act 1959* (Tas) pt XA to establish equality of treatment of family members who are victims of family violence.<sup>179</sup>

#### ***Submissions and consultations***

7.145 Most stakeholders who commented on the proposal supported it.<sup>180</sup> One stakeholder stated that ‘equality of treatment is vital for all family members who are victims of family violence’.<sup>181</sup>

7.146 The Commissioner for Children (Tas) expressed the view that the *Family Violence Act 2004* (Tas) provides inadequate protection for children, and that violence against children by parents and their partners should be included within the definition of family violence.<sup>182</sup>

7.147 The Department of Premier and Cabinet (Tas) objected to the proposal. It expressed the view that ‘family violence legislation should only relate to individuals sharing an intimate relationship and should not be used to cover other types of family relationships’.<sup>183</sup> It considered that family violence legislation may not be the most appropriate response to violence within broader categories of relationships, and submitted that alternative responses should be explored. The Legal Aid Commission of Tasmania also expressed this view.<sup>184</sup> Both stakeholders cited concerns that including a broader range of relationships in family violence legislation may dilute the message about inter-spousal violence.

#### ***Commissions’ views***

7.148 The Commissions’ view remains that persons in family relationships should have an equal level of protection both within and across jurisdictions. This position attracted widespread stakeholder support. One way of addressing this concern is to

178 Urbis, *Review of the Family Violence Act 2004* (2008), prepared for the Department of Justice (Tas), 12.

179 Consultation Paper, Proposal 4–19.

180 Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; N Norris, *Submission FV 176*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 68*, 1 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

181 M Condon, *Submission FV 45*, 18 May 2010.

182 Commissioner for Children (Tas), *Submission FV 62*, 1 June 2010.

183 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

184 National Legal Aid, *Submission FV 232*, 15 July 2010.

specify a core set of relationships that state and territory family violence legislation should cover.

7.149 The Commissions favour a modern, inclusive approach to the definition of family. Therefore, the categories recommended by the Commissions below constitute an essential core, to which states and territories may add consistently with the objective of ensuring equality of protection within the jurisdiction.

7.150 The Commissions consider that state and territory family violence legislation should cover, as the core group of persons protected, the following categories of relationships:

- past or current intimate relationships, including dating, cohabiting, and spousal relationships, irrespective of the gender of the parties and whether the relationship is of a sexual nature;
- family members;
- relatives;
- children of an intimate partner;
- those who fall within Indigenous concepts of family; and
- members of other culturally recognised family groups.

7.151 This core group reflects the recommendation of the United Nations Department of Economic and Social Affairs Division for the Advancement of Women, with the exception of persons living in the same household. In NSW, where members of the same household are covered by family violence legislation, police have expressed the view that the operation of such a broad definition is problematic.<sup>185</sup> The Commissions consider that whether to include persons living in the same household in family violence legislation is a matter for the states and territories to achieve consistency in the level of protection in the particular jurisdiction. To this end, where such persons are not covered by family violence legislation, they should have access to protection orders through other legislation.

7.152 The Commissions have concerns about the limited range of relationships covered by family violence legislation in Tasmania. In particular, the Commissions are concerned that certain family relationships—such as between parents and children and between siblings—are afforded less legal protection and redress on breach of a ‘restraint’ order than spouses and couples.

7.153 The Commissions do not make a separate recommendation regarding Tasmanian family violence legislation, as the general recommendation regarding a core group of protected persons applies to all state and territory family violence legislation. However,

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185 M Murdoch, ‘Prevention and Reduction of Family Violence: An Australasian Policing Strategy’ (Paper presented at Forensic Issues in Domestic Violence and Expert Evidence Conference, Sydney, 12 September 2009); Apprehended Violence Legal Issues Coordinating Committee, *Submission FV 228*, 12 July 2010.

the Commissions consider that the Tasmanian Government should review the *Family Violence Act 2004* to ensure that, at least, the core categories of relationships the subject of Recommendation 7–6 are covered by the Act.

### **Indigenous concepts of family**

7.154 Indigenous women suffer a disproportionately high level of family violence.<sup>186</sup> As noted in the *Time for Action* report, Indigenous women report higher levels of physical violence during their lifetime than non-Indigenous women, and they are much more likely to experience sexual violence and to sustain injury.<sup>187</sup> Indigenous women may experience family violence within families, extended families, kinship networks and communities.

7.155 Family violence legislation in six jurisdictions expressly recognises an extended concept of relative among Indigenous peoples. Western Australian family violence legislation applies to persons who are related ‘taking into consideration [their] cultural, social or religious backgrounds’, which may cover persons who fall within Indigenous concepts of family.<sup>188</sup> Tasmanian family violence legislation does not cover persons who fall within Indigenous concepts of family. Family violence legislation in Queensland, South Australia, Victoria and Western Australia covers members of other culturally recognised family groups.

7.156 The 2008 review of the Tasmanian family violence legislation stated that it had not tested the extent to which stakeholder views favouring a broadening of the definition to include Indigenous and other kin relationships had ‘thought through’ the implications of a criminal justice response. The Review stated ‘that if a broader definition were to be explored by the Tasmanian government, the implication of a criminal justice response is a critical point to test with stakeholders’.<sup>189</sup>

7.157 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should include as protected persons those who fall within Indigenous concepts of family, as well as those who are members of some other culturally recognised family group.<sup>190</sup>

7.158 There was strong widespread support for the proposal among stakeholders.<sup>191</sup> Two stakeholders indicated that it was important that the communities affected should be consulted regarding changes to legislation.<sup>192</sup>

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186 National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 17.

187 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 9.

188 *Restraining Orders Act 1997* (WA) s 4(2)(a).

189 Urbis, *Review of the Family Violence Act 2004* (2008), prepared for the Department of Justice (Tas), 12.

190 Consultation Paper, Proposal 4–20.

191 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc,

### **Commissions' views**

7.159 The Commissions consider that persons protected by family violence legislation of each state and territory should include as protected persons those who fall within Indigenous concepts of family. This is particularly important given the high levels of family violence experienced by Indigenous family members, including women and children. The Commissions consider that the *Family Violence Act 2004* (Tas) should be amended to capture such persons.

7.160 The Commissions acknowledge that family violence legislation in Western Australia is applicable to those who fall within Indigenous concepts of family. However, the Commissions consider that there is merit in making specific reference to Indigenous concepts of family in light of the disproportionately high rates of family violence in that community. The Commissions consider that the *Restraining Orders Act 1997* (WA) should make specific reference to Indigenous concepts of family in provisions regarding persons protected.

7.161 Family violence legislation should also include as protected persons those who belong to culturally recognised family groups. The Commissions consider it important that the nature and details of such amendments are informed by consultation with Indigenous and CALD communities.

### **Carers**

7.162 Family violence legislation in NSW and the Northern Territory protects persons in carer relationships, including paid carers.<sup>193</sup> In Queensland, South Australia and the ACT, legislation provides that relationships with paid carers or a carer acting on behalf

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*Submission FV 212*, 28 June 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 178*, 25 June 2010; N Norris, *Submission FV 176*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; T Searle, *Submission FV 108*, 2 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 68*, 1 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

192 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Confidential, *Submission FV 184*, 25 June 2010.

193 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 5(f); *Domestic and Family Violence Act 2007* (NT) s 9(g).

of another person or organisation are not included as a protected category.<sup>194</sup> In Victoria, relationships with paid and unpaid carers are expressly covered where that relationship is family-like.<sup>195</sup> Family violence legislation in Tasmania and Western Australia does not address relationships with carers.

7.163 In jurisdictions that exclude paid carers, or do not include carers in the legislation, it is possible that individual relationships may be captured by some other recognised category of relationship.

7.164 In the Consultation Paper, the Commissions asked whether relationships with carers—including those who are paid—should be included in the relationships covered by family violence legislation.<sup>196</sup>

### ***Submissions and consultations***

7.165 Stakeholders expressed a range of views. Some submissions supported the inclusion of paid and unpaid carers in family violence legislation.<sup>197</sup> For example, in a joint submission, Domestic Violence Victoria and others emphasised that violence in relationships with carers has the same dynamics or characteristics as family violence:

These essential dynamics are an intimate environment and a relationship of ‘power over’ brought about by the dependency of the person in relation to requiring intimate personal care and assistance with basic survival and daily living.<sup>198</sup>

7.166 Some stakeholders cited concerns about a gap in protection for the most vulnerable people in society—for example, people with disabilities, older persons, children and young people—if relationships with paid carers are not captured by family violence legislation.<sup>199</sup> Family violence legislation was considered an effective way of

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194 *Domestic and Family Violence Protection Act 1989* (Qld) s 12C(4); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) 8(8)(k); *Domestic Violence and Protection Orders Act 2008* (ACT) s 15(4)(b).

195 *Family Violence Protection Act 2008* (Vic) s 8(3)(h).

196 Consultation Paper, Question 4–7.

197 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Crossroads Community Care Centre Inc, *Submission FV 211*, 25 June 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Women With Disabilities Australia, *Submission FV 143*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 125*, 20 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 92*, 3 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 38*, 13 May 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

198 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

199 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria,

providing protection that could be obtained urgently, while potentially maintaining the relationship between the parties.

7.167 Several stakeholders opposed relationships with any carers—paid or unpaid—being included as a separate category of persons protected.<sup>200</sup> The Commissioner for Victims' Rights (South Australia) supported the inclusion of relationships with carers in family violence legislation only where the carer is in a family relationship with the person he or she is caring for.<sup>201</sup>

7.168 The Victorian Government distinguished relationships with carers that were family-like from other relationships involving the provision of care. The Victorian Government supported the inclusion of carers—both paid and unpaid—in circumstances where the carers are in a family-like relationship with the victim.<sup>202</sup> Its submission referred to the Victorian family violence legislation as a model. This was also the model preferred by Wirringa Baiya Aboriginal Women's Legal Centre Inc.<sup>203</sup>

7.169 However, the Magistrates' Court and Children's Court of Victoria expressed concern with the Victorian approach. It noted that dealing with relationships with carers under different legislation, depending on whether or not the carer has a family-like relationship with the victim, leads to complexity. The court submitted that 'it may be preferable if all carer relationships could be dealt with under the one Act'.<sup>204</sup>

7.170 Other stakeholders distinguished between relationships with carers who are paid, and relationships with carers who are unpaid. These submissions supported the inclusion of relationships with carers in family violence legislation only where the carers are unpaid, or the relationship is an informal care relationship.<sup>205</sup>

7.171 The Queensland Government expressed concern that including informal carers in the *Domestic and Family Violence Protection Act 1989* (Qld) would significantly increase the ambit of the legislation, and suggested that consideration be given to other approaches to deal with abuse in the context of formal care.<sup>206</sup> The Department of Premier and Cabinet (Tas) also stated that in Tasmania, violence in carer relationships may be dealt with by other legislative schemes.<sup>207</sup>

7.172 Two stakeholders outlined problems regarding the operation of the NSW family violence legislation, which includes relationships with paid carers.<sup>208</sup> Legal Aid NSW

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Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

200 K Greenland, *Submission FV 161*, 25 June 2010; A Brunacci, *Submission FV 97*, 4 June 2010; A Harland, *Submission FV 80*, 2 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010.

201 Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

202 Victorian Government, *Submission FV 120*, 15 June 2010.

203 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

204 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

205 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010 Confidential, *Submission FV 109*, 8 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

206 Queensland Government, *Submission FV 229*, 14 July 2010.

207 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

208 National Legal Aid, *Submission FV 232*, 15 July 2010; Apprehended Violence Legal Issues Coordinating Committee, *Submission FV 228*, 12 July 2010.

commented that, in some circumstances, the person using violence may be the person requiring care, and the use of family violence orders by paid carers against the person for whom they are caring may operate to disadvantage vulnerable people.<sup>209</sup>

7.173 A number of stakeholders who opposed the application of family violence legislation to relationships with paid carers stated that these relationships are of a different nature from the domestic, family or personal relationships which may involve the provision of unpaid care.<sup>210</sup> For example, Commissioner for Victims' Rights (South Australia) stated that, in broadening the definition of family violence to include relationships with unrelated paid carers, the concept of family violence is altered.<sup>211</sup>

#### ***Commissions' views***

7.174 Persons in relationships involving the provision of paid or unpaid care are entitled to protection from abuse. Family violence legislation may provide such protection to the most vulnerable in our communities— persons living with disabilities, older persons, children and young people—in an accessible and efficient way.

7.175 However, the Commissions note the difficulties identified by some stakeholders in the operation of family violence legislation which includes paid carers. The Commissions have concerns that including relationships with paid carers in family violence legislation may in some instances operate to further disadvantage persons requiring care.

7.176 In many cases, relationships with carers fall within other recognised categories of family relationships. The Commissions do not consider it essential that relationships with carers which do not fall within those categories should be included in family violence legislation in all states and territories. Legislation other than family violence legislation should provide persons in such relationships with access to protection orders. Therefore the Commissions do not make a recommendation that state and territory family violence legislation should cover relationships with carers.

**Recommendation 7–6** State and territory family violence legislation should include as the core group of protected persons those who fall within the following categories of relationships:

- (a) past or current intimate relationships, including dating, cohabiting, and spousal relationships, irrespective of the gender of the parties and whether the relationship is of a sexual nature;
- (b) family members;
- (c) relatives;

209 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

210 Ibid; Confidential, *Submission FV 184*, 25 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; A Harland, *Submission FV 80*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

211 Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

- (d) children of an intimate partner;
- (e) those who fall within Indigenous concepts of family; and
- (f) those who fall within culturally recognised family groups.



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## **Part C**

### **Family Violence and the Criminal Law**

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# **8. Family Violence and the Criminal Law**

## **—An Introduction**

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### **Contents**

Introduction	345
Prosecuting federal offences in a family violence context	346
Research and education about federal offences	347
Civil and criminal proceedings	351
Choice of proceedings	352
Mandatory reporting	359

### **Introduction**

8.1 The Terms of Reference direct the Commissions to consider the interaction in practice of family violence laws with the criminal laws of the Commonwealth, states and territories. This and the following six chapters are dedicated to this issue.

8.2 Family violence laws interact with the criminal law in a number of ways. They most often interact with state or territory criminal law, but may also interact with federal criminal law. A person who uses family violence may be subject to a protection order or to criminal prosecution—or to both. In practice, decision makers, such as police, may choose to pursue one avenue over another. This chapter considers how and why those decisions are made—and whether the decisions are always made appropriately and in the best interests of victims. It also briefly considers whether any persons, such as neighbours and health professionals, should be required to report family violence to police.

8.3 Chapter 9 considers the role of police in investigating family violence, issuing protection orders and applying for protection orders. It also considers the use of police powers of entry, search, seizure, arrest, direction and detention to investigate family violence and to protect victims.

8.4 Chapter 10 considers how family violence protection orders can interact with bail decisions made by police and the courts. Issues considered include: whether there should be a presumption regarding bail for crimes committed in a family violence context; whether bail conditions conflict with family violence protection order conditions; and whether victims of family violence are appropriately and promptly informed about bail decisions.

8.5 Chapter 11 discusses a number of issues arising from the interaction between family violence protection orders and the criminal law, including: the use of evidence

of protection orders in criminal proceedings; the making of protection orders during criminal proceedings; and the interaction between protection order conditions and the criminal law.

8.6 Chapter 12 considers issues that arise when protection orders are breached. Breaching a protection order is a criminal offence and can therefore result in the parties to protection order proceedings entering into the criminal justice system. The chapter considers issues concerning the aiding and abetting of breaches; how police and prosecutors decide whether to charge a person for breaching a protection order or for the underlying offence; the maximum penalties for breach; and sentences imposed for breaching protection orders.

8.7 Chapters 13 and 14 consider whether there should be an expanded role for the criminal law in recognising family violence. Chapter 13 considers how family violence is recognised in criminal offences and sentencing. Chapter 14 considers family violence in the context of defences to homicide and how—if at all—a family relationship should be defined where it is prescribed as an element of an offence, defence or as a sentencing factor.

## **Prosecuting federal offences in a family violence context**

8.8 The Commissions have been asked to consider the interaction of federal criminal laws with state and territory family violence laws. In Chapter 4, the Commissions consider federal offences committed in a family violence context, and the importance of capturing these offences in definitions of family violence. One point at which federal criminal laws and state and territory family violence laws interact is where federal offences committed in a family context are prosecuted—perhaps after or alongside the obtaining of a civil protection order or with state and territory offences also committed in a family violence context. Federal offences committed in a family violence context may be prosecuted by the Commonwealth Director of Public Prosecutions (CDPP), or by state and territory prosecutors—with or without the consent of the CDPP. Later in this chapter, the Commissions consider more broadly how decision makers decide whether to prosecute family violence crimes.

### ***Submissions and consultations***

8.9 In the Consultation Paper, the Commissions asked how matters were dealt with in practice that involve:

- (a) an overlap between state or territory family violence legislation and federal criminal law; and
- (b) a joint prosecution of state or territory and federal offences arising in a family violence context.

The Commissions also asked whether state and territory prosecutors sought the consent of the CDPP to prosecute federal offences arising in a family violence context, and whether they informed the CDPP of the outcome of any such prosecutions.<sup>1</sup>

8.10 Only a few submissions addressed this question. Persons are charged with federal offences relating to the use of carriage and postal services to, among other things, make threats and harass.<sup>2</sup> For example, a person may be charged with a carriage service offence for sending abusive text messages.<sup>3</sup>

8.11 State and territory prosecutors typically have carriage of these matters, and it seems the CDPP is not involved or notified of the outcome.<sup>4</sup>

Regularly such charges are withdrawn on a plea to substantive charges under state law. Part of the reason for this is the complexity of imposing a state sentence and a Commonwealth sentence in the same case.<sup>5</sup>

8.12 South Australian state prosecutors do not appear to consider breaches of Commonwealth legislation.<sup>6</sup> The Queensland Law Society submitted that any prosecutions for the improper use of mail, which appear to be rare, are undertaken by the Australian Federal Police and prosecutions for carriage service offences are undertaken by Queensland Police.<sup>7</sup> In New South Wales (NSW) such federal offences are sometimes prosecuted in tandem with protection order proceedings.<sup>8</sup> The CDPP advised that arrangements for joint trials involving state or territory and federal offences arising in a family violence context are working well in practice.<sup>9</sup>

### Research and education about federal offences

8.13 In the absence of centralised statistics, it is not clear how often federal offences are committed or prosecuted in a family violence context. Such offences could be prosecuted on their own or in conjunction with state or territory offences. The prosecution of the federal offences could also stem from, or prompt, family violence protection order proceedings.

8.14 In a 2010 brief on ‘Factors which influence the sentencing of domestic violence offences’, the NSW Bureau of Crime Statistics and Research looked at domestic violence related offences finalised in NSW Local and District Courts between January

1 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 5–1.

2 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

3 G Zdenkowski, *Consultation*, Sydney, 6 November 2009.

4 Office of the Director of Public Prosecutions (Cth), *Correspondence*, 8 January 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

5 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

6 A Cannon, *Submission FV 137*, 23 June 2010.

7 Queensland Law Society, *Submission FV 178*, 25 June 2010.

8 G Zdenkowski, *Consultation*, Sydney, 6 November 2009.

9 Office of the Director of Public Prosecutions (Cth), *Correspondence*, 8 January 2010.

2008 and June 2009. The only federal offence identified was using a carriage service to menace, harass or offend,<sup>10</sup> of which it found 127 cases.<sup>11</sup>

### **Submissions and consultations**

8.15 In the Consultation Paper, the Commissions proposed that the CDPP—either by itself or in conjunction with other relevant bodies—establish and maintain a centralised database of statistics that records federal offences prosecuted in a family violence context.<sup>12</sup> The Commissions also proposed that state and territory prosecutors provide the CDPP with specified information to facilitate the establishment and maintenance of this database.<sup>13</sup>

8.16 These proposals were generally supported.<sup>14</sup> However, the Australian Government Attorney-General's Department submitted that the Consultation Paper had not identified a practical need for the database and had not sufficiently justified the significant resources the database would demand.<sup>15</sup> Similarly, National Legal Aid suggested that ‘limited resources would be best directed elsewhere’, even though it submitted that ‘Commonwealth provisions in relation to using carriage services to make threats, menace, harass or cause offence are not prosecuted as frequently as they occur’.<sup>16</sup>

8.17 The CDPP said it had a database that recorded the prosecutions it conducted, but that this database does not delineate ‘the small number of offences committed in a family violence context’ and would not be suitable. The CDPP suggested the Australian Institute of Criminology or the Australian Institute of Family Studies might be better suited to maintaining any new database of federal offences prosecuted in a family violence context.<sup>17</sup>

8.18 In the Consultation Paper, the Commissions also asked whether there was a need for lawyers involved in family violence matters to receive education and training about the potential role of federal offences in protection order proceedings and how this could best be achieved.<sup>18</sup>

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10      *Criminal Code Act 1995* (Cth) s 474.17(1).

11      C Ringland and J Fitzgerald, *Factors which Influence the Sentencing of Domestic Violence Offenders* (2010), prepared for the NSW Bureau of Crime Statistics and Research.

12      Consultation Paper, Proposal 5–2.

13      *Ibid*, Proposal 5–3.

14      For example, Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

15      Australian Government Attorney-General’s Department, *Submission FV 166*, 25 June 2010.

16      National Legal Aid, *Submission FV 232*, 15 July 2010.

17      Commonwealth Director of Public Prosecutions, *Submission FV 76*, 2 June 2010; Office of the Director of Public Prosecutions (Cth), *Correspondence*, 8 January 2010.

18      Consultation Paper, Question 5–3.

8.19 Most submissions supported this proposal.<sup>19</sup> Some of those who supported the proposal said training on *all* matters of family violence and its dynamics was important.<sup>20</sup> Two stakeholders submitted that police and directors of public prosecution (DPPs) should also be trained to actively prosecute these offences;<sup>21</sup> another said the magistracy and judiciary should also be trained.<sup>22</sup>

8.20 A number of submissions suggested how this training might be delivered: ‘through the usual Community Legal Education channels, in particular the Family Law Section of the Law Council of Australia,’<sup>23</sup> for example, or through state law societies,<sup>24</sup> or it could be included in a program of accreditation for family violence and sexual assault specialists that some are now considering.<sup>25</sup>

8.21 One submission, however, said training was not necessary because ‘it happens in a relatively small minority of cases’.<sup>26</sup>

#### ***Commissions’ views***

8.22 The *Time for Action* report stressed the importance of collecting reliable data about family violence—of ‘building the evidence base’:

Data relating to violence against women and their children in Australia is poor. Data on services sought by, and provided to, victims are not readily available, and the way in which information is reported is generally inconsistent and does not allow for a comprehensive understanding of violence against women.<sup>27</sup>

8.23 In the Commissions’ view, it is also important to capture data about the prosecution of federal offences committed in a family violence context. Without adequate statistics and research, it is difficult to assess how often these offences are committed in the context of family violence, and how often they are prosecuted. Capturing the data should highlight the extent of the problem and could be used to develop principled policy. The information might highlight differences between how rigorously each jurisdiction prosecutes certain federal offences and suggest the need for education and training in certain jurisdictions and areas.

19 For example, Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

20 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

21 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

22 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

23 Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010.

24 Confidential, *Submission FV 198*, 25 June 2010. See also Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010.

25 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

26 Police Association of New South Wales, *Submission FV 145*, 24 June 2010.

27 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009) 47.

8.24 Capturing information about when these offences are raised in proceedings related to family violence, rather than simply when the offences are actually successfully prosecuted, might also provide a more useful picture of the role this conduct plays in family violence.

8.25 The Commissions recognise that capturing this information might be difficult and therefore do not prescribe any particular method. In the Consultation Paper, the Commissions suggested the CDPP could establish and maintain a database and that state and territory prosecutors could send relevant information to the CDPP. However, the information could be captured in other ways. The Australian Institute of Criminology might be a more appropriate agency to collect this data, given its stated functions and aims:

The Australian Institute of Criminology is Australia's national research and knowledge centre on crime and justice. We seek to promote justice and reduce crime by undertaking and communicating evidence-based research to inform policy and practice.<sup>28</sup>

8.26 If specialist family violence lists were adopted, as the Commissions discuss in Chapter 32, then courts might be able to mark and identify files with information about any federal crimes prosecuted or alleged to have been committed in a family violence context.

8.27 Federal offences committed in a family violence context should also be more widely recognised and understood amongst lawyers, police, prosecutors and the judiciary. Arguably, they should also be more widely prosecuted, assuming the criteria for instituting federal prosecutions are met. The Commissions discuss below how decision makers decide whether to prosecute state and territory offences, such as assault, committed in a family violence context. Where a person might have committed multiple crimes, decision makers will also decide which particular crime or crimes to prosecute—and in doing so, should ensure that the charges they decide upon properly reflect the nature and seriousness of the criminal conduct for which they have evidence.

8.28 A proper and informed decision about whether to prosecute should include at least a consideration of federal offences that might have occurred. The fact that these offences do not seem to be widely prosecuted when they are committed in a family violence context, might not itself suggest widespread ignorance of the offences. Decision makers might choose to focus on state or territory crimes for good reason. But if decision makers choose not to prosecute an available federal offence, it should be a deliberate decision, made by applying a test such as the two-stage test that must be satisfied under the CDPP's prosecution policy:

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28 Australian Institute of Criminology, *Homepage* <<http://www.aic.gov.au/>> at 14 September 2010.

- there must be sufficient evidence to prosecute the case; and
- it must be evident from the facts of the case, and all the surrounding circumstances, that the prosecution would be in the public interest.<sup>29</sup>

8.29 Accordingly, in the Commissions' view, existing training of police, prosecutors, lawyers and the judiciary in understanding family violence, should include training on potential federal offences committed in this context. This training should include when and how such offences should be prosecuted in line with prosecutorial guidelines, and when such offences might play a role in protection order proceedings under family violence legislation.

**Recommendation 8–1** The Australian Institute of Criminology (AIC) or another suitable federal agency should gather and report data about federal offences committed in a family violence context. This should include data about:

- (a) which of these federal offences are prosecuted and the result;
- (b) who conducts the prosecution;
- (c) whether the offences are prosecuted jointly with state or territory crimes committed in a family violence context; and
- (d) when the offences form the basis of a protection order.

This information should be regularly given to the AIC or relevant agency by either the courts or Commonwealth, state and territory prosecutors—including police and directors of public prosecution.

**Recommendation 8–2** Police, prosecutors, lawyers and judicial officers should be given training about potential federal offences committed in a family violence context, including when such offences should be prosecuted or used as a basis for obtaining a family violence protection order.

This training should be incorporated into any existing or proposed training about family violence that is conducted by, among others: state and federal police, legal professional bodies, directors of public prosecution (state and Commonwealth), and judicial education bodies.

## Civil and criminal proceedings

8.30 Conduct constituting family violence may form the basis of a protection order as well as grounds for a criminal prosecution. In these cases, civil family violence laws can interact with criminal law. Physical and sexual assault are clear examples; they are family violence—for the purpose of obtaining a protection order—and they are crimes in all jurisdictions. Not all family violence under state and territory family violence

<sup>29</sup> Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*.

legislation is criminal,<sup>30</sup> but as discussed in Chapter 9, criminal law procedures—such as police powers of arrest and detention—can also interact with civil law protection orders.

8.31 There are some key differences in the civil and criminal responses to family violence. Some of these are summarised in the following table:

	<b>Civil protection order</b>	<b>Criminal proceedings</b>
<b>Purpose (see discussion in Chapter 4)</b>	Protect victim from future violence.	Punish offender for past criminal conduct. Other sentencing purposes include: deterrence, rehabilitation, incapacitation, denunciation and restoration.
<b>Standard of proof</b>	Balance of probabilities.	Beyond reasonable doubt.
<b>Who initiates</b>	Victim, authorised person, police, and possibly—but less frequently—the DPP. In certain cases and in some jurisdictions, courts can also initiate making of protection order.	Police lay charges and prosecute less serious offences. State/territory DPPs prosecute more serious offences.
<b>Outcome</b>	Conditions or restrictions placed on person against whom order is made (eg, not to harass, be of good behaviour, not to approach victim).	On finding of guilt or conviction, offender is sentenced.

### **Choice of proceedings**

8.32 There may be legitimate reasons that police and prosecutors, when they encounter family violence, might seek a protection order for the victim, but not pursue criminal charges. Some family violence will not amount to a criminal offence; protection orders generally offer a speedier response to violence and therefore speedier protection; and there is a lower standard of proof in civil protection order proceedings. But are decision makers sometimes wrongly choosing to pursue one remedy at the expense of the other?

8.33 As noted by Amnesty International, the United Nations Special Rapporteur on Violence against Women, its Causes and Consequences, has raised concerns about the

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30 As discussed in Ch 5. Whether all family violence should be criminalised is discussed in Ch 13.

use of protection orders under family violence legislation in Australia instead of, rather than as well as, a criminal response.<sup>31</sup> Amnesty International has stated:

Civil protection orders are an essential part of the state's responsibility to protect survivors of violence, but should complement, not replace, a criminal response.<sup>32</sup>

8.34 Commentators have noted, however, that where there is an overlap between criminal and civil responses, the balance

is a delicate one, between providing a legal mechanism for protecting people who experience domestic violence, but not downplaying its significance by applying what is essentially a private law remedy.<sup>33</sup>

8.35 In 1990, Dr Jocelynne Scutt argued that family violence laws effectively 'decriminalise' family violence.<sup>34</sup>

The emphasis is on treating assault not as criminal, but to be dealt with by a civil law 'solution'. The man is not penalised for assaulting his wife; he is penalised if at all, for breaking an order of the court.<sup>35</sup>

8.36 In 2008, Dr Heather Douglas wrote that in Queensland, family violence continues to be dealt with mainly through protection orders, rather than the criminal law:

The development of protection order legislation grew, to some extent, out of frustration with the failure of the criminal justice system. Some of the key obstacles in criminal prosecution and conviction of domestic violence offences are the high standard of proof of 'beyond reasonable doubt' and the fact that many of the standard criminal offences fail to encapsulate certain violent behaviours ... These protection order schemes have been embraced by both women and by police. As one magistrate has noted, we have seen a 'rise and rise' in the use of protection orders.<sup>36</sup>

8.37 The Magistrates Court of Queensland reported that, in the year 2007–08, it made a total of 32,081 protection orders and dismissed 5,376 applications for such orders.<sup>37</sup> New South Wales Criminal Courts statistics also indicate high usage of the protection order system. Statistics for 2008 reveal that 22,684 protection orders were granted in proceedings under NSW family violence legislation—excluding interim orders.<sup>38</sup>

8.38 The 2008 review of the family violence legislation of Western Australia (WA) notes a concern that, despite police policy stating that protection orders 'are to be seen

31 Amnesty International, *Setting the Standard: International Good Practice to Inform an Australian National Plan of Action to Eliminate Violence Against Women* (2008), 45.

32 Ibid, 45 (citation omitted).

33 B Fehlberg and J Behrens, *Australian Family Law: The Contemporary Context* (2008), 200.

34 J Scutt, *Women and The Law* (1990), 451, 457.

35 Ibid, 459. Issues that arise on breach of a protection order are discussed in Ch 12.

36 H Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 444. However, in some cases, if civil redress were not available, a victim would be left without any protection.

37 Magistrates Court of Queensland, *Annual Report 2007–08*, Appendix 11, Table 9. The figure of 32,081 includes final and interim protection orders, as well as variation and revocation of protection orders. The total number of final protection orders made in the same reporting period was 15,632.

38 NSW Bureau of Crime Statistics and Research, *New South Wales Criminal Courts Statistics 2008*, 6, Table 1.14.

as an additional safeguard and are not regarded as an alternative to the laying of charges', the introduction of police-issued protection orders has become, in some instances, an alternative to a criminal justice response.<sup>39</sup> The WA review stated that:

The question is whether police are issuing police orders, not only in appropriate circumstances, but also in circumstances where they should be preferring charges ...

Responses from the policy survey indicate that, in some instances, issuing a police order may be preferred to laying charges because issuing a police order requires less police time.<sup>40</sup>

8.39 The WA review expressed concern that some police were potentially trivialising what, to a victim, was a serious offence.<sup>41</sup>

8.40 In contrast, the Commissions heard anecdotally in one consultation with magistrates in Adelaide that, in that jurisdiction, police prefer laying a charge to taking out a protection order because the latter involves preparing an affidavit and is more time-consuming.<sup>42</sup>

8.41 While one concern is that civil redress downplays the significance of family violence, concerns have also been raised that applying the criminal law to family violence may inflict further harm to women.<sup>43</sup> Douglas has stated that:

It is argued by some that involving the criminal justice system in domestic violence matters may create distress, disadvantages and disillusionment for women that override any hope or protection and safety gained through the criminal justice process. ... In Australia, there is research available that shows that indigenous women in some communities may be reluctant to call on police to protect them from violence where arrest and prosecution focused strategies are in place.<sup>44</sup>

8.42 Since the 1970s, some commentators emphasised that there are important reasons for treating family violence as criminal and not civil or private. Douglas suggested that this has encouraged public condemnation of the violence and police accountability for the protection of women.<sup>45</sup> However, Scutt argued that criminal assault in a family violence context

is effectively decriminalised by the failure of police and courts to treat it as criminal, the 'solution' is seen as passing legislation to grant women a right to an ... 'intervention order'.<sup>46</sup>

8.43 Whether a civil and/or a criminal response is pursued may also depend in practice on the victims' wishes. Whether victims choose to pursue a civil remedy or

39 Department of the Attorney General (WA), *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 22.

40 Ibid, 22–23.

41 Ibid, 22.

42 Family Violence Magistrates, *Consultation*, Adelaide, 25 September 2009.

43 H Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 439. The purposes of family violence legislation and the criminal law are discussed in Ch 4.

44 Ibid, 442–443 (citations omitted).

45 Ibid, 443 (citations omitted).

46 J Scutt, *Women and The Law* (1990), 451.

assist in a criminal prosecution may be influenced by a number of factors, including their experiences of the legal system; their access to support services; and the nature of their relationship with the persons who have been violent to them. As Douglas has noted:

Both individual judges and research have also recognised that the cyclical and complicated nature of family violence relationships often leads victims to seek to withdraw charges or underestimate the harm of particular conduct during periods of calm in their relationship.<sup>47</sup>

8.44 In cases of family violence involving allegations of sexual assault, there are parallel levels of attrition at various stages of the criminal process, which are considered in Part G of this report.

#### ***Submissions and consultations***

8.45 In the Consultation Paper, the Commissions asked whether police or other participants in the legal system were treating the obtaining of protection orders under family violence legislation and a criminal justice response to family violence as alternatives rather than potentially co-existing avenues of redress. In other words, were they choosing one remedy over the other, when perhaps they should have sought both? If they were, the Commissions asked, what are the practices or trends and how can this best be addressed?<sup>48</sup>

8.46 Stakeholders submitted that the research on this question was limited<sup>49</sup> and that practices vary between jurisdictions.<sup>50</sup>

8.47 While noting that it was to their credit that Queensland Police have taken strong and positive action to counter family violence, the Queensland Law Society submitted that the

most typical reaction by police in attending domestic situations is to take action and if necessary apply for a protection order and if necessary remove the perpetrator from the scene, taking him or her into custody for a number of hours, but not to charge the perpetrator with any offence.<sup>51</sup>

8.48 The Victorian Government stated that Victoria Police does not use one response over the other, and that since the introduction of the Code of Practice in August 2004, there have been substantial increases in both the number of intervention orders applied for by police and the number of charges laid arising from family violence incidents.<sup>52</sup>

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47 H Douglas, ‘The Criminal Law’s Response to Domestic Violence: What’s Going On?’ (2008) 30 *Sydney Law Review* 439, 454 (citation omitted).

48 Consultation Paper, Question 5–4.

49 J Stubbs, *Submission FV 186*, 25 June 2010.

50 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

51 Queensland Law Society, *Submission FV 178*, 25 June 2010.

52 Victorian Government, *Submission FV 120*, 15 June 2010.

8.49 However, some Victorian Magistrates have said that ‘Victoria Police do treat the obtaining of a protection order as an alternative to proceeding with criminal process. Others disagree’.<sup>53</sup> National Legal Aid submitted that:

In Victoria both intervention orders and criminal charges are used. Since the introduction of Family Violence Safety Notices allowing the police to remove alleged perpetrators from the home, criminal charges seem to be used only for the most serious cases. Family Violence Safety Notices should be used to ensure the safety of the victim and not as an alternative to criminal charges in appropriate circumstances.<sup>54</sup>

8.50 National Legal Aid submitted that in NSW local courts, ‘protection orders and criminal charges are often treated as co-existing avenues of redress’.<sup>55</sup> However, Women’s Legal Services NSW stated:

For many of our clients it is common for police not to charge offenders when charges would have been indicated as appropriate by police policy and the legislation ... In some cases where the victim and perpetrator are in a relationship, the police do not charge with criminal offences until there have been a number of incidents.<sup>56</sup>

8.51 Police in WA, it was submitted, in some cases tell victims to get a protection order rather than investigate and prosecute a crime.<sup>57</sup>

8.52 Tasmania’s Safe at Home program encouraged police to bring both criminal and protection order proceedings, National Legal Aid submitted, and this is ‘embedded in police and there are appropriate reviews to ensure that it happens consistently’.<sup>58</sup>

8.53 In the ACT, National Legal Aid, submitted:

it is not the police who apply for domestic violence orders, except very rarely in emergency telephone order situations. There is a Family Violence Intervention Program which involves [lawyers], police, magistrates and services. All criminal matters that involve family violence are marked ‘Family Violence’—they go into the ‘Family Violence List’—this takes them before a magistrate who is on the Intervention Program committee. It is still treated the same way in terms of criminal law but by a judicial officer who has an awareness of the significance of family violence. There is no option for police bail if a person is arrested for a family violence offence. Protection orders are applied for by individuals.<sup>59</sup>

#### ***Reasons for not prosecuting***

8.54 Various explanations were given for why police might choose to obtain a protection order, rather than prosecute a crime, when they could do both. The Queensland Law Society submitted that police claim it can be very difficult to prosecute these offences because:

- (a) The victim often recants and therefore police are reluctant to commence the prosecution; and (b) It can be hard to prove matters beyond reasonable doubt.

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53 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

54 National Legal Aid, *Submission FV 232*, 15 July 2010.

55 Ibid.

56 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

57 National Legal Aid, *Submission FV 232*, 15 July 2010.

58 Ibid.

59 Ibid.

Furthermore, Queensland Police in their operational police manual ... have their attention drawn to obtaining protection orders but not necessarily to also charging perpetrators of violence with offences arising out of the same conduct.<sup>60</sup>

8.55 Sometimes individuals are not charged, it is said, because prosecuting a crime means more work, and police might not have the time and resources to investigate these more difficult matters.<sup>61</sup> One legal centre also suggested ‘an attitude problem, especially towards Aboriginal women’, stating that ‘we often find that police are indifferent to Aboriginal women because there is a perception that Aboriginal women are unreliable’.<sup>62</sup>

8.56 Some victims of family violence reportedly do not want the offender to be charged with a criminal offence—they just want the violence to stop.<sup>63</sup> This might partly be out of fear of retribution,<sup>64</sup> but for some Indigenous victims of family violence, ‘by putting in place a DVO [a protection order] but not pressing aggravated assault charges, the police are in fact respecting the wishes of these women’.<sup>65</sup> Professor Julie Stubbs submitted that victims may choose to use different options at different times in response to their changing needs, concerns and capacities; an effective response to family violence should not preclude some capacity for victim choice.<sup>66</sup>

8.57 The idea of choice was also noted by the Commissioner for Victims’ Rights (South Australia), who cautioned against ‘a blanket approach that requires the police to always apply for a protection order and charge the substantive criminal offence’, because ‘it is important that victims know the choices, the implications and are engaged in the decision-making’.<sup>67</sup>

8.58 Stakeholders suggested that police need ongoing and comprehensive training, including about family violence and its complexities, especially in the context of Aboriginal communities, and about Aboriginal culture.<sup>68</sup> Police also need a ‘clear and cohesive framework’.<sup>69</sup> Standard operating procedures should guide police in deciding when to lay criminal charges.<sup>70</sup> Stakeholders also submitted that police responses to family violence should be monitored, scrutinised, and tracked.<sup>71</sup>

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60 Queensland Law Society, *Submission FV 178*, 25 June 2010.

61 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010. See also J Stubbs, *Submission FV 186*, 25 June 2010.

62 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010.

63 Confidential, *Submission FV 164*, 25 June 2010.

64 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

65 Confidential, *Submission FV 164*, 25 June 2010.

66 J Stubbs, *Submission FV 186*, 25 June 2010.

67 Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010.

68 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010.

69 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

70 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010.

71 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

8.59 One Victorian community service and advocacy organisation noted that criminal charges rely on a police assessment of the strength of the evidence. Accordingly, it submitted, police should be encouraged to collect evidence and to work with family violence service providers to encourage women to make statements.<sup>72</sup>

There also needs to be support for specialist children's support services, both to address the impact of violence and enable children to make statements to SOCA [Sexual Offences and Child Abuse police units]. Whole of service system support for victims is needed to encourage them to pursue criminal proceedings.<sup>73</sup>

8.60 While most submissions approached these questions by addressing whether police are not prosecuting family violence criminal offences when they should, one stakeholder addressed the question of whether protection orders were appropriately being put in place during or after criminal proceedings.<sup>74</sup>

#### *Commissions' views*

8.61 In the Commissions' view, police and prosecutors should only choose not to prosecute crimes committed in a family violence context with good reason. Civil and criminal responses to family violence can serve common purposes, such as the protection of a victim of family violence—but, as discussed more fully in Chapter 4, they can also serve different purposes. It is important that neither remedy is inappropriately neglected.

8.62 The question of whether to prosecute criminal family violence more actively inevitably raises the difficult matter of whether the state should prosecute despite the contrary wishes of the victim. This chapter does not explore this debate in detail, but notes that pro-arrest, pro-prosecution and other mandatory policies have their critics, some of whom maintain that the policies not only disempower victims, robbing them of their autonomy, but that they can even compromise victim safety.<sup>75</sup>

8.63 In practice, the reasons police do not prosecute crimes committed in a family context sometimes seem to be inappropriate, and sometimes do not clearly relate to the wishes or safety of victims. Not prosecuting because the task is difficult, or takes too much time, or because an officer thinks violence against a family member is less serious than other crimes are poor reasons not to prosecute a crime. As with decisions about whether to prosecute federal offences committed in a family violence context, discussed above, decisions about whether to prosecute other criminal offences committed in a family violence context should be made in accordance with prosecution policies. These policies consider such matters as the strength of the evidence and

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72 Berry Street Inc, *Submission FV 163*, 25 June 2010.

73 Ibid. Integrated responses and specialisation are discussed further in Chs 29 and 32 respectively.

74 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010. The making of protection orders in criminal proceedings is discussed in Ch 11. The interaction between protection orders and bail conditions is discussed in Ch 10.

75 For example, L Goodmark, 'Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions In Domestic Violence Cases' (2009) 37 *Florida State University Law Review* 1. This debate is discussed further below.

whether prosecuting is in the public interest. Determining this public interest will no doubt include carefully considering the needs and safety of victims.

8.64 Police should be trained and equipped to decide properly when to pursue civil and criminal responses to family violence—and when to pursue both.<sup>76</sup> In jurisdictions in which police now rarely play a role in issuing or applying for protection orders, it should be clear who is responsible and accountable for deciding whether to do so. The decisions police make in relation to when they issue or apply for a protection order and when they choose to prosecute a criminal offence should be monitored by senior police officers.

8.65 Failures to prosecute criminal family violence do not necessarily need to be addressed through mandatory-arrest or mandatory-prosecution policies. These are arguably blunt instruments. But a duty to investigate family violence, and to record when and why further action was not taken, should go some way to ensuring that police are alert to the importance of their role in combating family violence and treating it seriously. The Commissions discuss this duty to investigate in the following chapter. Chapter 11 also addresses the question of when it is appropriate for a court to issue a protection order during criminal proceedings—thereby accommodating a dual civil and criminal response to family violence.

## Mandatory reporting

### *Existing mandatory reporting laws*

8.66 The police have a duty to investigate family violence; whether this duty should be in legislation or police codes of practice is discussed in Chapter 9. One way that police can be alerted to family violence is through reports from neighbours, health professionals, and others. The making of such reports can be mandated; persons can be fined for not reporting violence when they should.

8.67 Such a policy has been adopted in the Northern Territory (NT), where a duty to report some types of family violence is imposed on all adults.<sup>77</sup> Police must take reasonable steps to ensure reports are investigated.<sup>78</sup> Failure to make a report is a criminal offence,<sup>79</sup> and can therefore result in a wide range of persons—including professionals and family members who have not themselves committed family violence—entering into the criminal justice system. As at 15 June 2010, there had been no prosecutions or formal investigations for this offence.<sup>80</sup> Tasmanian family violence

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76 The Commissions make recommendations about police training and education in family violence in Ch 31, and about the use of specialised police in Ch 32.

77 *Domestic and Family Violence Act 2007* (NT) s 124A.

78 Ibid s 124A (4).

79 The maximum penalty is \$22,000: Ibid s 124A(1).

80 Northern Territory, *Estimates Committee*, Legislative Assembly, 22 September 2010, Question Taken on Notice 3.8.

legislation also contains a mandatory reporting provision, but the relevant section has not commenced.<sup>81</sup>

8.68 Section 124A of the NT family violence legislation, inserted in 2009,<sup>82</sup> provides that an adult commits an offence if he or she fails to report to a police officer his or her belief, based on reasonable grounds, that:

- another person has caused, or is likely to cause, harm to someone else with whom the other person is in a domestic relationship; and/or
- the life or safety of another person is under serious or imminent threat because domestic violence has been, is being, or is about to be committed.<sup>83</sup>

8.69 Harm means ‘physical harm that is serious harm’<sup>84</sup> and serious harm is defined in the *Criminal Code* (NT) to mean any harm (including the cumulative effect of more than one harm):

- (a) that endangers, or is likely to endanger, a person’s life; or
- (b) that is or is likely to be significant and longstanding.<sup>85</sup>

8.70 There are defences in the NT legislation for ‘reasonable excuse’. Reasonable excuses for not reporting the violence include that the person reasonably believed someone else had reported the violence; the person was planning for the removal of the victim and intended to make his or her report soon after the removal; or that if the person reported the violence as soon as practicable, the report would have resulted in a serious or imminent threat to the life or safety of any person.<sup>86</sup>

8.71 The Tasmanian provision, unlike the NT provision, only applies to ‘prescribed persons’. Prescribed persons include registered medical practitioners, nurses, dentists, psychologists, and school teachers. These persons must inform a police officer as soon as practicable if they believe, or suspect, on reasonable grounds, or know, ‘that family violence involving the use of a weapon, sexual violence or physical violence, or where a child is affected, has occurred or is likely to occur’.<sup>87</sup> There is a defence for those who honestly and reasonably believe that a police officer has already been informed. The offence is punishable by a fine.

8.72 There are several key points about the reporting laws that are currently operating in the NT and that are proposed for Tasmania. First, under the NT provision, the

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81 *Family Violence Act 2004* (Tas) s 38 has not been proclaimed to commence since the act received Royal Assent in 2004.

82 *Domestic and Family Violence Amendment Act 2009* (NT).

83 *Domestic and Family Violence Act 2007* (NT) s 124A.

84 *Ibid* s 124A.

85 *Criminal Code* (NT) s 1. Physical harm is defined in s 1A to include ‘unconsciousness, pain, disfigurement, infection with a disease and any physical contact with a person that a person might reasonably object to in the circumstances, whether or not the person was aware of it at the time.’ The NT Government Department of Health and Families has published a toolkit: *Mandatory Reporting of Domestic and Family Violence: A Toolkit to Help Service Providers Meet the New Reporting Obligations*, September 2009, <[www.health.nt.gov.au](http://www.health.nt.gov.au)>.

86 *Domestic and Family Violence Act 2007* (NT) s 125.

87 *Family Violence Act 2004* (Tas) s 38(2) (uncommenced).

obligation to report is not limited to prescribed persons, such as health or welfare workers, but rather extends to all adults. A broader range of persons is therefore required to report this violence in the NT than is required, outside the NT, to report concerns for the safety or welfare of children under child protection laws and provisions.<sup>88</sup>

8.73 Secondly, the violence that must be reported in the NT is not as broad as the violence that may form the basis of obtaining a protection order under the NT family violence legislation.<sup>89</sup> As noted above, s 124A requires reporting only where ‘the life or safety of another person is under serious or imminent threat’ or where there is serious physical harm. The Tasmanian provision also limits the types of violence that would have to be reported.

8.74 The NT family violence legislation also provides that a person acting in good faith is not civilly or criminally liable, or in breach of any professional code of conduct, for making a report or for disclosing any information in the report.<sup>90</sup>

#### ***The community’s responsibility for family violence***

8.75 Supporters of mandatory reporting of family violence argue that family violence is a responsibility of the entire community. Introducing the NT provision, the Attorney-General said it reflects a ‘strong commitment to tackling domestic violence’ and ‘enables a community response to a community problem’.<sup>91</sup> It is the responsibility of

every member of our community to help break the cycle of domestic and family violence, and protect women and children from violence. The mandatory reporting law reflects this important responsibility.<sup>92</sup>

8.76 Viewed in this way, mandatory reporting is ‘not about peering over your neighbour’s fence or dobbing people in to the police’, but is about

no longer ignoring violence and abuse. Mandatory reporting is sending a message to the community, to our friends and neighbours, that abuse will no longer be ignored; that we, the community, will no longer remain silent.<sup>93</sup>

88 Duties to report concerns for the safety or welfare of children generally apply to people who work in organisations that provide health, welfare, education, law enforcement, child care or residential services to children. *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23, 27; *Children, Youth and Families Act 2005* (Vic) ss 162, 184; *Child Protection Act 1999* (Qld); *Public Health Act 2005* (Qld) ss 158, 191; *Education (General Provisions) Act 2006* (Qld) ss 365–366; *Children and Community Services Act 2004* (WA) ss 3, 124B; *Children’s Protection Act 1993* (SA) ss 6, 10–11; *Children, Young Persons and Their Families Act 1997* (Tas) ss 3–4, 14; *Children and Young People Act 2008* (ACT) ss 342, 356. In the NT, there is a duty to report some types of harm to children that applies to all persons, though there is a further duty that applies to health practitioners and other prescribed persons: *Care and Protection of Children Act 2007* (NT) ss 13–16, 26. See also Ch 20 for a discussion of mandatory reporting of children’s exposure to family violence.

89 See *Domestic and Family Violence Act 2007* (NT) ss 5, 18 for definition of domestic violence and for when domestic violence orders may be made.

90 Ibid s 125.

91 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2008 (C Burns—Justice and Attorney-General).

92 Ibid.

93 Ibid.

8.77 The Tasmanian Attorney-General also stressed that mandatory reporting reflects the community's responsibility for tackling family violence and that 'professionals, such as doctors, psychologists and police have an ethical responsibility to report the violence'.<sup>94</sup>

8.78 Enabling the state to intervene in a violent relationship at the earliest possible point has, in the United States (US), been an argument used for some time by supporters of laws for mandatory reporting by medical personnel.<sup>95</sup>

8.79 Given the community's responsibility for improving the safety of victims of family violence, it was argued during debate on the NT provision that the obligation to report should not be limited to 'serious harm'. Such a limitation was particularly dangerous in the NT, and might leave victims who do not need hospitalisation in a very dangerous position:

Violence is acculturated and engendered across many communities in the Territory. It has become normalised, and children grow up learning to accept violence, and that violence is a normal and acceptable response. Within this environment, in particular, it is very dangerous to restrict mandatory reporting to serious harm and to leave other forms of violence to the discretion of individuals, family members, community members, and professionals to report. By prescribing only serious harm as the type of violence to be reported, it requires bystanders to make a judgment about the seriousness or otherwise of the violence that occurs. ... [It] provides the ultimate out for perpetrators: 'I did not hit her hard. She was not bleeding. It was not harm that caused or will cause serious harm that endangered her life and it was not significant or long-standing'.<sup>96</sup>

### ***Criticisms of mandatory reporting***

8.80 Mandatory reporting, however, has many critics. For example, the Australian Domestic and Family Violence Clearinghouse expressed its 'strong' opposition to mandatory reporting of domestic and family violence by health professionals on grounds including the following:

- there is no evidence that it improves safety for victims;
- a significant number of victims are opposed to it;
- victims might be deterred or prevented from seeking medical treatment; and
- police do not have the capacity or willingness to investigate all reported cases.<sup>97</sup>

8.81 In introducing the family violence mandatory reporting provision, the NT Attorney-General noted the following concerns of opponents of mandatory reporting of

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94 Tasmania, *Parliamentary Debates*, Legislative Assembly, 18 November 2004, 97 (J Jackson—Attorney General and Minister for Justice and Industrial Relations), 102.

95 L Mills, 'Killing Her Softly: Intimate Partner Abuse and the Violence of State Intervention' (1999–2000) 113 *Harvard Law Review* 550, 562.

96 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 18 February 2009 (J Carney).

97 Australian Domestic and Family Violence Clearinghouse, *Response to Northern Territory Proposal for Mandatory Reporting of Domestic Violence by Health Workers* (2008) <[www.austdvclearinghouse.unsw.edu.au](http://www.austdvclearinghouse.unsw.edu.au)> at 14 September 2010.

child abuse: that people would not seek help; that it would result in further violence; that it would be unenforceable; that there would be confidentiality issues; and that certain occupations could be professionally compromised.<sup>98</sup> The Tasmanian Attorney-General also acknowledged that the mandatory reporting requirements ‘had caused some disquiet within the community sector’.<sup>99</sup>

8.82 Another criticism of mandatory reporting laws, also commonly directed to other mandatory legal responses to family violence, is that it can undermine the autonomy of victims. Some victims of family violence may consider that their safety and welfare is best secured by not seeking a protection order and by not seeking the prosecution of a criminal act of family violence. When the law for mandatory reporting of family violence in the NT was proposed, the National President of the Australian Association of Social Workers, Professor Bob Lonne, said that the Association’s members

know that a victim of family violence doesn’t always want the police to come round, as it doesn’t always lead to a resolution and can sometimes make the problem worse. Removing the power of the victim to decide when the police are notified makes the victim even more powerless in what is already a powerless family situation.<sup>100</sup>

8.83 Whether—and if so, under what circumstances—the state should defer to the wishes of victims and not investigate or act upon family violence remains a topic of debate.<sup>101</sup> Professor Leigh Goodmark, a US scholar and advocate of ‘autonomy feminism’, has said that whether and to what extent it is appropriate for the state to substitute its judgment for that of victims is a ‘hotly debated’ issue.<sup>102</sup> Goodmark argues for family violence law and policy that

respect[s] the rights of individual women to choose whether and how to use the criminal and civil legal systems. Such a shift would be consistent both with anti-essentialist feminist theory and with the focus on autonomy and agency that characterized the early battered women’s movement.<sup>103</sup>

Agency is, among other things, Goodmark argues,

the power to see a physician to have injuries treated but choose to have that physician maintain confidentiality about the cause of those injuries.<sup>104</sup>

8.84 Professor Cheryl Hanna has said that it is debated in feminist legal scholarship whether ‘autonomy and the right to make one’s own decisions offer more liberation for women, or are false notions masking subordination’:

98 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2008 (C Burns—Justice and Attorney-General).

99 Tasmania, *Parliamentary Debates*, Legislative Assembly, 18 November 2004, 97 (J Jackson—Attorney General and Minister for Justice and Industrial Relations), 102.

100 Australian Association of Social Workers, ‘Mandatory Reporting of Family Violence in the NT Won’t Always Help Victims’ (Press Release, 7 October 2008).

101 Parallel arguments are made in the context of allegations of sexual assault. See Ch 26.

102 L Goodmark, ‘Law is the Answer? Do We Know That For Sure?: Questioning the Efficacy of Legal Interventions for Battered Women’ (2004) 23 *St Louis Univ Publ Law Rev* 7, 31.

103 L Goodmark, ‘Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions In Domestic Violence Cases’ (2009) 37 *Florida State University Law Review* 1, 45.

104 Ibid, 48.

In practice, most victims want the violence in their relationship to stop and to that extent will cooperate with the state. Many women, however, will resist outcomes that involve criminal records, jail, fines, or other punitive measures.<sup>105</sup>

8.85 Prosecutors and judges, Hanna states, must often ‘navigate the tricky waters between a victim’s personal autonomy and concerns for public safety and justice’.<sup>106</sup> This debate has not been settled; and these waters must be navigated not only by prosecutors and judges, but also by all persons who encounter family violence—including family, friends, neighbours, police, and health and welfare professionals.

### ***Submissions and consultations***

8.86 Following the release of the Consultation Paper, some stakeholders raised the issue of mandatory reporting of family violence against adults, particularly with reference to the NT law. There were particular concerns expressed that the mandatory reporting of some family violence could, in fact, discourage women from accessing counselling and legal services.<sup>107</sup> One legal service provider said it had heard anecdotally that there had been a decline in counselling numbers, but that it was too early to tell whether the new mandatory reporting laws in the NT are having an impact.<sup>108</sup> Another said that mandatory reporting often does not benefit victims and, in any event, reports are not properly acted upon by police: often by the time police attend the scene, if they attend at all, the violence will have ceased.<sup>109</sup>

8.87 Concerns were also expressed about the effect of the law on the empowerment of women experiencing family violence and that the NT provision covers harm that has already happened, and therefore may operate even where further harm is not likely to occur in the future:

Women who are not likely to face imminent harm should be allowed to tell their friends, family, service providers of their past experiences etc without fear that it will be reported to police, if they don’t want it to be.<sup>110</sup>

8.88 The Commissioner for Children (Tas) also expressed opposition to the proposed Tasmanian mandatory reporting provision. The Commissioner was ‘not aware of any evidence that such a process would make the lives of family violence victims any safer’:

If police turn up at a doorstep on the report of a mandatory notifier, but not in the heat of the moment in dealing with an immediate family violence offence, there is a serious risk that a victim’s private plans to escape or end the violence will be disrupted. Further, the perpetrator who may at that time be in a calm phase of the well-documented ‘cycle of violence’, could become destabilised and work retribution

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105 C Hanna, ‘The Paradox of Hope: The Crime and Punishment of Domestic Violence’ (1997–1998) 39 *William and Mary Law Review* 1505, 1556.

106 Ibid, 1556.

107 Confidential, *Consultation*, Darwin, 27 May 2010; Confidential, *Consultation*, Darwin, 26 May 2010.

108 Confidential, *Consultation*, Darwin, 27 May 2010.

109 Confidential, *Consultation*, Darwin, 26 May 2010.

110 Confidential, *Consultation*, Darwin, 27 May 2010.

on the victim as a result of the visit itself. ... Adding another mandatory reporting regime could be the straw that breaks the back of the Child Protection camel.<sup>111</sup>

### **Commissions' views**

8.89 The Commissions share some of the concerns noted above about mandatory reporting of family violence committed against adults—in particular, the potential for such laws to isolate victims of family violence by acting as a disincentive for victims to seek assistance, guidance, and medical care. Such laws might disempower victims, and take from them some of the tools with which, in their judgment, they are best able to use to combat or escape from violence.

8.90 Children are generally more vulnerable and less capable of judging how to respond to, and escape from, family violence—hence, the community has a greater responsibility to report concerns for the safety or welfare of children. Furthermore, as noted in Chapter 2, under the United Nations *Convention on the Rights of the Child*, States Parties are required to take all appropriate measures to protect children from

all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse.<sup>112</sup>

8.91 One US academic has said that the ‘distinction between reporting domestic violence and reporting child abuse must be underscored’:

The latter involves minors who are, in most legal contexts, dependent on adults. While battered women may be dependent on their abusers, they should in most cases be viewed in light of the strength and agency they often exhibit.<sup>113</sup>

8.92 In the Commissions’ view, this distinction shows why it might be appropriate in some circumstances for certain persons to be required to report violence against children—with the threat of criminal sanction for failing to do so—but not necessarily violence committed against adult men and women.

8.93 While in many circumstances, individuals will have an ethical duty to report family violence to the police—and as discussed in the following chapter, it should be incumbent on the police to investigate such violence—the Commissions have some reservations about placing a broad legal duty upon adults, and even only upon certain professionals, to report family violence. This is of particular concern if, by reporting the violence, these persons will be required to breach professional, personal and familial confidences and trust. This can have potentially damaging consequences to relationships. Such confidences and trust may be breached, or appear to victims to have been breached, despite legislation that provides that a person is not civilly or criminally liable or in breach of any professional code of conduct for reporting violence.<sup>114</sup> It may be unreasonable, for example, to criminalise someone’s failure to report to the police

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111 Commissioner for Children (Tas), *Submission FV 62*, 1 June 2010.

112 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990), art 19(1).

113 L Mills, ‘Killing Her Softly: Intimate Partner Abuse and the Violence of State Intervention’ (1999–2000) 113 *Harvard Law Review* 550, 572, fn 101.

114 See *Domestic and Family Violence Act 2007* (NT) s 125.

violence committed by his or her father, mother, sibling, or even adult child. Criminalising this ‘behaviour’—a failure to report albeit serious violence—may be an overreach of the criminal law.<sup>115</sup> Arguing that the community should take more responsibility for family violence does not necessarily require charging individuals with a criminal offence for not taking adequate personal responsibility for reporting the violence.

8.94 It would also be unfortunate if, to prove beyond reasonable doubt a person’s failure to report violence, a prosecutor were to call upon the victim of the violence to give evidence, perhaps against the victim’s wishes, of the violence itself and/or the accused’s knowledge of the violence or threat of violence.

8.95 In Chapter 9, the Commissions recommend that police should have a duty to investigate family violence where they believe family violence has been, is being, or is likely to be committed. It could be argued that mandatory reporting of family violence is consistent with this recommendation. If police should investigate family violence, some might argue, then laws should also try to increase the number of referrals made to police of potential or actual family violence. However, in the Commissions’ view, the value of an increase in the number of referrals to police and the number of subsequent investigations would need to be weighed against the potential harm done to victims who choose not to access services or seek help for fear the violence will be reported to police.

8.96 The Commissions share the concerns discussed above about the potential negative consequences of mandatory reporting of family violence against adults, and accordingly suggest that the effect of the NT laws be monitored and evaluated.<sup>116</sup> The following matters, among others, might be worth consideration:

- variations in the number of reports made to police;
- how many of these reports are then properly investigated;
- victims’ responses (in the short and longer-terms) to the fact that the report was made and to the subsequent police investigation; and
- any variation in the number of persons accessing services, including family violence, medical and counselling services, that could reasonably be attributed to mandatory reporting laws.

8.97 The results of this evaluation should be carefully reviewed by Tasmania, should it consider proclaiming the commencement of its mandatory reporting provision.

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<sup>115</sup> The purposes of the criminal law are discussed in Ch 4.

<sup>116</sup> The Commissions understand from consultations conducted in the NT that the mandatory reporting laws are being evaluated. See, eg, Confidential, *Consultation*, Darwin, 27 May 2010.

# **9. Police and Family Violence**

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## **Contents**

Introduction	367
Police-issued protection orders	367
Police duties to investigate and to apply for orders	379
Indigenous-specific support for protection order applications	389
Police powers in dealing with family violence	393
Powers of entry	394
Powers of search and seizure	396
Powers of arrest, direction and detention	396
Identifying the ‘primary aggressor’	404

## **Introduction**

9.1 Police play a key role in responding to family violence. They may attend a scene of family violence and may issue or apply for a protection order for the victim; they may need to decide whether someone needs protection even though the person declines it; they may find two persons who both seem angry, injured, fearful and distraught and have to decide whether one was the aggressor and the other needs protection; and, as discussed in the previous chapter, police may discover potential criminal behaviour and have to decide whether to prosecute. In responding to family violence and in obtaining civil protection orders, police may use powers and procedures mainly designed to enforce criminal laws—powers of entry, search, seizure, arrest, direction and detention. This chapter considers these interactions between family violence laws and state and territory criminal procedures.<sup>1</sup>

### **Police-issued protection orders**

9.2 A person may be made subject to a protection order under family violence legislation in a number of ways: a victim might apply to a court directly for an order; a court may make an order on its own motion; police—and potentially directors of public prosecution (DPPs)—might apply to a court for an order; or police might issue an order themselves, without the approval of a judicial officer. This section considers this final type of order, police-issued protection orders. It considers whether it is appropriate for

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<sup>1</sup> The enforcement of injunctions under the *Family Law Act 1975* (Cth) is discussed in Ch 17.

police to issue these orders—and if so, in what circumstances. It also discusses whether police-issued protection orders protect victims in practice.<sup>2</sup>

9.3 In Victoria, Western Australia (WA), South Australia (SA), Tasmania and the Northern Territory (NT), police can issue protection orders or ‘police safety notices’ to persons who have used family violence. When police issue such notices they may generally attach certain conditions to the order, including conditions that exclude someone from his or her home.<sup>3</sup>

9.4 The duration of police-issued protection orders varies significantly across jurisdictions. In WA, police-issued protection orders can either last for 24 hours (without the consent of the victim, parent, guardian, or child welfare officer, as relevant), or for 72 hours (with consent).<sup>4</sup> The duration of a police-issued protection order cannot be extended or renewed and another police order cannot be made in relation to the same facts.<sup>5</sup> In Tasmania, such orders may last for 12 months, unless revoked, varied or extended sooner.<sup>6</sup>

9.5 The NT family violence legislation does not specify the duration of a police-issued protection order. Instead, it provides that first, the police must provide the person against whom the order is made with a copy of the order and secondly, that this copy serves as a summons for the person to appear before the court to show cause why the protection order should not be confirmed by the court.<sup>7</sup> The legislation further requires that ‘the time for the return of the [protection order] must be as soon as practicable after it is made’.<sup>8</sup>

9.6 In Victoria, a ‘family violence safety notice’ issued by the police acts as an application by a police officer for a protection order in favour of the victim, as well as a summons for the person against whom it is issued to appear in court at the first mention date for the application, which is to be within 72 hours of the police order being issued.<sup>9</sup> The ‘family violence safety notice’ ends on the earlier of: the court refusing to make a protection order; or, if the court makes a protection order, when the order is served.<sup>10</sup>

9.7 In SA, the issuing of an interim protection order by a police officer is taken to be an application for a protection order to the court, as well as a summons to the person

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2 The chapter will later discuss the role of police in applying to courts for protection orders on behalf of victims, and whether some victims might need assistance to apply to courts themselves for protection orders. Ch 11 considers the making of protection orders during criminal proceedings.

3 See, eg, *Family Violence Protection Act 2008* (Vic) s 29(1); *Family Violence Act 2004* (Tas) s 14(3). Types of protection order conditions and exclusion orders are discussed in Ch 11. Exclusion orders essentially prohibit a person who has used violence from entering or remaining in a residence shared with the victim, including where that person has an equitable or legal interest in the relevant premises.

4 *Restraining Orders Act 1997* (WA) ss 30F, 30G.

5 *Ibid* s 30H.

6 *Family Violence Act 2004* (Tas) s 14.

7 *Domestic and Family Violence Act 2007* (NT) ss 43, 44.

8 *Ibid* s 42.

9 *Family Violence Protection Act 2008* (Vic) s 31. The period of 72 hours can be extended where the first mention date would otherwise fall on a public holiday.

10 *Ibid* s 30.

against whom it is issued to appear in court.<sup>11</sup> The person against whom it is made is required to appear before the court within eight days of the interim protection order being issued or, if the court will not be sitting at the place within that period, within two days after the court next commences sitting at that place.<sup>12</sup> In effect, this limits the duration of police-issued interim protection orders to around 10 days.

9.8 The circumstances in which police officers can issue police orders also vary significantly across the jurisdictions. In Tasmania, for example, a police officer is empowered to issue such a notice if satisfied that the person has committed or is likely to commit a family violence offence.<sup>13</sup> Similarly, in SA, a police officer may issue an order if it appears that there are grounds for doing so and the person is present before the police officer.<sup>14</sup>

9.9 Other jurisdictions impose more stringent requirements. For example, in the NT an authorised police officer can issue a protection order only if, among other things, he or she is satisfied that because of urgent circumstances it is not practicable to obtain a protection order from the court.<sup>15</sup> In Victoria, police may apply to another police officer of the rank of Sergeant or higher for a ‘family violence safety notice’. They may only apply before 9am or after 5pm on a weekday or on the weekend or a public holiday, that is, essentially outside court hours. Among other things, they must believe on reasonable grounds that, until an application for a protection order can be decided by the court, a notice is necessary to ensure safety, protect a child, or preserve property.<sup>16</sup>

9.10 A 2008 review of the WA family violence legislation (the WA Review) found that police orders have been widely adopted by police and well received by victims and service providers:

Between December 2004 and December 2006, 12,296 police orders were issued. By way of comparison, in the 12 months prior to the introduction of police orders there were 7 telephone violence restraining orders throughout the state ...

There was universal agreement amongst those consulted during the review that police orders should be retained. Critically, police orders were thought to increase victim safety ...

Support for police orders was consistent across professional boundaries. Submissions from magistrates, police officers, workers in the domestic violence field, social workers and Aboriginal organisations all supported the initiative and deemed it successful. It is also noteworthy that support was strong across urban, rural and remote regions. Police orders appear to have sufficient flexibility to meet the needs of victims irrespective of locality.<sup>17</sup>

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11 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 18.

12 Ibid.

13 *Family Violence Act 2004* (Tas) s 14(1).

14 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 18.

15 *Domestic and Family Violence Act 2007* (NT) s 41.

16 *Family Violence Protection Act 2008* (Vic) s 24.

17 Department of the Attorney General (WA), *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 11 (citation omitted).

9.11 The WA review concluded that the orders should be retained,<sup>18</sup> but recommended that the requirement for the consent of the victim or other relevant person for 72 hour orders be removed, thereby replacing the 24 and 72 hour orders with a single order lasting up to 72 hours.<sup>19</sup> In making this recommendation, the WA review acknowledged the arguments for and against removing the consent requirement from the 72 hour order.

9.12 Arguments for removing consent include that victims in a crisis situation may find it difficult to assess how dangerous a situation is, or may be fearful of giving consent. Arguments in favour of retaining consent include: that victims should not be stripped of their ability to make decisions about their lives; and that orders made without consent increase the likelihood of consensual breaches of the order, creating enforcement challenges for the police.<sup>20</sup>

9.13 In particular, the WA review noted, in relation to its recommendation to allow for 72 hour police orders without consent of the victim or other relevant person:

Submissions from Aboriginal groups in remote and regional areas of the state clearly do not support this. The specific concern for these groups is the lack of appropriate places a perpetrator may stay, away from the primary residence for this extended period of time. Where there is no housing alternative there is a real risk that a breach of the order may occur leading to further contact with the criminal justice system.<sup>21</sup>

9.14 The rationale for the 72 hour police orders with consent of the victim was explained in the Second Reading Speech of the WA family violence legislation in the following way:

The 72 hour orders are an innovation that were sought specifically by Aboriginal women who were part of the consultation process for the writing and drafting of this legislation and also as we consulted the communities to put in place our domestic violence action plan. Many women said specifically that they did not want their men to be incarcerated, although they wanted to be protected from violent behaviour. Therefore, the 72 hour order allows for a cooling-off period. It will allow for immediate support for these women and that can be followed up with an application for a longer term order if the threatened or actual violence has not been resolved or reconciliation has not occurred.<sup>22</sup>

9.15 The 2008 review of the Tasmanian family violence legislation (the Tasmanian Review) noted varying stakeholder perspectives on police powers under the legislation. Some stakeholders argued that, in the context of pro-arrest and pro-prosecution policies, police powers needed to be limited in order to ensure a ‘balance’ between victims and those who use violence against them.<sup>23</sup> Some argued that police powers to make protection orders should be restricted to interim orders only, and that final or further interim orders should require police to apply to the court.<sup>24</sup> The Tasmanian

18 Ibid, 11, Rec 1.

19 Ibid, Rec 2.

20 Ibid, 14.

21 Ibid, 18.

22 Western Australia, *Parliamentary Debates*, Legislative Assembly, 12 June 1997, 4014 (R Parker), 4015.

23 Urbis, *Review of the Family Violence Act 2004* (2008), prepared for the Department of Justice (Tas), 14.

24 Ibid.

Review noted that the fact that parties could apply for variation of police orders had two advantages:

The first is that interim Orders place a burden on the Court with each matter needing to be reviewed and this is avoided in Tasmania, and secondly, the avenue is open to both parties to make application to vary or revoke Orders.<sup>25</sup>

9.16 In a 2009 report investigating responses to Indigenous family violence in Queensland, Professor Chris Cunneen recommended that the Queensland Police Service and the Department of Communities investigate the extension of police powers to provide for short-term emergency family violence orders issued by police. The recommendation also stated that any change to police powers in this regard must be accompanied by increased services and programs in the community for those who are violent towards family members.<sup>26</sup> Cunneen's report states that:

While Indigenous people have higher rates of domestic violence order use than non-Indigenous people, they are much less likely to be the person applying for the order. This raises questions about engagement with and confidence in the legal process, as well as the availability of services to assist with private applications. ...

Police indicated that one barrier to the use of domestic violence protection orders was the reluctance of some police to apply for orders because of the paperwork involved in the application.

The possibility of police-issued domestic violence orders was raised by police as a way of increasing the number of protection orders in remote and rural communities.<sup>27</sup>

9.17 In March 2010, the Queensland Department of Communities asked in its Consultation Paper on the review of Queensland's family violence legislation whether police in Queensland should have the capacity to issue protection orders and, if so, under what circumstances.<sup>28</sup> It noted, for example, that police-issued orders could provide immediate protection to victims, but that their introduction also brought 'a risk that a sharp increase in orders may result, including cross-orders, with the consequential risk of entry into the criminal justice system'.<sup>29</sup>

### **Submissions and consultations**

9.18 In the Consultation Paper, the Commissions asked whether, in practice, where police have powers to issue protection orders under family violence legislation, the exercise of such powers has increased victim safety and protection.<sup>30</sup>

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25 Ibid, 15.

26 C Cunneen, *Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities* (2009), Rec 1.

27 Ibid, 12.

28 Department of Communities (Qld), *Review of the Domestic and Family Violence Protection Act 1989: Consultation Paper* (2010), Questions 3.3.1, 3.3.2.

29 Ibid, 26.

30 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 5–6.

9.19 Evidence of whether these orders, where they can be made, have in fact increased victim safety appears to be limited.<sup>31</sup> Some stakeholders thought the police orders did make victims safer, at least in the short term or in particularly dangerous situations,<sup>32</sup> while others said they did not make victims safer.<sup>33</sup> Legal Aid WA believes that police orders have improved victim safety in WA.<sup>34</sup> It is not clear from these submissions whether or not police-issued protection orders have in fact increased victim safety in all jurisdictions that have such orders.

9.20 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation that empowers police to issue protection orders should provide that:

- (a) police are only able to impose protection orders to intervene in emergency or crisis situations in circumstances where it is not reasonably practicable or possible for the matter to be dealt with at that time by a court; and
- (b) police-issued protection orders are to act as an application to the court for a protection order as well as a summons for the person against whom it is issued to appear before the court within a short specified time period.<sup>35</sup>

The Commissions also proposed that s 14(6) of the *Family Violence Act 2004* (Tas)—which allows police-issued protection orders to last for 12 months—should be repealed.<sup>36</sup>

9.21 A number of stakeholders supported this proposal,<sup>37</sup> though a range of views were expressed about the benefits and dangers of police-issued orders.

#### ***Concerns with police orders***

9.22 Many submissions expressed concerns about police having powers to issue protection orders—even interim and provisional protection orders. Some expressed concerns about the extent and nature of police powers, and thought executive and judicial powers might be confused where police issue protection orders, in view of ‘the danger of the police failing to understand their role as ‘law enforcers’ as opposed to

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31 Legal Aid NSW, *Submission FV 219*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010. An independent evaluation of Victoria’s family violence safety notices was scheduled to be completed in July 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

32 Confidential, *Submission FV 184*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010.

33 Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010.

34 National Legal Aid, *Submission FV 232*, 15 July 2010.

35 Consultation Paper, Proposal 5–4.

36 Ibid, Proposal 5–4.

37 For example, Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; T McLean, *Submission FV 204*, 28 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010.

'law appliers and makers'.<sup>38</sup> One group even found lurking in these powers the 'spectre of a police state'.<sup>39</sup>

9.23 Other stakeholders stressed that issuing protection orders was a judicial function<sup>40</sup> and that judicial officers 'should determine whether an order should be made according to law'.<sup>41</sup> The court's role in issuing protection orders was important to stakeholders for a number of reasons. A court advocacy service submitted that both parties need to have an opportunity to present their views and evidence.<sup>42</sup>

Defendants in particular need to clearly understand the order, its conditions, and the consequences of breaching the order. We believe that this can only be achieved through due process at court.<sup>43</sup>

9.24 Dr Jane Wangmann, who expressed 'great concerns' about police-issued protection orders, also stressed the importance of having to go to court, where victims often come into contact with lawyers and various services; where the victim's story can be heard and believed; and where offenders can be told that the community does not tolerate violence.<sup>44</sup> Wangmann was concerned that orders issued without a judicial process of assessing evidence might further trivialise protection orders, already seen by some as 'just a piece of paper'.<sup>45</sup>

9.25 The North Australian Aboriginal Justice Agency (NAAJA) had a number of concerns. Referring to the NT police orders, NAAJA said police sometimes issue these orders as a 'first resort' or as a means of 'covering themselves' in case the violence later escalates; full non-contact orders issued against the wishes of both parties brought a 'grave danger of inadvertent breach'; police often do not fully explain the orders or explain how they can be varied; and partly because of the 'tick a box' forms, the conditions are 'rarely tailored to the particular circumstances of each case, and often, neither the protected person nor the defendant is asked [for] their input on the workability of that order'.<sup>46</sup> Moreover, if multiple factors are present, NAAJA argued, there is an 'immense' potential to set people up to breach orders. Full non-contact orders in remote communities, for example, 'will invariably prove almost impossible to comply with'.<sup>47</sup> Orders must therefore be 'realistic and reflect individual wishes if they are to be at all effective'.<sup>48</sup>

38 Legal Aid NSW, *Submission FV 219*, 1 July 2010. See also A Cannon, *Submission FV 137*, 23 June 2010.

39 Juries Against Illegal Laws, *Submission FV 44*, 17 May 2010.

40 J Stubbs, *Submission FV 186*, 25 June 2010.

41 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

42 Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. See also Queensland Law Society, *Submission FV 178*, 25 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

43 Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

44 J Wangmann, *Submission FV 170*, 25 June 2010.

45 Ibid.

46 North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010.

47 Ibid.

48 Ibid.

9.26 Some stakeholders were concerned that police might be less able or equipped than a court to properly identify ‘primary aggressors’.<sup>49</sup> One submission suggested that a policy on ‘primary aggressors’ should be adopted before police powers were extended.<sup>50</sup> One legal centre was concerned about ‘entrenched systematic racism in relation to Aboriginal women and children and abuse of police power in this context’.<sup>51</sup> It was also submitted that police might sometimes issue these orders inappropriately, such as where there is no real danger and the apparent victim does not even want an order.<sup>52</sup>

#### ***Benefits of police orders***

9.27 In contrast to the above, a range of views were expressed about the benefits of police-issued orders. The Queensland Government, for example, noted that police orders can relieve victims of the stress and pressure of appearing in court.<sup>53</sup> National Legal Aid submitted that police orders allow ‘a wider range of people to be protected, at an earlier stage’ and they ‘can be made at the time of the incident or soon afterwards’.<sup>54</sup>

This appears to be the stage at which victims are most likely to want to press charges and receive protection orders, before the process of second-guessing and considering priorities other than safety begins. It is also the stage at which a victim is most likely to want to leave the relationship.<sup>55</sup>

9.28 As noted above, in the Consultation Paper, the Commissions proposed that police only impose protection orders ‘to intervene in emergency or crisis situations in circumstances where it is not reasonably practicable or possible for the matter to be dealt with at that time by a court’.<sup>56</sup> A number of submissions noted the value of police-issued orders in these crisis situations and when the courts are closed,<sup>57</sup> as well as in remote communities where courts might only sit every few months.<sup>58</sup> However, the Victorian Government thought that ‘emergency’ and ‘crisis’ were subjective terms

49 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Centacare Safer Families Support Service, *Submission FV 118*, 15 June 2010.

50 Centacare Safer Families Support Service, *Submission FV 118*, 15 June 2010. Primary aggressor policy is discussed later in this chapter.

51 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010.

52 T McLean, *Submission FV 204*, 28 June 2010. This partner violence counsellor said that commonly a malicious neighbour will hear an argument and call the police and the police will feel obliged to make an order; the offender might then blame his or her partner.

53 Queensland Government, *Submission FV 229*, 14 July 2010.

54 National Legal Aid, *Submission FV 232*, 15 July 2010.

55 Ibid.

56 Consultation Paper, Proposal 5–4(a).

57 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

58 Queensland Government, *Submission FV 229*, 14 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Confidential, *Submission FV 198*, 25 June 2010.

and open to a range of interpretations, suggesting instead that ‘police concern for the safety of the individual is a more appropriate measure’.<sup>59</sup>

9.29 The Commissions also proposed that police-issued protection orders should act as an application to the court for a protection order and as a summons. However, in contrast, one submission highlighted some of the benefits of police-issued orders that do *not* act as an application to the court or as a summons. It submitted that the short-term police orders in WA had been particularly useful in Indigenous communities and rural and remote areas. The orders provided temporary protection for victims ‘not ready to leave the relationship’. It submitted that police should only apply for court orders ‘in line with the wishes of the victim’ and that summoning offenders may sometimes endanger victims and their children.<sup>60</sup>

#### ***Duration***

9.30 The duration of police-issued orders attracted considerable comment. Many stakeholders submitted that police-issued orders should only last a short time. One stakeholder submitted that police orders issued in emergency situations should not last for more than 28 days.<sup>61</sup> Another submitted that the respondent should be summonsed to the court within 14 days—at the most.<sup>62</sup> The Queensland Law Society supported the police being able to make orders for a period of up to 72 hours, so the matter can then come quickly before a court.<sup>63</sup> One legal service submitted that part-time rural courts should also be considered and that orders should be for: ‘perhaps 72 hours or [until] the next Court sitting day whichever is the earlier—with a maximum period prescribed’.<sup>64</sup>

9.31 Twelve month police orders were criticised by a number of stakeholders.<sup>65</sup> The Magistrates’ Court and the Children’s Court of Victoria said the orders should be limited in duration and that twelve months is excessive.

Most family violence safety notices include an exclusion condition and we believe a restriction of this nature requires timely review. For many protected persons it provides an immediate response when the family violence intervention occurs but, in their view, ceases to be necessary once the crisis has passed.<sup>66</sup>

9.32 The NAAJA was also concerned about the duration of orders in the NT:

These orders can last for 12 months if not varied in court by both parties. And in our experience, this is often what occurs due to the significant potential for inappropriate, unworkable orders to be simply left in place in remote Aboriginal communities. Aboriginal people in remote communities do not have ready access to legal advice on how to vary an order. They may also lack the functional English literacy skills to

59 Victorian Government, *Submission FV 120*, 15 June 2010.

60 Confidential, *Submission FV 184*, 25 June 2010.

61 Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

62 Better Care of Children, *Submission FV 72*, 24 June 2010.

63 Queensland Law Society, *Submission FV 178*, 25 June 2010.

64 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

65 J Schramm, *Submission FV 218*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Confidential, *Submission FV 198*, 25 June 2010. Such orders can be made in Tasmania.

66 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

complete an application to vary an order. Similarly, because bush courts only sit infrequently in remote communities, they also lack opportunity to bring applications to vary an order when court is sitting.<sup>67</sup>

9.33 The Police Association of New South Wales, however, would like police to be given the power to issue protection orders ‘which are enforceable immediately and only referred to a court for amendment or revocation by either party’. The Association submitted that, with the consent of both parties, the order should remain in force for twelve months. It said more victims will come forward if they do not need to go to court and the Tasmanian system should be rolled out in other jurisdictions.<sup>68</sup>

#### ***Police applications to a remote judicial officer***

9.34 There was some support for police applying to judicial officers for interim orders, usually by telephone, as they do in New South Wales (NSW).<sup>69</sup> Under such a system, the order is not made by the police, but by a judicial officer.

9.35 The Local Court of NSW supported the NSW ‘After Hours’ model, under which the decision about whether to make a protection order is made independently from the outset. This was ‘a preferable alternative to enabling police to make emergency protection orders.’<sup>70</sup> The Court stressed the importance of having independent decision makers in circumstances where legislation imposes a duty on police to apply for a protection order. It was also important to avoid a conflict of interest where a police officer has used family violence and must be made the subject of a protection order. The Court also warned against the danger of ‘net widening’—police making exclusion orders ‘as a matter of course’.

Whilst it is imperative that protection be afforded to those who require it, it is also implicit within the Act that the making of an order unnecessarily can be detrimental to the defendant.<sup>71</sup>

9.36 Queensland police can also apply to a magistrate to make an order over the telephone late at night or to take a respondent into custody in a more serious case, but the Queensland Law Society submitted that these applications are apparently ‘rarely brought in part due to the natural desire of magistrates not to be called at 2.00am ... except where absolutely necessary’.<sup>72</sup>

9.37 The value of protection orders was said to depend on the willingness of police to follow up on breaches, which, it was said, the police often fail to do.<sup>73</sup>

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67 North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010.

68 Police Association of New South Wales, *Submission FV 145*, 24 June 2010.

69 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010.

70 Local Court of NSW, *Submission FV 101*, 4 June 2010.

71 Ibid.

72 Queensland Law Society, *Submission FV 178*, 25 June 2010.

73 Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010. Breach of protection orders is discussed in Ch 12.

***Commissions' views******A judicial decision***

9.38 In the Commissions' view, family violence protection orders should, wherever possible, be made or authorised by a judicial officer. The ALRC is required to ensure that the laws it reviews do not make the rights and liberties of citizens unduly dependent on administrative rather than judicial decisions.<sup>74</sup> If a person's rights and liberty need to be curtailed by a protection order, the decision should ideally be made by a judicial officer.

9.39 There are many benefits to judicial officers issuing or authorising protection orders, even remotely, such as by phone. The orders should ideally have the benefit of a judicial officer's training and understanding of family violence legislation, its principles, and the known dynamics of family violence in practice. A judicial officer should also have a better understanding of the scope of the powers under family violence legislation and be able to tailor the order appropriately. Judicial officers are also independent of the police, and therefore serve as a check on police power.

9.40 There are further advantages when the decision is made in a court: the parties have a greater opportunity to be heard; they can use lawyers; they can use translators, Indigenous-specific support services and other court services; the court may have greater access to any family court orders or other protection orders that have been made in the past; the judicial officer can impress upon offenders the fact that society will not tolerate family violence; and the court can refer victims and persons who have used violence to appropriate services and programs.

9.41 There may be practical barriers that make it difficult for police to apply to judicial officers for protection orders. Police may be reluctant to disturb judicial officers outside court hours and they may be averse to completing the necessary paperwork associated with an application. These were the practical matters that prompted WA to adopt police-issued protection orders. In the Commissions' view, however, these barriers do not justify removing judicial oversight of protection order matters. The barriers should be overcome through training, better forms, more efficient procedures, and perhaps specialist judicial officers trained in family violence and—where there is sufficient need—with time dedicated to considering remote applications for protection orders.

9.42 The Commissions recognise that some victims may not want a long-term protection order, and may therefore prefer a short-term order issued by the police. A victim may also not want to go to court—to explain either why he or she needs or does not need an order—and may not even want the person who has used family violence to have to go to court. The victim may only have wanted police protection while the aggressor 'cooled off'.

9.43 The Commissions appreciate the importance of respecting the wishes of victims, but when violence has come to the attention of the state, it is incumbent on the state to

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74      Australian Law Reform Commission Act 1996 (Cth) s 24.

consider properly and carefully the safety of victims and any children. This consideration is best undertaken by a judicial officer, preferably in a court. The judicial officer can then decide—having heard from the aggressor and, if the victim wishes, from the victim—whether the victim wants or needs further protection. Furthermore, police will only apply for a protection order where there is family violence, and the serious nature of family violence suggests that a person who has used it should at least be required to appear before a court to explain his or her behaviour and why the victim does not need protection.

#### ***Limited circumstances justifying police orders***

9.44 While the Commissions would prefer all protection orders to be made by judicial officers, the Commissions are somewhat reluctant to recommend the removal of police-issued orders entirely, particularly in WA where submissions suggest they are working well and where the telephone application procedure was ineffective. In some circumstances and in some jurisdictions—particularly in remote and rural areas—it might not be possible for a court or a remote judicial officer to consider every application in a timely way. The Commissions recognise that where a victim of family violence needs immediate protection, a police-issued order will be better than no order at all.

9.45 In the Consultation Paper, the Commissions proposed that where police have the power to issue orders, they should only be able to do so ‘in emergency or crisis situations in circumstances where it is not reasonably practicable or possible for the matter to be dealt with at that time by a court’.<sup>75</sup> As noted above, the Victorian Government submitted that this test was subjective and suggested that ‘police concern for the safety of the individual is a more appropriate measure’. Police concern is also a subjective test, but the Commissions agree that the circumstances in which it might be appropriate for the police to issue an order might be wider than crisis or emergency situations. The Commissions therefore recommend that police should only have powers to issue orders where it is not reasonable or practicable: for the matter to be immediately heard before a court; or for police to apply to a judicial officer for an order (by telephone or other electronic medium).

#### ***Duration, application to court, and summons***

9.46 The greater a person’s rights and liberties are affected, the greater the need for judicial control or oversight. This is why the Commissions are particularly concerned about the Tasmanian model, which allows police to impose orders that may last 12 months, and effectively places an onus on the person against whom the order is made to apply for a variation or revocation. The Tasmanian provision should be amended to provide that police family violence orders last only for a short specified time—perhaps 72 hours, as in Western Australia.

9.47 The Commissions also recommend that, where police have the power to issue protection orders, the orders should act as an application to the court for a protection

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75 Consultation Paper, Proposal 5–4(a).

order as well as a summons to the person against whom the order is made to appear in court within a short specified time. This will mean that, even where it is necessary for police to issue an order, the matter will be more fully considered by a court and the parties will have the attendant benefits noted above.

9.48 Finally, to distinguish police-issued protection orders from judicial orders, the Commissions recommend that the police orders be called ‘safety notices’ or just ‘notices’—or something other than ‘orders’.

**Recommendation 9–1** State and territory family violence legislation that empowers police to issue protection orders should call these orders ‘safety notices’ or ‘notices’ to distinguish them from court orders.

The legislation should provide that police may only issue safety notices where it is not reasonable or practicable for:

- (a) the matter to be immediately heard before a court; or
- (b) police to apply to a judicial officer for an order (by telephone or other electronic medium).

The safety notice should act as an application to the court for a protection order and a summons for the person against whom the notice is issued to appear before the court within a short specified time. The notice should expire when the person to whom it is issued appears in court.

## Police duties to investigate and to apply for orders

9.49 In some jurisdictions police play an active role in applying to judicial officers for protection orders on behalf of victims. In most jurisdictions, police are empowered to apply for a protection order,<sup>76</sup> or to help a victim make an application.<sup>77</sup>

9.50 There are, however, significant differences across family violence legislation in respect of the obligations placed on police to take action where family violence is suspected.<sup>78</sup> In NSW, Queensland, and WA, family violence legislation places express obligations on police to investigate family violence. New South Wales and WA have the strongest legislative directions in relation to ‘pro-protection policing’.

9.51 In NSW, a police officer investigating a family violence matter is obliged to make an application for a protection order under family violence legislation if he or she suspects that a family violence offence or child-abuse related offence has been, is being, or is likely to be committed, against the person for whose protection the order

<sup>76</sup> See, eg, *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 20(1)(a); *Family Violence Act 2004* (Tas) s 15(2)(a); *Domestic Violence and Protection Orders Act 2008* (ACT) s 18(2); *Domestic and Family Violence Act 2007* (NT) s 28(1)(c).

<sup>77</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 18(2).

<sup>78</sup> Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 29.

would be made.<sup>79</sup> The legislation sets out the circumstances in which a police officer need not apply for an order, including where the victim intends to make the application. In such cases, a police officer must make a written record of his or her reasons for not making an application.<sup>80</sup>

9.52 Similarly, in WA a police officer is required to investigate whether an act of family violence is being, has been, or is likely to be committed if the police officer reasonably suspects that the act is a criminal offence or has put the safety of a person at risk.<sup>81</sup> After such investigation a police officer is required to make an application for a protection order, or a police order, or a written record of why neither of those actions was taken.<sup>82</sup>

9.53 In Queensland, if a police officer reasonably suspects that a person is one for whose protection a protection order under family violence legislation could be made, he or she is required to investigate, or cause to be investigated, the complaint or circumstance on which the reasonable suspicion is based until the officer is satisfied the suspicion is unfounded.<sup>83</sup> Following the investigation, a police officer is empowered, but not obliged, to apply for a protection order or take other action if the officer reasonably believes that the person needs protection and there is sufficient reason for the officer to take action.<sup>84</sup> The obligation to respond to domestic violence is also set out in the Queensland Police Operational Procedures Manual.<sup>85</sup>

9.54 In Victoria, the *Code of Practice for the Investigation of Family Violence*, issued by Victoria Police, requires police to apply for a protection order wherever the safety, welfare or property of a family member appears to be endangered by another, or a criminal offence is involved.<sup>86</sup>

9.55 In contrast, for example, in the ACT, police are not obliged to investigate on the basis of reasonable suspicion or to apply for protection orders.<sup>87</sup> ACT police are empowered to apply for emergency orders,<sup>88</sup> and are required in certain circumstances to make a written record of reasons for not applying for emergency orders.<sup>89</sup> ACT Policing has advised that it makes little use of emergency orders, but that this is not necessarily a negative position if there is a charge to proceed with. ACT Policing's pro-

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79     *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 49.

80     Ibid.

81     *Restraining Orders Act 1997* (WA) s 62A.

82     Ibid s 62C.

83     *Domestic and Family Violence Protection Act 1989* (Qld) s 67(1).

84     Ibid s 67(2).

85     Queensland Government, *Submission FV 229*, 14 July 2010.

86     Victoria Police, *Code of Practice for the Investigation of Family Violence* (2005), [5.3.2]. The Code has led to a significant increase in police applications for protection orders: Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006) 145 (citations omitted). The VLRC has expressed the view that with effective implementation of the Code, the addition of a legislative obligation is not yet appropriate: Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), 149.

87     Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 30.

88     *Domestic Violence and Protection Orders Act 2008* (ACT) s 68.

89     Ibid s 83.

arrest policy may mean that there is less reason for an emergency order to be made.<sup>90</sup> Other reasons are noted:

[Emergency orders] can also be difficult to obtain because the risk has to be imminent. There is narrow scope allowing for the application for an [emergency order]. While the use of [such orders] is low, it may be the fact that the situations in which police attend [do] not fit the criteria for an [emergency order].<sup>91</sup>

9.56 The Model Domestic Violence Laws contain a provision that requires a police officer to investigate whether an act of family violence has been, is being, or is likely to be, committed where that police officer believes or suspects such circumstances exist. The provision does not require a police officer to apply for a protection order following such investigation but requires a written record of the reasons for not doing so.<sup>92</sup> The proposal attracted criticism—from Karen Wilcox, for example:

Although tightening of police ... responsibilities ... was canvassed during the Model Laws development stage ... states and territories have been slow to adopt provisions which require 'pro-protection' action on the part of police ... Given the current emphasis on violence prevention in national and state/territory domestic violence public policy, this oversight is anomalous.<sup>93</sup>

### **Submissions and consultations**

9.57 The Consultation Paper considered both police duties to investigate family violence and police duties to apply for protection orders. The duties are related: a duty to apply for an order will often presuppose some investigation; and the outcome of an investigation can be that police will apply for a protection order.

### **Duty to investigate**

9.58 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should:

- (a) impose a duty on police to investigate family violence where they have reason to suspect or believe that family violence has been, is being, or is likely to be committed; and
- (b) require police to make a record of their reasons for not taking any action—such as applying for a protection order—if after investigating they decide not to take action.<sup>94</sup>

9.59 This was broadly endorsed by almost all submissions that addressed the proposal. Many submitted that police should be obliged to investigate family violence.<sup>95</sup> National Legal Aid said that placing a duty on police takes the onus off

90 ACT Policing, *Correspondence*, 15 March 2010.

91 Ibid. The ACT police's role in the ACT's Family Violence Intervention Program—a coordinated criminal justice response to family violence—is discussed in Ch 29.

92 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 8.

93 K Wilcox, *Recent Innovations in Australian Protection Order Law: A Comparative Discussion* (2010), prepared for the Australian Domestic and Family Violence Clearinghouse, 12.

94 Consultation Paper, Proposal 5–5.

95 National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July

victims to apply for orders. Western Australia adopted a similar proposal in 2004, it said, and this ‘has played a significant role in improving police response to family violence’.<sup>96</sup>

9.60 The Domestic Violence Prevention Council (ACT) was concerned about police having a duty to investigate where family violence was simply ‘likely’ to be committed—that this might be too broad. Instead, police should have an obligation to investigate ‘where they suspect or believe that a family violence offence is being committed’.<sup>97</sup>

9.61 Some stakeholders emphasised that police must receive family violence and cultural awareness training.<sup>98</sup> They need to ‘understand the dynamics of the relationships and difficulties for women to take action against their partner without close support’.<sup>99</sup>

9.62 There was also support for the proposal that police be required to record their reasons for not taking further action.<sup>100</sup> It was submitted that this would increase police

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2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirlangu Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; T McLean, *Submission FV 204*, 28 June 2010; Confidential, *Submission FV 198*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 125*, 20 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010 Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

96 National Legal Aid, *Submission FV 232*, 15 July 2010.

97 Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

98 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

99 Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

100 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirlangu Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Confidential, *Submission FV 198*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010;

accountability.<sup>101</sup> The records could also be used in future investigations or applications for protection orders,<sup>102</sup> and they would provide useful data for reporting and trend analysis.<sup>103</sup> The Domestic Violence Prevention Council (ACT) submitted that the record

should extend to documentation of reasons as to why an arrest wasn't made (if appropriate) and why criminal charges were not pursued. This may include noting whether there are concerns for the safety and welfare of the person reporting an incident and how safety and welfare concerns have been addressed.<sup>104</sup>

9.63 One submission supported the proposal because it would make it more onerous for police not to take action;<sup>105</sup> another—a partner violence counsellor—disagreed, and thought it was important that officers *not* think that taking further action is the easier or safer option.<sup>106</sup>

9.64 This counsellor also suggested that if a perceived victim does not want the police to take any further action, they could be asked to sign a document to that effect, away from any potential controlling influence.<sup>107</sup> Another stakeholder submitted that, to the contrary, the victim's refusal to take further action should *not* be an acceptable reason not to take action.<sup>108</sup>

9.65 There were some concerns about whether police had adequate resources to always investigate family violence properly,<sup>109</sup> and some said it was important to minimise any administrative burden on police.<sup>110</sup>

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Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 125*, 20 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

101 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

102 National Legal Aid, *Submission FV 232*, 15 July 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

103 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; T Searle, *Submission FV 108*, 2 June 2010.

104 Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

105 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

106 T McLean, *Submission FV 204*, 28 June 2010.

107 Ibid.

108 C Pragnell, *Submission FV 70*, 2 June 2010.

109 Confidential, *Submission FV 128*, 22 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010.

110 T McLean, *Submission FV 204*, 28 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

**Duty to apply for a protection order**

9.66 In the Consultation Paper, the Commissions asked in what circumstances police should be required to apply for protection orders on behalf of victims.<sup>111</sup>

9.67 Police applying for protection orders was said to be a ‘useful strategy’.<sup>112</sup> National Legal Aid submitted that it could help to shift the responsibility away from the victim and to a target less subject to pressure, while sending a message to the community that family violence will not be tolerated and victims will be supported.<sup>113</sup> Others suggested that the duty should be supported by education, training and resources,<sup>114</sup> and that there should be a ‘comprehensive and proactive system of supervision’.<sup>115</sup> Monitoring was said to be important because sometimes police still fail to take action.<sup>116</sup>

9.68 A number of different circumstances were suggested for when police should be required to apply for an order. Some identified the types of victims for whom police should apply for orders:

- children—either in direct danger or at risk of exposure to violence;<sup>117</sup>
- people with an intellectual disability or ‘complex needs such as drug and alcohol or mental illness’;<sup>118</sup>
- older persons;<sup>119</sup> and
- people ‘traumatised or psychologically damaged by exposure to abuse, especially victims of repeat assaults’.<sup>120</sup>

9.69 Other submissions identified various circumstances in which police should apply for orders:

- when necessary to protect the safety of the victim;<sup>121</sup>
- to preserve the victim’s property;<sup>122</sup>

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111 Consultation Paper, Question 5–7.

112 J Stubbs, *Submission FV 186*, 25 June 2010.

113 National Legal Aid, *Submission FV 232*, 15 July 2010.

114 Ibid; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

115 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

116 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

117 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; T McLean, *Submission FV 204*, 28 June 2010; N Ross, *Submission FV 129*, 21 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010.

118 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

119 Ibid.

120 Ibid.

121 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

122 Ibid.

- where a domestic violence offence has occurred;<sup>123</sup>
- where a person expresses reasonable fear of another person;<sup>124</sup>
- where it is likely that the violence will occur in the future;<sup>125</sup>
- where the victim is fearful of applying for the order themselves;<sup>126</sup>
- where the victim ‘appears unable to do so for him or herself because, for example, he or she is under the influence of alcohol or other drugs or obvious mental disorder;’<sup>127</sup> and
- where someone appears to be ‘menacingly coercing or otherwise influencing the victim to not make a complaint’.<sup>128</sup>

9.70 The Queensland Law Society thought the ‘statutory balance’ under the Queensland Act was appropriate.<sup>129</sup> The Wirringa Baiya Aboriginal Women’s Legal Centre supported the NSW model.<sup>130</sup>

9.71 Differing views were expressed in relation to victim consent—some saying consent was necessary, others that it was not. There were concerns about issuing protection orders for people who say they do not need protection. Courts ‘should be informed if the protected person does not agree’, one stakeholder submitted.<sup>131</sup> Others went further, and submitted that police must have the consent of the victim to institute any proceedings, because

to pursue such an order without the victim’s consent will be futile and will once again place the victim under the control of another rather than giving them the power to make their own decisions.<sup>132</sup>

9.72 One stakeholder, who identified herself as a survivor of family violence, did not support this proposal because ‘at times the victim knows instinctively that the serving of a protection order would be like ‘a red rag to a bull’’. <sup>133</sup>

9.73 One stakeholder suggested the police should have to apply for an order ‘with the consent of the victim, and without the consent of the victim where the victim’s life or safety is at risk’.<sup>134</sup>

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123 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

124 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

125 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

126 K Johnstone, *Submission FV 107*, 7 June 2010.

127 T McLean, *Submission FV 204*, 28 June 2010.

128 Ibid.

129 Queensland Law Society, *Submission FV 178*, 25 June 2010. The Queensland test is described above.

130 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010.

131 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

132 Gosnells Community Legal Centre Inc, *Submission FV 56*, 31 May 2010.

133 M Condon, *Submission FV 45*, 18 May 2010. See also Confidential, *Submission FV 89*, 3 June 2010.

134 The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010.

9.74 Some submitted that police must have some discretion; there should be some room to manoeuvre.<sup>135</sup> Others emphasised the importance of victims being able to apply to the court directly for an order, without involving the police.<sup>136</sup> As noted below, this might be particularly important for Indigenous women:

In business hours where women prefer to access an [Aboriginal and Torres Strait Islander] or mainstream legal service for assistance, and where this assistance is available, the women should be able to exercise this option.<sup>137</sup>

#### ***Location of duties***

9.75 In the Consultation Paper, the Commissions proposed that a duty to investigate family violence should be set out in state and territory family violence legislation. Those who supported the proposal presumably agreed that it should be in legislation. Women's Legal Services (NSW) specifically submitted that the duty to investigate should be set out in legislation, rather than just in policy.<sup>138</sup>

9.76 The Victorian Government, however, submitted that a duty for police to investigate belongs in codes of practice, rather than in legislation.<sup>139</sup> Victoria Police submitted that a legal duty to investigate family violence would be 'inconsistent with the overall response to investigate all other offences where a legal duty is not imposed'.<sup>140</sup>

9.77 The Commissions also asked whether a requirement to apply for protection orders on behalf of victims should be imposed by state and territory family violence legislation or by police codes of practice.<sup>141</sup> Some stakeholders said the requirement should have a legislative basis;<sup>142</sup> codes of practice are 'difficult to monitor and enforce—legislation is preferable',<sup>143</sup> and not all police consistently follow codes of practices.<sup>144</sup> One legal service provider said the requirement should be in legislation for the sake of 'transparency, enforceability, clarity and consistency'.<sup>145</sup> Another emphasized that, by putting the duty in legislation and making it law,

police are more likely to actively pursue their obligation and take notice of the requirement ... Having statutory force could also reassure the police that they will not be subject to adverse consequences.<sup>146</sup>

135 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010.

136 Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010.

137 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

138 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

139 Victorian Government, *Submission FV 120*, 15 June 2010.

140 Ibid.

141 Consultation Paper, Question 5–7.

142 National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

143 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

144 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

145 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

146 Gosnells Community Legal Centre Inc, *Submission FV 56*, 31 May 2010.

9.78 Most stakeholders who said the requirement should be in legislation, said it should also be in codes of practice. ‘It may be preferable to include broad principles in legislation with a requirement for a code of practice to support the application of those principles that is subject to regular review’.<sup>147</sup>

9.79 The Victorian Government, on the other hand, did not support the introduction in legislation of a set of circumstances in which police should apply for an order, as this was the role of codes of practice, police training and policy.<sup>148</sup>

The Victoria Police Code of Practice for the Investigation of Family Violence outlines the circumstances in which police are required to apply for a family violence intervention order on behalf of victims, which is based on a comprehensive family violence risk assessment.<sup>149</sup>

### ***Commissions’ views***

#### ***Duty to investigate***

9.80 Police should be required to investigate family violence where they have reason to believe or suspect family violence has been, is being, or is likely to be committed, as suggested in the Model Domestic Violence Laws. This duty should be imposed either in family violence legislation or in police codes of practice and should be supported by training and education.

9.81 A duty to investigate relieves victims of some of the pressure of dealing with family violence; they are no longer solely responsible for securing their protection and the protection of their children. A duty to investigate accomplishes this without taking from victims all control over their situation, and allows police to consider properly the needs and wishes of victims before taking further action.

9.82 The Commissions maintain that the duty should include a duty to investigate where family violence is even simply ‘likely’ to be committed, as well as where it has been or is being committed. According to the most frequently cited exposition of the word, ‘likely’ can, in some contexts,

mean ‘probably’ ... that is to say, more likely than not or more than a 50 per cent chance. It can also, in an appropriate context, refer to a real or not remote chance or possibility, regardless of whether it is less or more than 50 per cent.<sup>150</sup>

9.83 The lower standard seems appropriate where police assess a risk of family violence—particularly if the family violence includes physical or sexual assault or danger to children. If a police officer believes there is a real or not remote chance or possibility of family violence, the officer should investigate. This duty only becomes

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147 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010. See also Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; N Ross, *Submission FV 129*, 21 June 2010.

148 Victorian Government, *Submission FV 120*, 15 June 2010. See also Confidential, *Submission FV 184*, 25 June 2010.

149 Victorian Government, *Submission FV 120*, 15 June 2010.

150 Deane J in *Tillmans Butcheries Pty Ltd v Australasian Meat Industry Employees’ Union* (1979) 27 ALR 367.

clearer and more pressing if the officer believes there is a greater than 50% chance of family violence. It is important for police to try to prevent family violence, not simply respond after it has happened.

9.84 However, if the definition of family violence were expanded, and more relationships were captured by the definition of family,<sup>151</sup> there might be more incidents of family violence to investigate. Another consequence of a duty to investigate wherever police suspect any family violence—that is, behaviour that causes fear, or that coerces or controls a family member, including economic and emotional abuse—is *likely* to occur, might be an increase in the potential number of investigations. For police to accommodate such responsibilities, a significant increase in resources is desirable. However, police codes of practice and training should also equip police to assess efficiently and responsibly a person’s need for protection, and to respond accordingly.

9.85 If police choose not to take action when they find family violence, or a likelihood of family violence, they should record their reasons for not taking action—for example, their reasons for not issuing or applying for a protection order and for not charging or arresting a person who has committed a family violence crime. This is the approach advocated in the Model Domestic Violence Laws and that has been adopted by a small number of jurisdictions. Such records might be valuable in future investigations; they could be used by more senior officers to assess whether police are making appropriate decisions about when to take further action; and the records might also be a good source of data for higher-level analysis. To ensure police officers may perform their duties efficiently, the process for recording reasons should not be made administratively burdensome.

#### ***Duty to apply for a protection order***

9.86 The Commissions also suggest that, in appropriate circumstances, police have a duty to apply to a court or a judicial officer for a protection order. Many of the advantages of police being required to investigate family violence, as identified by stakeholders, were also cited as advantages of police being required to apply for protection orders in some circumstances. When a police officer applies for an order, it relieves a victim of the need to do so. It might also mean the aggressor will be more likely to (wrongly) blame the police for the order, rather than (wrongly) blame the victim.

9.87 Submissions did not reveal a clear picture of precisely when the police should be required to apply for a protection order. There may be some circumstances in which it is quite clear that they should: the most straightforward are where the victim asks the police to apply for an order or where the victim is in clear and imminent danger of physical or sexual assault.

9.88 The need for protection will also be more pressing where the violence is criminal. The Commissions recommend in Chapter 11 that judicial officers should be

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151 See Chs 5, 7.

able to issue a protection order at any stage of a criminal proceeding that relates to family violence—including prior to a plea or finding of guilt. To some extent, this recommendation may alleviate the need to require police always to apply for a protection order for victims of criminal family violence.

9.89 However, the Commissions are not convinced that there should be a very broad, fixed set of circumstances in which police must always apply for a protection order. It does not seem appropriate to require police to apply routinely for an order whenever there has been an incident of family violence or whenever there is some likelihood of future family violence—particularly if the victim, without apparent coercion or intimidation, has made it clear that he or she does not need protection in this way. The Commissions therefore do not prescribe a list of particularly vulnerable victims for whom police must always apply for an order. Similarly, the Commissions do not prescribe a set of circumstances in which police must always apply for an order. However, police codes of practice, education and training should give police guidance on this matter.

9.90 This is not to say police should not investigate the matter. The circumstances in which police have a duty to investigate family violence are broader than those in which they should apply for a protection order. Investigations of family violence—during which officers pay close attention to the victim; listen to his or her needs; assess danger—will often best reveal whether the police should apply for a protection order or take any other action.

**Recommendation 9–2** State and territory family violence legislation and/or police codes of practice should impose a duty on police to:

- (a) investigate family violence where they believe family violence has been, is being, or is likely to be committed; and
- (b) record when they decide not to take further action and their reasons for not taking further action.

### Indigenous-specific support for protection order applications

9.91 Arguments for and against a more active police role in applying for protection orders were canvassed by the Victorian Law Reform Commission (VLRC) in its report, *Review of Family Violence Laws*.<sup>152</sup> One disadvantage identified in a submission to that review is that Indigenous peoples may be reluctant to seek assistance for family violence if most applications are brought by police.<sup>153</sup>

9.92 The VLRC expressed the view that ‘if the system is going to be flexible and responsive to victims’ needs, it is essential that victims can apply for a [protection

<sup>152</sup> See Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [5.80]–[5.93].  
<sup>153</sup> Ibid, [5.89] (citation omitted).

order] without involving the police'.<sup>154</sup> In particular, it recommended increased Indigenous-specific support services in court to enable Indigenous people to apply for a protection order without police involvement.<sup>155</sup>

### ***Submissions and consultations***

9.93 In the Consultation Paper, the Commissions asked whether all state and territory governments should ensure that there are Indigenous-specific support services in courts to enable Indigenous people to apply for protection orders without police involvement.<sup>156</sup> In response, nearly all submissions answered the question in the affirmative,<sup>157</sup> with one saying that Indigenous people should be consulted about what is needed.<sup>158</sup> A range of views was evident in submissions.

9.94 Some said that Indigenous women were often reluctant to engage with police<sup>159</sup> and 'to avail themselves of protection orders'.<sup>160</sup> They need 'a great deal of support around applying for a protection order'.<sup>161</sup> It was submitted that this might be due to:

- the 'historical relationship between police and Aboriginal people';
- a 'distrust of police';
- fear of authorities;
- 'fear of community reprisals'; and
- fear of children being removed from their families.<sup>162</sup>

9.95 One Indigenous legal service said that applying for protection orders is time-consuming and complicated and therefore restricts access to justice.<sup>163</sup> Some of the barriers to reporting sexual assault, discussed in Chapter 26, might also partly explain why some Indigenous women may be reluctant to approach the police.

9.96 Not all submissions agreed that Indigenous women were reluctant to engage with the police. Stubbs supported the proposal, but said it should not be used as an

154 Ibid, [5.91].

155 Ibid, [5.92].

156 Consultation Paper, Question 5–8.

157 For example, Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

158 National Legal Aid, *Submission FV 232*, 15 July 2010.

159 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

160 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

161 Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

162 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010 quoting NSW Police Force, *Code of Practice for the NSW Police Force Response to Domestic and Family Violence* (2009) <[http://www.police.nsw.gov.au/\\_data/assets/pdf\\_file/0016/165202/code\\_of\\_practice\\_nswpf\\_response Domestic\\_family\\_violence.pdf](http://www.police.nsw.gov.au/_data/assets/pdf_file/0016/165202/code_of_practice_nswpf_response Domestic_family_violence.pdf)> at 15 September 2010, 39.

163 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

excuse to neglect Indigenous victims. Indigenous people have criticised police, Stubbs said, for too often ‘being unresponsive to the needs of Indigenous victims’.<sup>164</sup>

9.97 Most of the Indigenous women that speak to the Wirringa Baiya Aboriginal Women’s Legal Centre want the police to be involved, the Centre submitted. The women want to be relieved of the responsibility for making a decision about the order—and of the pressure exerted by ‘the offender, his family or community’. But the police response ‘must be appropriate, responsive, respectful and culturally sensitive’.<sup>165</sup>

9.98 The Victorian Government submitted that it supports initiatives that provide additional assistance to groups over-represented in the justice system. It referred to the Koori Family Violence Court Support Project, a pilot project now under development that aims to improve the capacity of the Magistrates’ Court to

provide a culturally appropriate response for family violence cases in the Koori community by developing partnerships with local Indigenous services, providing access to support for both Indigenous victims and offenders of family violence, and implementing training in Koori-specific family violence issues in the courts.<sup>166</sup>

9.99 The Queensland Government said it would consider the issues raised by this question in the context of the Queensland Government Strategy and recommendations made by Professor Chris Cunneen.<sup>167</sup> It also said that it ‘currently funds a number of services which provide court support to women affected by domestic and family violence’:

Some of these services are able to provide assistance to applicants in completing applications for domestic violence orders. The Australian Government funds Family Violence Prevention Centres which offer assistance to Aboriginal and Torres Strait Islander victims of domestic and family violence in regional and remote areas in Central, North and Far North Queensland. Legal advice and assistance is also provided by Legal Aid Queensland, the Aboriginal and Torres Strait Islander Legal Service and Community Legal Centres.<sup>168</sup>

9.100 Though Indigenous specific support services should be available, it was submitted, Indigenous persons should not have to use them if they do not want to—victims might be related to Indigenous court workers or they might be concerned about confidentiality, particularly in remote areas.<sup>169</sup>

Aboriginal women want to be able to access mainstream services that are sensitive to their needs and culturally appropriate as well as have the option of using Indigenous specific services. The choice should be the women’s choice.<sup>170</sup>

164 J Stubbs, *Submission FV 186*, 25 June 2010.

165 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010.

166 Victorian Government, *Submission FV 120*, 15 June 2010.

167 Queensland Government, *Submission FV 229*, 14 July 2010. See also C Cunneen, *Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities* (2009).

168 Queensland Government, *Submission FV 229*, 14 July 2010.

169 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010.

170 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010.

9.101 Many submissions stressed that Indigenous victims of family violence need more than Indigenous-specific court services to help them apply for protection orders. They also need support well before they go to court.<sup>171</sup> Indigenous women may not access the Aboriginal Legal Service, it was submitted, because the service is seen to act for perpetrators.<sup>172</sup> Hence, various services need to be established, expanded or given more funding—particularly in areas of greatest need.<sup>173</sup> These services include:

- advocacy and court services for Indigenous victims of family violence, such as the Women's Domestic Violence Court Advocacy Services;<sup>174</sup>
- Indigenous women's programs;<sup>175</sup>
- Aboriginal and Torres Strait Islander family violence prevention legal centres;<sup>176</sup>
- Aboriginal and Torres Strait Islander women's legal services;<sup>177</sup>
- outreach support services for remote courts;<sup>178</sup>
- Aboriginal and Torres Strait Islander court liaison officers in local courts;<sup>179</sup> and
- Indigenous support services in police stations.<sup>180</sup>

#### *Commissions' views*

9.102 All victims of family violence should be able to apply for protection orders without necessarily involving the police. Victims who fear, distrust or simply dislike the police—with or without good reason, and even for fear of being arrested themselves—should still be able to obtain a family violence protection order. The process should be as simple and straightforward as possible; services should be put in place to help victims apply for orders. There is a particular need for Indigenous-specific support services in courts. Some victims from particular cultural and linguistic backgrounds might also need extra assistance to apply to a court for an order themselves. As Dr Heather Douglas notes, in a related context:

women from non-English speaking backgrounds may experience linguistic and cultural issues in their dealings with police. Uncertain immigration status may also impact on a victim's willingness to involve police.<sup>181</sup>

9.103 The Commissions agree, however, that victims should not be automatically referred to culturally-specific services. They may feel they do not need extra help, or

171 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

172 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

173 Queensland Law Society, *Submission FV 178*, 25 June 2010.

174 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

175 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010.

176 Ibid; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

177 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

178 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

179 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

180 Ibid.

181 H Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 453 (citations omitted).

they may simply prefer to use ‘mainstream’ services for other reasons. However, special services should be available and should be offered to those who might need them.

9.104 As stakeholders have pointed out in other contexts, the power of a protection order often depends on the willingness of police to enforce its conditions; victims who will not call police to have their orders enforced might therefore compromise their own safety. But some victims who prefer not to ask police to apply for an order may nevertheless be prepared to call upon the police to enforce the order. In any event, a protection order can protect victims even if police are not called upon to enforce it. Victims may threaten to call the police if the order is breached. The subject of the order might obey it anyway. Further, as outlined above, there are many benefits of victims and aggressors attending court for an order: for example, parties can have their say; aggressors can be censured; and parties can be referred to services and counselling programs.

9.105 If relations between police and Indigenous people are poor in some areas—as submissions suggest they are—then concerted efforts should be made by police and Indigenous communities to repair those relations and build trust. But even where relations are strong and positive, particular victims of family violence might prefer to apply for a protection order without involving police. This choice should be respected and fostered with practical assistance.

**Recommendation 9–3** State and territory governments should ensure that support services are in place to assist persons in need of protection to apply for a protection order without involving police. These should include services specifically for:

- (a) Indigenous persons; and
- (b) persons from culturally and linguistically diverse backgrounds.

## Police powers in dealing with family violence

9.106 Although protection orders are a civil remedy, and the standard of proof to obtain them is the civil standard of the balance of probabilities, the procedures followed are those usually associated with criminal matters.<sup>182</sup>

9.107 There have been numerous investigations into policing practices in the context of family violence in Australia since 2001. These have focused on issues such as police attitudes to family violence; training of police; evidence-gathering; inter-agency liaison

<sup>182</sup> R Alexander, ‘Family Violence’ in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.301].

and communication; pro-arrest and pro-charging policies; and the role of police in applying for, issuing, and enforcing protection orders.<sup>183</sup>

9.108 The following section discusses the special police powers that exist in most jurisdictions in the context of family violence, including police powers of entry, search and seizure, arrest, direction and detention.

### **Powers of entry**

9.109 At common law, the police may enter a home without a warrant in the following circumstances: by invitation; in order to carry out an arrest; on reasonable suspicion that an offence is being committed; or on reasonable suspicion that a breach of the peace is occurring or is about to occur.<sup>184</sup>

9.110 In addition, in most Australian jurisdictions, the police have specific legislative powers to enter premises without warrants in cases of family violence. These provisions are designed to overcome

[t]he difficulty police face in domestic violence cases, where the need to gain entry may be of vital importance for the victim's safety, ... that if all appears quiet and the only evidence available about possible violence is, eg a neighbour's telephone call, the police are at risk of making an illegal entry if they enter without permission. They may face a civil action or possibly disciplinary proceedings.<sup>185</sup>

9.111 The scope of these powers varies between jurisdictions. Such powers may be conferred by family violence legislation, or by legislation governing criminal procedure.

#### ***Powers of entry under family violence legislation***

9.112 The family violence Acts of Victoria, WA, Tasmania and the NT each confer powers of entry on police.

9.113 In Victoria, a police officer is authorised to enter premises using reasonable force and without warrant if, for example, the officer reasonably believes that a person: has assaulted or threatened to assault a family member; is on the premises in contravention of a protection order; or is refusing or failing to comply with a direction by police to remain in a place, go to and remain at a place, or remain in the company of a designated person.<sup>186</sup>

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183 See, eg, NSW Ombudsman, *Domestic Violence: Improving Police Practice* (2006); Queensland Crime and Misconduct Commission, *Policing Domestic Violence in Queensland* (2005); Commonwealth Ombudsman, *Policing Domestic Violence: Own Initiative Investigation into the Policing of Domestic Violence in the ACT* (2001) for example contained one recommendation directed at police powers of entry—with the Commonwealth Ombudsman recommending that the AFP should include reference to police powers of entry in family violence guidelines, based on the Woden Patrol Pilot Project: Rec 1. See also Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Ch 5.

184 Thomson Reuters, *The Laws of Australia*, vol 17 Family Law, 17.5, [13].

185 Ibid.

186 *Family Violence Protection Act 2008* (Vic) s 157.

9.114 In WA, a police officer may enter premises without warrant if the officer reasonably suspects that a person is committing an act of family violence or that such an act was committed before the officer's arrival. The police officer may remain on the premises for as long as he or she considers necessary to: investigate the matter; ensure that there is no imminent danger of family violence being committed on the premises; or give or arrange for reasonable assistance.<sup>187</sup>

9.115 In Tasmania, a police officer is authorised to enter and remain on premises without warrant and use such force as is necessary to prevent family violence at the request of the person who apparently resides on the premises; or if the officer reasonably suspects that family violence is being, has been, or is likely to be committed on those premises.<sup>188</sup>

9.116 In the NT, a police officer is authorised to enter premises if the officer reasonably believes that grounds exist for making a protection order, and it is necessary to remove a person from the premises to prevent an imminent risk of harm to another person or damage to property.<sup>189</sup>

9.117 South Australian family violence legislation confers a comparatively narrower power of entry on police. If a protection order requires a person to surrender specified weapons and articles, then police may enter and search any premises or vehicle where such a weapon or article is reasonably suspected to be.<sup>190</sup>

#### ***Powers of entry under other legislation***

9.118 In other jurisdictions, powers of entry are conferred on police under legislation other than family violence legislation. In NSW, law enforcement legislation confers a power of entry to investigate or prevent the commission of family violence offences on a police officer if the police officer is invited onto the premises by an apparent resident, or pursuant to a warrant.<sup>191</sup> In Queensland, legislation setting out police powers and responsibilities confers on police powers of entry where an officer reasonably suspects that family violence is occurring or has occurred prior to the officer's arrival.<sup>192</sup> The NT legislation governing police administration also confers on police an express power to enter premises where there is a reasonable belief that a contravention of a protection order has occurred, is occurring or is likely to occur.<sup>193</sup>

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187 *Restraining Orders Act 1997* (WA) s 62B.

188 *Family Violence Act 2004* (Tas) s 10.

189 *Domestic and Family Violence Act 2007* (NT) s 84(1), (2)(a).

190 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 37. A review of South Australian family violence laws preceding the introduction of the 2009 Act raised the option of including a new police power of entry modelled on the WA provisions: M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007), 98.

191 See *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) ss 82, 83, 85. A police officer is also entitled to request a person whose identity is unknown to the officer to disclose his or her identity if the officer reasonably suspects that a protection order has been made against the person: s 13A.

192 *Police Powers and Responsibilities Act 2000* (Qld) s 609.

193 *Police Administration Act* (NT) s 126(2A)(b).

9.119 The *Crimes Act 1900* (ACT) confers powers of entry where an officer reasonably believes that: an offence or breach of the peace is being committed; a person has suffered physical injury or there is imminent danger of injury to a person or damage to property, and it is necessary to enter the premises immediately for preventative purposes.<sup>194</sup> The relevant provision does not refer expressly to family violence.

9.120 The *Summary Offences Act 1953* (SA) empowers the SA Commissioner of Police to issue general search warrants to such police officers as the Commissioner thinks fit. The warrants generally remain in force for six months, and give the officer power to, among other things, ‘enter into, break open and search any house, building, premises or place where he or she has reasonable cause to suspect that an offence has been recently committed, or is about to be committed’.<sup>195</sup>

### **Powers of search and seizure**

9.121 In most jurisdictions, family violence legislation or other legislation governing criminal procedure confers on police powers to:

- search premises,<sup>196</sup>
- search for and seize firearms either with or without warrant;<sup>197</sup>
- search a person and any ‘vehicle, package or thing in the person’s possession’ if the officer reasonably suspects that the person has any object that may cause injury or damage or may be used to escape;<sup>198</sup> or
- search and seize other articles used, or that may be used, to commit family violence.<sup>199</sup>

### **Powers of arrest, direction and detention**

9.122 Usually, the police only exercise the power of arrest if they intend to charge the person with an offence. This requires some evidence and a judgment as to whether prosecution will be successful. The law of arrest is also framed to favour requiring a person to appear in court by way of summons, rather than by arrest, because of the greater coercive effect of powers of arrest. However, since in family violence cases arrest ‘provides a measure of safety’, the law of arrest has been modified in some

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194 *Crimes Act 1900* (ACT) s 190. See also *Crimes Act 1900* (ACT) s 188.

195 *Summary Offences Act 1953* (SA) s 67.

196 *Family Violence Protection Act 2008* (Vic) s 157; *Police Powers and Responsibilities Act 2000* (Qld) s 609; *Restraining Orders Act 1997* (WA) s 62B.

197 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 86; *Family Violence Protection Act 2008* (Vic) s 159; *Restraining Orders Act 1997* (WA) s 62B; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 37; *Family Violence Act 2004* (Tas) s 10(5); *Crimes Act 1900* (ACT) s 191; *Police Administration Act* (NT) s 126.

198 *Family Violence Protection Act 2008* (Vic) s 16.

199 *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 87; *Family Violence Protection Act 2008* (Vic) s 16; *Police Powers and Responsibilities Act 2000* (Qld) s 609; *Restraining Orders Act 1997* (WA) s 62B(2); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 37; *Family Violence Act 2004* (Tas) s 10(3), (4).

jurisdictions to provide greater powers of arrest and detention in family violence cases.<sup>200</sup> These powers may be conferred either by family violence legislation or by other legislation governing criminal procedure.

#### **Arrest**

9.123 In Tasmania and the ACT, a police officer may arrest without warrant if the officer suspects on reasonable grounds that a person has committed or is committing a family violence offence.<sup>201</sup> Tasmanian family violence legislation specifies that, in deciding whether to arrest a person for family violence, a police officer is to give priority to the safety, wellbeing and interests of any affected person or affected child.<sup>202</sup>

9.124 Three jurisdictions also make specific legislative provision enabling arrest without warrant upon breach of a protection order.<sup>203</sup> In other jurisdictions, for each of the above cases, there would be powers to arrest without warrant on the basis that an offence has been committed.<sup>204</sup>

9.125 There are other, less common, special powers of arrest. In NSW, an authorised officer may issue a warrant for arrest if an application for a final protection order has been made, even though the person is not alleged to have committed an offence.<sup>205</sup> In Victoria, a magistrate or registrar may issue a warrant for arrest on an application for a protection order on the basis of a reasonable belief that it is necessary to achieve certain objects, including: ensuring the safety of the victim and the protection of child victims; preserving the property of a victim; or ensuring a person's attendance at court for a mention.<sup>206</sup>

#### **Direction and detention**

9.126 In the majority of Australian jurisdictions, there are powers to enable police to detain people who have used family violence, principally but not exclusively for purposes associated with issuing, serving or applying for protection orders. The precise form of these powers differs. In Queensland, the ACT, and the NT, police are empowered to remove and detain persons who have used family violence.<sup>207</sup> In NSW,

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200 Thomson Reuters, *The Laws of Australia*, vol 17 Family Law, 17.5, [21] (as at 7 January 2009).

201 *Crimes Act 1900* (ACT) s 212(2); *Family Violence Act 2004* (Tas) s 11. The definition of a 'domestic violence offence' in the *Crimes Act 1900* (ACT) s 212 is linked to the definition of 'domestic violence' in the *Domestic Violence and Protection Orders Act 2008* (ACT). See also *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 34(1) which provides a power of arrest in circumstances connected to the service of an interim protection order.

202 *Family Violence Act 2004* (Tas) s 11.

203 *Family Violence Protection Act 2008* (Vic) ss 38 (safety notice), 50 (intervention order); *Police Powers and Responsibilities Act 2000* (Qld) s 365(1)(j); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 36.

204 See, eg, *Law Enforcement (Powers and Responsibilities) Act 2002* (NSW) s 99.

205 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 88. The officer must issue such a warrant if it appears that the personal safety of the victim will be put at risk unless the defendant is arrested for the purpose of being brought before the court.

206 *Family Violence Protection Act 2008* (Vic) s 50.

207 *Domestic and Family Violence Protection Act 1989* (Qld) s 69; *Domestic Violence and Protection Orders Act 2008* (ACT) s 75; *Domestic and Family Violence Act 2007* (NT) s 84 (removal permitted if necessary to prevent imminent risk of harm to a person or damage to property).

Victoria, WA and SA, these powers take the form of a power to direct or require a person to remain in a designated place, in default of which the person may be arrested.<sup>208</sup>

9.127 In NSW, for example, if a police officer makes or is about to make an application for a provisional order, he or she has a power to direct a person to remain at the scene of the incident or, in a case where the person has left the scene, at another place where the police officer locates the person. If a person refuses to remain at the specified place, the police officer may arrest and detain the person at the scene of the incident or other place, or arrest and take the person to a police station and detain the person there until a provisional protection order is made and served.<sup>209</sup> There is no maximum limit on the time of this detention.

9.128 The Commissions heard in consultations that there are problems in the practical application of the police power in NSW to direct a person to remain at the scene of the incident, particularly in remote areas. For example, police may need to travel in excess of an hour to attend an incident, including those that occur in remote Indigenous communities. Directing a person who has used violence to remain at the scene of the incident, when the victim is there, is problematic—especially if the incident is only attended by one police officer who needs to leave the scene to arrange for a provisional protection order. If there is more than one police officer attending the incident, one of those officers has to remain at the scene while the other goes to arrange the provisional order.

9.129 The maximum time limit of these ‘holding’ powers varies, with SA limiting the time of detention after arrest at two hours, with an extension allowing an aggregate of eight hours by court order,<sup>210</sup> Queensland, the ACT and the NT allowing four hours;<sup>211</sup> and Victoria providing for up to six hours on the authority of the police and a maximum of ten hours by order of a court.<sup>212</sup>

9.130 In Tasmania, a police officer may, without warrant, arrest a person they reasonably suspect has committed family violence. The person may then be detained ‘for a period reasonably required’ to determine charges; carry out a risk screening or safety audit; implement measures identified by a safety audit; make a police-issued protection order or apply to the court for a protection order.<sup>213</sup> A person taken into custody must also be brought before a court ‘as soon as practicable’ and s 4 of the *Criminal Law Detention and Interrogation Act 1995* (Tas) applies.<sup>214</sup>

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208 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 89; *Family Violence Protection Act 2008* (Vic) ss 13–15; *Restraining Orders Act 1997* (WA) s 62F; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 34(1), (2). The Victorian Act also allows the police to direct the person to remain in the company of a designated person.

209 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 89.

210 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 34.

211 *Domestic and Family Violence Protection Act 1989* (Qld) s 69; *Domestic Violence and Protection Orders Act 2008* (ACT) s 75; *Domestic and Family Violence Act 2007* (NT) s 84.

212 *Family Violence Protection Act 2008* (Vic) s 18.

213 *Family Violence Act 2004* (Tas) s 11(4).

214 *Ibid* s 11.

9.131 Special provision is also made in Victoria and Queensland to enable detention for the purposes of arranging for victim safety or services once the purpose of applying for a protection order has been fulfilled.<sup>215</sup>

### ***Submissions and consultations***

#### ***Entry, search and seizure powers***

9.132 In the Consultation Paper, the Commissions asked whether any issues arise in relation to the availability, scope and exercise in practice of police powers in connection with family violence to: (a) enter premises; (b) search for and seize firearms or other articles; and (c) arrest and detain persons. The Commissions also asked whether there is a need for legislative redress.<sup>216</sup>

9.133 Stakeholders that addressed this question seemed largely satisfied with the scope of these police powers: the powers were sufficient<sup>217</sup> and should be maintained.<sup>218</sup> It was suggested that the powers might not be used as often as they should be,<sup>219</sup> but also that powers should not be expanded just because the existing ones were not being utilised effectively.<sup>220</sup>

9.134 Victoria Police were consulted on the development of the *Family Violence Protection Act 2008* (Vic) and advised that they ‘have not had any issues with the listed powers’.<sup>221</sup> The Queensland Law Society said these powers were regularly used and it ‘supports police being able to attend at a domestic and be able to take direct action to ensure the safety of those present’.<sup>222</sup>

9.135 Some stakeholders, however, expressed concerns with these police powers. The Aboriginal Family Violence Prevention and Legal Service Victoria said police often do not know where to send respondents when they exclude them from a property. The service did not advocate the increased incarceration of Indigenous men, but submitted that where Indigenous men are detained

it is critical that high level duty of care is exercised and appropriate legal and medical arrangements are made. In addition to improved services for [Indigenous] women victims, resourcing for appropriate services for [Indigenous] men perpetrators is also required.<sup>223</sup>

215 *Family Violence Protection Act 2008* (Vic) s 18(3); *Domestic and Family Violence Protection Act 1989* (Qld) s 69(3).

216 Consultation Paper, Question 5–10.

217 National Legal Aid, *Submission FV 232*, 15 July 2010; A Cannon, *Submission FV 137*, 23 June 2010.

218 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

219 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

220 A Cannon, *Submission FV 137*, 23 June 2010.

221 Victorian Government, *Submission FV 120*, 15 June 2010.

222 Queensland Law Society, *Submission FV 178*, 25 June 2010.

223 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

9.136 The NT Legal Aid Commission noted that the fact that NT police powers were conferred by a broad range of legislation was ‘confusing’. The laws should be consolidated

into a single item of legislation, which more clearly, systematically and consistently sets out the scope and nature of police powers of entry, search, apprehension, detention and so on.<sup>224</sup>

9.137 With respect to the scope of police powers, the Commissions expressed a particular interest in whether limited express legislative powers of entry for family violence in some jurisdictions, particularly SA, were causing difficulties.

9.138 The South Australian Government submitted that SA powers of entry and search were comparatively unlimited. It said the option developed by Maurine Pyke QC, cited above, did not seem to account for the existing power of entry and search in s 67 of the *Summary Offences Act 1953* (SA), which was ‘deemed sufficient for forced entry’.<sup>225</sup> The Commissioner for Victims’ Rights (SA) also noted that this section might be sufficient, but said:

Notwithstanding, it seems to me that the High Court has over time indicated that Parliament should state police authorities in statute law, rather than those authorities be assumed.<sup>226</sup>

9.139 Stakeholders did not address two further issues identified in the Consultation Paper about: whether there is a concern that police proceed by way of summons rather than arrest in some family violence cases; and the varied maximum duration of holding powers.<sup>227</sup>

#### ***Direction power***

9.140 In the Consultation Paper, the Commissions proposed that state and territory legislation which confers on police powers to detain persons who have used family violence should empower police to remove such persons from the scene of the family violence or direct them to leave the scene and remain at another specified place for the purpose of the police arranging for a protection order.<sup>228</sup>

9.141 Nearly all submissions that addressed this proposal, supported it.<sup>229</sup> The Victorian Government submitted that police holding powers were introduced in 2006,<sup>230</sup> that no complaints have been made, and the powers have helped to protect victims. The Victorian Aboriginal Legal Service Co-operative supported the Victorian practice

224 Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

225 Government of South Australia, *Submission FV 227*, 9 July 2010.

226 Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010.

227 Consultation Paper, [5.121].

228 Ibid, Proposal 5–6.

229 For example, National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010.

230 Victorian Government, *Submission FV 120*, 15 June 2010.

of removing alleged offenders from the scene of the violence.<sup>231</sup> The Police Association of NSW criticised the ‘limited’ power in NSW and submitted that persons ‘can only be directed to remain at the location as specified by a police officer and there is no penalty attached for breaching that direction’.<sup>232</sup>

9.142 Remote communities present particular difficulties in practice with respect to direction powers. The Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service submitted that there may be few other places in a small community for someone to go, and if detained, they might need to be taken to a remand centre or prison many hundreds of kilometres away.<sup>233</sup>

#### ***Detention power to secure safety***

9.143 The Commissions also asked whether state and territory legislation that confers on police a power to detain persons who have used family violence, should also empower police to detain such persons for a reasonably short period for the purpose of making arrangements to secure the safety of victims and affected children to the extent that it does not already do so.<sup>234</sup>

9.144 Most submissions that addressed this question, answered it in the affirmative.<sup>235</sup> One person, for example, submitted that this would give victims the chance to remove their personal belongings and pets without the danger of further assault.<sup>236</sup> National Legal Aid drew attention to the immediate safety needs of victims:

In some circumstances it is impossible to make the former residence sufficiently safe for a victim and/or children, and in those circumstances it is necessary to use the time that a person is in detention to put arrangements in place for the victim to flee. In other cases the victim actively wants to leave the house with the children rather than remain usually for reasons of safety, protection and secrecy.<sup>237</sup>

9.145 The Victorian Government supported the idea and suggested that the Victorian legislation, which provides police with this detention power, should be the model:

It empowers police to either direct or detain a person for a short period of time, allowing victims (and their children, if any) either time to go to a refuge or alternative accommodation if required, or some time away from the perpetrator to seek support from a family violence worker. It also empowers police to direct or detain an offender for the purposes of applying for an intervention order on the victim’s behalf and serving it on the perpetrator at the time without the perpetrator avoiding service.<sup>238</sup>

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231 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

232 Police Association of New South Wales, *Submission FV 145*, 24 June 2010.

233 Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

234 Consultation Paper, Question 5–11.

235 For example, Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

236 Confidential, *Submission FV 69*, 2 June 2010.

237 National Legal Aid, *Submission FV 232*, 15 July 2010.

238 Victorian Government, *Submission FV 120*, 15 June 2010.

9.146 However, there were some concerns about using this power in response to non-criminal behaviour. The Law Society of NSW, for example, submitted that:

Interfering with the liberty of another person should only be exercised in those circumstances where the police are exercising statutory powers of arrest and bail determination. This power should not be extended to circumstances which may not involve the commission of a criminal offence.<sup>239</sup>

9.147 Similarly, Legal Aid NSW submitted that only ‘in very limited circumstances and for a very short period of time’ should a person be able to be detained for something ‘not linked to an offence’.<sup>240</sup> Some criminal lawyers also believed the time for detention should be fixed, so that ‘arguments as to what is reasonably practicable do not arise’.<sup>241</sup>

9.148 Submissions from Queensland and Tasmania suggested that there were appropriate safeguards in these jurisdictions. The Queensland Law Society said there were ‘adequate means’ under the Queensland legislation:

The requirement under section 69 of the Queensland Act currently is very wide ... If police believe that there is a danger of personal injury or damage to property then that is an adequate ground to take a respondent into custody.<sup>242</sup>

9.149 The Legal Aid Commission of Tasmania considers that the Tasmanian legislation protects victims, ‘without having a greater-than-necessary impact upon alleged offenders’.<sup>243</sup>

9.150 Notwithstanding broad support for a limited power of detention, some stakeholders drew attention to the practical difficulties of implementing this in remote communities. To detain a person in a remote community, for example, might mean having to take them to a remand centre or prison hundreds of kilometres away.<sup>244</sup> It was also submitted that particular care should be taken when detaining Indigenous offenders.<sup>245</sup>

### *Commissions’ views*

#### *Entry, search and seizure*

9.151 Police powers of entry, search and seizure in relation to family violence appear to be satisfactory. Stakeholders have not expressed any great concerns with the overall scope of these powers. In addition, the Commissions note the submission of the South Australian Government that police powers of entry are accounted for in s 67 of the *Summary Offences Act 1953* (SA). Accordingly, the Commissions make no recommendations about powers of entry, search and seizure.

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239 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

240 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

241 National Legal Aid, *Submission FV 232*, 15 July 2010.

242 Queensland Law Society, *Submission FV 178*, 25 June 2010.

243 National Legal Aid, *Submission FV 232*, 15 July 2010.

244 Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

245 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

9.152 The Commissions note the NT Legal Aid Commission's submission that NT police powers should be consolidated into one Act and clarified. The Commissions agree that laws should be simplified and consolidated where possible, but consolidating police powers—including powers unrelated to family violence—is beyond the terms of reference for this Inquiry.

#### ***Direction power***

9.153 In the Commissions' view, a police officer must be able to protect persons who appear to be victims of family violence in the short period it should take the officer to apply for a protection order. Victims should not be left exposed when they may feel most at threat—for example at the height of someone's aggressiveness. The presence of police may make some persons more aggressive; victims should not fear that when the police are called, their safety will be jeopardised. Short term protection can be provided by directing the apparent aggressor to leave premises and remain at a specified place. To be effective, such a power would need to be enforceable, should someone refuse to comply. The Commissions consider that this power will not unduly encroach on the liberty of the person thought to have used family violence. The response seems commensurate with the risk.

9.154 While in the Consultation Paper the Commissions proposed the direction power should allow for a period long enough to enable police to arrange for a protection order, arguably, a person should be subject to police direction until the police are satisfied that the victim is safe. If arrangements need to be made for the victim's safety, then an aggressor might need to be subject to a direction order for a short period even after a protection order is put in place. This is the case in Victoria, where the direction order can remain in force if 'a police officer believes on reasonable grounds that it is necessary ... to continue to enable further measures to be taken for the protection of the affected family member'—though usually not for longer than six hours.

9.155 The Commissions note the concerns expressed about the practical implications of the provision in the NSW family violence legislation empowering police in certain circumstances to direct a person who has used violence to remain at the scene of an incident, particularly where the incident occurs in a remote area.<sup>246</sup> There may be serious implications for a victim's safety and wellbeing if the victim is in close proximity to the person who has used violence, particularly in an emotionally charged atmosphere in the aftermath of violence. A victim should be able to remain where he or she is while the police, if necessary, remove the person who has used violence from the scene, or direct that person to leave the scene and remain in another designated place, for the purpose of the police applying for a protection order or issuing a safety notice.

#### ***Detention power to secure safety***

9.156 Detaining a person is a greater encroachment on liberty than directing a person to go and stay at a specified place. It is a power appropriately used for family violence that is criminal. Detaining someone who has committed a crime in a family violence

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246 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 89.

context while arrangements are made to secure the safety of victims is justified. In such cases, police will have existing powers of arrest and detention.

9.157 However, some existing definitions of family violence, and the definition of family violence that the Commissions have recommended, capture non-criminal activity. The Commissions are reluctant to recommend that police powers of detention be extended to deal with non-criminal family violence, even if the person is only to be detained in the short time it might take to secure the safety of victims and their children. Some types of family violence—economic abuse, for example—might not justify police detaining someone or asking someone to leave his or her home immediately. In any event, the types of family violence from which victims might need urgent and immediate short-term protection are likely to involve criminal behaviour. It seems improbable that an aggressor who had used economic abuse, for example, and not physical abuse, would need to be detained while arrangements were made for the victim's safety. The Commissions share the concerns of the Law Society of NSW that detaining persons in these circumstances might not be justified.

**Recommendation 9–4** State and territory family violence legislation should empower police officers, only for the purpose of arranging protection orders, to direct a person who has used family violence to remain at, or go to, a specified place or remain in the company of a specified officer.

### **Identifying the ‘primary aggressor’**

9.158 The Commissions heard concerns throughout the Inquiry that police may sometimes fail to identify the ‘primary aggressor’ and the ‘primary victim’ when attending a scene of family violence. This may mean that victims are wrongly charged with family-violence related offences and inappropriately having protection orders taken out against them.<sup>247</sup> Accurate and comparable data about dual arrests for family violence are not available in Australia, but the number of dual arrests has reportedly increased in the United States (US) since the 1980s.<sup>248</sup>

9.159 Primary aggressor policies arose in the US after mandatory or pro-arrest statutes began to be implemented and police, applying the law strictly, chose to arrest both parties.<sup>249</sup> Mandatory arrest laws in the US, it has been said:

may lead officers to adopt a legalistic orientation. Considering it inappropriate to use discretion, they apply the law in a mechanistic style. Thus, when faced with a

247 NSW Ombudsman, *Domestic Violence Community Stakeholders Forum*, 9 December 2009. See also National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 114 which raises the issue of ‘dual arrests’ of a victim and an offender, following police intervention, and how such action re-victimises victims of family violence.

248 R Braaf, *Arresting Policies: Implications of Pro and Mandatory Arrest Policies for Victims of Domestic and Family Violence* (2008) Australian Domestic & Family Violence Clearinghouse, 3.

249 T Erwin, *When is Arrest Not an Option? The Dilemmas of Predominant Physical Aggressor Language and the Regulation of Domestic Violence* (2004) Battered Women’s Justice Project, 4.

situation that appears to involve two mutual combatants, they opt to arrest both, leaving it to the prosecutor, and perhaps the court, to determine culpability.<sup>250</sup>

9.160 Primary aggressor policies, as Wangmann has argued, require police to look beyond the incident they are presented with and consider ‘a wider contextual framework’—including:

- whether there is a history of violence perpetrated by one party against the other;
- the nature of the injuries sustained by both parties;
- the likelihood of violence in the future; and
- whether one person was acting in self-defence.<sup>251</sup>

The policy is not just about ‘always arresting the guy’, it has been said, but asks police to consider that ‘violence has different meanings in different contexts’.<sup>252</sup>

9.161 In March 2010, the Queensland Department of Communities in its Consultation Paper on the review of Queensland’s family violence legislation, noted problems in identifying the primary aggressor. It asked whether legislation should help identify the primary aggressor or protect the party at risk, noting that some states in the US.<sup>253</sup>

have primary aggressor laws which are designed to reduce the rate of dual arrests by requiring police officers to consider a number of factors such as history of domestic violence, the comparative extent of injuries (where both parties exhibit injuries) and the existence of self-defence.<sup>254</sup>

9.162 In Ohio, for example, to determine who is the ‘primary physical aggressor’, officers are required to consider, in addition to any other relevant circumstances:

- (i) Any history of domestic violence or of any other violent acts by either person...;
- (ii) If violence is alleged, whether the alleged violence was caused by a person acting in self-defense;
- (iii) Each person’s fear of physical harm, if any, resulting from the other person’s threatened use of force against any person or resulting from the other person’s use or history of the use of force against any person, and the reasonableness of that fear;
- (iv) The comparative severity of any injuries suffered by the persons involved in the alleged offense.<sup>255</sup>

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250 E Buzawa, D Faggiani, D Hirschel and A Pattavina, ‘Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?’ (2007–2008) 98 *J. Crim. L. & Criminology* 255, 296 (citations omitted).

251 J Wangmann, “‘She Said ...’ ‘He said ...’: Cross Applications in NSW Apprehended Domestic Violence Order Proceedings”, *Thesis*, University of Sydney, 2009 (citations omitted).

252 T Erwin, *When is Arrest Not an Option? The Dilemmas of Predominant Physical Aggressor Language and the Regulation of Domestic Violence* (2004) Battered Women’s Justice Project, 15.

253 Department of Communities (Qld), *Review of the Domestic and Family Violence Protection Act 1989: Consultation Paper* (2010), 17–18, Question 2.2.1.

254 *Ibid*, 17.

255 *Ohio Revised Code* § 2935.032(A)(1)(a)(ii), 2935.03(B)(3)(d).

9.163 The WA Review of family violence legislation also noted concerns about police issuing orders to both parties, and not always correctly identifying the primary aggressor and the primary victim.<sup>256</sup>

The view put forward by the Western Australia Police is that, although understanding the nature of domestic violence is crucial to ensuring an effective response, ultimately members are only able to respond to the circumstances before them. In ambiguous circumstances, an understanding of who is likely to be the primary aggressor will be a useful guide. However, if the female is the one who clearly appears to be threatening to commit an act of family and domestic violence, the police are obliged to respond to the circumstance before them. According to police, this means that, just as it is not the role of police to take into consideration circumstances that may amount to a defence when considering whether to arrest for the commission of an offence, police are obliged to issue an order against the woman notwithstanding that she may have been subjected to acts of domestic violence many times in the past.<sup>257</sup>

9.164 The WA Review stated that it is evident that police continue to have difficulty in responding to family and domestic violence incidents:

Given the highly charged and emotional atmosphere in these situations that is not surprising. In the ACT service providers attend domestic violence incidents with the police. If the complexity of domestic violence investigation requires the assistance of skilled counsellors, then such a change to police investigation procedures in Western Australia needs to be considered.<sup>258</sup>

9.165 Evidence concerning the impact of primary aggressor policies varies in the United States; fewer women are being arrested in some jurisdictions; in other jurisdictions the arrest rate has continued to rise.<sup>259</sup> One recent study from the US concluded that the impact of primary aggressor legislation on the decision to arrest merited further examination, but found that ‘the passage of a primary aggressor law clearly does not negate the relationship between mandatory arrest laws and higher dual arrest rates’.<sup>260</sup>

### ***Submissions and consultations***

9.166 In the Consultation Paper, the Commissions asked whether there was a need for legislative amendments to provide guidance in identifying the primary aggressor in family violence cases.<sup>261</sup> Most submissions agreed that it was important for police to identify properly the primary aggressors. It was said to be ‘imperative’<sup>262</sup> and that it was ‘critical that police have an understanding of the complex nature of domestic

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256 Department of the Attorney General (WA), *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 21.

257 Ibid, 21–22.

258 Ibid, 22.

259 J Wangmann, “‘She Said ...’ ‘He said ...’: Cross Applications in NSW Apprehended Domestic Violence Order Proceedings”, *Thesis*, University of Sydney, 2009 (citations omitted).

260 E Buzawa, D Faggiani, D Hirschel and A Pattavina, ‘Domestic Violence and Mandatory Arrest Laws: To What Extent Do They Influence Police Arrest Decisions?’ (2007–2008) 98 *J. Crim. L. & Criminology* 255, 296–297 (citations omitted).

261 Consultation Paper, Question 5–12.

262 Queensland Law Society, *Submission FV 178*, 25 June 2010.

violence and the manipulation and power dynamics that are involved'.<sup>263</sup> Women's Legal Service Victoria submitted, for example, that police need to know who is at greater risk and who should be excluded from the home.<sup>264</sup> Sometimes the aggressor gets to the police first; sometimes the victim is not a strong communicator.<sup>265</sup> A female victim might be upset and 'take it out on an attending officer' and thus seem to be the aggressor when, in fact, she is not.<sup>266</sup>

9.167 Centacare Safer Families Support Service submitted that identifying a 'predominant aggressor'

charges officers with the responsibility of determining who has the most potential for doing the most harm, and what actions were done in self-defence. It encourages officers to desist from 'equalizing' the violence or seeing domestic violence as mutual combat. Factors to consider include the history of domestic violence between the people involved, the threats and fear level of each person, and whether either person acted in self defence.<sup>267</sup>

9.168 National Legal Aid submitted that there were 'a number of incidents' in NSW 'where if a proper investigation of the incident had taken place, charges against the victim should not have been laid'. It also submitted that it had anecdotal evidence that in WA 'there are numerous cases where women have been issued with police orders and evicted from their homes despite a history of family violence towards them'.<sup>268</sup> The Wirringa Baiya Aboriginal Women's Legal Centre was also aware, anecdotally,

of a number of incidents where Aboriginal women have been charged for family violence offences, when in fact she has been the primary victim of family violence for a long period of time.<sup>269</sup>

9.169 Wangmann referred to the work of Trish Erwin, who noted that in the US, the language of 'primary' aggressor led police to focus on 'who started it'. So many states and local police departments in the US adopted one of the following phrases: 'predominant physical aggressor', 'principal physical aggressor' or 'dominant aggressor'. However, these changes in terminology have not necessarily brought about the changes sought, Erwin argued:

Predominant physical aggressor language is, in some ways, trying to make the law do what it does not want to do: it is designed to remedy power differentials in the use of violence within intimate relationships, but it is at odds with the goal of the law in providing a neutral standard upon which to determine a legal action, eg probable cause.<sup>270</sup>

263 National Legal Aid, *Submission FV 232*, 15 July 2010.

264 Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

265 Confidential, *Submission FV 164*, 25 June 2010.

266 Confidential, *Submission FV 198*, 25 June 2010.

267 Centacare Safer Families Support Service, *Submission FV 118*, 15 June 2010.

268 National Legal Aid, *Submission FV 232*, 15 July 2010.

269 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

270 T Erwin, *When is Arrest Not an Option? The Dilemmas of Predominant Physical Aggressor Language and the Regulation of Domestic Violence* (2004) Battered Women's Justice Project, 14–15.

9.170 There was some support for giving guidance in determining the primary aggressor in legislation.<sup>271</sup> Reasons included that it might reduce the number of cross-applications<sup>272</sup> and that without legislated practice, police might ‘not pay enough attention to the assessment issues ... in cases where men persuasively present themselves as the primary victim’.<sup>273</sup> The Queensland Law Society considered that it would

focus the minds of judges, police and lawyers as to whether or not it is appropriate for an order to be made and, if so, what the conditions of that order ought to be and/or what punishment there ought to be for a breach of the order. In addition to any other benefit, this may be of benefit in any *Family Law Act* proceedings between the parties.<sup>274</sup>

9.171 However, many submissions thought that the problem should be addressed through education, training, and police codes of practice,<sup>275</sup> and not in legislation,<sup>276</sup> although it was recognised that this would not be easy because ‘this is a very complex area and training should be comprehensive’.<sup>277</sup>

9.172 Submissions also stressed the value of counsellors and other family violence workers helping to identify primary aggressors.<sup>278</sup> The Victorian Government also suggested that ‘social context information for judicial officers’ could be provided in a model bench book.<sup>279</sup>

9.173 One group that campaigns for the recognition of men as victims of family violence submitted that police should be given discretion, and should not always have to identify the primary aggressor, because ‘mutual or reciprocal violence is more common than one-sided or unilateral violence, and often there simply is no primary

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271 See, eg, Berry Street Inc, *Submission FV 163*, 25 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

272 Queensland Government, *Submission FV 229*, 14 July 2010.

273 No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

274 Queensland Law Society, *Submission FV 178*, 25 June 2010.

275 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; J Wangmann, *Submission FV 170*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

276 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

277 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

278 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

279 Victorian Government, *Submission FV 120*, 15 June 2010.

aggressor’—although in other cases, ‘the definition is entirely appropriate’.<sup>280</sup> The Christian group Family Voice Australia was also concerned about gender bias:

Given the widespread misconception that women are the sole victims of domestic violence any insistence that a primary aggressor be identified in every case of cross-applications is likely to lead to further injustice against male victims.<sup>281</sup>

9.174 The Inner City Legal Centre and The Safe Relationships Project submitted that it may be even more difficult to identify the ‘primary aggressor’ where there is violence between same-sex couples. In such cases,

it seems it will always be difficult to identify who is the primary aggressor. That said, if police question both parties separately, asking domestic violence screening questions and questions about the history of the relationship, we think that would be beneficial in working out who is the primary aggressor.<sup>282</sup>

9.175 If police are given additional obligations, there may be resource implications, noted the Queensland Government.

Requiring police to utilise evidence kits, take photographs and video recordings and obtain statements from independent witnesses would increase the time and cost associated with attending domestic violence incidents. Clearly, this needs to be measured against the benefit that identification of the primary aggressor may bring.<sup>283</sup>

### *Commissions’ views*

9.176 The Commissions note the concerns of some stakeholders that police might sometimes fail to identify primary aggressors and primary victims, and that this can result in victims being inappropriately charged with crimes or having protection orders made against them. The Commissions consider that this problem can best be avoided through improved police education and training about the dynamics of family violence.<sup>284</sup>

9.177 The Commissions consider that guidance to police about identifying primary aggressors need not be in legislation. The task of identifying ‘primary aggressors’ and ‘primary victims’ can be difficult and nuanced and better addressed through education, training, and police codes of practice.

9.178 The phrase ‘primary aggressor’, however, may imply that there must be a secondary aggressor, that is, that both parties might at least partly have been aggressive. Though this will sometimes be the case, it will not always be so. As a matter of semantics, it might not even be possible to have a primary and secondary aggressor, where there are only two parties to a dispute, because the term ‘aggressor’

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280 One in Three Campaign, *Submission FV 35*, 12 May 2010.

281 Family Voice Australia, *Submission FV 75*, 2 June 2010.

282 Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192*, 25 June 2010.

283 Queensland Government, *Submission FV 229*, 14 July 2010.

284 Chs 31 and 32 consider broader questions of police education and training, and the benefits that may flow from having police officers or police units that specialise in family violence.

means ‘someone who attacks first; someone who begins hostilities; an assailant or invader’;<sup>285</sup> ‘a person who attacks without provocation’.<sup>286</sup>

9.179 Accordingly, the Commissions recommend that police be trained to identify persons who have used family violence and persons who need to be protected from family violence. This formulation reflects the importance of identifying those who are most in need of protection.

9.180 The Commissions also endorse the suggestion made by the WA Review of family violence legislation that consideration should be given to having skilled counsellors attend family violence incidents together with police.

**Recommendation 9–5** Police should be trained to better identify persons who have used family violence and persons who need to be protected from family violence, and to distinguish one from the other. Guidance should also be included in police codes of practice and guidelines.

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285 S Butler, *Macquarie Dictionary Online* Macquarie Dictionary Publishers <<http://www.macquariedictionary.com.au>> at 15 September 2010.

286 J Hughes, P Mitchell and W Ramson, *The Australian Concise Oxford Dictionary* (2nd ed, 1992).

# 10. Bail and Family Violence

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## Contents

Introduction	411
Description and purpose of bail	411
Criteria for determining bail	412
Bail presumptions	413
Bail conditions and protection order conditions	420
Protection through bail conditions or a protection order	422
Informing victims about bail decisions	425

## Introduction

10.1 Persons subject to a protection order will sometimes be charged with a criminal offence and a decision will be made about whether they should be released on bail, and if so, what conditions they should be subject to while on bail. The criminal offence they are charged with may have been an incident of family violence that prompted the protection order, another incident of criminal family violence, or a crime unrelated to family violence.

10.2 After briefly describing bail and its purposes, including bail in the context of family violence, this chapter considers three important ways in which bail and family violence laws interact. The first concerns the question of whether there should be a presumption for or against the granting of bail for crimes committed in a family violence context. The second concerns bail conditions and whether they can conflict with family violence protection order conditions.<sup>1</sup> Such conflicts and ambiguity may cause confusion and compromise the safety of protected persons. Finally, the chapter considers whether victims of family violence are properly informed about bail decisions and understand what the conditions of bail mean and how they might interact with a protection order.

## Description and purpose of bail

10.3 Bail is a decision on the liberty or otherwise of the accused, between the time of arrest and verdict.<sup>2</sup> Bail is, in theory, ‘process-oriented’, aiming to ensure that the accused reappears in court either to face charges or be sentenced.<sup>3</sup> A decision to grant

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1 The types of conditions that can be imposed pursuant to a protection order are discussed in Ch 11.

2 M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (2005), 117.

3 D Chappell and P Wilson, *Australian Crime and Criminal Justice* (2005), 147.

bail is made by either the police or the courts, and certain conditions or requirements may be attached to the grant.<sup>4</sup>

10.4 The *International Covenant on Civil and Political Rights* (ICCPR), to which Australia is a signatory, states that:

it shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial.<sup>5</sup>

10.5 The purpose of refusing bail is to protect the community and to reduce the likelihood of further offending,<sup>6</sup> and should not be used to punish or coerce the accused into a course of action.<sup>7</sup> A person who is on bail before trial has not been convicted of an offence, and this accords with the principle of the presumption of innocence.<sup>8</sup>

## **Criteria for determining bail**

10.6 While the criteria for granting bail are generally prescribed by statute, they have their foundations in the common law. The primary factor in determining bail is the likelihood of the accused failing to appear.<sup>9</sup> In determining whether a person is likely to appear, certain matters must generally be taken into account, such as any previous failure to answer bail and the person's background and family ties.<sup>10</sup> Other considerations include the:

- seriousness of the offence;
- protection of the victim;
- protection of the community from further offending;
- strength of the prosecution's case;
- severity of the possible sentence;
- probability of conviction;
- prior criminal history of the accused;
- potential interference with witnesses;
- court delay;

<sup>4</sup> The bail legislation of the states and territories specifies what conditions may be attached. *Judicary Act 1903* (Cth) s 8 provides that the bail laws of each state and territory apply to federal offences tried in that particular state or territory.

<sup>5</sup> *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 9(3). Other aspects of the ICCPR are noted in Ch 2.

<sup>6</sup> D Chappell and P Wilson, *Australian Crime and Criminal Justice* (2005), 147.

<sup>7</sup> See *R v Greenham* [1940] VLR, 239; *R v Mahoney-Smith* [1967] 2 NSW, 158.

<sup>8</sup> D Chappell and P Wilson, *Australian Crime and Criminal Justice* (2005), 147; M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (2005), 118.

<sup>9</sup> See *Re Robinson* (1854) 23 LJQB 286; *R v Appleby* (1966) 83 WN 300; *R v Mahoney-Smith* [1967] 2 NSW, 158; *Burton v The Queen* (1974) 3 ACTR 77, 78.

<sup>10</sup> See, eg, *Bail Act 1978* (NSW) s 32(1).

- requirements for preparing a defence; and
- view of the police and prosecution.<sup>11</sup>

10.7 Legislative provisions governing bail may also require officers to consider specified factors in making bail decisions, such as:

- the safety or physical protection of a victim or other person, or a victim's concerns about the need for protection;<sup>12</sup>
- the likelihood of contravening a protection order;<sup>13</sup>
- the likelihood of injury being caused to, or threats made against, a victim;<sup>14</sup>
- any available rehabilitation program assessment;<sup>15</sup>
- the interests of the accused, having regard to matters such as whether the accused is injured or has special needs arising from an intellectual disability or mental illness;<sup>16</sup>
- the person's demeanour;<sup>17</sup> and
- the availability of suitable accommodation for the victim and any affected child.<sup>18</sup>

## Bail presumptions

10.8 A person arrested for an offence related to family violence may be released on bail, either by the police or the court. This could be dangerous for a victim of family violence. Special bail laws have been enacted that might 'tend to counteract the prevalent civil libertarian bias and reverse the onus in general bail legislation towards releasing an arrested person on bail'.<sup>19</sup>

10.9 There are three broad ways a bail presumption can operate: there can be a presumption *for* bail; a presumption *against* bail; or *no* presumption either way. Because there is generally a pre-existing general presumption for bail, one option is often referred to as 'removing the presumption in favour of bail'—but this has the same outcome as the no presumption option.

11 See, eg, M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (2005), 117.

12 *Bail Act 1985* (SA) s 10(4); *Justices Act 1959* (Tas) ss 34(2), 35(2), 106F(1A); *Bail Act 1992* (ACT) ss 9F, 23A; *Bail Act 1982* (NT) s 24(3)–(6). Prosecutorial guidelines for family violence offences in NSW also require the prosecutor to put before the bail authority a victim's need or perceived need for protection: Office of the Director of Public Prosecutions (NSW), *ODPP Prosecution Guidelines* <[www.odpp.nsw.gov.au/guidelines/guidelines.html](http://www.odpp.nsw.gov.au/guidelines/guidelines.html)> at 12 March 2010, Appendix E.

13 *Bail Act 1985* (SA) s 10(1)(b)(iv), as amended by *Intervention Orders (Prevention of Abuse) Act 2009* (SA) sch 1, cl 2.

14 *Bail Act 1982* (NT) s 24(1)(d) (where person arrested for breach of a protection order).

15 *Family Violence Act 2004* (Tas) s 12.

16 *Bail Act 1978* (NSW) s 32(1)(b).

17 *Family Violence Act 2004* (Tas).

18 Ibid.

19 Thomson Reuters, *The Laws of Australia*, vol 17 Family Law, 17.5, [28] (as at 7 January 2009).

10.10 Presumptions in favour of bail are displaced in New South Wales (NSW) for family violence offences and breach of protection orders in circumstances where the accused has a history of violence; has previously been violent to the victim of the alleged offence in the past or has failed to comply with a protective bail condition.<sup>20</sup> Presumptions in favour of bail are also displaced in certain family violence circumstances in Victoria,<sup>21</sup> the ACT,<sup>22</sup> and the Northern Territory (NT).<sup>23</sup>

10.11 For police bail, in the ACT, there is a presumption *against* granting bail for family violence offences. The *Bail Act 1992* (ACT) provides that police must not grant bail to a person accused of a domestic violence offence unless satisfied that the person ‘poses no danger to a protected person while released on bail’.<sup>24</sup>

10.12 The South Australian family violence legislation amends the *Bail Act 1985* (SA) s 10A to include a presumption against bail for certain family violence offences involving physical violence or the threat of violence.<sup>25</sup>

10.13 The family violence legislation of Tasmania provides that a person is not to be granted bail unless a court, judge or police officer is satisfied that the release of the person on bail would not be likely to adversely affect the safety, wellbeing and interests of an affected person or affected child.<sup>26</sup> The 2008 review of Tasmanian family violence legislation noted that a number of stakeholders expressed concern that ‘the Act weighs against the rights of the accused’. The most criticism

was levelled at the bail provision s 12(1), and that the onus of proof to grant bail is effectively reversed by the operation of the Act. It should be noted, however, that there is a presumption against the granting of bail where there is a history or threat of domestic violence in most Australian jurisdictions.<sup>27</sup>

10.14 The review noted that s 12 has attracted criticism in the Supreme Court of Tasmania<sup>28</sup>—criticism illustrated by Justice Underwood, who has written:

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20 *Bail Act 1978* (NSW) s 9A.

21 *Bail Act 1977* (Vic) s 4(4)(b), (ba) (stalking and contraventions of protection orders involving violence or threats to use violence). The Victorian Government is now considering and implementing parts of the Victorian Law Reform Commission’s 2007 review of the *Bail Act*: Victorian Government, *Submission FV 120*, 15 June 2010.

22 *Bail Act 1992* (ACT) s 9B (breach of a protection order, if the person has in the previous 10 years been found guilty of an offence involving violence or the threat of violence).

23 *Bail Act 1982* (NT) s 8(1)(aa) (breach of a protection order where accused found guilty in preceding 10 years of specified offences, including serious offences).

24 *Bail Act 1992* (ACT) s 9F. Protected person means a person against whom the alleged conduct making up the offence was directed and includes any other relevant person in relation to the accused person: s 9F(6). Also, s 14 provides that an authorised person must not grant bail to person accused of the family violence offence of murder. Courts must not grant bail to a person accused of murder, ‘unless satisfied that special or exceptional circumstances exist favouring the grant of bail’: s 9C.

25 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) sch 1.

26 *Family Violence Act 2004* (Tas) s 12. ‘Affected person’ is defined in s 4 to mean ‘a person against whom family violence is directed’. Section 12 also sets out factors which a court must consider in making a bail decision, including the availability of suitable accommodation for the victim and any affected child.

27 Urbis, *Review of the Family Violence Act 2004* (2008), prepared for the Department of Justice (Tas), 15.

28 *Re S* [2005] TASSC 89; *S v White* [2005] TASSC 27; *Olsen v Tasmania* [2005] TASSC 40.

It is one thing to take into account the safety, wellbeing and interests of an affected person or an affected child, it is quite another to refuse liberty unless the defendant discharges the onus of proof cast on him (or her but it is invariably him) by s 12(1).<sup>29</sup>

10.15 There are no provisions in the *Bail Act 1980* (Qld) that cater specifically for family violence cases.<sup>30</sup> The *Bail Act 1982* (WA) restricts the jurisdiction to grant bail in respect of breaches of protection orders in urban areas.<sup>31</sup>

### ***Submissions and consultations***

10.16 In the Consultation Paper, the Commissions asked whether in practice the application of provisions that contain a presumption against bail, or displace the presumption in favour of bail, in family violence cases, struck the right balance between ensuring the safety and wellbeing of victims, and safeguarding the rights of accused persons.<sup>32</sup> The Commissions also asked about the presumption against bail in the Tasmanian family violence legislation.

10.17 Some submissions said the balance was right, without expressing a preference for either a presumption against bail or for no presumption.<sup>33</sup> Others provided specific comments in relation to these options. Some stressed that bail should be a matter of judicial discretion.<sup>34</sup>

### ***No presumption***

10.18 Some stakeholders submitted that the balance was best struck by removing the presumption in favour of bail—that is, by having no presumption either way.<sup>35</sup> Professor Julie Stubbs considered that this ‘should draw the attention of the bail decision makers to the need to give this due consideration without unduly limiting their discretion’.<sup>36</sup> The Local Court of NSW submitted that this would ‘strike the right balance’, because:

The onus is placed upon the accused person to show why a grant of bail is appropriate, and the Court is often able to craft conditions around the need for the

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29 Urbis, *Review of the Family Violence Act 2004* (2008), prepared for the Department of Justice (Tas), 15.  
30 Thomson Reuters, *The Laws of Australia* vol 17 Family Law, 17.5, [32] (as at 7 January 2009).

31 *Bail Act 1982* (WA) s 16A(3). See also sch 1, pt C, cls 3A, 3B (presumption against bail where serious offence committed while accused on bail for another serious offence unless exceptional circumstances; in deciding whether there are exceptional circumstances in cases of breach of a protection order, there is an obligation on the judicial officer to give the person for whose protection the order was made an opportunity to give evidence on matters relating to the protection order).

32 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 5–13.

33 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010.

34 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

35 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.  
36 J Stubbs, *Submission FV 186*, 25 June 2010.

protection of the victim. Bail conditions will often be reflective of the conditions of a protection order.<sup>37</sup>

10.19 The Magistrates' Court and Children's Court of Victoria submitted it was not aware of any cases that suggest the balance was not right in the *Bail Act 1977* (Vic) (in which the presumption in favour of bail is displaced for stalking and contraventions of protection orders involving violence or threats of violence). However, the courts submitted, legislation may provide better protection for victims

if provisions of this nature were not limited to contraventions of intervention orders and included a set of principles to be applied in deciding all bail applications arising from family violence offences.<sup>38</sup>

### ***Presumptions against***

10.20 Some stakeholders said they supported a presumption against bail for family violence offences.<sup>39</sup> For example, the Domestic Violence Prevention Council (ACT) considered that this provided better protection for victims:

There are too many circumstances where the rights of the accused person have been favoured above those of the victims and the safety of the victims has been compromised. There are many examples of this nationally, some of which have resulted in the murder or murder/suicide of families. We have found in the ACT that the operation of the presumption against bail has effectively worked to protect victims without unnecessarily prejudicing the accused.<sup>40</sup>

10.21 Women's Legal Service Victoria commented that safety concerns were especially important in a family violence context. It supported a presumption against bail, in light of the risk of offenders returning home and using more violence 'at a time where the risk of violence is higher as noted by various post separation articles and studies'.<sup>41</sup>

10.22 The Wirringa Baiya Aboriginal Women's Legal Centre also supported a presumption against bail and commented in particular on the implications for Indigenous women:

While there is a justifiable concern in the Aboriginal community about the numbers of Aboriginal people in custody, we speak to many Aboriginal women who are upset about offenders of family violence being given bail.<sup>42</sup>

10.23 For other stakeholders, however, a presumption against bail had various dangers. Criminal law lawyers at National Legal Aid said it would unduly compromise the rights of accused persons.<sup>43</sup> Further, a number of submissions stressed that a

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37 Local Court of NSW, *Submission FV 101*, 4 June 2010.

38 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

39 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

40 Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

41 Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

42 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

43 National Legal Aid, *Submission FV 232*, 15 July 2010.

presumption against bail might act as a disincentive for victims to report offences.<sup>44</sup> One women's legal service said that except in extreme cases and repeat offences, 'it would usually be in the best interests of the whole family for the accused to remain in their employment'.<sup>45</sup>

10.24 The North Australian Aboriginal Justice Agency (NAAJA) submitted that if there were a presumption against bail, first-time offenders and persons who have committed 'relatively trivial family violence matters, such as contacting the protected person by email or text message' would be refused bail.<sup>46</sup> The agency suggested that the criteria in sections 24 and 26 of the *Bail Act 1982* (NT), coupled with appropriate bail conditions, strike the right balance and it 'would not support any further tightening of bail provisions in relation to breaches of domestic violence orders'.<sup>47</sup> NAAJA was particularly concerned about any proposal to introduce a presumption against bail whenever someone is charged with breaching a protection order, and noted the practical difficulties that could ensue:

it is impossible to determine at the bail stage of proceedings the circumstances of the offence including its nature and seriousness and the strength of the prosecution case. Given that most family violence matters are decided on 'oath on oath' evidence, the strength of the case generally falls on the performance of the witnesses at hearing. The needs of the person to be free to prepare for his appearance in court, obtain legal representation, and be free for any other lawful purpose is a serious consideration for the court.<sup>48</sup>

10.25 NAAJA also warned of the 'extreme injustices that can arise from overly punitive bail provisions', for example in the cases of:

(a) those pleading not guilty to breach domestic violence order charges who may feel compelled to plead guilty to avoid lengthy remands in custody following refusals of bail, or (b) those who assert their innocence and are refused bail and spend several months remanded in custody pending hearing (when they may subsequently be acquitted or not sentenced to a term of imprisonment that equates to the time they spent on remand).<sup>49</sup>

10.26 Regarding the prohibition in the ACT on police granting bail for domestic violence offences 'unless satisfied that the person poses no danger to a protected person while released on bail', National Legal Aid submitted that this:

can sometimes lead to injustice because it seems police are reluctant to make a decision in relation to bail preferring to leave it to the Court to decide. This has resulted in children who exhibit challenging behaviours being refused bail by police.<sup>50</sup>

<sup>44</sup> J Stubbs, *Submission FV 186*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; A Cannon, *Submission FV 137*, 23 June 2010; Confidential, *Submission FV 109*, 8 June 2010.

<sup>45</sup> Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

<sup>46</sup> North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010.

<sup>47</sup> Ibid.

<sup>48</sup> Ibid.

<sup>49</sup> Ibid.

<sup>50</sup> National Legal Aid, *Submission FV 232*, 15 July 2010.

### ***Presumption for***

10.27 The Law Society of NSW was opposed to the erosion of the presumptions in favour of bail, which it said ‘usually follows an horrific case and is often more a politically charged reaction to public opinion than a carefully considered response’.<sup>51</sup>

10.28 In Queensland, the presumption in favour of bail is not removed for family violence offences. The Queensland Government submitted that the:

legislative framework of the *Bail Act 1980* provides protection to victims as well as upholding the presumption of innocence for people charged with offences.<sup>52</sup>

10.29 The Queensland Law Society also did not think the Queensland test needed to be changed. These alleged offenders usually comply with bail conditions, it submitted, because, unlike many acts of family violence, a breach of a bail condition will almost certainly result in imprisonment.<sup>53</sup>

### ***The Tasmanian legislation***

10.30 In the Consultation Paper, the Commissions expressed an interest in hearing about whether the presumption against bail in Tasmania should be modified or narrowed.<sup>54</sup> National Legal Aid submitted that ‘in practice the presumption does not actually reverse the onus of bail, it requires the courts to be satisfied about the victim’s safety and where this is the case the offender will be bailed’.<sup>55</sup> This approach, it said, ‘adequately reflects the complexities of family violence, and the degree of risk to which a victim can be potentially exposed’.<sup>56</sup> National Legal Aid also discussed the experience in practice of the application of the presumption, noting that though s 12 of the Tasmanian family violence legislation initially led to a large number of offenders being remanded in custody where they otherwise would not have been, this is no longer the case.

The factors, which a court is able to take account of, are not limited, and allow for the exercise of discretion by the court. Tasmanian Supreme Court decisions and continuing application of the section by the Magistrates has continued to guide court decisions in relation to bail. This has led to a considerable change in the court’s approach to bail decisions and a decrease in offenders being detained without good cause. Courts are requiring reliable material on which to base their decisions, and flexibility to respond to the circumstances of the case ...

In the north of Tasmania it appears that such factors as the willingness of the victim to take part in proceedings, the seriousness of the offending, and the history of the violence between the parties for example are properly being examined in the application of s 12. The effect of this is that it is rare for offenders to be locked up in situations where victims are, for example, unwilling to give evidence in relation to the criminal charges.<sup>57</sup>

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51 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

52 Queensland Government, *Submission FV 229*, 14 July 2010.

53 Queensland Law Society, *Submission FV 178*, 25 June 2010.

54 Consultation Paper, 263.

55 National Legal Aid, *Submission FV 232*, 15 July 2010.

56 Ibid.

57 Ibid.

***Commissions' views***

10.31 Crimes related to family violence are unlike many other crimes. For one thing, they are more likely to have a history—perhaps a long history—of fear, coercion and control. Where a crime is committed in the context of family violence, the accused will know the victim; he or she might often want to return to the victim; the victim and the accused may have had children together; the victim and the accused might live in the same home. All these factors suggest that a person who has committed a crime in the context of family violence might, if granted bail, be more likely to see the victim—and so endanger the victim—than a person accused of a crime against a stranger. When granting bail, judicial officers must therefore be alert to the importance of providing for the safety of victims and related children.

10.32 The Commissions do not, however, consider that the safety of women and children is best secured by creating a presumption against bail for all crimes committed in a family violence context. If, as some have submitted, a presumption against bail acts as a disincentive to victims to report family violence crimes, then the presumption might sometimes indirectly undermine the safety of victims. Some victims will also not want alleged offenders incarcerated—this appears to be of particular concern to some Indigenous persons. Furthermore, a presumption against bail for all family violence offences appears to deny unfairly the accused the presumption of innocence.

10.33 A presumption against bail also seems inappropriate for some crimes in a family violence context. Without diminishing the seriousness of any type of breach of a protection order, it would seem that a breach of a contact condition of a protection order that does not involve any family violence, particularly where the protected person invited the contact uncoerced, might not justify a presumption against bail.

10.34 For these reasons, the Commissions do not support presumptions *against* bail for all crimes committed in a family violence context. This is not to say that there should not be a presumption against bail for *some* family violence crimes, such as murder.

10.35 The Commissions note National Legal Aid's submission that the Tasmanian courts' approach to s 12 of the Tasmanian legislation has changed and that fewer alleged offenders are now being detained without good cause. However, in the Commissions' view, and for the reasons outlined above, the Tasmanian legislation does not seem to strike the right balance between protecting victims and giving an accused the presumption of innocence, particularly as it might create a presumption against bail for economic and emotional abuse. The Commissions therefore recommend that it be amended.

10.36 In the Commissions' view, the balance is best struck by generally maintaining a presumption in favour of bail—consistent with the presumption of the accused's innocence—but removing the presumption in favour in certain specific circumstances. The Commissions make no specific recommendation about what those circumstances should be, but suggest that they would include, for example, where an accused has been violent against the victim in the past—as is the case in NSW.

10.37 The Commissions are also somewhat concerned with the ACT provision that provides that police must refuse bail for domestic violence offences ‘unless satisfied that the person poses no danger to a protected person while released on bail’—particularly if police do not try to ascertain whether the victim will be in danger, but simply leave the decision to the court. Persons might then be incarcerated unnecessarily in the period between arrest and when the court hears the matter.

**Recommendation 10–1** State and territory legislation should not contain presumptions against bail on the grounds only that an alleged crime occurred in a family violence context.

## Bail conditions and protection order conditions

10.38 Bail conditions may be imposed that provide for the protection of victims of crime and others. These conditions may be the same as, or similar to, conditions attached to an existing family violence protection order. For example, the *Bail Act 1992* (ACT) provides that a person charged with a family violence offence and released on bail may not, among other things:

- contact, harass, threaten or intimidate or cause someone else to engage in such behaviour against a stated person;
- be on premises where a stated person lives or works;
- be within a specified distance of the stated person; and
- enter or remain at home if the person is under the influence of alcohol or other drug and lives at that home with another person.<sup>58</sup>

10.39 The *Bail Act 1978* (NSW) provides that an accused person may be required to enter into an agreement to observe specified requirements as to his or her conduct while at liberty on bail.<sup>59</sup>

10.40 The conditions of bail may also be the same as those imposed by a protection order under family violence legislation.<sup>60</sup> For example, the *Bail Act 1994* (Tas) expressly provides that bail conditions may include any condition of a protection order or police-issued ‘family violence order’.<sup>61</sup>

10.41 In practice, bail conditions can be imposed in parallel to conditions imposed by a protection order. Alternatively, a bail condition can be imposed that requires an accused to comply with the conditions of a protection order, with the consequence that a breach of the protection order also amounts to a breach of bail.

58     *Bail Act 1992* (ACT) s 25(4)(f).

59     *Bail Act 1978* (NSW) s 36(2)(a).

60     The types of conditions that can be imposed pursuant to a protection order are discussed in Ch 11.

61     *Bail Act 1994* (Tas) s 5(3A) (ba).

### **Submissions and consultations**

10.42 In the Consultation Paper, the Commissions asked how often inconsistent bail requirements and protection order conditions were imposed on persons accused of family violence offences.<sup>62</sup> It is unclear from submissions how often these inconsistencies arise. There was some evidence—mostly anecdotal—that inconsistencies occur often.<sup>63</sup> Others stakeholders said the conditions were usually consistent.<sup>64</sup> It was submitted the question was important, but might need further research.<sup>65</sup> On balance, the submissions suggest that inconsistencies occur, but not all that commonly.

10.43 National Legal Aid, for example, suggested that inconsistencies do occur, but usually where bail conditions have been imposed prior to the conditions of the protection order being determined at the first mention. If the prosecutor or legal practitioner does not raise the inconsistency or apply for a change in bail conditions, inconsistent conditions might continue.<sup>66</sup>

10.44 One submission blamed inconsistencies on ‘poor record keeping or information systems not properly communicating with each other’.<sup>67</sup>

10.45 The Local Court of NSW and the Magistrates’ Court and Children’s Court of Victoria identified particular circumstances in which inconsistencies were likely to occur. The Local Court of NSW said inconsistencies were more likely to occur where police, rather than the court, grant bail.<sup>68</sup> The Court ‘frequently deals with matters that involve both a criminal prosecution and an application for a protection order, and in such instances will seek to ensure that the matters travel together and/or will enquire as to the status of one when dealing with the other’.<sup>69</sup>

10.46 The Magistrates’ Court and Children’s Court of Victoria said inconsistencies happen ‘from time to time’, and are more likely to occur when criminal proceedings and protection order proceedings are heard separately. This was an ‘argument for integrated lists involving both family violence criminal offences and family violence protection orders’.<sup>70</sup>

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62 Consultation Paper, Question 5–15.

63 Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010.

64 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010.

65 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

66 National Legal Aid, *Submission FV 232*, 15 July 2010.

67 Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010.

68 Local Court of NSW, *Submission FV 101*, 4 June 2010.

69 Ibid.

70 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

***Commissions' views***

10.47 Bail conditions and protection order conditions should be consistent. Where they are inconsistent and victims and accused persons do not understand how they work and interact, then conditions can be inadvertently breached and ambiguities can be deliberately exploited. This can compromise the safety of victims. This may also have serious consequences for accused persons—breaching a protection order is a criminal offence; breaching a bail condition might bring the accused back before court, where the accused may be refused bail and incarcerated.

10.48 Bail conditions that require an accused to abide by the conditions contained in an existing protection order will often avoid inconsistencies. But this simple formula for consistency should not be adopted at the expense of protecting victims.

10.49 Inconsistencies could be avoided, in the Commissions' view, if decision makers—including police and courts—had access to and used a national protection order database when imposing bail conditions.<sup>71</sup> This database could be consulted whenever bail was granted by a court or by police.

10.50 Courts, police and prosecutors that specialise in family violence are also more likely to be alert to the importance of ensuring bail conditions are consistent with protection order conditions. Conditions are also more likely to be consistent if a specific criminal and civil family violence matter were dealt with by the one court. These are further arguments in favour of integrated court lists and specialisation, discussed in chapters 29 and 32.

10.51 Consistency is one question; adequacy is another. A protection order may have been imposed well before the criminal incident allegedly occurred, and the alleged crime may highlight a need for greater protection. A protection order may need to be amended, or the bail conditions might need to add further conditions. There may also be no protection order in place. The next section of this chapter considers these matters and how they might be best resolved.

**Protection through bail conditions or a protection order**

10.52 Bail conditions can provide for, among other things, the protection of an alleged victim of crime. However, such protective bail conditions might not serve the same purpose as a protection order, and might not protect a victim adequately. Arguably, therefore, upon granting bail, judicial officers should consider whether to also issue a protection order.

10.53 In NSW, when a person is charged with a family violence offence, the court must make an interim court order for the protection of the person against whom the offence appears to have been committed, unless the court is satisfied that it is not required, ‘for example, because an apprehended violence order has already been made’.<sup>72</sup>

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71 The establishment of this database is discussed in Ch 30.

72 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 40. The making of protection orders during criminal proceedings is discussed in Ch 11.

10.54 The *Bail Act 1982* (WA) provides that, before imposing bail conditions for certain purposes (including for the purpose of ensuring the accused ‘does not endanger the safety, welfare or property of any person’), a judicial officer must consider whether ‘that purpose would be better served’ by the making of a protection order under family violence legislation.<sup>73</sup>

10.55 The Law Reform Commission of Western Australia (WA) addressed the interaction between bail legislation and family violence legislation in its 2009 report on Court Intervention Programs, noting that:

It is common for both protective bail conditions and [protection] orders to be imposed in family violence matters. ... In some ways protective bail conditions provide greater protection for victims; unlike [protection] orders bail conditions cannot be withdrawn by the victim. ... However, [protection] orders have some advantages over protective bail conditions; for example it has been suggested that it is difficult to get the police to act on a breach of bail—they are more likely to act on a breach of a [protection] order.<sup>74</sup>

10.56 The Law Reform Commission of WA expressed the view that magistrates should be able to impose either, or both, protective bail conditions and protection orders when an offender first comes before the court. It therefore recommended that the *Bail Act 1982* (WA) should be amended to provide that, on imposing a requirement on the grant of bail for the purpose of ensuring that an offender does not commit an offence while on bail, or endanger the safety, welfare or property of any person, a judicial officer should consider whether that purpose might be served or assisted by a protection order, protective bail conditions or both.<sup>75</sup>

#### ***Submissions and consultations***

10.57 In the Consultation Paper, the Commissions proposed that judicial officers should be allowed, on a grant of bail, to consider whether the purpose of ensuring that the offender does not commit an offence while on bail or endanger the safety, welfare or property of any person might be better served or assisted by a protection order, protective bail conditions or both, as recommended by the Law Reform Commission of WA in relation to the *Bail Act 1982* (WA).<sup>76</sup>

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73     *Bail Act 1982* (WA) sch 1, pt D, cl 2(2)(a).

74     Law Reform Commission of Western Australia, *Court Intervention Programs: Final Report* Project No 96 (2009), 97 (citations omitted).

75     Ibid, 98, Rec 28. It also recommended that WA family violence legislation be amended to enable a judicial officer hearing a bail application to make an interim protection order.

76     Consultation Paper, Proposal 5–6.

10.58 The proposal was widely supported.<sup>77</sup> It was submitted that this would avoid multiple court attendances, which can be very demanding for victims.<sup>78</sup> Stubbs submitted that protection orders can sometimes better secure a victim's safety than bail conditions:

Unlike the [breach of a] protection order, the breach of bail is not in itself a criminal offence and it may be more difficult to get police to respond to breaches of bail that do not constitute an offence. Victims do not always know about bail agreements and bail conditions whereas they should always have a copy of the protection order.<sup>79</sup>

10.59 It was also argued that victims can be left feeling vulnerable when an accused is acquitted, particularly if the victim has testified against the accused, so the court should consider whether the victim needs ongoing protection.<sup>80</sup>

In addition, an 'own motion power' to make an interim family violence protection order would assist in these circumstances. Where evidence is before the court, an interim order can be made or a final order if the alleged offender agrees.<sup>81</sup>

10.60 The Local Court of NSW supported the position in NSW and submitted that it did not support the practice of imposing bail conditions in place of interim protection orders, when it would be appropriate to make an interim protection order.<sup>82</sup>

### *Commissions' views*

10.61 The Commissions consider that where conduct constituting family violence gives rise to concurrent protection order and criminal proceedings, judicial officers should be able to impose either or both protective bail conditions and protection orders. The Commissions endorse the recommendation made by the Law Reform Commission of WA to amend the *Bail Act 1982* (WA) to allow a judicial officer on grant of bail to consider whether specific purposes of bail might be served or assisted by a protection order, protective bail conditions, or both. However the Commissions would go further, and suggest that judicial officers *must* consider both options.<sup>83</sup>

10.62 Issuing or varying a protection order when granting bail serves a number of important functions. It might save the victim the trouble, expense and stress of having

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77 National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

78 Confidential, *Submission FV 164*, 25 June 2010.

79 J Stubbs, *Submission FV 186*, 25 June 2010. See also Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

80 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

81 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010. The issue of courts making protection orders on own motion is considered in Ch 11.

82 Local Court of NSW, *Submission FV 101*, 4 June 2010; *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 40. See also Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

83 See also Rec 11–3.

to return to court to apply for a protection order or to have an order varied. The victim may be given a copy of the protection order and told what it means and how it interacts with the bail conditions. And when considered together, bail and protection order conditions are more likely to be clear and consistent. It should be made clear to the accused and alleged victims how bail conditions and protection order conditions interact, and that a bail condition never implies the accused may breach a protection order condition—and vice versa.

**Recommendation 10–2** State and territory legislation should provide that, on granting bail, judicial officers should be required to consider whether to impose protective bail conditions, issue or vary a family violence protection order, or do both.

### Informing victims about bail decisions

10.63 Victims of family violence have an obvious interest in knowing when a person who has used family violence against them is released on bail, and in understanding the conditions of bail and how those conditions might interact with any relevant protection order.

10.64 This interest has been recognised as a right in most state and territory victim-focused legislation, though the obligation to provide information only arises if the victim requests the information.

10.65 The charter of rights for victims of crime in section 6 of the *Victims Rights Act 1996* (NSW) provides:

A victim should be informed about any special bail conditions imposed on the accused that are designed to protect the victim or the victim's family.

10.66 Under the *Victims of Crime Assistance Act 2009* (Qld), if asked by a victim, an investigatory agency must, so far as is reasonably practicable, advise the victim of the outcome of an application for bail and—if the charged person is released on bail or otherwise before the proceeding on the charge is finished—the arrangements made for the release, including any condition and any application for variation of the condition that may affect the victim's safety or welfare.<sup>84</sup>

10.67 The *Victims' Charter Act 2006* (Vic) provides that a prosecuting agency, on request by a victim, is to ensure that the victim is informed of bail decisions and, if bail is granted, any conditions imposed to protect the victim or family members of the victim.<sup>85</sup>

<sup>84</sup> *Victims of Crime Assistance Act 2009* (Qld) s 11.

<sup>85</sup> *Victims' Charter Act 2006* (Vic) s 10.

10.68 The ‘Guidelines as to how victims should be treated’ in the *Victims of Crime Act 1994* (WA) provides that a ‘victim who has so requested should be kept informed about’ among other things, ‘any bail application made by the offender’.<sup>86</sup>

10.69 The *Victims of Crime Act 2001* (SA) provides that victims should be informed, on request, about the outcome of a bail application made by the alleged offender.<sup>87</sup> Also, if a police officer or a person representing the Crown in bail proceedings is made aware that the victim feels a need for protection from the alleged offender, ‘reasonable efforts must be made to notify the victim of the outcome of the bail proceedings and, in particular, any condition imposed to protect the victim from the alleged offender (unless the victim indicates that he or she does not wish to be so informed)’.<sup>88</sup>

10.70 The *Northern Territory Charter for Victims of Crime* provides that at the victim’s request, the police and/or the Office of the Director of Public Prosecutions ‘can’ tell the victim about, among other things, ‘whether or not bail has been granted and any bail conditions relating to protecting [the victim] from the accused’.<sup>89</sup>

10.71 Tasmania does not appear to have a charter of victims rights. There is a Victims Register—‘an automated database that enables Victims Support Services to provide information to victims of crime about the offender’—but it is not clear whether information is provided about bail decisions and variations to bail conditions.<sup>90</sup>

10.72 Although the *Victims of Crime Act 1994* (ACT) does not specifically mention bail, it provides that one of the principles that should govern the treatment of victims is that ‘a victim who is known to have expressed concern about the need for protection from an offender should be told about the offender’s impending release from custody’.<sup>91</sup> The *Bail Act 1992* (ACT), however, provides specifically for victims of domestic violence. If bail is granted to someone accused of a domestic violence offence, ‘the officer must take reasonable steps to tell each protected person, as soon as practicable, about the decision and, if the accused person is granted bail subject to a bail condition, about the condition’. Protected persons must also be told about decisions not to grant bail.<sup>92</sup>

10.73 A participant in the ALRC’s Family Violence Online Forum expressed concerns that bail decisions were not, in practice, always communicated.

In [the ACT] the police are not involved in the application for a protection order so the victim is conducting that proceeding herself. Often she is not aware of the status of the bail conditions and whether, for example, they are different, even contradictory, to the provisions of the protection order. It is often up to the victim to contact the police to find out what is happening with the criminal proceedings. She may not be

<sup>86</sup> *Victims of Crime Act 1994* (WA) sch 1.

<sup>87</sup> *Victims of Crime Act 2001* (SA) s 8.

<sup>88</sup> Ibid s 7.

<sup>89</sup> Northern Territory Office of the Director of Public Prosecutions, *Charter for Victims of Crime for the Northern Territory*, Government Printer of the Northern Territory.

<sup>90</sup> Department of Justice (Tas), *Victims Support Services*, <[www.justice.tas.gov.au/victims](http://www.justice.tas.gov.au/victims)> at 15 September 2010.

<sup>91</sup> *Victims of Crime Act 1994* (WA) s 4.

<sup>92</sup> *Bail Act 1992* (ACT) ss 16(5), (6). See also s 47A.

aware that bail conditions have been changed, for example, or have any information about the timeline of the criminal matter.<sup>93</sup>

10.74 In Victoria, in addition to the obligation imposed by the *Victims' Charter Act 2006*, where the respondent to an application for a family violence intervention order is arrested under a warrant (as a person may be in some circumstances if a magistrate or registrar believes it is necessary), the affected family members must be advised of the outcome of the application for bail and, if bail is granted, of any conditions imposed that are intended to protect the family member.<sup>94</sup> The family member must also be given a copy of the undertaking of bail.<sup>95</sup> But this does not apply to victims of crimes that occurred in a family violence context where the offender is *not* a respondent to an application for a family violence intervention order.

#### **Submissions and consultations**

10.75 In the Consultation Paper, the Commissions asked how often victims of family violence involved in protection order proceedings were not informed about a decision to release the offender on bail and the conditions of release.<sup>96</sup>

10.76 Stakeholder responses to this question varied, perhaps because, as some submitted, *practices* vary—they vary ‘among police and between courts’<sup>97</sup> and ‘from state to state’.<sup>98</sup> Some said victims were often or commonly not told;<sup>99</sup> another stakeholder said uninformed victims were ‘a significant group’.<sup>100</sup> One agency submitted that victims were ‘quite often’ not informed and the whole protection order process was ‘quite shambolic’.<sup>101</sup> Integrated systems, such as that in Tasmania, another stakeholder said, address this problem more effectively.<sup>102</sup>

10.77 It was submitted that in NSW victims were informed ‘more often than not’,<sup>103</sup> and that only a ‘minority’ were not informed.<sup>104</sup> Women’s Legal Service NSW noted, however, that most victims know the offender has been released, but do not understand

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93 Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers.

94 Family Violence Protection Act 2008 (Vic) ss 50, 52.

95 Ibid s 52(2).

96 Consultation Paper, Question 5–14.

97 J Stubbs, *Submission FV 186*, 25 June 2010.

98 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

99 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010. See also Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

100 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010.

101 Justice for Children, *Submission FV 148*, 24 June 2010. See also Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

102 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

103 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

104 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

the conditions.<sup>105</sup> It was also submitted that victims commonly do not have a copy of the bail conditions, and so find it difficult to get police to act on breaches of bail.<sup>106</sup>

10.78 The Victorian Government suggested that its legislation covered this proposal and was supported by police operational procedures and codes of practice. It noted, however, that bail notification, and communication between criminal justice agencies about bail outcomes and conditions, could be enhanced.<sup>107</sup> The Aboriginal Family Violence Prevention and Legal Service Victoria also submitted that police communication with victims is generally poor and women complain they cannot reach particular police officers.<sup>108</sup> It is also often difficult for offenders to find out about the progress of their applications for a protection order.<sup>109</sup>

10.79 The Magistrates' Court and Children's Court of Victoria also suggested that perhaps police or courts should be required to notify victims of family violence and sexual assault of every bail decision that affects their personal safety—whether arising from criminal charges, the contravention of protection orders, or from family violence protection application warrants—rather than only in the circumstances set out in s 52 of the Victorian family violence legislation.<sup>110</sup>

10.80 One NT solicitor was told she could not have a copy of the bail conditions for her client, but she could have them read to her over the phone.<sup>111</sup> Another person submitted that 'Corrections have privacy regulations whereby they cannot even inform the solicitor for the protected person about the release of the prisoner'.<sup>112</sup>

10.81 The Office of the Director of Public Prosecutions NSW (NSW ODPP) submitted that its officers are instructed to inform victims about bail conditions as soon as practicable after the bail application,<sup>113</sup> but their efforts are often frustrated by practical impediments, such as

not having the contact details of the victim and being unable to contact the police informant to contact the victim, little or no prior notice about the bail application and having one prosecutor in court who is unable to leave the bar table to make a phone call.<sup>114</sup>

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105 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

106 J Stubbs, *Submission FV 186*, 25 June 2010. See also Confidential, *Submission FV 164*, 25 June 2010.

107 Victorian Government, *Submission FV 120*, 15 June 2010.

108 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010. See also Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

109 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

110 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

111 Confidential, *Submission FV 164*, 25 June 2010.

112 Confidential, *Submission FV 198*, 25 June 2010.

113 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

114 Ibid.

10.82 Courts should therefore allow sufficient time for the prosecution to make contact with the victim, the NSW ODPP submitted.<sup>115</sup> Women's Legal Services Australia pointed out another practical impediment:

Whilst there are various victim registries that seek to inform victims about details such as parole board hearings and offender release dates, often there are certain requirements and/or forms that need to be completed.<sup>116</sup>

10.83 In the Consultation Paper, the Commissions also proposed the following:

State and territory legislation, to the extent that it does not already do so, should impose an obligation on the police and prosecution to inform the victim of a family violence offence of: (a) decisions to grant or refuse bail to the offender; and (b) where bail is granted, the conditions of release. The *Bail Act 1992* (ACT) provides an instructive model in this regard. Police codes of practice or operating procedures and prosecutorial guidelines or policies as well as appropriate education and training programs should also address the obligation to inform victims of family violence of bail decisions.<sup>117</sup>

10.84 This proposal was widely supported: legislation should provide that victims are informed<sup>118</sup> and this should be supported in police and prosecutorial codes and policies, guidelines, education and training.<sup>119</sup> Victims should also be told when bail conditions are varied.<sup>120</sup>

10.85 The importance of informing victims of family violence of bail decisions was widely recognised.<sup>121</sup> As the Victorian Government noted, 'when a victim of family violence is confronted by a perpetrator she believes to be in jail, this can be a traumatic and dangerous experience'.<sup>122</sup> Victims need to know about bail decisions as soon as

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115 Ibid.

116 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010.

117 Consultation Paper, Proposal 5–7.

118 For example, National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

119 For example, Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

120 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010.

121 National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

122 Victorian Government, *Submission FV 120*, 15 June 2010.

possible so they can plan to secure their safety and the safety of their children.<sup>123</sup> When they do not know, ‘they feel there is no reason to be vigilant’.<sup>124</sup>

10.86 The Commissioner for Victims’ Rights (South Australia) submitted that ‘copies of the bail agreement should be readily and freely available to the victim, school staff and so on. This should be an exception from any human rights or privacy provision’.<sup>125</sup>

10.87 Some stakeholders considered *how* victims might be informed. One stakeholder submitted that domestic violence liaison officers who have developed a rapport with the victims should contact the victim directly.<sup>126</sup> An Indigenous women’s domestic and family violence service noted that some victims ‘are very mobile and often do not have access to phones’ and therefore:

Any arrangements should allow that where the victim is a client of an organisation, such as NPY Women’s Council, that service should be informed so that they can pass the information onto the client.<sup>127</sup>

10.88 This service also submitted that police in some jurisdictions will provide them with relevant bail conditions under memorandums of understanding, but often the caseworker will need to know the accused has applied for bail.<sup>128</sup>

### *Commissions’ views*

10.89 Victims of family violence must be informed of decisions about bail. Knowing about and understanding bail decisions might be vital to their safety and peace of mind. The Commissions recommend that this legislative obligation to notify victims be extended to Tasmania and the NT.

10.90 As noted above, there is a legislative obligation to notify victims of crime—which would include victims of family violence crimes—about bail decisions in most state and territory victims of crime legislation. The Commissions recognise the importance of informing all victims of crime about bail decisions, if they choose to be informed, and the Commissions see no reason to distinguish between victims here. Crimes that do not occur in a family violence context are outside the terms of reference for this report, but the Commissions note that one way of implementing this recommendation would be for Tasmania and the NT to adopt victims of crime legislation that contains a duty to inform all victims about bail decisions. But the Commissions do not wish to be prescriptive, and these jurisdictions might prefer to place this obligation elsewhere, such as in family violence legislation.

10.91 Victims of crime legislation usually gives victims the right to information about bail decisions only when they *ask* for the information. This assumes victims will know to ask—and they might not, particularly victims from marginalised groups. In the

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123 Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

124 Confidential, *Submission FV 78*, 2 June 2010.

125 Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010.

126 Confidential, *Submission FV 183*, 25 June 2010.

127 Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

128 Ibid.

Commissions' view, therefore, state and territory legislation should provide that victims of family violence must be notified promptly—or at least asked whether they wish to be notified—about bail decisions concerning persons who have used family violence against them.

10.92 The Commissions also recommend that the legislation be clarified to make it clear that victims should be told promptly about the conditions attached to bail—including when the conditions are varied or revoked. This should be implied by a broad obligation to inform victims about bail decisions, but the matter could be made explicit, to avoid any doubt.

10.93 Victims should also be given or sent a copy of the bail conditions. Victims might keep their copy of the bail conditions for future reference. A copy should also be sent to any service provider, such as a domestic violence advocacy or legal service, with whom the victim is known to have regular contact.

10.94 Any such statutory obligation to inform victims of bail decisions will need to be implemented. Police codes of conduct or operating procedures and prosecutorial guidelines or policies should reflect this obligation, as should police training and education. Where there are both bail conditions and a protection order, the obligation should extend to explaining how they interact.

**Recommendation 10–3** State and territory legislation should impose an obligation on police and prosecutors to inform victims of family violence promptly of:

- (a) decisions to grant or refuse bail; and
- (b) the conditions of release, where bail is granted.

Victims should also be given or sent a copy of the bail conditions. Where there are bail conditions and a protection order, police and prosecutors should explain how they interact.

Police codes of practice or operating procedures, prosecutorial guidelines or policies, and education and training programs should reflect these obligations. These should also note when it would be appropriate to send bail conditions to family violence legal and service providers with whom a victim is known to have regular contact.



# 11. Protection Orders and the Criminal Law

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## Contents

Introduction	433
Concurrent proceedings under family violence laws and the criminal law	433
Liability and use of evidence issues	434
Court-initiated protection orders in criminal proceedings	446
Protection order conditions and the criminal law	461
Types of conditions	461
Application of conditions in practice	464
Exclusion orders	472
Rehabilitation and counselling conditions in protection orders	489
Rehabilitation orders pre-sentencing	490
Rehabilitation orders on sentencing	490
Other interactions between protection orders and sentencing	503

## Introduction

11.1 This chapter considers the interaction between protection orders obtained under family violence laws and the criminal law. The first section of this chapter discusses issues that arise when there are concurrent proceedings under family violence laws and the criminal law, including issues concerning liability and the use of evidence.<sup>1</sup> In particular, the discussion focuses on the powers of courts to make protection orders under family violence laws in the course of criminal proceedings.

11.2 The second section of this chapter addresses the potential for conditions in protection orders to overlap with: general prohibitions or requirements imposed by the criminal law; pre-sentencing orders; and orders made on sentencing. Particular attention is given to interaction issues that may arise following the imposition of exclusion orders and rehabilitation orders.

## Concurrent proceedings under family violence laws and the criminal law

11.3 The family violence legislation of most states and territories expressly recognises that there can be concurrent criminal and civil proceedings.<sup>2</sup> For example,

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<sup>1</sup> The interaction of bail and protection orders under family violence laws is discussed in Ch 10.

<sup>2</sup> However, the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), for example, does not contain an express provision in this regard. The handling of concurrent civil and criminal proceedings by specialist family violence courts is discussed in Ch 32.

s 62 of the *Domestic and Family Violence Protection Act 1989* (Qld) provides that an application can be made and dealt with under the Act notwithstanding that a person concerned in the application has been charged with an offence arising out of the same conduct. The counterpart provisions in the family violence legislation of WA and the ACT are broader in their scope, each recognising the power of a court to make a protection order if a person has been charged with or convicted—and in the case of the ACT found guilty—of an offence arising out of the same conduct on which the application is based.<sup>3</sup>

11.4 The family violence legislation of New South Wales (NSW) and the Northern Territory (NT) each allows protection orders to be made even if criminal proceedings are commenced against an accused arising out of the same conduct relied on to make the protection order application.<sup>4</sup> The Victorian family violence legislation expressly provides that a protection order can be made at any time before or after the commencement of proceedings for the offence.<sup>5</sup>

### **Liability and use of evidence issues**

11.5 Most state and territory family violence legislation—while recognising the potential for concurrent civil and criminal proceedings—does not address the relationship between the two proceedings; nor does the legislation address the issue of what use can be made in the criminal proceedings of matters raised in civil protection order proceedings. There are a few exceptions to this. The first concerns provisions in the family violence legislation of Western Australia (WA) and the NT which deal with liability issues; the second is the provision in the Queensland family violence legislation which deals with references in criminal proceedings to matters arising from proceedings under family violence legislation. Each of these is addressed below.

11.6 The NT family violence legislation provides that the making of a protection order does not affect the civil or criminal liability of the person against whom it is made in relation to the family violence to which the order relates.<sup>6</sup> The Western Australian family violence legislation provides that, except as provided by that Act, neither making nor varying a protection order affects the civil or criminal liability of a person bound by the order in respect of the conduct out of which the application for the protection order arose.<sup>7</sup>

11.7 In Queensland, certain evidence about protection orders and protection order proceedings is rendered inadmissible in criminal proceedings where a person is charged with an offence arising out of conduct on which an application for a protection order is based and:

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3     *Restraining Orders Act 1997* (WA) s 63C(1); *Domestic Violence and Protection Orders Act 2008* (ACT) s 113.

4     *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 81; *Domestic and Family Violence Act 2007* (NT) s 86.

5     *Family Violence Protection Act 2008* (Vic) s 155.

6     *Domestic and Family Violence Act 2007* (NT) s 87.

7     *Restraining Orders Act 1997* (WA) s 63C(2).

- a court has made, varied or revoked a protection order, or refused any such applications; or
- proceedings under family violence legislation are current at the time a person is charged with an offence arising out of conduct on which an application is based.<sup>8</sup>

11.8 In such circumstances:

- (3) A reference to—
- (a) the making, or refusal to make, the order, or a revocation or variation; or
  - (b) the existence of current proceedings ... or
  - (c) the fact that evidence of a particular nature or content was given in—
    - (i) the proceedings in which the order, revocation or variation was made or refused; or
    - (ii) the current proceedings;

is inadmissible in the trial of the person for an offence arising out of conduct on which the application for the order, revocation, or variation, or relevant to the current proceedings, is based.

11.9 This is reinforced by the following provisions in s 62(4), (5):

- (4) To allay any doubt, it is declared that, subject to this section, an application, proceeding or order under this Act in relation to the conduct of the person does not affect any proceeding for an offence against the person arising out of the same conduct.
- (5) A person may be punished for the offence mentioned in subsection (4) despite any order against him or her under this Act.<sup>9</sup>

11.10 If a criminal charge relating to family violence is proved, then the standard of proof needed for the evidence for the protection order application is exceeded.<sup>10</sup> In any case, in such circumstances a protection order will be mandatory in some jurisdictions for certain offences.<sup>11</sup> While it is potentially problematic to use evidence relating to protection order proceedings in criminal proceedings, the same difficulties do not arise when evidence related to criminal proceedings is used in protection order proceedings.

***Submissions and consultations***

***Liability***

11.11 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should be amended to ensure that the making, variation or revocation of a protection order, or the refusal to make, vary or revoke such an order,

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<sup>8</sup> *Domestic and Family Violence Protection Act 1989* (Qld) s 62.

<sup>9</sup> *Ibid.*

<sup>10</sup> As noted in Ch 8, the standard of proof for protection order proceedings is on the balance of probabilities; the standard of proof for criminal proceedings is beyond reasonable doubt.

<sup>11</sup> See discussion below.

does not affect the civil or criminal liability of a person bound by the order in respect of the family violence the subject of the order.<sup>12</sup>

11.12 This proposal was broadly supported by the majority of stakeholders,<sup>13</sup> with some emphasising the need for greater legislative clarity.<sup>14</sup> National Legal Aid, in supporting the proposal, submitted that where there are charges and protection orders arising out of the same alleged conduct, the criminal charges should be dealt with first, and an interim protection order should be made and then finalised, if necessary, after the criminal proceedings.<sup>15</sup>

11.13 The Department of Premier and Cabinet (Tas) noted that, as a matter of practice, criminal proceedings are generally dealt with before civil matters, where there are concurrent proceedings, which ‘avoids difficulty about findings of fact/liability because of issues of standard of proof’. The Northern Territory Legal Aid Commission noted that, in most cases,

orders are made without admissions, or interim orders are made and kept on foot pending the resolution of the associated criminal charges.<sup>16</sup>

11.14 Other stakeholders also noted in consultation that, in some jurisdictions, until criminal proceedings are resolved, magistrates tend to prefer to make only interim protection orders,<sup>17</sup> or to adjourn the hearing of any protection order application.<sup>18</sup>

11.15 The Victorian Government stated that the need for clarification in respect of civil liability had not, to date, been identified, but said the issue ‘could be considered as part of any future legislative review’.<sup>19</sup>

12 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Proposal 6–1.

13 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

14 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

15 National Legal Aid, *Submission FV 232*, 15 July 2010.

16 Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

17 Legal Aid Commissions, *Consultation*, Sydney, 10 September 2009.

18 G Zdenkowski, *Consultation*, Sydney, 6 November 2009.

11.16 The Department of Premier and Cabinet (Tas) expressed some concerns about possible unintended effects of this proposal, and submitted that it was

important that if a matter proceeds to a fully-contested hearing, the facts found by the Magistrate are available in other jurisdictions—for example, Child Protection or Family Law.<sup>20</sup>

### ***Use of evidence***

#### ***Cross-examination of victims***

11.17 As noted in the Consultation Paper, one stakeholder in Adelaide told the Commissions that sometimes an affidavit in support of a protection order may contain less detail than the statement in criminal proceedings.<sup>21</sup> Some detail may be omitted because the victim was distressed at the time of taking the affidavit or because of time pressures on police at the time of taking the affidavit. The Commissions also heard that a victim may be subjected to cross-examination on the fact that certain material was not included in the affidavit in support of the protection order and that this may impact adversely on the victim.

11.18 In the Consultation Paper, the Commissions asked whether it was common for victims in criminal proceedings to be cross-examined about evidence that they have given in support of an application for a protection order under family violence legislation, when the conduct the subject of the criminal proceedings and the protection order is substantially the same.<sup>22</sup>

11.19 A number of stakeholders submitted that it was common.<sup>23</sup> National Legal Aid, without commenting on the frequency of such occurrence, noted that a victim in criminal proceedings may be cross-examined on inconsistent evidence given by him or her in protection order proceedings relating to the same issue. This is ‘part of the basic entitlement to cross-examine on the basis of prior inconsistent statements’.<sup>24</sup>

11.20 The Northern Territory Legal Aid Commission observed that the cross-examination of a victim in such circumstances ‘can occur and occasionally does so’ where a victim has made a prior inconsistent statement in an affidavit in support of an application for a family violence protection order.<sup>25</sup>

11.21 Some NSW stakeholders, however, stated that the need to cross-examine a witness in such circumstances is largely overcome in practice. This is because courts

19 Victorian Government, *Submission FV 120*, 15 June 2010.

20 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

21 Office of the Director of Public Prosecutions (SA), *Consultation*, Adelaide, 24 September 2009.

22 Consultation Paper, Question 6–1.

23 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

24 National Legal Aid, *Submission FV 232*, 15 July 2010.

25 Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

hear the criminal matter first, and then automatically issue a protection order on a finding of guilt.<sup>26</sup> Where the order is automatically issued, this removes the need for a second hearing.<sup>27</sup> Other stakeholders also noted that the making of interim protection orders pending the resolution of criminal proceedings also avoids the potential for such cross-examination of victims.<sup>28</sup>

11.22 The Aboriginal Family Violence Prevention and Legal Service Victoria submitted that the practice of respondents consenting to protection orders but denying liability ‘limits the protection order material upon which a victim can be cross-examined’.<sup>29</sup>

11.23 Other stakeholders also said that it was not common for victims to be cross-examined in the circumstances identified in the proposal.<sup>30</sup> Women’s Legal Services NSW said in practice, victims rarely give evidence in support of an interim protection order where there are also criminal charges.<sup>31</sup> Women’s Legal Service Queensland submitted that it understood that the two matters are ‘considered quite separately with very little cross-reference’.<sup>32</sup>

11.24 The Commissioner for Victims’ Rights (South Australia) submitted that there should be legal prohibitions on inappropriate questions during cross-examination.<sup>33</sup>

#### ***Operation of provision in Queensland family violence legislation re use of evidence***

11.25 In the Consultation Paper, the Commissions asked how s 62 of the *Domestic and Family Violence Protection Act 1989* (Qld)—which renders inadmissible in criminal proceedings certain evidence about protection orders where those proceedings arise out of conduct upon which a protection order is based—is working in practice. In particular, the Commissions asked, how it is interacting in practice with s 18 of the *Evidence Act 1977* (Qld), which states that ‘proof may be given’ of a previous inconsistent statement,<sup>34</sup> and whether it provides a model for other states and territories to adopt in their family violence legislation.<sup>35</sup>

11.26 Some Queensland stakeholders could not comment on how s 62 is operating in practice or how it is interacting with s 18 of the *Evidence Act*,<sup>36</sup> although the Queensland Law Society agreed that it provides a model for other states and territories

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26 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

27 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

28 Confidential, *Submission FV 198*, 25 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

29 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

30 Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

31 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

32 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

33 Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010.

34 Consultation Paper, Question 6–2.

35 Ibid, Question 6–2.

36 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

to adopt in their family violence legislation.<sup>37</sup> The Queensland Government submitted that, to date, no specific issues had been raised in the Queensland review of its family violence legislation on the interaction between s 62 and s 18 of the *Evidence Act 1977* (Qld). It foreshadowed that the purpose and intent of s 62 would be examined as part of that review.<sup>38</sup>

11.27 However, National Legal Aid submitted that s 62 is operating effectively in practice. It said that it is desirable that, in criminal proceedings arising from the same incident that led to the family violence proceedings, a complainant can be cross-examined about a prior inconsistent statement, such as one in an affidavit accompanying an application for a protection order. However, this can be done without offending s 62 by avoiding mention of the proceedings themselves.

The way that this is raised in practice is that the question would be phrased ‘you provided an affidavit on another occasion’ or ‘you gave evidence on another occasion’.<sup>39</sup>

11.28 The Commissions also asked whether there is a need for s 62 of the Queensland family violence legislation to make an express exception for bail, sentencing and breach of protection order proceedings.<sup>40</sup> Two stakeholders said that express exception should be made.<sup>41</sup> However, the Queensland Law Society submitted that such exceptions were not necessary. In particular, it noted that the key phrase in s 62 is that evidence is inadmissible in the trial of the person ‘*for an offence* arising out of conduct on which the application for the order, revocation or variation or relevant to the current proceedings is based’. It stated that bail proceedings are not ‘*for an offence*’ but in relation to bail relating to that offence and that:

Section 62 does not apply to breach of protection order proceedings except if there are further proceedings or a protection order or variation or revocation of a protection order as a result of that further conduct.<sup>42</sup>

#### *Need for clarity re use of evidence*

11.29 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should be amended to clarify whether, in the trial of an accused for an offence arising out of conduct which is the same or substantially similar to that upon which a protection order is based, references can be made to:

- (a) the making, variation, and revocation of protection orders in proceedings under family violence legislation;
- (b) the refusal of a court to make, vary or revoke a protection order in proceedings under family violence legislation;

37 Queensland Law Society, *Submission FV 178*, 25 June 2010.

38 Queensland Government, *Submission FV 229*, 14 July 2010.

39 National Legal Aid, *Submission FV 232*, 15 July 2010.

40 Consultation Paper, Question 6–2.

41 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010.

42 Queensland Law Society, *Submission FV 178*, 25 June 2010.

- (c) the existence of current proceedings for a protection order under family violence legislation against the person the subject of the criminal proceedings;
- (d) the fact that evidence of a particular nature or content was given in proceedings under family violence legislation.

11.30 Such provisions, the Commissions proposed, would need to address separately the conduct which constitutes a breach of a protection order under family violence legislation.<sup>43</sup>

11.31 The Commissions' proposal was directed to the need for clarification—it did not state how the law was to be clarified. Some stakeholders offered a view on the need for clarification and, as discussed below, others also offered varying views about whether references to the matters the subject of the proposal should be allowed in the trial of an accused.

11.32 A number of stakeholders supported the proposal.<sup>44</sup> The Aboriginal Family Violence Prevention and Legal Service Victoria said that legislative clarification should address separately 'conduct which constitutes a breach of a protection order under family violence legislation'.<sup>45</sup>

11.33 In a joint submission, Domestic Violence Victoria and others submitted that references should be able to be made in the trial of an accused to relevant protection order proceedings and matters:

It is important that where relevant, criminal and civil charges and proceedings not be quarantined in separate silos which can act to the detriment of victims.<sup>46</sup>

11.34 However, some stakeholders expressed the view that references to certain of the matters identified in the proposal should not be allowed in the trial of an accused, principally on the grounds of affording fairness to an accused. For example, National Legal Aid and the Law Society of NSW submitted that evidence about protection orders is not relevant to a criminal charge and could be prejudicial to the accused.<sup>47</sup> They noted that the subject of the order may not have responded to the protection order

<sup>43</sup> Consultation Paper, Proposal 6–2.

<sup>44</sup> Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Confidential, *Submission FV 198*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

<sup>45</sup> Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

<sup>46</sup> Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010. A similar view was expressed in Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. Professor Julie Stubbs submitted that the information identified in the proposal 'should be permitted for bail, sentencing and breach of protection order proceedings': J Stubbs, *Submission FV 186*, 25 June 2010.

<sup>47</sup> National Legal Aid, *Submission FV 232*, 15 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010. See also Legal Aid NSW, *Submission FV 219*, 1 July 2010.

application, or may have consented to the application without admissions.<sup>48</sup> Similarly, Legal Aid NSW submitted that:

There are risks in allowing reference in a trial to information that has not been subject to the criminal standard of proof. It could be particularly prejudicial to make reference to an order that was made by consent, without admission. Similarly, reference to current, incomplete proceedings could be unfairly prejudicial. There may be less of a concern about reference to evidence given in family violence proceedings, as long as the weight that is given to that evidence in the criminal proceedings is appropriate, taking into account the type of evidence and degree of scrutiny to which it has been subjected in the criminal proceedings.<sup>49</sup>

11.35 National Legal Aid and the Law Society of NSW also emphasised the prejudice that could result from the consideration of evidence determined according to a different standard of proof. National Legal Aid submitted that:

It would be misleading and unhelpful to present evidence of the making of the restraining or protection order in a later criminal proceeding and has the potential to result in a miscarriage of justice.<sup>50</sup>

11.36 The Queensland Law Society also expressed concern about ensuring that the civil liberties of an accused are adequately protected.<sup>51</sup>

11.37 One stakeholder noted that allowing references in a criminal trial to a court's refusal to make a protection order could be prejudicial to a victim, and should not be seen as evidence of innocence.<sup>52</sup>

### ***Commissions' views***

#### ***Liability***

11.38 The Commissions maintain their view expressed in the Consultation Paper, that there should be greater legislative clarity about how the making, variation, revocation or refusal to vary or revoke a protection order affects the civil or criminal liability of a person for the conduct that gave rise to the protection order, noting substantial stakeholder support for this position. State and territory family violence legislation should make it expressly clear that such actions concerning protection orders do not affect the civil or criminal liability of a person subject to the order.

11.39 The Commissions' intention in extending the ambit of the recommendation to civil liability is to cover, for example, instances where a person using family violence may be sued for torts against the person, namely the torts of battery, assault and false imprisonment.<sup>53</sup>

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48 National Legal Aid, *Submission FV 232*, 15 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

49 Legal Aid NSW, *Submission FV 219*, 1 July 2010. The same view was expressed in National Legal Aid, *Submission FV 232*, 15 July 2010.

50 National Legal Aid, *Submission FV 232*, 15 July 2010.

51 Queensland Law Society, *Submission FV 178*, 25 June 2010.

52 Confidential, *Submission FV 184*, 25 June 2010.

53 Professors Francis Trindade and Peter Cane define the torts as follows: 'A battery is a direct act of the defendant which has the effect of causing contact with the body of the plaintiff without the latter's

11.40 Western Australian family violence legislation is an instructive model, in that it expressly provides that the making or the varying of a protection order does not affect the civil or criminal liability of a person bound by the order in respect of the same conduct the subject of the application for the protection order. However, the Commissions consider that such provisions should also extend to the revocation and refusal to vary or revoke a protection order.

### ***Use of evidence***

#### ***Need for clarity***

11.41 The Commissions are of the view that there should be legislative clarity about whether, in the trial of an accused for an offence arising out of conduct which is the same or substantially similar to that upon which a protection order is based, references can be made to the following:

- the making, variation or revocation of a protection order or the refusal to take any of those actions;
- the existence of current proceedings for a protection order against the person the subject of the criminal proceedings; and
- evidence given in proceedings under family violence legislation.

#### ***Making, variation or revocation of a protection order or refusal to take any such action***

11.42 In seeking to achieve clarity, the question then arises as to what limits, if any, should be placed on the making of such references in the trial of an accused for a family-violence related offence. There are competing considerations to consider in this regard. On the one hand, there are compelling considerations of fairness—both to accused persons and victims—which weigh in favour of disallowing references in the trial of an accused to the making, variation or revocation of a protection order, or the refusal of a court to take any of those actions, where the offence arises out of conduct which is the same or substantially similar to that upon which a protection order is based.

11.43 To allow references to be made to facts that have not been subject to the criminal standard of proof may be prejudicial to an accused, affecting his or her rights to a fair trial. The risk of prejudice is significantly increased in circumstances where an accused has agreed to a protection order without admission of liability.

11.44 Evidence about whether protection orders were made, varied or revoked, or whether applications for such orders were rejected, could improperly influence juries in their deliberations. Where the evidence is about the making of a protection order, or a variation to increase the protection provided by such an order, adverse inferences might

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consent'. 'An assault is any direct threat by the defendant that places the plaintiff in reasonable apprehension of an imminent contact with the plaintiff's person either by the defendant or by some person or thing within the defendant's control'. 'A false imprisonment is a wrongful total restraint on the liberty of the plaintiff that is directly brought about by the defendant': F Trindade and P Cane, *The Law of Torts in Australia* (3rd ed, 1999), 27, 42, 50 respectively.

be drawn by jurors, which operate unfairly with respect to an accused. Conversely, where the evidence is about the revocation of a protection order, a variation of a protection order which decreases the level of protection afforded by the order, or evidence about a court's refusal to make a protection order, this can operate unfairly against a victim of a family violence offence, perhaps creating the impression to jurors that the conduct the subject of the offence was not serious.

11.45 On the other hand, the fact that a protection order was made or that the court refused to vary or revoke an order could, for example, be relevant to tendency or coincidence<sup>54</sup> or motive. For example, it may be relevant to a defendant's motive that the court refused to revoke a protection order and he or she was angry and sought revenge against the victim. In cases where, for example, there is evidence that a defendant has acted violently towards a victim on each occasion, or on previous occasions, when a protection order was made, or an application to revoke a protection order has been rejected, this could be relevant to tendency.

11.46 Accordingly, the Commissions are hesitant to recommend unequivocally that such references should always be inadmissible. Rather, the Commissions consider that references to the making, variation and revocation of protection orders and the refusal of a court to take such action, should not be allowed in a trial of an accused for a family-violence related offence arising out of conduct which is the same or similar to that upon which a protection order is based, unless the court grants leave. Clearly, in order for such evidence to be admissible, it would need to be established that it is relevant to an issue in the proceedings.

11.47 The court, under general evidentiary rules, has discretion to limit the use to be made of evidence if there is a danger that its particular use might be unfairly prejudicial to a party or will be misleading or confusing.<sup>55</sup> In addition, in deciding whether to admit such evidence in the first instance, the court would be bound by the rule of evidence that requires courts to exclude evidence adduced by the prosecutor where its probative value is outweighed by the danger of unfair prejudice to the accused,<sup>56</sup> as well as by rules of evidence which confer on courts a discretion to refuse to admit evidence if its probative value is substantially outweighed by the danger that the evidence might be misleading or confusing, or cause or result in undue waste of time.<sup>57</sup>

11.48 Furthermore, in the case of tendency and coincidence evidence, the test for admissibility under the Uniform Evidence Acts is whether the tendency or coincidence has significant probative value which substantially outweighs any prejudicial effect it may have on the defendant.<sup>58</sup>

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54 Tendency and coincidence evidence is discussed in Ch 27.

55 See, eg, *Evidence Act 1995* (NSW) s 136; *Evidence Act 2008* (Vic) s 136.

56 See, eg, *Evidence Act 1995* (NSW) s 137; *Evidence Act 2008* (Vic) s 137.

57 See, eg, *Evidence Act 1995* (NSW) s 135, *Evidence Act 2008* (Vic) s 135.

58 Uniform Evidence Acts, ss 97, 98, 101. The test for admissibility in jurisdictions that do not apply the Uniform Evidence Acts, is governed by the common law, as modified by statute in some jurisdictions. See *Pfennig v The Queen* (1995) 182 CLR 461 and Ch 27.

11.49 Requiring a party to seek the leave of the court to lead evidence of such matters acts as an important safeguard in ensuring that an accused is given a fair trial. Where evidence about the making, variation or revocation of protection orders or a court's refusal to make any such order is admitted, it will be incumbent on a trial judge to explain to a jury the weight to give such evidence.

11.50 Evidence about the making of a protection order is relevant to proceedings for breach of a protection order, because the making of the order is a relevant fact to be established.<sup>59</sup> Similarly, evidence about the variation or revocation of a protection order may also be relevant to proceedings for breach of a protection order. In such cases, the court's leave to adduce such evidence need not be sought.

#### ***Current protection order proceedings***

11.51 The Commissions also consider that references in the trial of an accused for a family violence offence to current incomplete proceedings for a protection order against him or her could also be unfairly prejudicial. This would be particularly so in circumstances where he or she had not had an opportunity to respond to the allegations or evidence in those proceedings. Accordingly, the Commissions recommend that references to such proceedings should not be allowed unless the leave of the court has been sought, and relevance established.

#### ***Evidence given in family violence proceedings***

11.52 There are a number of factors at play in considering whether evidence given in family violence proceedings concerning protection orders should be able to be used in criminal proceedings. These include balancing the desirability of a victim not being cross-examined about prior evidence—which is a factor weighing against the use of such evidence in criminal proceedings—with the desirability of a victim not having to give evidence in more than one proceeding, which may be a factor supporting the use of such evidence in criminal proceedings. The need to avoid prejudicing criminal proceedings is also an important factor, consistent with obligations under the *International Covenant on Civil and Political Rights* (ICCPR) in relation to fair trials.<sup>60</sup>

11.53 The Commissions agree with the views expressed by legal aid bodies that, compared with references to the making, variation and revocation of protection orders or the refusal of a court to undertake any of these actions, there may be fewer concerns about allowing references in a trial of an accused for an offence arising out of conduct, which is the same or substantially similar to that upon which a protection order is based, to evidence in family violence proceedings—provided that the weight given to such evidence is appropriate in the criminal law proceedings.

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59 Clearly, judicial officers deciding bail conditions and imposing sentence should be aware of protection orders made under family violence legislation and the restrictions which they place on accused persons and offenders before them. Bail is discussed in Ch 10, and the consideration of protection orders in sentencing is discussed below.

60 See Ch 2 which discusses the *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976).

11.54 Accordingly, the Commissions consider that such evidence may be admissible either by consent or by leave of the court, provided that, in either case, the court is to give such evidence the weight that it thinks fit, in accordance with general rules of evidence—including those mentioned above which require or allow the court to exclude evidence where its probative value is outweighed by the danger of unfair prejudice to the accused.

11.55 The Commissions' recommended approach recognises that there may be situations where there is no dispute about the evidence and time can be saved by allowing the earlier evidence to be admitted without having to duplicate it. However, even if the evidence is in dispute, the court may take the view that it is assisted by contextual information that is not unduly prejudicial and may consider that the victim should not be put to the trauma of having to give evidence again in certain specific circumstances.

11.56 The approach recommended by the Commissions would not displace general rules of evidence which allow witnesses to be cross-examined on prior inconsistent statements—both in jurisdictions in which the Uniform Evidence Acts apply<sup>61</sup> as well as jurisdictions, such as Queensland, which have their own evidence legislation.<sup>62</sup>

**Recommendation 11–1** State and territory family violence legislation should make it clear that the making, variation or revocation of a protection order, or the refusal to make, vary or revoke such an order, does not affect the civil or criminal liability of a person bound by the order in respect of the family violence the subject of the order.

**Recommendation 11–2** State and territory legislation should clarify that in the trial of an accused for an offence arising out of conduct that is the same or substantially similar to that on which a protection order is based, references cannot be made, without the leave of the court, to:

- (a) the making, variation and revocation of protection orders in proceedings under family violence legislation—unless the offence the subject of the trial is breach of a protection order, in which case leave of the court is not necessary;
- (b) the refusal of a court to make, vary or revoke a protection order in proceedings under family violence legislation; and
- (c) the existence of current proceedings for a protection order under family violence legislation against the person the subject of the criminal proceedings.

61 Uniform Evidence Acts, s 43.

62 See, eg, *Evidence Act 1977* (Qld) s 18.

Evidence given in proceedings under family violence legislation may be admissible by consent of the parties or by leave of the court.

### Court-initiated protection orders in criminal proceedings

11.57 Some provisions in family violence or sentencing legislation expressly permit a court, on its own initiative, to make protection orders when a person pleads guilty, is found guilty after a contested hearing, or is convicted of an offence that involves family violence.<sup>63</sup> The NT provision also permits such an order to be made on the application of the prosecution.<sup>64</sup>

11.58 Similarly, a provision in the Queensland criminal legislation allows the prosecution, or an interested person, to apply to the court to constitute itself to consider whether a ‘restraining order’ should be made against a person on a hearing of a charge against that person for unlawful stalking.<sup>65</sup> The court may also act on its own initiative in this regard.<sup>66</sup>

11.59 These important provisions may circumvent the need for a victim to make a separate application for a protection order. Three issues arise in relation to these types of provisions. First, whether they confer on the court a discretion to make such an order, or compel it to do so; secondly, the point in time in the criminal proceedings when these orders can be made; and thirdly, whether a court in a criminal proceeding is specifically empowered to vary an existing protection order. Each of these issues is addressed below.

#### *Discretionary versus mandatory*

11.60 There is a significant difference in the level of discretion conferred on courts to make protection orders under family violence legislation in criminal proceedings. Some provisions give courts discretion to make such orders, while others mandate that

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63 See, eg, *Domestic and Family Violence Protection Act 1989* (Qld) ss 16, 30 (power to make order triggered by guilty plea or finding of guilt); *Criminal Law (Sentencing) Act 1988* (SA) s 19A (power to make order triggered by finding of guilt or on sentencing for an offence); *Domestic and Family Violence Act 2007* (NT) s 45 (power to make order triggered by guilty plea or finding of guilt).

64 *Domestic and Family Violence Act 2007* (NT) s 45.

65 *Criminal Code Act 1899* (Qld) sch 1 s 359F. The Commissions understand that, in practice, prosecutors in Queensland make applications for orders under this section: Office of the Director of Public Prosecutions (Qld), *Consultation*, Brisbane, 30 September 2009.

66 The extent to which directors of public prosecution are involved in protection order proceedings varies across the states and territories. *Director of Public Prosecutions Act 1986* (NSW) s 20A expressly empowers the NSW Director of Public Prosecutions (DPP) to institute and conduct, on behalf of an applicant, an application for a protection order in the local court, children’s court or district court, and any related appeals on behalf of a victim. See also Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, App E, [3.2]. The Office of the NSW DPP informed the Inquiry that this power is being used, for example, where a protection order is related to criminal charges being prosecuted by it: Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010. Other stakeholders submitted that it was rare in Queensland and Victoria for the DPP to play a role in proceedings for protection orders: Queensland Government, *Submission FV 229*, 14 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

the court do so—particularly in matters involving serious offences. For example, the Queensland provisions are discretionary, providing that if a person is before a Magistrates Court, the Children’s Court, the District Court or the Supreme Court, for an offence involving family violence, the court *may* make a protection order if the person pleads guilty to, or is found guilty of, that offence.<sup>67</sup>

11.61 In contrast, the NSW provision is framed in mandatory terms, requiring a court to make a protection order if a person pleads guilty to, or is found guilty of, certain offences, irrespective of whether an application for such an order has been made. However, the provision also stipulates that the court need not make an order where satisfied that it is not required, for example because there is an existing order in place.<sup>68</sup> As noted below, another NSW provision mandates the court to make interim protection orders when a person is charged with a serious offence.

11.62 The Western Australian family violence legislation mandates the court to make protection orders to protect victims when specified violent personal offences—such as attempt to murder, grievous bodily harm and sexual penetration without consent—are committed.<sup>69</sup> The exception to this requirement is if the victim, for whose benefit the court proposes to make the order, objects to the order being made.<sup>70</sup> In other cases, the Western Australian family violence legislation confers discretion on the court to make protection orders during other proceedings. In particular, when considering a bail application, the court may make a protection order against the person charged or any other person who gives evidence in relation to the charge.<sup>71</sup>

11.63 In 1999, the Domestic Violence Legislation Working Group advocated conferring discretion on courts to make protection orders when persons are found guilty of an offence. It expressed concern that mandating courts to make protection orders could increase the likelihood of ‘inappropriate or unnecessary orders’ being issued.<sup>72</sup>

### ***Timing of order***

11.64 In some jurisdictions courts are only empowered to make protection orders in criminal proceedings when a person has been convicted, found guilty or has pleaded

67 *Domestic and Family Violence Protection Act 1989* (Qld) ss 16, 30. See also *Criminal Code Act 1899* (Qld) sch 1, s 359F (on the hearing of a charge for unlawful stalking, a judicial officer may constitute the court to consider whether a restraining order should be made against the person). The South Australian provision also confers a discretion on courts to make protection orders on a finding of guilt, or on sentencing: *Criminal Law (Sentencing) Act 1988* (SA) s 19A.

68 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 39.

69 *Restraining Orders Act 1997* (WA) s 63A.

70 *Ibid* s 63A. See also *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 40 (quasi-mandatory language in relation to interim protection orders for serious offences).

71 *Restraining Orders Act 1997* (WA) s 63. This section also allows a court hearing proceedings under the *Family Court Act 1997* (WA), *Family Law Act 1975* (Cth), or protection proceedings under the *Children and Community Services Act 2004* (WA) to make a protection order against a party to the proceedings or any other person who gives evidence in the proceedings.

72 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), 67.

guilty.<sup>73</sup> In other jurisdictions courts are empowered to make protection orders in criminal proceedings *before* a person has been convicted or found guilty. For example, NSW family violence legislation requires courts to make interim protection orders on the *charging* of serious offences, which is defined to include a ‘domestic violence offence’ other than murder or manslaughter.<sup>74</sup> In the Second Reading Speech of the NSW family violence legislation, Tony Kelly MLC stated:

Under the reforms victims will automatically be protected by an apprehended violence order if their alleged attacker is charged with certain serious personal violence offences. The automatic apprehended violence orders will be extended to all victims in these types of cases, irrespective of whether they are involved in a relationship with the person. The defendant will not be entitled to contest the order in court until the concurrent criminal charges have been finalised. This will spare victims of violence the trauma of being cross-examined at the hearing for the apprehended violence order as well as at the hearing of the criminal charges.<sup>75</sup>

11.65 Western Australian family violence legislation allows a judicial officer, on request or on the court’s own initiative, to make a protection order when considering a case for bail.<sup>76</sup> Tasmanian family violence legislation allows a court to make protection orders in ‘proceedings for a family violence offence’.<sup>77</sup> The language is not precise, but the reference to proceedings appears to suggest that an order could be made while a trial was on foot—that is, prior to a verdict.

11.66 The Domestic Violence Legislation Working Group did not support provisions enabling courts to make protection orders of their own volition against accused persons when criminal proceedings against them were continuing.<sup>78</sup> It expressed the view that the making of orders on the basis of ‘untried facts’ would amount to a ‘denial of justice’.<sup>79</sup>

### *Variation*

11.67 Some family violence legislation expressly provides that a court may vary an existing protection order of its own initiative on a plea or finding of guilt in relation to an offence involving family violence. In NSW a court is empowered to vary a final or interim order of its own volition where a person pleads guilty to, or is found guilty of, an offence of stalking or intimidation with intent to cause physical or mental harm, or of a ‘domestic violence offence’. The court may make such a variation for the purpose of providing greater protection for the person against whom the offence was

73 For example, *Domestic and Family Violence Protection Act 1989* (Qld) s 30 and *Domestic and Family Violence Act 2007* (NT) s 45. In South Australia protection orders can be made on a finding of guilt or on sentencing: *Intervention Orders (Prevention of Abuse) Act 2009* (SA) sch 1 pt 4.

74 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 40.

75 New South Wales, *Parliamentary Debates*, Legislative Council, 29 November 2007, 4652 (T Kelly—Minister for Lands, Minister for Rural Affairs, Minister for Regional Development, and Vice-President of the Executive Council).

76 *Restraining Orders Act 1997* (WA) s 63(1).

77 *Family Violence Act 2004* (Tas) s 36. See also *Justices Act 1959* (Tas) s 106J.

78 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), 67. The views expressed by the Working Group in this regard did not expressly distinguish between final and interim protection orders.

79 *Ibid*, 67.

committed—irrespective of whether or not an application has been made to vary the order.<sup>80</sup>

11.68 In Queensland and the NT, a court before which a person pleads guilty to, or is found guilty of, an offence that involves family violence must, if a protection order is already in force, consider the order and whether in the circumstances it needs to be varied, including for example, by varying the date the order ends.<sup>81</sup> In WA, a court convicting a person of a violent personal offence—including attempted murder, aggravated sexual penetration without consent and aggravated sexual coercion—must, where a ‘violence restraining order is in force for the protection of a victim of the offence’, vary that order by extending its duration.<sup>82</sup>

### ***Submissions and consultations***

#### ***Whether courts are exercising their powers to make protection orders in criminal proceedings***

11.69 In the Consultation Paper, the Commissions asked to what extent, in practice, courts are exercising their powers to make protection orders in criminal proceedings on their own initiative, where a discretion to do so is conferred on them.<sup>83</sup>

11.70 Stakeholders submitted that the use of the powers varies among jurisdictions. In Tasmania, the power is exercised,<sup>84</sup> though it is unclear how often.<sup>85</sup> Generally the prosecution will apply for an order when it presents a charge, if an order is not already in place.<sup>86</sup> If the conduct is denied, an interim order is made, until the charge is determined.<sup>87</sup> The Department of Premier and Cabinet (Tas) submitted that:

an interim order is not considered to prejudice the outcome of the hearing. Generally, final orders where the offender is involved are made ‘without admission’ and therefore could not prejudice the criminal hearing.<sup>88</sup>

11.71 In WA, National Legal Aid submitted that it is unusual for magistrates to issue protection orders in criminal proceedings on their own initiative, but orders are sometimes made in the superior courts pursuant to the Prosecutions Victim Support Policy.<sup>89</sup>

11.72 In South Australia (SA), protection orders can be made upon a finding of guilt or a guilty plea, but in practice they are only made if the prosecutor applies for the

80     *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 75.

81     *Domestic and Family Violence Protection Act 1989* (Qld) s 30(2); *Domestic and Family Violence Act 2007* (NT) s 45(3).

82     *Restraining Orders Act 1997* (WA) s 63A(1)(b).

83     Consultation Paper, Question 6–3.

84     Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010.

85     Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

86     Ibid.

87     Ibid; National Legal Aid, *Submission FV 232*, 15 July 2010.

88     Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

89     National Legal Aid, *Submission FV 232*, 15 July 2010.

order. Sometimes prosecutors only apply if the victim asks for them to do so, or as it was put: ‘If victims are not proactive they miss out’.<sup>90</sup>

11.73 In NSW, it was submitted, courts do exercise their power to make protection orders when criminal proceedings are on foot.<sup>91</sup> For example, courts must generally make protection orders where the accused has been charged with a ‘serious offence’. Women’s Legal Services NSW said that in practice, ‘interim orders are usually made when the matter also involves criminal charges’.<sup>92</sup> The Local Court of NSW submitted that it is uncommon for the Court to decline to make an order, ‘except where a protection order has already been made’.<sup>93</sup>

11.74 In Queensland, ‘knowledge about this is very limited,’ the Queensland Law Society submitted, but ‘by the time the matter comes before the court the aggrieved [party] has already obtained a temporary protection order (or police have applied)’.<sup>94</sup> Women’s Legal Service Queensland submitted that courts, particularly higher courts, ‘rarely if ever make such an order without a request by or on behalf of the victim’.<sup>95</sup>

11.75 In SA, an approach could be adopted similar to the one recently introduced (but not yet operative) for sexual offences, suggested the Commissioner for Victims’ Rights (SA).<sup>96</sup> Section 19A of the *Criminal Law (Sentencing Act) 1988* will be amended to provide that a court must, on finding a person guilty of a sexual offence or on sentencing a person for a sexual offence, consider whether a restraining order should be issued.<sup>97</sup> The Commissioner submitted:

Although the onus is on the prosecutor to apply for the order, it seems to me that a court respectful of the victim’s right to personal safety would inquire during the sentencing stage of proceedings.<sup>98</sup>

11.76 In the NT, courts do not need to make these orders in criminal proceedings, the Northern Territory Legal Aid Commission stated,

because police almost invariably make [domestic violence orders under the Northern Territory family violence legislation] which are continued as interim orders at the first mention of the associated criminal matters, and then continued until the criminal matters are disposed of, at which point they are confirmed (or not, as the case may be).<sup>99</sup>

11.77 A legal service provider from the NT was ‘not aware of this occurring’ within its service area.<sup>100</sup> A women’s legal service submitted that sometimes courts are not

90 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

91 Ibid; Local Court of NSW, *Submission FV 101*, 4 June 2010.

92 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

93 Local Court of NSW, *Submission FV 101*, 4 June 2010.

94 Queensland Law Society, *Submission FV 178*, 25 June 2010.

95 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

96 Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010.

97 *Statutes Amendment (Victims of Crime) Act 2009* (SA) s 9.

98 Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010.

99 Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

100 The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010.

making protection orders despite an explicit power to do so and requests by lawyers that this power be exercised. ‘It is a very useful provision but it is not being utilised’.<sup>101</sup>

#### **Mandatory protection orders**

11.78 There was some support in consultation for provisions mandating that judicial officers make protection orders on the charging of a person with a family-violencerelated offence.<sup>102</sup>

11.79 In the Consultation Paper, the Commissions asked whether current provisions in family violence legislation that mandate that courts make either interim or final protection orders—on charging, on a finding or plea of guilt, or in the case of serious offences—are working in practice.<sup>103</sup> The Commissions also asked whether such provisions have resulted in the issuing of unnecessary or inappropriate orders; and what types of circumstances, in practice, satisfy judicial officers in NSW that such orders are not required.<sup>104</sup>

11.80 The general theme which arose in submissions was that the provisions in NSW, which require the making of a protection order on the finding that an offence is proven or following a plea of guilty, are working,<sup>105</sup> and have not resulted in the issuing of unnecessary orders because magistrates usually provide victims with an opportunity to indicate whether they want a protection order.<sup>106</sup> Stakeholders observed that ‘judicial officers in NSW do not require orders where the victim indicates under oath they are not in fear and do not want an order’.<sup>107</sup> Moreover, Women’s Legal Services NSW submitted that ‘most orders made in this context are appropriate to the needs of the person needing protection’.<sup>108</sup>

11.81 A few stakeholders submitted that a ‘mandatory protection order upon conviction adds weight to the serious nature of the order and results in the victim not being required to make that decision’.<sup>109</sup>

11.82 Both Legal Aid NSW and the Law Society of NSW said the discretion not to impose an order is only exercised rarely and in exceptional cases:

for example a charge is proven but the court decides to dismiss the charge unconditionally and without recording a conviction, it is a first offence and the victim advises the court that s/he does not require the protection of an order.<sup>110</sup>

101 Confidential, *Submission FV 164*, 25 June 2010.

102 Australian Domestic & Family Violence Clearinghouse, *Consultation*, Sydney, 27 January 2010.

103 Consultation Paper, Question 6–4.

104 Ibid, Question 6–4.

105 National Legal Aid, *Submission FV 232*, 15 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010;

106 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. Both these submissions noted that courts also consider ‘the seriousness of the offence, whether there are children involved, and the ongoing safety of the victim’.

107 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

108 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

109 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

11.83 National Legal Aid submitted that the discretion under the NSW family violence legislation for a court not to make a protection order should be retained, noting that there will be circumstances where such an order is not in the interests of either party.<sup>111</sup>

11.84 Deputy Chief Magistrate Andrew Cannon stated that he was not aware of any issuing of inappropriate orders in South Australian courts.<sup>112</sup>

#### ***Exception to the making of protection orders for when victims object***

11.85 In the Consultation Paper, the Commissions asked whether it is appropriate for legislation that mandates that courts make protection orders to contain exceptions for situations when a victim objects to the making of the order.<sup>113</sup>

11.86 Stakeholder opinions on this issue were divided. Those who were in favour of the retention of such an exception emphasised the need for judicial discretion to deal with a victim's objections in the circumstances of a particular case, as well as the potential negative impacts on a victim caused by ignoring her or his wishes.

11.87 Several stakeholders submitted that there should be an exception for where a victim objects to the making of the order.<sup>114</sup> A partner violence counsellor submitted that an exception should be made, 'provided there is some supporting documentation from a counselling professional indicating that the victim is not being coerced, manipulated or misguided'.<sup>115</sup> Other stakeholders expressed similar concerns about courts obtaining an accurate indication of a victim's wishes:

Courts should ... be mindful of the power and control dynamics that exist and questions of this nature should be worded carefully and discussed away from the perpetrator of such violence. Victims should also be assured that they can claim to have no say in this process as this can be an effective tool to avoid violence or abuse following the awarding of a protection order.<sup>116</sup>

11.88 One stakeholder submitted that victims might object to an order—because they fear further violence if the order is granted, or for cultural reasons, or because the victim wishes to continue the relationship—and concluded:

110 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

111 National Legal Aid, *Submission FV 232*, 15 July 2010. See also Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

112 A Cannon, *Submission FV 137*, 23 June 2010.

113 Consultation Paper, Question 6–5.

114 T McLean, *Submission FV 204*, 28 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010; Confidential, *Submission FV 78*, 2 June 2010.

115 T McLean, *Submission FV 204*, 28 June 2010. Another stakeholder also expressed the view that there is a need for some assessment of whether a victim objects to an order due to coercion or fear: Berry Street Inc, *Submission FV 163*, 25 June 2010.

116 Confidential, *Submission FV 184*, 25 June 2010. See also The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010, which stated that 'caution and informed expertise must be exercised in ascertaining the wishes of a victim, particularly in open court'.

Mandating orders could work to protect the victim or alter his/her life in a negative way, perhaps an exemption is the best solution with the court resolving the matter on the basis of the evidence before it.<sup>117</sup>

11.89 A legal service provider from the NT submitted that, though it had limited practical experience concerning this particular issue, removing a victim's power to object to the making of a court-mandated protection order can, in theory, have a complex impact:

Removing the agency of victims to make choices about their own lives should only be done if it does not result in additional feelings of disempowerment for women who have already been disempowered by their partners.<sup>118</sup>

11.90 The Law Society of NSW submitted that police charging offenders and courts imposing 'an order following conviction or plea in all but the most exceptional of circumstances', is 'designed to reflect the seriousness with which the Government views domestic violence in all its forms'.<sup>119</sup> However, there is danger in removing discretion from police and courts:

sometimes a person seeks some intervention to resolve a situation involving domestic violence which is not a feature of their relationship. The incident may have arisen in exceptional circumstances. If by calling the police victims lose all control over the outcome of the process, there may be a disincentive to involve police at all. In summary, balance and discretion should be maintained. Public attitudes can still be shifted without applying the sledgehammer to every domestic violence situation.<sup>120</sup>

11.91 While some stakeholders submitted that victims should be consulted and their views taken into account in relation to the conditions of the order,<sup>121</sup> several stakeholders expressed the view that an exception should not be made where a victim objects to the making of an order if there are reasonable grounds to think the victim's safety might be compromised.<sup>122</sup> For example, the Queensland Law Society submitted that 'if it is necessary for State intervention to ensure the safety of a victim then the ability to have a mandatory protection order should remain'.<sup>123</sup> An exception was not appropriate, however, 'unless there are cogent reasons for the victim's objection'.<sup>124</sup>

11.92 A key theme arising from submissions opposing an exception based on a victim's consent, was that a mandatory order relieves a victim of any pressure—including pressure from an aggressor—not to apply for an order.<sup>125</sup> As mentioned in

117 Confidential, *Submission FV 171*, 25 June 2010.

118 Confidential, *Submission FV 164*, 25 June 2010.

119 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

120 *Ibid.*

121 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010.

122 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

123 Queensland Law Society, *Submission FV 178*, 25 June 2010.

124 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

125 National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*,

one submission ‘most times when the victim objects it is not because they want to, it is because they know the person who hurt them will be upset at them for getting the order’.<sup>126</sup>

11.93 The impact of pressure was identified by Women’s Legal Services NSW which recalled that, before s 16(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW)<sup>127</sup> was introduced,

pressure was often brought to bear on persons in need of protection to say that they had no fears of the defendant and magistrates had no option but to dismiss the application.<sup>128</sup>

11.94 Women’s Legal Services Australia also noted the risk of pressure being brought to bear on victims and submitted that such an exception ‘could potentially be a step backwards’.<sup>129</sup>

11.95 The Aboriginal Family Violence Prevention and Legal Service Victoria submitted that magistrates should only be mandated to make protection orders on an interim basis.<sup>130</sup>

11.96 Where there are children of a violent relationship, there is a further issue to be considered—namely the concerns of child protection agencies. The Department of Premier and Cabinet (Tas) submitted that, ultimately, if a person with children in their care remains in a violent relationship:

it must be a matter for the Department of Health and Human Services whether that child is at such a risk that intervention is necessary, either to remove the child or (preferably) to educate and support especially the victim, but also the offender.<sup>131</sup>

#### *Applications by prosecutors*

11.97 In the Consultation Paper, the Commissions asked to what extent prosecutors in the NT are making applications for protection orders where a person pleads guilty or is found guilty of an offence that involves family violence. The Commissions also asked whether legislation should give this power to prosecutors in other states and territories.<sup>132</sup>

11.98 The Commissions heard mixed responses about the practice of prosecutors in the NT. A legal service provider said it was ‘not aware of a single instance’ of this

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25 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

126 Confidential, *Submission FV 130*, 21 June 2010.

127 This provides that, in some circumstances, when making a protection order, it is not necessary for the court to be satisfied that the person for whose protection the order would be made in fact fears a relevant offence will be committed, or that relevant conduct will be engaged in.

128 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

129 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

130 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

131 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

132 Consultation Paper, Question 6–6.

power being used.<sup>133</sup> Similarly, National Legal Aid submitted that the power is not generally utilised by prosecutors in the NT.<sup>134</sup> It provided the following case study:

There had been serious assault, statements taken, the defendant was in custody and pleaded guilty on the day the protection order expired. The prosecution made no application and the victim had to attend the Legal Aid Commission to assist her to apply for a new protection order.<sup>135</sup>

11.99 The Northern Territory Legal Aid Commission submitted that because interim protection orders will commonly already have been made, and because these orders are commonly confirmed at sentencing, ‘the need to use this power does not in practice arise’.<sup>136</sup>

11.100 However, an Indigenous women’s council said that in its experience, NT prosecutors are in fact making these applications in many cases,<sup>137</sup> and another legal service provider submitted that the prosecutors do so

as a matter of course where findings of guilt are made by a court for a family violence offence. The legislation is a useful and practical tool and does not take away any discretion of the court.<sup>138</sup>

11.101 National Legal Aid expressed the view that victims would benefit if prosecutors applied for protection orders, because:

currently in circumstances where criminal charges have been laid women have to apply for protection orders or extension of such orders. The victim has to provide another statement for the court, and appear in protection order proceedings separate to the criminal charges. This is traumatic, stressful and time consuming for them.<sup>139</sup>

11.102 Stakeholders that addressed the matter submitted that prosecutors in other states and territories should be empowered to apply for protection orders.<sup>140</sup> For example, the Magistrates’ Court and Children’s Court of Victoria submitted that:

Arguably, the Director of Public Prosecutions could play a greater role in seeking the protection of an intervention order for crimes arising from family violence after a finding of guilt consistent with the recommendations of the Sentencing Advisory Council’s 2009 report on contraventions of intervention orders.<sup>141</sup>

133 The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010.

134 National Legal Aid, *Submission FV 232*, 15 July 2010. This stakeholder also noted that there have been occasions where magistrates have refused to entertain applications because the police domestic violence unit has not been present or did not have a view on the application.

135 Ibid.

136 Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

137 Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

138 Confidential, *Submission FV 198*, 25 June 2010.

139 National Legal Aid, *Submission FV 232*, 15 July 2010.

140 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010.

141 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

**Court powers to make protection orders on own initiative**

11.103 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should include an express provision conferring on courts a power to make a protection order on their own initiative at any stage of a criminal proceeding—including prior to a plea or finding of guilt.<sup>142</sup> This proposal received overwhelming support, from nearly all stakeholders that addressed it.<sup>143</sup>

11.104 Improved victim safety and protection were among the reasons advanced in support. For example, one stakeholder stated that the proposal ‘allows protection for victims while an accused is on bail or during a trial for acts of [family violence] which have given rise to criminal proceedings’.<sup>144</sup> The Queensland Government considered that the proposal could ‘potentially improve the safety of victims in circumstances where the police officers undertaking the criminal investigation have not applied for an order’.<sup>145</sup>

11.105 Similarly, the Department of Premier and Cabinet (Tas) stated that:

In relation to whether the court should make protective orders of its own volition, ultimately if a court is dealing with a family violence matter, that court is responsible for making decisions which will keep the victim and any affected children safe.<sup>146</sup>

11.106 National Legal Aid also submitted that courts should have the power to make a protection order to ‘ensure the safety of the children of the relationship between the alleged offender and the victim’. It provided a case study in which a magistrate granted a protection order for the mother but refused to grant a protection order for a child, and instead referred the mother to the Family Court.<sup>147</sup>

The mother was very fearful that the father would seriously harm or kill the child if he was to spend any time with the child. The client was extremely anxious and frightened and was advised by Legal Aid not to commence family court proceedings.<sup>148</sup>

11.107 The Department of Premier and Cabinet (Tas) and National Legal Aid commented that courts may not routinely be considering the possibility of making

142 Consultation Paper, Proposal 6–3.

143 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010.

144 Confidential, *Submission FV 171*, 25 June 2010.

145 Queensland Government, *Submission FV 229*, 14 July 2010.

146 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

147 National Legal Aid, *Submission FV 232*, 15 July 2010.

148 Ibid.

protection orders in the course of criminal proceedings against persons who have committed family violence.<sup>149</sup> They identified two situations in which the broader context of family violence may not immediately be apparent:

- where the offender attempts to involve the family violence victim in criminal activities—for example, coercing him or her to provide a false alibi for the offender, or forcing the victim to commit crimes under duress; and
- where a family violence offender commits an offence against a third person—for example, an assault—with the intention of intimidating or causing harm or distress to the victim.

11.108 Both stakeholders commented that these situations would likely warrant the making of a protection order. National Legal Aid further submitted that courts should be alert to the potential opportunities to make protection orders in these circumstances, as well as in the event that a victim of family violence is prosecuted for the commission of offences committed under duress.<sup>150</sup>

11.109 Against the need to improve victim safety, the need to ensure procedural fairness for the respondent was also identified.<sup>151</sup> Women's Legal Services NSW supported the proposal, 'provided that the defendant (and prosecution) can make submissions as to the appropriateness of the orders'.<sup>152</sup>

11.110 There was some concern that magistrates should not pass interlocutory judgment on the substantive issues of a case.<sup>153</sup> Two stakeholders said that an interim order is fair and appropriate, until there is a plea of guilt or the court makes its finding.<sup>154</sup>

11.111 Two stakeholders opposed the proposal. One legal service provider said that if a court had concerns about a victim's safety, it 'could invite police or [the] prosecution to make such an application. The defendant would then have the appropriate opportunity to respond'.<sup>155</sup> The Peninsula Community Legal Centre submitted that the proposal would amount to a 'denial of justice':

It is irrelevant that the civil or criminal liability of the person bound by the order is not affected by the making of the order. A fundamental basis of the rule of law is the right of a party to defend any application against them, rather than having an order issued on the basis of what may constitute untried facts and an order that the affected family member may not wish to have imposed.<sup>156</sup>

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149 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010.

150 National Legal Aid, *Submission FV 232*, 15 July 2010, citing the comments of the Tasmanian Legal Aid Commission.

151 Queensland Government, *Submission FV 229*, 14 July 2010.

152 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

153 Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

154 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010.

155 Confidential, *Submission FV 198*, 25 June 2010.

156 Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

### ***Varying protection orders***

11.112 In the Consultation Paper, the Commissions proposed that state and territory legislation should provide that a court, before which a person pleads guilty or is found guilty of an offence involving family violence, must consider any existing protection order obtained under family violence legislation and whether, in the circumstances, that protection order needs to be varied to provide greater protection for the person against whom the offence was committed, irrespective of whether an application has been made to vary the order.<sup>157</sup>

11.113 This proposal received overwhelming support, from nearly all stakeholders that addressed it—most without further comment.<sup>158</sup> The Australian Government Attorney-General's Department said this proposal was consistent with a report of its Access to Justice Taskforce because it provided ‘mechanisms for better linking of different parts of the system’.<sup>159</sup> The Queensland Law Society also supported the proposal, and submitted that:

The problem of family violence needs to be tackled in an holistic manner. Too often the victims of violence fall through the cracks due to a lack of co-ordinated response. There should be the opportunity when an offender is sentenced for the court to ensure that the protection order is adequate.<sup>160</sup>

11.114 In contrast, one stakeholder did not support the proposal, although without providing any reasons.<sup>161</sup>

### ***Commissions' views***

11.115 Provisions empowering courts in criminal matters to make protection orders on their own initiative at any stage of a criminal proceeding are an extremely important way of alleviating the need for a victim—already involved in criminal proceedings as a witness—to apply for a protection order, and potentially to give further evidence. A court should be able to make such orders of its own initiative where it considers it is

157 Consultation Paper, Proposal 6–4.

158 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

159 Australian Government Attorney-General's Department, *Submission FV 166*, 25 June 2010. See also Australian Government Attorney-General's Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009).

160 Queensland Law Society, *Submission FV 178*, 25 June 2010.

161 Confidential, *Submission FV 198*, 25 June 2010.

appropriate to do so to protect a victim. The family violence legislation of each state and territory should contain an express provision empowering courts in this way. The Commissions note that the Victorian family violence legislation does not contain such a provision.

11.116 In empowering courts in this way, the Commissions consider that it is also important to address legitimate concerns expressed about denying justice to an accused in a criminal proceeding, based on the making of orders on ‘untried facts’. The Commissions acknowledge the importance of Australia’s obligations under the ICCPR, noted in Chapter 2, with respect to the entitlement of an accused to a fair trial. In the Commissions’ view, such a concern is addressed in the following ways:

- requiring any order made by a court on its own initiative prior to a plea or finding of guilt to be of an interim nature;
- allowing both the victim and the respondent to make submissions to the court as to the appropriateness of an order;
- clarifying in family violence legislation that the making of a protection order does not affect the criminal liability of a person in respect of conduct the subject of the order;<sup>162</sup> and
- in particular, clarifying in state and territory legislation that, in the trial of an accused for an offence arising out of conduct that is the same or substantially similar to that upon which a protection order is based, references cannot be made to the making, variation or revocation of a protection order, or the refusal by a court to take any of those actions, in proceedings under family violence legislation, without the leave of the court.<sup>163</sup>

11.117 The overall effect of the Commissions’ approach to their recommendations about the making of protection orders in criminal proceedings, and the use of evidence about the making of such orders in the trial of an accused, is to accommodate the systemic objectives of victim protection and ensuring that an accused receives a fair trial.

11.118 It is imperative that courts retain discretion as to whether to make a protection order on their own initiative. A court should be able to decide whether an order is necessary to ensure the safety of the victim, and what conditions should be imposed to secure such safety. The attitude of the victim may be one compelling factor to consider, although it may not necessarily be determinative, for example in circumstances where the court has concerns about the victim’s safety despite the victim’s objections to the order.

11.119 The Commissions consider that an appropriate complement to their recommendation that courts be empowered to make protection orders in criminal proceedings of their own initiative is a provision empowering prosecutors to seek

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<sup>162</sup> Rec 11–1.

<sup>163</sup> Rec 11–2.

protection orders where a person pleads guilty or is found guilty of an offence involving family violence.

11.120 The combined effect of the Commissions' recommendations about empowering courts to make protection orders of their own initiative,<sup>164</sup> empowering prosecutors to apply for such orders where a person pleads guilty or is found guilty of an offence,<sup>165</sup> using specialised judicial officers and specialised prosecutors in specialised family violence courts,<sup>166</sup> and providing training to judicial officers, prosecutors and lawyers on the dynamics and features of family violence<sup>167</sup> is to:

- increase the likelihood that judicial officers and prosecutors involved in family-violence related criminal proceedings focus on the issue of victim safety and protection;
- lessen the trauma, stress and time involved in a victim having to obtain a protection order in separate civil family violence proceedings in addition to criminal proceedings for family-violence related offences; and
- increase the likelihood that judicial officers and lawyers will be alert to the need to consider whether to make or apply for a protection order, respectively, in those types of criminal proceedings identified by stakeholders where the broader context of family violence may not necessarily be apparent. These include criminal proceedings against an accused who has:
  - used family violence to coerce the victim into participating in criminal activities—such as providing a false alibi for the offender; or
  - committed an offence against a third person, for example, an assault, with the intention of intimidating the victim.

#### *Variation*

11.121 In the Commissions' view, a court before which a person pleads guilty or is found guilty of an offence involving family violence, should be required to consider whether any existing protection order needs to be varied to provide greater protection for the person against whom the offence was committed. Courts should be required to consider this irrespective of whether or not an application has been made to vary the order.

11.122 This approach does not require the court to vary an existing protection order. Rather, its intended impact is to focus the attention of a court exercising criminal jurisdiction on an existing protection order, to ascertain whether its conditions remain appropriate and sufficient to protect the affected victim.

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164 Rec 11–3.

165 Rec 11–4.

166 Rec 32–3.

167 Rec 31–1.

**Recommendation 11–3** State and territory family violence legislation should include an express provision conferring on courts a power to make a protection order on their own initiative at any stage of a criminal proceeding. Any such order made prior to a plea or finding of guilt should be interim until there is a plea or finding of guilt.

**Recommendation 11–4** State and territory family violence legislation should expressly empower prosecutors to make an application for a protection order where a person pleads guilty or is found guilty of an offence involving family violence.

**Recommendation 11–5** State and territory legislation should provide that a court before which a person pleads guilty, or is found guilty of an offence involving family violence, must consider whether any existing protection order obtained under family violence legislation needs to be varied to provide greater protection for the person against whom the offence was committed.

## Protection order conditions and the criminal law

11.123 Conditions in protection orders may overlap with:

- general prohibitions or requirements imposed by the criminal law;
- bail conditions;<sup>168</sup>
- pre-sentencing orders; and
- orders made on sentencing—including non-contact and place restriction orders.

11.124 In addition, protection orders can impose conditions that restrict behaviour not otherwise prohibited by the criminal law, as well as conditions—such as orders excluding a person from his or her home—which are not typically sentencing options.<sup>169</sup>

### Types of conditions

11.125 Before considering issues of overlap between conditions in protection orders obtained under family violence legislation and the criminal law, and areas where conditions may operate independently of the criminal law, it is necessary to consider the types of conditions available under protection orders.

11.126 The Australian Government Solicitor (AGS) has expressed the view that family violence legislation does not appear to be substantially different across jurisdictions in respect of crucial matters such as:

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<sup>168</sup> The potential overlap between conditions in protection orders and bail conditions is discussed in Ch 10.

<sup>169</sup> As noted below, a limited number of jurisdictions have in place restriction orders as a sentencing option.

the types of orders that may be made in the domestic violence context and the kinds of prohibitions, restraints and conditions that an order may impose on the person against whom it is made.<sup>170</sup>

11.127 The types of conditions that are authorised by family violence legislation to be imposed typically include any that the court considers to: protect the victim and any child from family violence,<sup>171</sup> encourage the person to accept responsibility for the violence committed against the victim, or change his or her behaviour.<sup>172</sup>

11.128 Conditions can also prohibit (or restrict) the person against whom the protection order is made from:

- committing family violence against the victim;<sup>173</sup>
- harassing, threatening or intimidating the victim;<sup>174</sup>
- verbally abusing or assaulting the victim;<sup>175</sup>
- entering the victim's residence, workplace or any other specified premises—including where that person has a legal or equitable interest in the property;<sup>176</sup>
- being anywhere within a specified distance of the victim or a specified place;<sup>177</sup>
- approaching the victim or any specified premises—including within 12 hours of consuming intoxicating liquor or illicit drugs;<sup>178</sup>
- telephoning or otherwise contacting the victim—including by email or by text message, unless in the company of a police officer or specified person,<sup>179</sup> and including attempting to contact the victim at a refuge either directly or through someone else;<sup>180</sup>
- interfering with or damaging the victim's property;<sup>181</sup>
- stalking the victim;<sup>182</sup>

<sup>170</sup> Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 13.

<sup>171</sup> For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(1).

<sup>172</sup> For example, *Domestic and Family Violence Act 2007* (NT) s 21(1)(b).

<sup>173</sup> For example, *Family Violence Protection Act 2008* (Vic) s 81(2)(a); *Penalties and Sentences Act 1992* (Qld) s 22.

<sup>174</sup> For example, *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(i); *Domestic Violence and Protection Orders Act 2008* (ACT) s 48(2)(f).

<sup>175</sup> *Family Violence Act 2004* (Tas) s 14(3)(d); *Domestic and Family Violence Act 2007* (NT) s 21(1)(a).

<sup>176</sup> For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(2)(a),(b); *Family Violence Protection Act 2008* (Vic) ss 81(2)(b), 82; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(a), (5).

<sup>177</sup> For example, *Family Violence Protection Act 2008* (Vic) s 81(2)(e); *Penalties and Sentences Act 1992* (Qld) s 22. See also *Restraining Orders Act 1997* (WA) s 13(2)(c).

<sup>178</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(2)(a), (c).

<sup>179</sup> *Family Violence Protection Act 2008* (Vic) s 81(2)(d). *Restraining Orders Act 1997* (WA) s 13(2)(d) prohibits communicating or attempting to communicate with the victim.

<sup>180</sup> *Penalties and Sentences Act 1992* (Qld) s 25(3)(d).

<sup>181</sup> For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(2)(e); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(f).

<sup>182</sup> For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 36.

- locating or attempting to locate the victim;<sup>183</sup>
- causing another person to engage in behaviour prohibited by the protection order;<sup>184</sup>
- taking possession of specified personal property reasonably needed by the victim;<sup>185</sup>
- preventing the victim from obtaining and using personal property reasonably needed by the victim;<sup>186</sup> and
- possessing firearms, prohibited weapons,<sup>187</sup> or a firearms licence.<sup>188</sup>

11.129 In NSW and Queensland, protection orders include mandatory conditions. In NSW every protection order is taken to include conditions which prohibit the person from: assaulting, molesting, harassing, threatening, stalking and engaging in any intimidating conduct towards the victim or anyone with whom the victim has a domestic relationship.<sup>189</sup> In Queensland, every protection order is taken to include a condition that the person is to be of good behaviour and not commit family violence.<sup>190</sup>

11.130 In addition to prohibiting or restricting conduct, conditions attached to a protection order can require the person to undertake certain actions, such as: vacate premises—whether or not the person has a legal or equitable interest in the premises;<sup>191</sup> surrender firearms and other weapons;<sup>192</sup> return specified personal property required by the victim;<sup>193</sup> attend an assessment to determine an appropriate form of intervention program and eligibility for such a program;<sup>194</sup> or attend a rehabilitation program.<sup>195</sup> Conditions can also specify the circumstances in which a person against whom a protection order is made may be on particular premises or approach or contact a particular person.<sup>196</sup>

183 *Penalties and Sentences Act 1992* (Qld) s 25(3)(e). This section does not prohibit the person against whom the order is made from asking his or her lawyer to contact the victim: s 25(7).

184 For example, *Family Violence Protection Act 2008* (Vic) s 81(2)(f); *Restraining Orders Act 1997* (WA) s 13(2)(f); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(h).

185 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(g).

186 *Restraining Orders Act 1997* (WA) s 13(2)(e).

187 For example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35(2)(d); *Family Violence Act 2004* (Tas) s 16(3)(b). Other legislation frames this in terms of revoking, suspending or cancelling weapons approval or firearms authority, eg, *Family Violence Protection Act 2008* (Vic) s 81(2)(g),(h) or requiring the person to surrender specified weapons or articles that could be used to commit violence against the victim: *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(k).

188 *Restraining Orders Act 1997* (WA) s 14.

189 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 36.

190 *Penalties and Sentences Act 1992* (Qld) ss 22, 25(1).

191 *Family Violence Act 2004* (Tas) s 16(3); *Domestic and Family Violence Act 2007* (NT) s 22.

192 For example, *Family Violence Protection Act 2008* (Vic) s 158; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 14.

193 For example, *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(1)(j). Personal property directions—dealing with the return of personal property to a victim, or allowing a victim or the person against whom a protection order is made to collect personal property following the making of an exclusion order—are discussed in Ch 16.

194 Ibid s 13.

195 *Domestic and Family Violence Act 2007* (NT) s 24.

196 *Domestic Violence and Protection Orders Act 2008* (ACT) s 48(2)(j).

11.131 In SA only, a court making a protection order may make a problem gambling order providing that the person be subject to a problem gambling family protection order under the *Problem Gambling Family Protection Orders Act 2004* (SA) imposing specified requirements or orders of a kind that could be imposed by the Independent Gambling Authority under that Act.<sup>197</sup> Such orders include requiring the person to attend counselling or rehabilitation; prohibiting the person from taking part in gambling activities; and prohibiting the person from contacting or intimidating a family member for the purpose of demanding or requesting money for gambling activities.<sup>198</sup> The Commissions heard in one consultation with magistrates in Adelaide that problem gambling orders are not being imposed as part of the conditions of protection orders.

11.132 Directions not to breach the criminal law may be attached as conditions to a protection order. For example, conditions which provide that a person is not to threaten, assault or stalk another person, or damage another person's property, essentially articulate what is, in any event, conduct typically prohibited by the criminal law. A condition to be of good behaviour is also essentially a condition to abide by the law. Other conditions, however, prohibit conduct which, but for the prohibition in the protection order, would not infringe the law. For example, persons are usually free to contact, communicate with, approach and locate family members, and free to enter and live in their own residence—conduct which can be proscribed by a protection order that includes an exclusion order.<sup>199</sup>

### **Application of conditions in practice**

11.133 The above summary indicates the wide range of conditions potentially available to judicial officers to impose in the making of protection orders under family violence legislation. However, Professor Rosemary Hunter's study of the handling of family violence protection order proceedings in magistrates' courts in Victoria found that the median hearing time for protection order applications, other than contested final orders, was three minutes.<sup>200</sup> She observed that the speed with which protection order applications were dealt with resulted in judicial officers not giving particularised attention to the conditions attached to a protection order. She concluded that conditions were not tailored to the particular allegations of each case.<sup>201</sup>

11.134 The application forms for protection orders in most jurisdictions set out the conditions that may be attached to the making of a protection order, with an option for applicants to tick the conditions which they seek.<sup>202</sup> However, the application form for a protection order in WA does not set out the conditions which may be imposed.<sup>203</sup>

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197 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 24.

198 *Problem Gambling Family Protection Orders Act 2004* (SA) s 5.

199 Exclusion orders are discussed below.

200 R Hunter, *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (2008), 81. A great number of protection orders are made by consent, and the making of consent orders is discussed in Ch 18.

201 *Ibid.* 98.

202 In South Australia, this information is set out in the Magistrates Court of South Australia, *Affidavit to Support Application for Domestic Violence Restraining Order* <[www.courts.sa.gov.au](http://www.courts.sa.gov.au)> at 8 March 2010.

11.135 The application forms for NSW and Queensland specify the mandatory conditions which attach to a protection order in those jurisdictions. The application form for a protection order in Victoria includes a note informing the applicant that if there is something that he or she wants the person who has used violence to do—or not do—which is not covered in the list, the applicant should discuss this with the Court Registrar.<sup>204</sup>

### **Submissions and consultations**

#### **Tailored conditions**

11.136 In the Consultation Paper, the Commissions asked whether, in practice, the conditions that judicial officers attach to protection orders under state and territory family violence legislation were sufficiently tailored to the circumstances of particular cases.<sup>205</sup>

11.137 Stakeholder responses to this question were divided. Some stakeholders stated that protection orders are generally adequately tailored,<sup>206</sup> but noted that this was dependent largely on: whether the parties had legal representation; the quality of legal representation;<sup>207</sup> whether the victim was able to obtain assistance from family violence support services or court support services;<sup>208</sup> and, in some cases, the varying practices of judicial officers.<sup>209</sup> Some submitted that judicial officers tailor orders according to what is presented to them by the victim, prosecution, or offender.<sup>210</sup>

11.138 For example, it was submitted that:

- in the ACT, the precedent list of conditions and exceptions used by judicial officers is ‘sufficiently thorough to enable appropriate tailoring’;<sup>211</sup>

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Local courts in NSW have a pro forma bench sheet attached to the court file which allows the court to tick the relevant orders.

203 Magistrates Court of Western Australia, *Violence Restraining Order Application* <[www.magistratescourt.wa.gov.au/content/restraining.aspx](http://www.magistratescourt.wa.gov.au/content/restraining.aspx)> at 9 April 2010.

204 Magistrates’ Court of Victoria, *Information for Application for an Intervention Order* (2009) <[www.magistratescourt.vic.gov.au](http://www.magistratescourt.vic.gov.au)> at 2 February 2010. As noted below, however, certain conditions concerning rehabilitation and counselling are not generally included on application forms.

205 Consultation Paper, Question 6–7.

206 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010. One submission stated that more research into this question was needed: Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

207 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

208 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

209 National Legal Aid, *Submission FV 232*, 15 July 2010; Confidential, *Submission FV 171*, 25 June 2010.

210 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

211 National Legal Aid, *Submission FV 232*, 15 July 2010.

- in Tasmania, the standard conditions are broad enough to apply in most situations;<sup>212</sup>
- in WA, some judicial officers give great consideration to appropriate terms, while others ‘adopt a more standard approach’, and problems have arisen where justices of peace, who are not legally trained, hear interim protection order applications;<sup>213</sup>
- in Queensland, magistrates are ‘attuned to ensuring that a protection order provides for safety and proper conditions are tailored to the circumstances of each case’;<sup>214</sup> and
- in Victoria, if one or both parties are represented, then the conditions to be included are negotiated, and judicial officers will give active consideration to whether particular conditions should be included.<sup>215</sup>

11.139 However, many stakeholders expressed concern that conditions were not adequately tailored to the circumstances of particular cases,<sup>216</sup> with time constraints being cited as a common reason.<sup>217</sup> For example, Professor Julie Stubbs submitted that research suggests that:

applications for orders are often poorly drafted and busy courts often have little time to establish the particular needs of the parties nor to tailor the orders to those needs.<sup>218</sup>

11.140 In a confidential submission, a legal service provider in the NT said that ‘little attention’ is given to the conditions, ‘especially when the order is not contested’—and it reported that it had certainly never seen a magistrate take the initiative to explore orders outside the usual list.<sup>219</sup> National Legal Aid also noted that inappropriate protection orders have been made for persons living in remote Indigenous communities, for example ‘the order might ignore the fact that both parties will have to use the only local grocery shop’.<sup>220</sup>

11.141 The Aboriginal Family Violence Prevention and Legal Service Victoria submitted that tailoring conditions is more difficult when police, rather than lawyers, are involved:

The standardised form results in laziness and inhibits further enquiry as to whether particular conditions are appropriate. ... Generally it takes some time to talk through a victim’s particular situation ... Police are generally time pressured and not best placed

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212 Ibid.

213 Ibid.

214 Queensland Law Society, *Submission FV 178*, 25 June 2010.

215 National Legal Aid, *Submission FV 232*, 15 July 2010.

216 J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 71*, 1 June 2010.

217 Confidential, *Submission FV 183*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010.

218 J Stubbs, *Submission FV 186*, 25 June 2010.

219 Confidential, *Submission FV 164*, 25 June 2010.

220 National Legal Aid, *Submission FV 232*, 15 July 2010. This concern was echoed in another consultation: Northern Territory Legal Aid Commission, *Consultation*, Darwin, 26 May 2010.

to do this. Understanding of the broader legal situation with respect to proceedings on foot or pending or other orders made, is also required in tailoring orders, and again police are not best placed to deal with this.<sup>221</sup>

11.142 Several stakeholders submitted that tailoring conditions is ‘imperative’.<sup>222</sup> Properly tailored conditions ‘ensure that the victim does not need to return unnecessarily to court to vary the order and therefore leads to efficiency across the justice system’.<sup>223</sup> Similarly, a legal service from the NT submitted that, given that not all victims have access to legal representation—or to legal representation of appropriate experience and skill—‘it would be very helpful if the magistrates could consider specialised orders on their behalf’.<sup>224</sup>

11.143 The Department of Premier and Cabinet (Tas) stated that judicial officers should not draft conditions which address only the violence that has already been committed because this ‘is likely to leave victims without sufficient protection’.

With family violence behaviours, just because somebody used the telephone to carry out the harassment the first time does not mean that they will not approach in person the next time.<sup>225</sup>

11.144 It also emphasised the utility of courts being able to impose orders which require respondents to refrain from doing acts which would constitute a breach of the law because it ‘actually does help them to realise that these behaviours are going to lead to consequences’.<sup>226</sup>

#### ***Trying to locate the victim***

11.145 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should provide expressly that one of the conditions that may be imposed by a court making a protection order is to prohibit the person against whom the order is made from locating or attempting to locate the victim of family violence.<sup>227</sup>

11.146 Most stakeholders supported this proposal.<sup>228</sup> In a joint submission, Domestic Violence Victoria and others agreed that the condition was important for

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221 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

222 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

223 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

224 Confidential, *Submission FV 164*, 25 June 2010.

225 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

226 Ibid.

227 Consultation Paper, Proposal 6–5.

228 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*,

those trying to sever ties with persons who have used family violence.<sup>229</sup> One legal service provider submitted that this would give police ‘more specific scope to arrest a defendant should they breach this condition’.<sup>230</sup>

11.147 Some stakeholders expressed qualified support for the proposal. An advocacy organisation agreed with the proposal, provided that ‘there is a priority for minimal disruption to the protected person and any children involved that assumes, where safe and possible, they remain in the home, and the perpetrator is removed’.<sup>231</sup> The Aboriginal Family Violence Prevention and Legal Service Victoria supported the proposal, ‘subject to [the application] of *Family Law Act* location provisions’.<sup>232</sup>

11.148 National Legal Aid stressed that care would need to be taken to ensure that such orders were appropriate for individual cases, and that this could be the subject of further training and education.<sup>233</sup> Legal Aid NSW stated that such conditions would need to be qualified to allow parties to be contacted in order to engage in family dispute resolution in appropriate circumstances.<sup>234</sup>

11.149 Other stakeholders expressed concern that such a condition could pose ‘practical difficulties’;<sup>235</sup> would be difficult to enforce;<sup>236</sup> and could be open to abuse by a victim.<sup>237</sup> For example, the Department of Premier and Cabinet (Tas) submitted that if a condition were to set out in detail what a respondent to a protection order must not do—such as check the electoral roll or ask friends where the victim is—this may be counter-productive in actually suggesting ways to locate the victim, potentially endangering him or her.<sup>238</sup>

11.150 Legal Aid NSW and the Law Society of NSW both expressed the view that the current prohibition on contacting a victim should be sufficient.<sup>239</sup> The Victorian Government stated that it would consider this proposal, and noted that Victorian family

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24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 78*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. The Queensland Law Society noted that ‘this has been a condition open to magistrates since 2003 in Queensland’: Queensland Law Society, *Submission FV 178*, 25 June 2010.

229 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

230 Confidential, *Submission FV 183*, 25 June 2010.

231 Confidential, *Submission FV 184*, 25 June 2010.

232 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

233 National Legal Aid, *Submission FV 232*, 15 July 2010.

234 Legal Aid NSW, *Submission FV 219*, 1 July 2010. A similar point was made in relation to family court proceedings generally, in Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

235 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

236 Law Society of New South Wales, *Submission FV 205*, 30 June 2010. See also Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

237 T McLean, *Submission FV 204*, 28 June 2010.

238 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

239 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

violence legislation permits the court to impose any conditions that appear to the court to be necessary or desirable in the circumstances.<sup>240</sup>

11.151 Other stakeholders opposed the proposal.<sup>241</sup> The South Australian Government said it was difficult to see how the proposal would add anything,<sup>242</sup> and another stakeholder noted that trying to locate someone does not necessarily constitute intention to harm that person.<sup>243</sup>

#### ***Application forms***

11.152 In the Consultation Paper, the Commissions proposed that application forms for protection orders in each state and territory should clearly set out the full range of conditions that a court may attach to a protection order. The forms should be drafted to enable applicants to indicate the types of conditions that they would like imposed. In particular, the Commissions proposed, the application forms in WA should be amended in this regard.<sup>244</sup>

11.153 This proposal was widely supported,<sup>245</sup> with one stakeholder noting, for example, that applicants for protection orders need guidance as to the available and appropriate conditions.<sup>246</sup>

11.154 However, a strong theme that emerged in several submissions was that, the list of conditions should be an aid but not exhaustive, allowing judicial officers discretion to impose tailored conditions where it was necessary and desirable.<sup>247</sup> One stakeholder, while supporting the proposal, submitted that more than a ‘check-box’ approach is

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240 Victorian Government, *Submission FV 120*, 15 June 2010.

241 Government of South Australia, *Submission FV 227*, 9 July 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

242 Government of South Australia, *Submission FV 227*, 9 July 2010.

243 Better Care of Children, *Submission FV 72*, 24 June 2010.

244 Consultation Paper, Proposal 6–6.

245 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Northern Territory Legal Aid Commission, *Consultation*, Darwin, 26 May 2010; Domestic Violence Legal Service, *Consultation*, Darwin, 26 May 2010.

246 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

247 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

necessary, and that there is ‘also a need for on-site duty lawyers who can advise applicants of all their options’.<sup>248</sup>

11.155 Another stakeholder expressed the view that if a form were to include a complete list of possible conditions, it could become ‘unwieldy and confusing’ and that it may be more helpful for the court registry or website to have an expanded list of sample orders for applicants to consider in drafting their applications for protection orders.<sup>249</sup>

11.156 One stakeholder was concerned that ‘emotionally charged revenge seeking’ applicants might request *all* the conditions set out in an application form.<sup>250</sup>

11.157 A number of stakeholders also commented on the efficacy of the application forms being used in their own jurisdictions. For example, the Commissions heard that:

- the checklist of special conditions set out in the application forms in Queensland ‘appears to work well’;<sup>251</sup>
- the application forms in NSW are clear and do not need to be changed;<sup>252</sup> and
- the application forms in the NT are ‘poor’, with stakeholder support for better forms and a standard affidavit.<sup>253</sup>

#### *Commissions’ views*

11.158 The Commissions consider that, in making protection orders, it is particularly important that judicial officers are able to impose conditions which proscribe conduct which is otherwise not criminal. All citizens are, in any event, under an obligation not to breach the criminal law. However, there is benefit in attaching conditions to protection orders that are, in essence, directions not to breach the criminal law. A breach of a protection order is a criminal offence and, as discussed in Chapter 12, it may be easier to prove a breach than the underlying offence to the requisite degree of proof. In addition, articulating conditions which reinforce duties to obey the criminal law also emphasises to a respondent that his or her offending behaviour will attract certain consequences.

11.159 In considering the conditions which courts can impose to proscribe conduct which is otherwise not criminal, the Commissions consider that a condition prohibiting a respondent to a protection order from locating or attempting to locate the victim—such as that contained in the family violence legislation of Queensland—is of particular importance in the context of victims fleeing family violence and attempting to sever ties with those who have used violence against them. All state and territory family violence legislation should include a condition to this effect—and such a condition should be specified on all state and territory application forms for protection

248 Berry Street Inc, *Submission FV 163*, 25 June 2010.

249 Confidential, *Submission FV 164*, 25 June 2010.

250 Better Care of Children, *Submission FV 72*, 24 June 2010.

251 Queensland Law Society, *Submission FV 178*, 25 June 2010.

252 Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

253 For example, Domestic Violence Legal Service, *Consultation*, Darwin, 26 May 2010.

orders, thereby allowing victims the option to ask the court to consider imposing such a condition.

11.160 The imposition of such a condition will not be appropriate in all cases. Importantly, judicial officers will need to be trained as to the application of such a condition, ensuring that it is only applied in appropriate circumstances, and qualified, where necessary to allow a respondent to attempt to locate a victim only for specified legitimate reasons such as those arising from family law dispute resolution processes or family law proceedings. The use of specialised family violence courts with specialised judicial officers—as discussed in Chapter 32—will assist in ensuring the appropriate use of this condition.

11.161 Training and education of judicial officers, and the use of specialised family violence judicial officers are also key to ensuring that, to the greatest extent possible, tailored conditions are imposed in particular matters.<sup>254</sup> For example, it is imperative that judicial officers in remote communities avoid unconditional ‘no contact’ conditions unless absolutely necessary to minimise the potential for unintentional breaches. It is also critical that protection order applications are, in fact, heard by judicial officers and not by justices of the peace who are not legally trained—as the Commissions have heard is the practice in WA.

11.162 As a practical matter, it is also important that applications for protection orders clearly set out the types of conditions that a court may attach to a protection order, allowing for the possibility of tailored conditions. The forms should be drafted to enable victims to indicate the types of conditions that they seek. For example, the application for a protection order in WA should be amended to set out the types of conditions that a court may impose in making a protection order. This information will serve as a guide to applicants, and should be augmented by the provision of victim support services, including specialist legal representation—as recommended in Chapter 32.

11.163 Below the Commissions express views in relation to exclusion orders, and rehabilitation and counselling conditions.

**Recommendation 11–6** State and territory family violence legislation should provide expressly that one of the conditions that may be imposed by a court making a protection order is to prohibit the person against whom the order is made from locating or attempting to locate the victim of family violence.

**Recommendation 11–7** Application forms for protection orders in each state and territory should clearly set out the types of conditions that a court may attach to a protection order, allowing for the possibility of tailored conditions. The forms should be drafted to enable applicants to indicate the types of conditions that they seek to be imposed.

<sup>254</sup> See Chs 31, 32.

### **Exclusion orders**

11.164 Family violence legislation makes provision for protection order conditions which allow a court to prohibit a person who has used violence from entering and remaining in a residence shared with the victim, including, in some cases, the power to terminate an existing tenancy agreement and replace it with one for the benefit of the victim. In other words, a court can impose a condition requiring the person against whom the protection order is made to vacate premises, notwithstanding any ownership rights in relation to such premises.<sup>255</sup>

11.165 As stated in Chapter 7, courts have been reluctant to make exclusion orders as they have the potential to cause great hardship—ultimately homelessness—for the person against whom it is made.<sup>256</sup> The making of an exclusion order may be relevant to the sentencing for a family-violence related offence of the person against whom the order was made.

11.166 As noted by the AGS, there is significant variation in:

- the factors that a court has to take into account in making exclusion orders;
- whether the safety and accommodation needs of the victim are prioritised;
- whether there is a statutory presumption in favour of exclusion; and
- the impact of an exclusion order on a residential tenancy.<sup>257</sup>

Some of these differences are considered below.

#### ***Factors a court has to take into account in making an exclusion order***

11.167 A Victorian court that makes a protection order is required to consider whether to make an exclusion order.<sup>258</sup> In some jurisdictions, including Victoria, Queensland, and NSW, courts are directed to consider specific requirements before making an exclusion order and these requirements are in addition to those to be considered in making a protection order. These requirements include:

- the desirability of minimising disruption to the victim and any child living with the victim and the importance of maintaining social networks and support;<sup>259</sup>

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<sup>255</sup> See, eg, *Family Violence Act 2004* (Tas) s 16(3).

<sup>256</sup> As noted below, for a court to not make an exclusion order can also have negative repercussions for a victim and children.

<sup>257</sup> Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 146. Some family violence legislation allows courts to alter tenancy agreements in favour of victims during protection order determinations: see K Wilcox, *Recent Innovations in Australian Protection Order Law: A Comparative Discussion* (2010), prepared for the Australian Domestic and Family Violence Clearinghouse, 11–12. The interaction of family violence laws and state and territory residential tenancy laws is beyond the scope of the Terms of Reference.

<sup>258</sup> *Family Violence Protection Act 2008* (Vic) s 82(1).

<sup>259</sup> Ibid s 82(2). Special considerations apply where an exclusion order is to be made against a child: s 83.

- the desirability of continuity and stability in the care of any child living with the victim;<sup>260</sup>
- the desirability of allowing any childcare arrangements, education, training or employment of the victim, or any child living with the victim, to continue without interruption or disturbance;<sup>261</sup>
- the effects and consequences on the safety and protection of the victim and any children living or ordinarily living at the residence if an exclusion order is not made;<sup>262</sup> and
- whether there is a need for a condition allowing the person against whom the exclusion order is made to remain at or return to the premises to recover personal property.<sup>263</sup>

11.168 In other jurisdictions the factors that a court is bound to consider in making a protection order are the same, regardless of whether the protection order includes an exclusion order.<sup>264</sup> For example, in making a protection order, South Australian courts must consider the desirability of: minimising disruptions to victims and any children living with victims; maintaining social networks and support for victims; ensuring continuity and stability in the care of children living with victims; and allowing childcare arrangements, education, training and employment of victims or any children living with victims to continue uninterrupted.<sup>265</sup>

11.169 As stated above, some jurisdictions—such as Victoria and NSW—require courts to have specific regard to the needs of the victim and any child of the victim in deciding whether to make an exclusion order.<sup>266</sup> In Victoria, a court is only required to consider the accommodation needs of a person against whom an exclusion order is made if that person is a child.<sup>267</sup> Moreover, there are additional considerations where the person excluded is an Indigenous child. These considerations are the priority for that child to live with his or her extended Indigenous family and relatives, and the need for the child to keep the child's culture and identity through contact with the child's community.<sup>268</sup>

11.170 Other jurisdictions take a similar approach in deciding whether to make a protection order. For example, in the NT a court is directed expressly to consider the

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260 Ibid s 82(2).

261 Ibid.

262 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 17(2)(a).

263 *Penalties and Sentences Act 1992* (Qld) s 25A(3). Personal property directions are discussed in more detail in Ch 16.

264 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 146.

265 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10.

266 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 17(2)(c) requires the court to have regard to the 'accommodation needs of all relevant parties, in particular the protected person and any children'. The court is also required to give reasons for not making an exclusion order in circumstances where one is sought: s 17(4).

267 *Family Violence Protection Act 2008* (Vic) s 83(3). In such cases the court must be satisfied that the child has appropriate alternative accommodation, care and supervision.

268 Ibid s 83(4).

accommodation needs of the victim in making a protection order, but not those of the person against whom the order is made.<sup>269</sup>

11.171 Other jurisdictions take a less victim-focused approach in the making of protection orders—including exclusion orders—by either allowing or directing the court to take into account the needs or interests of the person against whom the order is to be made. For example, the Queensland family violence legislation provides that the court may impose any condition it considers necessary or desirable in the interests of the victim, any named person, and the person against whom the protection order is made.<sup>270</sup>

11.172 The ACT family violence legislation requires that the court must, in making a final protection order, consider the accommodation needs of the victim and any relevant children, as well as any hardship that may be caused to the person against whom the order is made.<sup>271</sup> Similarly, the Western Australian legislation requires a court making a protection order to consider the accommodation needs of the person against whom the order is made, as well as the victim, and any hardship that may be caused to the person against whom the order is made.<sup>272</sup>

11.173 If police in Victoria issue a family violence safety notice that includes an exclusion order, they are required to consider the accommodation needs of the person against whom the order is made and any dependent children of that person. The police are required to take reasonable steps to secure for such persons access to temporary accommodation.<sup>273</sup>

#### ***Presumption in favour of exclusion***

11.174 Only the NT family violence legislation contains an express presumption that where a victim, a person who has used family violence against the victim, and a child reside together, the protection of the victim and the child are best achieved by their living in the home. The presumption does not act to prevent a protection order including a condition allowing the person against whom the protection order is made to visit the child at the home.<sup>274</sup> Such a presumption acts to implement a central objective of the legislation referred to in the Second Reading Speech of the Domestic and Family Violence Bill 2007 (NT), namely ‘to ensure minimal disruption to the lives of families affected by violence’.<sup>275</sup>

11.175 Significantly, the presumption only operates where there is a child involved. It has no application in the case of family violence between partners living in the same residence without a child.

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269 *Domestic and Family Violence Act 2007* (NT) s 19(2)(b).

270 *Penalties and Sentences Act 1992* (Qld) s 25(2).

271 *Domestic Violence and Protection Orders Act 2008* (ACT) s 47(1)(c), (d).

272 *Restraining Orders Act 1997* (WA) s 12(1)(d), (e).

273 *Family Violence Protection Act 2008* (Vic) s 36.

274 *Domestic and Family Violence Act 2007* (NT) s 20.

275 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 17 October 2007, 4846 (S Stirling—Attorney-General), 4848.

### ***Submissions and consultations***

#### ***Duty to consider making of exclusion order***

11.176 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should require judicial officers considering the making of protection orders to consider whether or not to make an exclusion order—that is, an order excluding a person against whom a protection order is made from premises shared with the victim, even if the person has a legal or equitable interest in such premises.<sup>276</sup>

11.177 This proposal received overwhelming support,<sup>277</sup> on the basis, for example, that:

- the safety of victims is of paramount importance;<sup>278</sup>
- it might mean that fewer women and children become homeless as a result of family violence;<sup>279</sup>
- it may help ‘address the particular vulnerabilities of, and additional barriers to leaving family violence for, people with disability’;<sup>280</sup> and
- it is onerous and difficult for victims to pursue an exclusion order—especially if they fear it will ‘open up the flood gates’ to further abuse.<sup>281</sup> But if the Courts were required to consider making the order, the onus will be removed from the victim and it will be less likely that the victim will be blamed.<sup>282</sup>

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276 Consultation Paper, Proposal 6–7.

277 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 198*, 25 June 2010; NSW Women’s Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Disability Services Commission (WA), *Submission FV 138*, 23 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

278 Confidential, *Submission FV 77*, 2 June 2010.

279 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

280 Disability Services Commission (WA), *Submission FV 138*, 23 June 2010.

281 Confidential, *Submission FV 183*, 25 June 2010.

282 Ibid.

11.178 A number of stakeholders emphasised that this issue should also be addressed by education and training as it is ‘a core responsibility’ of the police prosecutor or solicitor representing the victim to raise this issue, and the responsibility of a judicial officer to give it consideration.<sup>283</sup>

11.179 The Victorian Government supported the proposal, suggesting that Victoria’s family violence legislation should be a model, and submitted that police and registrars:

need to advise victims in the first instance about exclusion conditions ... This is particularly important due to the number of victims who may go direct to court without having had any support from a family violence agency.<sup>284</sup>

11.180 One stakeholder expressed qualified support for the proposal on the basis that

care is taken to ensure this does not hold up the process of awarding interim protection orders, or that by making this explicit we see more respondents objecting to the interim protection order.<sup>285</sup>

11.181 Other stakeholders expressed concerns about the proposal, including:

- ‘it will not be appropriate in all cases and may come to be a disincentive for some victims to seek legal assistance if it is to be raised in all circumstances’,<sup>286</sup>
- evicting an ‘emotionally charged’ person, who might be suffering from a mental disorder, will aggravate matters and may cause more violence.<sup>287</sup>

11.182 A partner violence counsellor submitted that judicial officers should not consider exclusion automatically, but only at the request of the police or victim, and they should provide sufficient grounds for the exclusion.<sup>288</sup>

#### ***Relevant factors***

11.183 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should specify the factors that a court is to consider in making an exclusion order. The Commissions also proposed that judicial officers should be required to consider the effect that making or declining to make an exclusion order will have on the accommodation needs of the parties to the proceedings and on any children.<sup>289</sup>

11.184 A significant number of stakeholders supported this proposal.<sup>290</sup> A legal service provider said this was particularly relevant in the NT,

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283 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. See also Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010, which suggested legislative change be accompanied by judicial education in the use of exclusion orders.

284 Victorian Government, *Submission FV 120*, 15 June 2010.

285 Confidential, *Submission FV 184*, 25 June 2010.

286 J Stubbs, *Submission FV 186*, 25 June 2010.

287 Better Care of Children, *Submission FV 72*, 24 June 2010.

288 T McLean, *Submission FV 204*, 28 June 2010.

289 Consultation Paper, Proposal 6–8.

290 Confidential, *Submission FV 198*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June

where there is significant housing pressure and, not only is it hard to find affordable accommodation, it can be hard, at times, to find accommodation at all.<sup>291</sup>

11.185 Many stakeholders expressly supported consideration being given to the needs of the victim and any children in making an exclusion order,<sup>292</sup> with one noting that it may decrease the number of victims and children who are faced with homelessness as a result of family violence.<sup>293</sup> However, several submissions expressed a concern that the accommodation needs of the respondent be treated as a secondary consideration to the need to ensure the safety of a victim and any children.<sup>294</sup>

11.186 For example, the Disability Services Commission (WA) agreed that highlighting factors for consideration is important, and submitted that the factors a court should consider are complex and may, in some cases, be conflicting.<sup>295</sup> It submitted that some factors should be ‘higher order considerations’, such as minimal disruption to the lives of victims. The accommodation needs of the parties, it submitted, could be a secondary consideration.

11.187 However, the Victorian Government opposed the court having to consider the accommodation needs of the respondent at all, noting that, in Victoria, courts are not required to do so unless the subject of the order is a child. It submitted that this ‘position was arrived at after extensive consultation with stakeholders and it is considered an appropriate balance’ and that emergency accommodation options are provided as part of Victoria’s integrated system.<sup>296</sup> Some stakeholders suggested that the Victorian legislation should provide a model.<sup>297</sup>

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2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

291 Confidential, *Submission FV 164*, 25 June 2010.

292 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 77*, 2 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

293 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

294 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Disability Services Commission (WA), *Submission FV 138*, 23 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010; Confidential, *Submission FV 77*, 2 June 2010.

295 Disability Services Commission (WA), *Submission FV 138*, 23 June 2010.

296 Victorian Government, *Submission FV 120*, 15 June 2010.

297 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

11.188 Another stakeholder stated that it assumed each state and territory has emergency accommodation services to assist men who are made homeless following the making of an exclusion order:

Given this, we can see no reason why courts or police should hesitate to apply an exclusion order to a male user of family violence on the basis that the man would need to use emergency accommodation.<sup>298</sup>

11.189 Another stakeholder suggested that the specified factors should not be considered exhaustive, but rather as ‘an indication of the kinds of factors to be considered, so that individual circumstances can be taken into account’.<sup>299</sup>

11.190 The Disability Services Commission also submitted that a further secondary consideration that should be considered by the court is the impact of a person’s disability,

including that of victims, perpetrators and children. An exclusion order may result in undue hardship for a perpetrator with disability. Similarly, not making an exclusion order may result in undue hardship for a victim with disability or any children with disability.<sup>300</sup>

11.191 The Disability Services Commission (WA) submitted that courts may need to consider, among other things:

- any aids, equipment, care and support necessary for daily life;
- whether alternative support and accessible accommodation are available;
- the person’s ability to contact and access the support and accommodation; and
- the time required to organise this support and accommodation.<sup>301</sup>

#### *Inclination of judicial officers to make exclusion orders*

11.192 Although it was not a question raised in the Consultation Paper, some stakeholders commented on the inclination of judicial officers to make exclusion orders. For example, the Queensland Law Society submitted, that ‘ouster’ orders are ‘less cumbersome, quicker and cheaper to obtain than sole use orders under the *Family Law Act*’—but at times there are ‘remarkably different approaches from different magistrates’:

Anecdotal evidence is that some magistrates are inclined to make these orders quite readily, including on an ex parte basis, whereas other magistrates regularly decline to make them, particularly if they are concerned that they are being used as an inappropriate stalking horse for property settlement proceedings.<sup>302</sup>

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298 No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

299 T McLean, *Submission FV 204*, 28 June 2010.

300 Disability Services Commission (WA), *Submission FV 138*, 23 June 2010.

301 Ibid.

302 Queensland Law Society, *Submission FV 178*, 25 June 2010.

11.193 Another stakeholder submitted that ouster orders are difficult to obtain in Queensland, particularly where the respondent has a legal connection to the premises—and even where the victim is named jointly on the title or lease.<sup>303</sup> It was also suggested that respondents are also less likely to be evicted if they say they have no other accommodation.<sup>304</sup>

11.194 The NSW Women's Refuge Movement Working Party Inc said that experiences reported by its member refuges indicate that 'many judicial officers are often not inclined to make exclusion orders' and one refuge recently said 'one magistrate didn't even know what an exclusion order was'.<sup>305</sup> Legislative direction and education of judicial officers would therefore also be useful.<sup>306</sup>

#### ***Police role in securing accommodation for excluded person***

11.195 In the Consultation Paper, the Commissions asked, where state or territory family violence legislation empowers police to make orders excluding persons who have used family violence from their homes, whether they should be required to take reasonable steps to secure temporary accommodation for the excluded persons.<sup>307</sup>

11.196 Stakeholder views on this issue were divided. Some stakeholders expressed concerns about police making exclusions orders at all,<sup>308</sup> or making them in situations which were not urgent or in cases where it was not possible for a court to hear the matter.<sup>309</sup>

11.197 Many stakeholders submitted that where police have the power to exclude persons, they should be required to take reasonable steps to secure temporary accommodation,<sup>310</sup> including on the basis that:

- Exclusion orders are more likely to work when excluded persons are helped to find alternative accommodation.<sup>311</sup> Without accommodation, the respondent will

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303 Confidential, *Submission FV 171*, 25 June 2010.

304 Ibid.

305 NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010.

306 Ibid.

307 Consultation Paper, Question 6–8.

308 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

309 J Stubbs, *Submission FV 186*, 25 June 2010. The issue of whether police should be able to issue protection orders, and in what circumstances, is discussed in Ch 9.

310 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Confidential, *Submission FV 183*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; Confidential, *Submission FV 69*, 2 June 2010. The Victorian Government supported the police having to make reasonable enquiries about temporary accommodation for the excluded person: Victorian Government, *Submission FV 120*, 15 June 2010.

311 National Legal Aid, *Submission FV 232*, 15 July 2010.

often breach the orders<sup>312</sup>—being not only more likely to return to the family home, but doing so at the invitation of a concerned and sympathetic victim.<sup>313</sup>

- It would increase the safety—and sense of safety—of victims, and reduce the risk of further or escalated violence,<sup>314</sup> especially given that excluded men ‘often need specialised support’ finding themselves ‘in particularly volatile states of mind soon after the intervention’.<sup>315</sup>
- It is necessary to ensure that there are systems in place to address any homelessness that may ensue as a result of an exclusion order.<sup>316</sup>

11.198 The Aboriginal Family Violence Prevention and Legal Service Victoria submitted that although police are already subject to this obligation under the Victorian legislation, police ‘lack knowledge of the procedure’.<sup>317</sup>

11.199 Some stakeholders stated that, if the government is serious about reducing family violence, it needs to address the availability of suitable accommodation as a priority.<sup>318</sup> National Legal Aid, for example, noted that in Tasmania ‘a fund for perpetrator housing was created, but has not been used to anywhere near the extent that was anticipated’.<sup>319</sup> Berry Street Inc submitted that there are ‘under-utilised’ but ‘very useful’ resources for excluded men in Victoria to be provided with a few nights accommodation with support and police are aware of this resource.<sup>320</sup>

11.200 Other stakeholders expressed the view that police should not have to take reasonable steps to secure accommodation,<sup>321</sup> including because this is an onerous requirement;<sup>322</sup> not core police work;<sup>323</sup> could dissuade police from applying for an exclusion order;<sup>324</sup> and would not be of any practical benefit due to the lack of

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312 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

313 National Legal Aid, *Submission FV 232*, 15 July 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010. See also Legal Aid NSW, *Submission FV 219*, 1 July 2010.

314 Confidential, *Submission FV 77*, 2 June 2010. Another stakeholder also expressed the view that victims should not be ‘left in an unsafe situation because the perpetrator has no alternative accommodation’: Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

315 No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

316 Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

317 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

318 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010.

319 National Legal Aid, *Submission FV 232*, 15 July 2010.

320 Berry Street Inc, *Submission FV 163*, 25 June 2010.

321 Queensland Law Society, *Submission FV 178*, 25 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Gosnells Community Legal Centre Inc, *Submission FV 56*, 31 May 2010.

322 N Ross, *Submission FV 129*, 21 June 2010.

323 Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. See also Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010. Another stakeholder also expressed the view that preferably a non-government organisation or program should be engaged to secure alternative accommodation: Confidential, *Submission FV 109*, 8 June 2010.

324 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

available accommodation.<sup>325</sup> However, some favoured that the police be trained to take some form of action, such as:

- enquire of the respondent about the availability of alternative accommodation;<sup>326</sup> and/or
- refer the respondent to a housing or homeless service, support service such as the Salvation Army or other assistance.<sup>327</sup>

#### ***Providing reasons for not excluding***

11.201 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should require a court to give reasons for declining to make an exclusion order—that is, an order excluding the person against whom a protection order is made from premises in which he or she has a legal or equitable interest—where such order has been sought.<sup>328</sup>

11.202 The great majority of stakeholders supported this proposal,<sup>329</sup> with one legal service provider opposing it without providing further comment.<sup>330</sup> Reasons for support included that:

- reasons are essential in case there are grounds to appeal.<sup>331</sup>

325 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

326 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

327 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. See also T McLean, *Submission FV 204*, 28 June 2010. The need for police to receive training in dealing was also emphasised by National Legal Aid: National Legal Aid, *Submission FV 232*, 15 July 2010.

328 Consultation Paper, Proposal 6–9.

329 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

330 Confidential, *Submission FV 198*, 25 June 2010.

331 Confidential, *Submission FV 183*, 25 June 2010.

- it enhanced ‘consideration of the safety of victims’ and of the ‘social context of family violence embedded in the legislation via principles and definitions’;<sup>332</sup>
- victims have a right to have the court outcome explained to them;<sup>333</sup>
- courts should be held to account when they choose not to make an exclusion order;<sup>334</sup> and
- magistrates in making or refusing to make an order in any case should provide reasons.<sup>335</sup>

11.203 Stubbs agreed that reasons should be given in those cases where an exclusion order has been sought.<sup>336</sup> Women’s Legal Services Australia also submitted that police should have to give their reasons, if they have the power to make such an order.<sup>337</sup>

11.204 Legal Aid NSW stated that it was its experience that courts ‘do not often give considered reasons in these situations’.<sup>338</sup>

#### ***Northern Territory presumption***

11.205 In the NT family violence legislation, there is a presumption that where a victim, a person who uses family violence, and child reside together, the protection of the victim and child is best achieved by their remaining in the home. In the Consultation Paper, the Commissions asked how this presumption is working in practice. In particular, the Commissions asked if it has resulted in the making of more exclusion orders.<sup>339</sup>

11.206 Stakeholders addressed the application of the presumption both by police and the courts. National Legal Aid submitted that this presumption is regularly used by the police when they issue protection orders in urgent circumstances.<sup>340</sup> However, one legal service provider said it was ‘still rare’ to have an exclusion order granted:

Police do not utilise it in a remote setting and instead still tend to favour the emergency evacuation of a victim regardless of whether she has children.<sup>341</sup>

11.207 National Legal Aid stated that courts have made exclusion orders where victims have requested them, ‘because of the existence of the presumption’. However, it said that magistrates ‘take these applications seriously’, do not grant them ‘as a matter of course’, and an initial fear that the presumption would be abused by people

332 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

333 Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010.

334 Confidential, *Submission FV 77*, 2 June 2010.

335 Queensland Law Society, *Submission FV 178*, 25 June 2010.

336 J Stubbs, *Submission FV 186*, 25 June 2010.

337 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

338 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

339 Consultation Paper, Question 6–9.

340 ‘The police often require the alleged perpetrator to vacate the home and defendants are unable to return until the order is changed later at court’: National Legal Aid, *Submission FV 232*, 15 July 2010.

341 Confidential, *Submission FV 198*, 25 June 2010.

seeking to gain control of property to circumvent the family law jurisdiction had not been realised.<sup>342</sup>

11.208 Stakeholders expressed mixed views about the practical effect of the presumption on victims. It was recognised that, in some circumstances, the presumption is benefiting victims, while in others it is not—principally because many women do not want to stay home because they do not feel safe there or are advised not to stay home because of the risk of the respondent returning.<sup>343</sup>

11.209 A NT legal service provider strongly supported the provision, which it said:

prioritises victims' safety, permits children to continue an established routine, encourages an alleged offender to accept responsibility for [his or her] conduct, and responds to the existing reality of nil/very limited bed space at women's shelters which results in victims being unhoused and in very unsafe circumstances.<sup>344</sup>

#### ***Whether there should be a presumption that victims remain in the home***

11.210 In the Consultation Paper, the Commissions asked whether state and territory family violence legislation should include an express presumption that the protection of victims is best served by their remaining in the home in circumstances where they share a residence with the persons who have used violence against them.<sup>345</sup>

11.211 Many stakeholders submitted that there should be such an express presumption.<sup>346</sup> However, several of these stakeholders also expressed the view that judicial officers must have sufficient discretion to assess individual circumstances and that victims should decide whether they want to remain in the home, acknowledging that it may not always be the safest option for a victim to remain in the home—or the fairest option to exclude the respondent.<sup>347</sup>

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342 National Legal Aid, *Submission FV 232*, 15 July 2010. In consultation, the Northern Territory Legal Aid Commission also expressed the view that the presumption is not being abused and that magistrates generally will not entertain applications for exclusion in the absence of solid evidence: Northern Territory Legal Aid Commission, *Consultation*, Darwin, 26 May 2010.

343 National Legal Aid, *Submission FV 232*, 15 July 2010; Confidential, *Submission FV 89*, 3 June 2010.

344 The Central Australian Aboriginal Family Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010.

345 Consultation Paper, Question 6–10.

346 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; T McLean, *Submission FV 204*, 28 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Gosnells Community Legal Centre Inc, *Submission FV 56*, 31 May 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. One stakeholder submitted such a presumption should be rebuttable: Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

347 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Women's

11.212 Reasons given in favour of such a presumption included that:

- it ‘favours the alleged victim and that is fair’;<sup>348</sup>
- it ‘acts as a prompt to judicial officers to seriously consider an exclusion order’;<sup>349</sup>
- it may assist judicial officers to recognise that it is often easier, less disruptive and less expensive for a single person to find accommodation than for a mother and children, particularly considering that ‘often victims of family violence are forced to flee the family home with meagre belongings’;<sup>350</sup> and
- a person who uses family violence forfeits the right to stay in his or her home.<sup>351</sup>

11.213 However, many stakeholders expressed concerns about the practical application of such a presumption. The impracticality of applying such a presumption in particular Indigenous settings was raised as a particular issue. One legal service provider noted that often an Indigenous victim may reside in the home of the aggressor’s family with members of that family, such as a mother-in-law. ‘Such a presumption in these circumstances is invalid’.<sup>352</sup>

11.214 In addition, stakeholders noted the potential for the presumption to result in ‘unintended consequences’.<sup>353</sup> For example, both National Legal Aid and the Victorian Government expressed the view that the presumption could be problematic, operating against genuine victims where an aggressor ‘seeks to get in first’ by applying for an order or making a cross-application to manipulate the system to enable him or herself to remain in the family home.<sup>354</sup>

11.215 Several stakeholders opposed the proposal on the basis that it could compromise the safety of victims and children.<sup>355</sup> In particular, stakeholders stressed that victims will not always be safe in the home—and that the safest option might sometimes be for the victim to leave, particularly given that the aggressor knows where she or he lives, knows the premises well, and might still have a key.<sup>356</sup>

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Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. See also Queensland Law Society, *Submission FV 178*, 25 June 2010.

<sup>348</sup> Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

<sup>349</sup> Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

<sup>350</sup> Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

<sup>351</sup> Berry Street Inc, *Submission FV 163*, 25 June 2010.

<sup>352</sup> Confidential, *Submission FV 198*, 25 June 2010.

<sup>353</sup> J Stubbs, *Submission FV 186*, 25 June 2010.

<sup>354</sup> National Legal Aid, *Submission FV 232*, 15 July 2010; Victorian Government, *Submission FV 120*, 15 June 2010. See also Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

<sup>355</sup> NSW Women’s Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Confidential, *Submission FV 96*, 2 June 2010.

<sup>356</sup> Confidential, *Submission FV 164*, 25 June 2010. The Victorian Government also expressed the view that ‘there are instances where it is not appropriate for victims to remain at an address known’ to the aggressor: Victorian Government, *Submission FV 120*, 15 June 2010.

11.216 For example, the No to Violence Male Prevention Association stated that excluding a man from his home

is no guarantee that he won't attempt to return to the family home, and in some situations the risk of such might be associated with significant safety risks for affected family members.<sup>357</sup>

11.217 Some stakeholders noted that for victims the idea of remaining in the home might be ‘daunting and scary’,<sup>358</sup> and remind the victim of the trauma that occurred in the house<sup>359</sup>—and this emphasised the importance of giving the victim a choice of whether to leave or to stay.<sup>360</sup> For example, one stakeholder said that ‘women are often the best judges of the risk of further violence towards themselves and their children’.<sup>361</sup>

11.218 The NSW Women’s Refuge Movement Working Party cautioned that a ‘blanket’ presumption is ‘ill conceived’ because there are many factors which need to be considered before determining whether exclusion is the best option, including the ongoing safety risks to the victim and what safety strategies can minimise these risks.<sup>362</sup>

11.219 Many stakeholders emphasised the importance of safety strategies beyond the mere making of an exclusion order. In a joint submission, Domestic Violence Victoria and others stated that ‘safety can only be assured when other systems responses are in place that support the exclusion condition’.<sup>363</sup> Another stakeholder said such a presumption ‘should not detract from the need for safe houses and emergency evacuation funds’.<sup>364</sup> Stakeholders also suggested that victims should be helped with all safety precautions—‘including locks being changed, security cameras, sensor lights security doors etc’,<sup>365</sup> and that ‘appropriate safety planning involving the police’ and ‘arrangements including the use of personalised duress alarms’ would also be of assistance.<sup>366</sup>

#### *Commissions’ views*

##### *Duty to consider making exclusion orders*

11.220 Courts issuing protection orders should be required to consider whether to make an exclusion order—as is the case in Victoria. This proposed legislative duty does not require a judicial officer to make an exclusion order—but to consider actively whether the circumstances of a particular case warrant such an order being made in the interests of ensuring victim safety. Implementation of this recommendation may go

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357 No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

358 Confidential, *Submission FV 184*, 25 June 2010.

359 Confidential, *Submission FV 183*, 25 June 2010.

360 *Ibid.*

361 No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

362 NSW Women’s Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010.

363 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

364 Confidential, *Submission FV 198*, 25 June 2010.

365 Confidential, *Submission FV 77*, 2 June 2010.

366 National Legal Aid, *Submission FV 232*, 15 July 2010.

some way to increasing the likelihood of judicial officers making exclusion orders in appropriate circumstances, and to addressing the apparent ‘judicial unease’ in making such orders.<sup>367</sup>

11.221 The legislative duty to consider the making of an order should be complemented by educating and training police prosecutors and lawyers involved in family violence matters to raise this issue in appropriate circumstances.

#### ***Relevant factors***

11.222 State and territory family violence legislation should address separately the factors which courts are required to take into consideration in making or declining to make an exclusion order—over and above the factors that are to be considered in making a protection order generally. The Victorian and NSW family violence legislation are instructive models in this regard. As stated by the AGS, ‘the advantage of specifying particular considerations is that it should ensure courts focus on matters considered especially important by the legislature and that the parties are aware of the particular significance of those matters’.<sup>368</sup>

11.223 In identifying relevant factors, it is important that the legislation distinguishes between the paramount consideration of ensuring the safety of a victim and her or his children, and other secondary factors. An exclusion order should only be made when it is necessary to secure the safety of a victim or affected child. Relevant to the issue of a victim’s safety and that of any affected children are their vulnerability, having regard to their physical, emotional and psychological needs as well as any disability. Secondary factors that a court should consider are the accommodation needs of, and options available to, the parties,<sup>369</sup> particularly in light of any disability that they may have—and the length of time required for any party to secure alternative accommodation. These factors are not intended to be exhaustive. There are others in the Victorian legislation—including those concerning the desirability of minimising disruption to the victim and child, which may also be instructive.

11.224 Identifying such factors necessarily acknowledges that decisions about whether or not to make an exclusion order involve competing rights. The making of an exclusion order in appropriate circumstances can have a significant positive impact on the safety and lives of victims and children—potentially avoiding their becoming homeless, and infusing a measure of stability at a time of emotional upheaval. Not making an exclusion order in appropriate cases can cause severe hardship—those subjected to severe violence may need to flee the home.

11.225 However, the making of such an order may also have a number of adverse consequences—not least rendering the excluded person homeless or in severely reduced circumstances, potentially fuelling an escalation of violence borne of resentment and bitterness, which can further threaten victim safety or indeed the safety

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367 See Ch 7.

368 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 147.

369 This approach is consistent with Australian Law Reform Commission, *Domestic Violence*, Report 30 (1986), [100], Rec 14.

of others. It is unsatisfactory to say that persons who use family violence have brought this situation upon themselves and should suffer the consequences. Nor is it realistic to consider that laws alone can address and resolve complex social problems.

#### ***Need for an integrated response***

11.226 Addressing potential homelessness following a decision to make—or not to make—an exclusion order requires solutions beyond the scope of legal frameworks. A serious governmental response to family violence requires funding for emergency accommodation. If a person is excluded from his or her home, there needs to be an integrated response which involves providing necessary support and assistance to that person—not only in the interests of his or her welfare, but also in the interests of reducing risks to victim safety.<sup>370</sup> Critically, this entails the provision of emergency housing, links to support networks, access to relevant medication and aids necessary for a person’s daily life, as well as access to work tools and personal property.<sup>371</sup>

11.227 Similarly, victims and children need support to stay safe where an exclusion order is made. This could include, for example, police supervision of the eviction to ensure that an aggressor does not cause damage or commit further family violence; funding for the changing of locks, as well as the installation of security cameras, security doors and sensor lights. Equally, in circumstances where it is safer for a victim and her or his children to flee the family home, it is imperative that there be appropriate emergency and other accommodation and links to victim support and counselling services.<sup>372</sup>

11.228 The Commissions do not make a specific recommendation about any legislative obligation on police to take reasonable steps to secure accommodation for a person in cases where they are empowered to make exclusion orders, principally because the Commissions’ approach in Chapter 9 is to limit the circumstances in which police can issue protection orders. Family violence protection orders—and therefore exclusion orders—should, wherever possible, be made or authorised by a judicial officer.

11.229 However if, in the limited circumstances identified in Recommendation 9–1, police are empowered to make a protection order and therefore an exclusion order, the Commissions consider that police should take certain steps to assist the excluded person—including making enquiries of him or her about accommodation options, and referring that person to relevant housing and support services. The Commissions consider that this can properly be accommodated by police training and education, and the establishment of collaborative relationships between police and support services as part of an integrated response to family violence, rather than being imposed as a legislative duty.

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370 Integrated responses are discussed in Ch 29.

371 Personal property directions are discussed in Ch 16.

372 In Ch 29, the Commissions recommend that governments prioritise the provision of, and access to, culturally appropriate victim support services for victims of family violence: Rec 29–3.

***No presumption that victim remains in home***

11.230 The inclusion of a legislative presumption that victims should remain in the home when they reside with persons who use family violence, may result in problematic consequences in application. Significantly, it may compromise the safety of victims and children, by failing to recognise adequately that sometimes the safest options for victims is to leave the home. Victims should be able to make the choice about whether it is safest for them to remain in the home or to flee. Well-intentioned judicial officers in respecting such a presumption may inadvertently risk the safety of victims.

11.231 In addition, the application of such a presumption will be of little import where victims, including Indigenous victims, reside in the home of the aggressor with the family of the aggressor.

11.232 The reasons for which the Commissions refrain from making a recommendation about such a legislative presumption are consistent with the reasons discussed in Chapter 7 for not recommending that a core purpose of family violence legislation should be to ensure minimal disruption. Inevitably, on occasion, taking appropriate steps to ensure the safety of victims may require action which leads to significant disruption and upheaval—which is the case in those circumstances where it is safer for a victim to flee the home than to stay at an address known to the aggressor.

***Providing reasons for not excluding***

11.233 In the interests of promoting transparency and accountability in decision making judicial officers should be required to give reasons for not making an exclusion order where such an order has been sought. The family violence legislation of NSW provides an instructive model in this regard. This approach respects victims' rights to have a court outcome explained to them.

**Recommendation 11–8** State and territory family violence legislation should require judicial officers making protection orders to consider whether or not to make an exclusion order—that is, an order excluding a person against whom a protection order is made from premises shared with the victim, even if the person has a legal or equitable interest in such premises.

**Recommendation 11–9** State and territory family violence legislation should provide that a court should only make an exclusion order when it is necessary to ensure the safety of a victim or affected child. Primary factors relevant to the paramount consideration of safety include the vulnerability of the victim and any affected child having regard to their physical, emotional and psychological needs, and any disability. Secondary factors to be considered include the accommodation needs and options available to the parties, particularly in light of any disability that they may have, and the length of time required for any party to secure alternative accommodation.

**Recommendation 11–10** State and territory family violence legislation should require a court to give reasons for declining to make an exclusion order where such order has been sought.

### Rehabilitation and counselling conditions in protection orders

11.234 The AGS noted that there are significant differences across the jurisdictions concerning the making of orders directing a person who has used family violence and who has had a protection order issued against him or her to attend counselling or rehabilitation programs or to refer that person to such programs.<sup>373</sup>

11.235 Five jurisdictions address the power of courts to attach conditions to protection orders involving either rehabilitation or counselling. Key differences between them include: whether such orders are mandatory or voluntary; whether they are available only on sentencing; and their effects.

11.236 The family violence legislation of the ACT and WA provides for voluntary counselling orders. The ACT Magistrates Court may recommend that the person against whom the protection order is made, or the victim, take part in a ‘program of counselling, training, mediation, rehabilitation or assessment’.<sup>374</sup> In WA, a court or the police, in making a protection order, must explain to the parties that counselling and support services may be of assistance and, where appropriate, refer them to specific services.<sup>375</sup>

11.237 By comparison, the family violence legislation of Victoria provides that the Family Violence Court Division, upon the making of a final protection order against a person, must order that the person be assessed for counselling, where there is approved counselling reasonably available and where it is appropriate to do so.<sup>376</sup> If the person is assessed as eligible to attend counselling, the Family Violence Court Division must order the person to attend counselling. It is an offence for the person to fail to attend counselling, without reasonable excuse.<sup>377</sup>

11.238 In the NT, a court may make an order requiring a person against whom a protection order is made to attend a rehabilitation program, but only if the person consents, the court is satisfied that the person is suitable to take part in the program and there is place in such program.<sup>378</sup> Similarly, under South Australian family violence legislation, a court may require a person against whom a protection order is made to undergo eligibility assessment for an intervention program, and if the person is eligible and the services are available, order the person to undertake such a program.<sup>379</sup>

373 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 31.

374 *Domestic Violence and Protection Orders Act 2008* (ACT) s 89.

375 *Restraining Orders Act 1997* (WA) ss 8(1)(i), 30E(3).

376 *Family Violence Protection Act 2008* (Vic) s 129.

377 Ibid s 130.

378 *Domestic and Family Violence Act 2007* (NT) s 24.

379 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 13.

11.239 The Queensland and Tasmania, family violence legislation allows courts to impose any conditions that the court considers necessary and desirable, which could include counselling or rehabilitation orders.<sup>380</sup>

11.240 In NSW, a court may impose ‘such prohibitions or restrictions on the behaviour of the defendant as appear necessary or desirable’.<sup>381</sup> Requiring someone to attend counselling or rehabilitation may go further than prohibiting or restricting that person’s behaviour. Therefore, the NSW legislation could be interpreted as not giving courts the power to make counselling or rehabilitation orders.

11.241 Application forms for protection orders, in those jurisdictions where there are legislative provisions concerning the imposition of conditions relating to rehabilitation or counselling, do not generally set out conditions relating to rehabilitation or counselling. One exception is the application form for a protection order in Victoria, which allows an applicant to indicate that she or he would like the court to encourage the person against whom the order is sought to contact the Men’s Referral Service.<sup>382</sup>

### **Rehabilitation orders pre-sentencing**

11.242 In certain jurisdictions, rehabilitation orders may be made as part of the criminal process in the pre-sentencing phase. In NSW and SA, for example, courts may defer sentencing for up to 12 months on the date of a finding of guilt, for the purpose of:

- assessing an offender’s capacity and prospects for rehabilitation or for participation in an intervention program;<sup>383</sup>
- allowing an offender to demonstrate that rehabilitation has taken place; and
- allowing the offender to participate in an intervention program.<sup>384</sup>

11.243 Such orders may overlap with protection order conditions requiring attendance at a rehabilitation or intervention program.

### **Rehabilitation orders on sentencing**

11.244 In some jurisdictions rehabilitation orders can be made on sentencing. Tasmanian legislation empowers a court sentencing for a family violence offence to make a ‘rehabilitation program order’, either with or without recording a conviction.<sup>385</sup>

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380 *Domestic and Family Violence Protection Act 1989* (Qld) s 25; *Family Violence Act 2004* (Tas) s 16(2).

381 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 35.

382 Magistrates’ Court of Victoria, *Information for Application for an Intervention Order* (2009) <[www.magistratescourt.vic.gov.au](http://www.magistratescourt.vic.gov.au)> at 2 February 2010.

383 In South Australia ‘intervention program’ means a program that provides supervised: treatment, rehabilitation, behaviour management, access to support services; or a combination of the above: *Criminal Law (Sentencing) Act 1988* (SA) s 3.

384 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 11; *Criminal Law (Sentencing) Act 1988* (SA) s 19B (the latter Act allows the court discretion to adjourn proceedings for a period exceeding the usual maximum of 12 months).

385 *Sentencing Act 1997* (Tas) s 7(ea). ‘Rehabilitation program order’ means an order to attend and participate in a rehabilitation program and in doing so comply with the reasonable directions of a person employed or engaged to conduct such a program: s 4.

In determining the sentence for a family violence offence, the court is required to take into account the results of any rehabilitation program assessment undertaken by the offender.<sup>386</sup>

11.245 In the NT, a court that finds a person guilty of an offence may order the person to participate in an ‘approved project’, which means a rehabilitation program or work, or both, approved by a community work advisory committee under the *Prisons (Correctional Services) Act* (NT).<sup>387</sup> This means that in the NT, a person against whom a protection order is made can be required to attend a rehabilitation program<sup>388</sup>—as noted above—and, if that person is found guilty of an offence related to family violence, may also be ordered to participate in a rehabilitation program.

11.246 In the ACT, if an offender is convicted or found guilty of an offence, the court in sentencing may make a good behaviour order, which may include a rehabilitation program condition;<sup>389</sup> as well as any other condition that the court considers appropriate, as long as it is not inconsistent with sentencing and sentencing administration legislation.<sup>390</sup> An example of such a condition provided by the legislation is ‘that the offender attend educational, vocational, psychological, psychiatric or other programs for counselling’.<sup>391</sup> This means that in the ACT, a person against whom a protection order is made under family violence legislation may be subject to a rehabilitation or counselling order, and if that same person is found guilty of a family-violence related offence, he or she may also be subject to a good behaviour bond containing a rehabilitation or counselling order.

11.247 Under South Australian sentencing legislation, a court may impose—as a condition of a good behaviour bond—a condition that the offender undertake an intervention program.<sup>392</sup> If an offender has participated in an intervention program, the court has a discretion to treat the offender’s participation and achievements in the program as relevant to sentence. However, the fact that an offender has not participated in, or had the opportunity to participate in, or performed badly in such a program is not relevant to sentence.<sup>393</sup>

11.248 In NSW, a court may impose a good behaviour bond on sentencing, which may contain a condition requiring the offender to participate in an intervention program,<sup>394</sup> or to participate in any program for treatment or rehabilitation that is not an intervention program.<sup>395</sup>

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386 *Family Violence Act 2004* (Tas) s 13(b).

387 *Sentencing Act 1995* (NT) ss 3, 34.

388 *Domestic and Family Violence Act 2007* (NT) s 24.

389 *Crimes (Sentencing) Act 2005* (ACT) s 13(3)(c). See also pt 6.2.

390 *Ibid* s 13(3)(g).

391 *Ibid* s 13(3).

392 *Criminal Law (Sentencing) Act 1988* (SA) s 42(1)(da).

393 *Ibid* s 10.

394 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 95A. Intervention programs are defined in the *Criminal Procedure Act 1986* (NSW) s 346.

395 *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 95(c), 95A.

11.249 The Sentencing Advisory Council in Victoria considered the making of rehabilitation orders on sentencing in its 2009 report on sentencing practices for breach of protection orders.<sup>396</sup> Its consultations revealed that ‘the perceptions of the efficacy of these programs are mixed’.<sup>397</sup> The Council recommended that:

the government should consider funding the development and delivery of a statewide men’s behavioural change program specifically designed for offenders found guilty of offences in the family violence context.<sup>398</sup>

11.250 It also recommended that until this program is implemented, courts should develop procedures to monitor whether offenders are attending these programs where they have been ordered to do so as part of an adjourned undertaking.<sup>399</sup> The Victorian Government is considering these recommendations ‘in the context of the broader family violence reform agenda’.<sup>400</sup>

### ***Submissions and consultations***

11.251 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should be amended, where necessary, to allow expressly for courts making protection orders to impose conditions on persons against whom protection orders are made requiring them to attend rehabilitation or counselling programs, where they are suitable and eligible to participate in such programs.<sup>401</sup>

11.252 This proposal was supported by a significant number of submissions.<sup>402</sup> For example, the Queensland Law Society noted the value of such programs in preventing future violence:

properly run and resourced perpetrator programs that are run for a sufficient length of time and most importantly are linked in with services that are assisting the victims of

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396 Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report* (2009), Ch 4.

397 Ibid, 75.

398 Ibid, Rec 1.1.

399 Ibid, Rec 1.2.

400 Victorian Government, *Submission FV 120*, 15 June 2010.

401 Consultation Paper, Proposal 6–10.

402 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Hunter Women’s Centre, *Submission FV 79*, 1 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010.

violence can be an effective tool in preventing further acts of domestic violence and inter-generational transmission of domestic violence.<sup>403</sup>

11.253 Similarly, the Local Court of NSW expressed support in principle for mandatory assessment for counselling and rehabilitation ‘as a step in the right direction in helping to break the cycle of violence’.<sup>404</sup>

11.254 While not expressing a view on the imposition of rehabilitation and counselling programs as part of protection order proceedings, one stakeholder expressed ‘wholehearted’ support for ‘any initiative that may serve as an alternative to incarcerating Indigenous men and boys’.<sup>405</sup> Similarly, the North Australian Aboriginal Justice Agency submitted that:

if we are serious about addressing the issues which lead to family violence, and if we are to genuinely run a criminal justice system where imprisonment is the sentence of last resort, we must as a matter of urgency put in place culturally appropriate domestic violence counselling, anger management counselling, [and] psychological counselling services in all parts of the Northern Territory.<sup>406</sup>

#### **Limited evidence of efficacy**

11.255 However, there were a number of reservations expressed in relation to counselling and rehabilitation programs—including from stakeholders who supported the proposal. One concern is that there is limited evidence showing that such programs actually work.<sup>407</sup> This was one reason why some stakeholders did not support the proposal.<sup>408</sup> One stakeholder expressed the view that the programs are unlikely to work because ‘violence is successful behaviour that gives them what they want’.<sup>409</sup> The programs were even less likely to work—to change aggressive behaviour—when participants were forced to attend.<sup>410</sup> For these and other reasons, submissions stressed that programs need to be properly evaluated and that further research is required to

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403 Queensland Law Society, *Submission FV 178*, 25 June 2010.

404 Local Court of NSW, *Submission FV 101*, 4 June 2010.

405 Confidential, *Submission FV 164*, 25 June 2010.

406 North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010.

407 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 105*, 6 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

408 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

409 Confidential, *Submission FV 105*, 6 June 2010.

410 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 164*, 25 June 2010. See also Local Court of NSW, *Submission FV 101*, 4 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. Though one legal service provider submitted that in the Northern Territory such orders can be made only with the consent of the ‘defendant’, and this consent is rarely obtained and so ‘an opportunity for behavioural change, reduced offending and reduced imprisonment is forgone’: The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010.

examine whether, over time, such programs are effective in changing behaviour,<sup>411</sup> and to inform future development of the programs.<sup>412</sup>

11.256 The No to Violence Male Family Violence Prevention Association, however, noted that there can be benefits to these programs even where they do not result in sustained behavioural changes:

Some men, for example, might reduce their use of some forms of violence while in the program due to the scrutiny associated with their participation, which might provide their partners with some ‘breathing space’ through which to make decisions concerning safety, the relationship, etc, and to begin the process of healing. Men’s Behaviour Change Programs can also play a vital role in undertaking ongoing risk assessments by virtue of working regularly with the man and contacting his (former) partner to gauge the realities of his behaviour, and if there is any discernible short-term change.<sup>413</sup>

#### ***Akin to a sentencing option***

11.257 In addition, some stakeholders were concerned that an order requiring someone to attend rehabilitation or counselling might seem like a sanction—‘akin to a sentence’.<sup>414</sup> Both Legal Aid NSW and the Law Society of NSW noted that the making of a protection order does not mean that an offence has been committed, and expressed the view that ‘the State needs to be cautious about the extent to which it seeks to compel people to do things not associated with the commission of a criminal offence’.<sup>415</sup>

11.258 Stubbs expressed concern about whether it was appropriate to attach such conditions to an order ‘made on the balance of probabilities and potentially without any admissions being made’:

Does this mean that the failure to attend counselling or rehabilitation in breach of an order could be criminalised? That would be an unwelcome outcome and arguably an over-reach of the criminal law.<sup>416</sup>

11.259 However it may be useful, Stubbs submitted, for information about these programs to be offered to persons against whom protection orders are sought.<sup>417</sup>

#### ***Enforcement***

11.260 Enforcing orders to attend counselling or rehabilitation programs also raised concerns. One stakeholder, a counsellor, submitted that legally requiring individuals to attend rehabilitation and counselling programs is inappropriate, as it is likely to set

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411 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010.

412 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

413 No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

414 National Legal Aid, *Submission FV 232*, 15 July 2010.

415 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

416 J Stubbs, *Submission FV 186*, 25 June 2010.

417 Ibid.

them up for failure, and that it would be preferable to ‘encourage or support’ individuals to attend.<sup>418</sup> Other stakeholders, however, expressed the view that there should be criminal penalties for non-compliance, and that these penalties should be enforced.<sup>419</sup>

11.261 The Local Court of NSW submitted that an ‘appropriate penalty regime’ would need to be developed; however, this would require careful consideration so as not to impact adversely on victims.<sup>420</sup> The Court noted that penalties, such as fines, imposed for breaches of protection orders, sometimes harm victims indirectly.<sup>421</sup> The Court also emphasised the need for effective oversight of participation. In the Court’s view, without effective mechanisms in place to report breaches and enforce orders, the orders will be less effective and judicial officers will be less willing to make them.<sup>422</sup>

#### ***Access to programs***

11.262 Some supported the idea ‘in theory’, but were concerned about how it would work in practice.<sup>423</sup> A number of stakeholders noted, for example, that such programs are not readily available in many regional and remote areas.<sup>424</sup> The Local Court of NSW stated that the regions with the highest number of protection orders ‘have consistently been those located outside the Sydney metropolitan area’,<sup>425</sup> while another stakeholder noted that currently such programs may not even be available in metropolitan areas.<sup>426</sup>

11.263 Other stakeholders expressed the view that, overall, there is a ‘dire shortage’ of services,<sup>427</sup> and that programs are not available at all for women who use family violence.<sup>428</sup> One counsellor concluded that attendance ‘at a private practice where the clinician does not qualify [for the Medicare rebate], and where the offending person will have to pay for the service, may be the only option’.<sup>429</sup> Other submissions stressed that greater resources and funding would clearly be necessary if this proposal were to be properly implemented.<sup>430</sup>

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418 T McLean, *Submission FV 204*, 28 June 2010.

419 Hunter Women’s Centre, *Submission FV 79*, 1 June 2010.

420 Local Court of NSW, *Submission FV 101*, 4 June 2010.

421 Ibid.

422 Ibid.

423 No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010.

424 National Legal Aid, *Submission FV 232*, 15 July 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010. See also Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

425 Local Court of NSW, *Submission FV 101*, 4 June 2010.

426 J Stubbs, *Submission FV 186*, 25 June 2010.

427 T McLean, *Submission FV 204*, 28 June 2010. See also No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

428 R Smith, *Submission FV 135*, 22 June 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

429 T McLean, *Submission FV 204*, 28 June 2010.

430 Confidential, *Submission FV 184*, 25 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

11.264 The Department of Premier and Cabinet (Tas) said the programs would need to be ‘family violence specific, available, properly resourced, evidence based, quality-assured and monitored’.<sup>431</sup>

***Programs should be targeted and effective***

11.265 Submissions also stressed that programs need to be appropriate and effective.<sup>432</sup> For example, the Queensland Law Society submitted that it was essential that the programs be run for an adequate period of time, noting that ‘overseas research indicates that programs should be run for a minimum of 26 to 52 weeks’.<sup>433</sup> The Hunter Women’s Centre expressed the view that generic rehabilitation programs and counselling sessions were not effective; programs must be structured and targeted specifically for persons who have used family violence.<sup>434</sup>

11.266 The North Australian Aboriginal Justice Agency stated that there was a need to target alcohol and other drug dependencies, which were said to be ‘an important contributing factor’ to family violence.<sup>435</sup> Another stakeholder submitted that the programs ‘must be facilitated by specialist men’s workers in conjunction with women’s services’ and must be

centred around the perpetrator becoming responsible and acknowledging [his or her] the abuse ... Ordinary counselling services do not do this. The courses must be recognised as being knowledgeable around the dynamics of domestic abuse and violence, such as the use of power and control tactics.<sup>436</sup>

***Programs should be culturally appropriate***

11.267 Programs should also be culturally appropriate.<sup>437</sup> The Aboriginal Family Violence Prevention and Legal Service Victoria stated that there should be ‘ATSI specific programs’.<sup>438</sup> Another stakeholder noted the need for services targeted at men from culturally and linguistically diverse backgrounds.<sup>439</sup> Programs should also be available for ‘adolescent or adult children who are using violence towards their parents or other elders’.<sup>440</sup>

***Programs should not be relied on to ensure victim safety***

11.268 Another key concern about this proposal was that counselling orders might be relied on to justify the imposition of a lighter set of other conditions,<sup>441</sup> or as a

431 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

432 National Legal Aid, *Submission FV 232*, 15 July 2010.

433 Queensland Law Society, *Submission FV 178*, 25 June 2010.

434 Hunter Women’s Centre, *Submission FV 79*, 1 June 2010. See also Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

435 North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010.

436 Confidential, *Submission FV 96*, 2 June 2010.

437 National Legal Aid, *Submission FV 232*, 15 July 2010; North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010.

438 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010. See also Berry Street Inc, *Submission FV 163*, 25 June 2010.

439 Berry Street Inc, *Submission FV 163*, 25 June 2010.

440 Ibid.

441 No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

substitute for providing for the protection of victims.<sup>442</sup> The No to Violence Male Family Violence Prevention Association noted that:

Attending a men's behaviour change program is by no means a guarantee that a man will change his behaviour and therefore lessen the risk of harm to his (former) partner and children.<sup>443</sup>

11.269 It was suggested that counselling and rehabilitation orders should be 'additional conditions to be attached to protection orders',<sup>444</sup> or should be made as separate orders.<sup>445</sup> This approach would help to ensure that protection orders are not diluted or revoked, and that participation in a program would be 'less likely to be seen as a safety condition related to the victim's protection'.<sup>446</sup>

11.270 Stakeholders also noted that counselling orders can give victims 'a false sense of security or encouragement',<sup>447</sup> and this can mean they remain in unsafe situations.<sup>448</sup>

#### *Application forms for protection orders*

11.271 In the Consultation Paper, the Commissions also proposed that application forms for protection orders should specify conditions relating to rehabilitation or counselling or allow a victim to indicate whether she or he wishes the court to encourage the person who has used violence to contact an appropriate referral service.<sup>449</sup>

11.272 A significant number of submissions supported this proposal.<sup>450</sup> One stakeholder submitted that the person who needs protection will often have 'the best knowledge of other measures which might promote his or her safety'.<sup>451</sup>

442 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

443 No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

444 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

445 No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

446 Ibid.

447 T McLean, *Submission FV 204*, 28 June 2010.

448 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

449 Consultation Paper, Proposal 6–11.

450 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010.

451 Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192*, 25 June 2010.

11.273 Some stakeholders, however, expressed some concern about placing the onus on the victim to indicate that the person who has used violence should be referred to an appropriate program.<sup>452</sup> For example, the No to Violence Male Family Violence Prevention Association submitted that application forms should not be the primary mechanism initiating referral to counselling and rehabilitation programs.<sup>453</sup> The Association supported a response that was ‘systems based, rather than the onus being on affected family members to take the initiative’. The Association suggested that police, magistrates and other relevant court personnel should also have a role in encouraging ‘men identified as respondents to participate in a men’s behaviour change program’.<sup>454</sup>

11.274 Women’s Legal Services NSW opposed the proposal on the basis that it:

risks placing considerable pressure on victims of family violence to provide solutions for conduct of the offender which is best dealt with seriously and appropriately as family violence (with associated legislated protections and criminal justice responses).<sup>455</sup>

#### ***Imposed without express power***

11.275 In the Consultation Paper, the Commissions asked whether judicial officers in jurisdictions, such as NSW and Queensland, in which family violence legislation does not specify expressly rehabilitation or counselling programs as potential conditions attaching to a protection order, in fact, impose such conditions as part of their general power to impose any orders that they consider to be necessary or desirable.<sup>456</sup>

11.276 Under the NSW family violence legislation, it was submitted, there is no power to impose rehabilitation or counselling conditions on the making of an order. A court may impose ‘prohibitions or restrictions’ on a person’s behaviour, but not a positive obligation to do something, such as attend a program.<sup>457</sup> One legal service provider said that the imposition of such conditions in NSW ‘does not happen very often at all’;<sup>458</sup> and another noted that a ‘now retired Magistrate at a suburban Sydney Court made such orders on a few occasions—which provided the victim with great comfort and trust that the Court was “listening” to her’.<sup>459</sup>

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452 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

453 No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

454 Ibid.

455 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

456 Consultation Paper, Question 6–11.

457 Local Court of NSW, *Submission FV 101*, 4 June 2010. See also National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

458 Confidential, *Submission FV 81*, 2 June 2010.

459 Confidential, *Submission FV 183*, 25 June 2010.

11.277 In Queensland, it was submitted, magistrates do not generally impose these conditions<sup>460</sup>—except ‘from time to time’ on the Gold Coast.<sup>461</sup> However, courts may sometimes suggest that someone attend a program or counselling.<sup>462</sup> Women’s Legal Service Queensland submitted that it had not seen such conditions ‘requested, granted or refused’ nor even suggested by the magistrate.<sup>463</sup> National Legal Aid submitted that ‘issues of what would happen if the person did not comply with the conditions would arise as there is no framework or process for monitoring’ compliance.<sup>464</sup>

11.278 The Department of Premier and Cabinet (Tas) submitted that such orders are not imposed in Tasmania as part of protection order conditions, although participation in counselling or some other form of program may be required ‘before the court will agree that there has been a change of circumstances justifying the variation of an order’.<sup>465</sup>

### ***Conflicting obligations***

11.279 In the Consultation Paper, the Commissions asked whether overlapping or conflicting obligations are placed on persons as a result of conditions imposed by protection orders under family violence legislation requiring attendance at rehabilitation or counselling programs and any orders to attend such programs either pre-sentencing or as part of the sentencing process.<sup>466</sup>

11.280 Only a few submissions addressed this question. One stakeholder said that in its experience this does not happen,<sup>467</sup> another said it happens sometimes.<sup>468</sup>

11.281 Other stakeholders addressed how such an issue is or could be addressed if it arises. National Legal Aid submitted that ‘access by respective courts to information held by the other should address this problem to the extent that it occurs’.<sup>469</sup> A legal service provider submitted that the problem ‘can easily be avoided if a defendant has a competent lawyer’.<sup>470</sup>

### ***Commissions’ views***

#### ***Availability of rehabilitation and counselling conditions***

11.282 While the imposition of rehabilitation and counselling conditions as part of a protection order raises some challenging issues in application, the Commissions

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460 National Legal Aid, *Submission FV 232*, 15 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

461 Queensland Law Society, *Submission FV 178*, 25 June 2010.

462 National Legal Aid, *Submission FV 232*, 15 July 2010.

463 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

464 National Legal Aid, *Submission FV 232*, 15 July 2010. This submission also noted that such conditions can be imposed as part of sentencing.

465 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

466 Consultation Paper, Question 6–12.

467 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

468 Justice for Children, *Submission FV 148*, 24 June 2010.

469 National Legal Aid, *Submission FV 232*, 15 July 2010.

470 Confidential, *Submission FV 198*, 25 June 2010. It was submitted that Aboriginal Legal Aid should be given more funding.

consider that these challenges ought to be met as part of a broad integrated response to family violence. It is important for family violence legislation to allow expressly for courts making protection orders to impose conditions requiring persons to attend rehabilitation or counselling programs in appropriate circumstances—the details of which are set out below.

11.283 As stated in Chapter 7, common purposes of family violence legislation should be to prevent or reduce family violence and to ensure that persons who use family violence are made accountable for their conduct. One important way of achieving these objectives is to endeavour to rehabilitate the offender in order to stop the cycle, and intergenerational transmission, of violence.

11.284 Rehabilitation programs are an essential measure for treating the causes rather than the symptoms of family violence.<sup>471</sup> While protection order conditions prohibiting or restricting a respondent's contact with the victim may assist in reducing or preventing violence against that victim in the short term, successful participation by a respondent in appropriate and relevant rehabilitation and counselling programs has the advantage of targeting the long-term reduction or prevention of family violence—including as against persons other than the victim the subject of the protection order.

11.285 The Commissions note that there is a lack of consensus about the effectiveness of general or specific counselling and rehabilitation programs currently operating in Australia.<sup>472</sup> A key feature of an integrated response is ongoing data collection and evaluation, with a view to system review and process improvements,<sup>473</sup> and the Commissions consider that rehabilitation and counselling programs for persons who use family violence should be the subject of continuing monitoring and evaluation.

11.286 In the Commissions' view, because some persons who use violence can benefit from rehabilitation or counselling programs,<sup>474</sup> courts should be empowered to order a person against whom a protection order is made to attend such programs, where the person is suitable and eligible to participate. The fact that imposition of a rehabilitation or counselling order may be an option on sentencing should not preclude the availability of such options when a protection order is imposed. This is important for two reasons. First, not all conduct which gives rise to a protection order is criminal. Secondly, even if the offending conduct that gives rise to a protection order is criminal and is prosecuted, if the prosecution fails, protection order conditions aimed at rehabilitation could still be imposed.

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471 Australian Law Reform Commission, *Domestic Violence*, Report 30 (1986), 55.

472 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 161. See also L Laing, *Responding to Men Who Perpetrate Domestic Violence: Controversies, Interventions and Challenges* (2002), Australian Domestic & Family Violence Clearinghouse; K Wilcox, *Recent Innovations in Australian Protection Order Law: A Comparative Discussion* (2010), prepared for the Australian Domestic and Family Violence Clearinghouse, 12 (citations omitted).

473 Discussed in Ch 31.

474 See, eg. Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report* (2009), Ch 4.

***Appropriate circumstances for imposition of such conditions***

11.287 A court should have discretion as to whether to impose conditions requiring persons to attend rehabilitation or counselling programs, and as to whether to impose such orders on the making of an interim or final protection order.

11.288 In each case, the court should not make such an order without being satisfied that the person is a suitable person to participate, is eligible to participate, and the program is accessible to the person. The assessment for eligibility and suitability should be undertaken by an independent professional required to report to the court on this issue. Relevant considerations in assessing eligibility and suitability—which could be contained in regulations—should include whether the respondent consents to the order; the availability of transport; and the respondent's work and educational commitments, cultural background and any disability. In general terms, the Commissions agree that consent is a necessary prerequisite to suitability to participate in such programs pursuant to the making of a protection order condition. Coercively-imposed rehabilitation programs are less likely to be effective.

11.289 Where such a condition is imposed on the making of an interim protection order, the completion of the program should be a factor in the court's determination as to whether a final order is appropriate, the conditions in the final order and its duration.

***Meeting practical challenges in implementation***

11.290 Obviously, requiring a person to attend a rehabilitation or counselling program—whether as part of a protection order condition or as a sentencing option—assumes that such programs are available. As one District Court judge in WA commented:

It is a tragedy of the criminal justice system in Western Australia that alcohol treatment programs and family violence counselling programs are not available in the more remote parts of the State. Judges involved in sentencing family violence offenders in the Kimberley, for example, realise that there is almost nothing in the community to support an offender who may be trying to heal the relationship and avoid alcohol.<sup>475</sup>

11.291 It is essential that rehabilitation and counselling programs are: available and accessible, including in remote and regional areas; culturally appropriate; gender appropriate; relevant and targeted to the causes of offending behaviour. Achieving this aspiration will require funding, and the deployment of significant and appropriate resources to develop and conduct such programs, including the training of specialised personnel. A serious long-term integrated response to family violence demands no less a commitment.<sup>476</sup>

***Enforcement***

11.292 In order for such orders to be effective, there need to be sanctions for failure to comply. There is, however, an understandable concern about criminalising breach of a

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475 M Yeats, *Correspondence*, 23 December 2009.

476 Integrated responses are discussed in Ch 29.

condition to complete a rehabilitation or counselling program or to attend for assessment. As discussed in Chapter 12, breach of a protection order is a criminal offence and maximum terms of imprisonment vary across the jurisdictions from one year to five years imprisonment, and maximum fines vary from \$2,400 to \$44,000.

11.293 The Commissions consider that it is appropriate to restrict a court's sentencing options for breaches of rehabilitation and counselling orders. The failure to attend such programs should not lead to imprisonment. The maximum penalty should be a fine, which is set at a lower level than the maximum penalty for breaching a protection order in the jurisdiction in which the breach occurs.<sup>477</sup> On breach, courts should retain the discretion to adjourn the matter to allow an opportunity for compliance, having regard, for example, to the extent to which a program has been completed and to any difficulties that a person has faced in achieving compliance, such as medical reasons. In addressing appropriate financial penalties, courts should have regard to the potential adverse impact on the victim of violence.

#### ***Provision of information about programs***

11.294 The Commissions acknowledge the concerns expressed by some stakeholders that the rehabilitation and counselling of those who use family violence require systemic address, and that the onus should not be placed on victims to suggest or seek that such persons are referred to these programs. Therefore the Commissions do not recommend that application forms specify conditions relating to rehabilitation or counselling nor allow a victim to indicate whether she or he wishes the court to encourage the aggressor to contact an appropriate referral service.

11.295 In the Commissions' view it is incumbent on courts to provide persons against whom protection orders are made with information about relevant culturally and gender-appropriate rehabilitation and counselling programs where appropriate. This will involve developing or collating appropriate information and making it available in all court registries. One way of implementing this recommendation would be for this information to be attached to protection orders served on such persons.

**Recommendation 11–11** State and territory family violence legislation should provide that:

- (a) courts have an express discretion to impose conditions on persons against whom protection orders are made requiring them to attend rehabilitation or counselling programs, where such persons have been independently assessed as being suitable and eligible to participate in such programs;

<sup>477</sup> This is the case, for example, in Victoria with respect to failure to attend counselling—which attracts a fine of 10 penalty units, compared with the maximum fine of 240 penalty units for breaching a protection order: *Family Violence Protection Act 2008* (Vic) ss 37, 123, 130(4).

- (b) the relevant considerations in assessing eligibility and suitability to participate in such programs should include: whether the respondent consents to the order; the availability of transport; and the respondent's work and educational commitments, cultural background and any disability; and
- (c) failure to attend assessment or to complete such a program should not attract a sentence of imprisonment, and the maximum penalty should be a fine capped at a lower amount than the applicable maximum penalty for breaching a protection order.

**Recommendation 11–12** Where appropriate, state and territory courts should provide persons against whom protection orders are made with information about relevant culturally and gender-appropriate rehabilitation and counselling programs.

### Other interactions between protection orders and sentencing

11.296 The discussion below addresses interactions between non-contact and place restriction orders imposed on sentencing, with similar conditions in protection orders; as well as the issue of taking protection order conditions into account in sentencing.

#### **Non-contact orders**

11.297 The Queensland sentencing legislation allows a court, on the sentencing of an offender for a personal offence, to make a non-contact order, which prohibits the offender, for a specified period, from:

- contacting the victim against whom the offence was committed; or someone who was with the victim when the offence was committed; and/or
- going to a stated place or within a stated distance of a specified place.<sup>478</sup>

11.298 However, that legislation prohibits such an order from being made if an order can be made under s 30 of the Queensland family violence legislation. Section 30 empowers a court to make a protection order on its own initiative when a person pleads guilty to, or is found guilty of, an offence that involves family violence.<sup>479</sup>

#### **Place restriction orders**

11.299 Place restriction orders are available as a sentencing option in NSW and Tasmania.<sup>480</sup> In Tasmania, a court may make an ‘area restriction order’ if it finds a person guilty of an offence. An ‘area restriction order’ is an order that the offender

<sup>478</sup> *Penalties and Sentences Act 1992* (Qld) ss 43B, 43C.

<sup>479</sup> This provision is noted above in the section on making protection orders in criminal proceedings. Non-association orders are available in NSW as a sentencing option for any offence punishable by imprisonment for six months or more: *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A.

<sup>480</sup> *Ibid* s 17A; *Sentencing Act 1997* (Tas) s 70.

must not loiter in an area or class of area specified in the order at any time or during such periods as specified in the order.

11.300 In NSW, place restriction orders are only available on sentencing for offences punishable by imprisonment for six months or more. A place restriction order prohibits the offender from frequenting or visiting a specified place or district for a specified term and can be made by the court if it is satisfied that it is reasonably necessary to make such an order to ensure that the offender does not commit any further offences.<sup>481</sup>

11.301 Place restriction or area restriction orders imposed on sentencing for a family-violence related offence have the potential to overlap or conflict with conditions attached to a protection order prohibiting or restricting a person's access to certain premises.

#### ***Submissions and consultations***

11.302 In the Consultation Paper, the Commissions asked whether there had been cases where there has been overlap or conflict between place restriction or area restriction orders imposed on sentencing and protection order conditions which prohibit or restrict the same person's access to certain premises.<sup>482</sup>

11.303 Only a few submissions addressed this question. One stakeholder said that it had not seen this happen.<sup>483</sup> The Queensland Law Society said many magistrates avoid distance or area restriction orders because they can be particularly difficult to enforce.<sup>484</sup>

11.304 A few stakeholders, however, submitted that there had been cases of such overlap or conflict.<sup>485</sup> The Local Court of NSW submitted that this may arise 'where a protection order is made at a different time to the sentencing for a criminal matter', but that this was rare because in NSW the matters are dealt with together.<sup>486</sup> Inconsistencies were more common, the Court submitted, 'where police bail is granted when an existing protection order is in place'.<sup>487</sup>

11.305 National Legal Aid submitted that the risk of overlap or conflict should be minimised by 'coordinated and appropriate information sharing processes between relevant agencies/courts'.<sup>488</sup>

#### ***Commissions' views***

11.306 As this issue does not appear to be a significant problem in practice, the Commissions make no specific recommendation in this regard. However, in any event,

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481 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17A(2).

482 Consultation Paper, Question 6–14.

483 Confidential, *Submission FV 198*, 25 June 2010.

484 Queensland Law Society, *Submission FV 178*, 25 June 2010.

485 Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 77*, 2 June 2010.

486 Local Court of NSW, *Submission FV 101*, 4 June 2010. See also Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

487 Local Court of NSW, *Submission FV 101*, 4 June 2010.

488 National Legal Aid, *Submission FV 232*, 15 July 2010.

the Commissions consider that the potential for conflicting non-contact and place restriction conditions to be imposed is likely to be minimised if the recommendations made by the Commissions in Chapter 32, concerning specialised practices, are implemented. Of particular relevance are the recommendations about the use of specialised family violence courts with specialised judicial officers to deal with both protection order proceedings and criminal offences arising in a family violence context—as well as the mainstreaming of such specialist practices in other state and territory courts.

11.307 In addition, access to information on the proposed national protection order database may also go some way to avoiding the imposition of conditions on sentence which conflict with conditions contained in a protection order.<sup>489</sup>

#### ***Taking protection order conditions into account in sentencing***

11.308 Another issue which arises on the sentencing of an offender for a family-violence related offence is the extent to which courts take into account the conditions that have been imposed by a protection order under family violence legislation. A related issue is whether courts should take protection order conditions into account in sentencing. The views of stakeholders on these two issues are canvassed below.

#### ***Whether protection order conditions are taken into account in practice***

11.309 Prior to the release of the Consultation Paper, the Commissions heard in consultation that, in NSW, protection orders are regularly taken into account in sentencing. It is relevant for the court imposing sentence to know the length of the protection order and the extent of the prohibitions placed on the offender to be sentenced. If an order is very restrictive and lasts for an extended time it may influence the penalties to be imposed on sentencing. In addition, it is relevant for the court to know whether any rehabilitation was ordered as part of the protection order—in those jurisdictions where this is permissible—because if not, a condition to this effect may be appropriate in a good behaviour bond.<sup>490</sup>

11.310 The Commissions also heard that District Court judges who sentence offenders for family-violence related offences in WA have available to them a pre-sentence report, and that offenders are invariably represented by counsel. Therefore any existing protection orders are brought to the attention of the sentencing judge.<sup>491</sup>

11.311 Some stakeholders expressed concern about attendance at rehabilitation programs or willingness to attend such programs being relied upon as mitigating factors in sentencing, in the absence of longitudinal evidence that such programs, in fact, reduce violence.<sup>492</sup>

11.312 In the Consultation Paper, the Commissions asked whether, in practice, courts sentencing offenders for family violence related offences are made aware of, and take

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489 See Ch 30.

490 G Zdenkowski, *Consultation*, Sydney, 6 November 2009.

491 M Yeats, *Correspondence*, 23 December 2009.

492 Australian Domestic & Family Violence Clearinghouse, *Consultation*, Sydney, 27 January 2010.

into account, any protection order conditions to which the offender to be sentenced is or has been subject.<sup>493</sup>

11.313 Some submitted that courts are made aware of these conditions<sup>494</sup> and take them into account,<sup>495</sup> though one stakeholder questioned the weight courts give to the orders and related family violence convictions.<sup>496</sup> They are taken into account in NSW, it was submitted, because the matters are dealt with concurrently.<sup>497</sup>

11.314 Others submitted that prosecutors<sup>498</sup> and ‘competent’ lawyers<sup>499</sup> will direct the court to these conditions. National Legal Aid submitted that prosecutors should inform the court of ‘all relevant facts surrounding charges arising from domestic violence incidents and restraining order breaches’.<sup>500</sup>

11.315 Other stakeholders submitted that courts are not made aware of these conditions<sup>501</sup>—or only where the charge relates to the breach of a protection order.<sup>502</sup> Both Legal Aid NSW and an advocacy service said police prosecutors will ordinarily give the magistrate a copy of a criminal record, but may not indicate whether a protection order is in place or has been in place.<sup>503</sup>

11.316 National Legal Aid submitted that in imposing sentence, courts already have

significant regard to the factor that offences have occurred in a domestic relationship and have particular concern when a restraining or protection order has been breached.<sup>504</sup>

#### ***Whether protection order conditions should be taken into account in sentencing***

11.317 In the Consultation Paper, the Commissions proposed that state and territory legislation should provide that a court sentencing an offender for a family-violence related offence should take into account, in sentencing the offender:

- (a) any protection order conditions to which the person being sentenced is subject, where those conditions arise out of the same or substantially the same conduct giving rise to the prosecution for the offence; and
- (b) the duration of any protection order to which the offender is subject.<sup>505</sup>

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493 Consultation Paper, Question 6–13.

494 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Confidential, *Submission FV 162*, 25 June 2010; Confidential, *Submission FV 109*, 8 June 2010; Confidential, *Submission FV 77*, 2 June 2010.

495 Confidential, *Submission FV 162*, 25 June 2010; Confidential, *Submission FV 109*, 8 June 2010; Confidential, *Submission FV 77*, 2 June 2010.

496 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

497 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

498 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

499 Confidential, *Submission FV 198*, 25 June 2010.

500 National Legal Aid, *Submission FV 232*, 15 July 2010.

501 Confidential, *Submission FV 130*, 21 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

502 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

503 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

504 National Legal Aid, *Submission FV 232*, 15 July 2010.

505 Consultation Paper, Proposal 6–12.

11.318 A significant number of stakeholders supported this proposal,<sup>506</sup> and one submitted that the court should also be informed *how* to take the orders into account, because the orders ‘ought not be regarded as a mitigating factor’.<sup>507</sup>

11.319 Two stakeholders noted that if the sentence is for a longer duration than the protection order, victims may wish to have protection orders extended so that the orders have the same duration as the sentence.<sup>508</sup>

11.320 However, two stakeholders submitted that there appeared to be no need for the proposal, either because courts take these matters into account anyway or because it was covered in current sentencing legislation.<sup>509</sup> The Local Court of NSW submitted that the current legislative provisions are operating well in practice.<sup>510</sup>

#### *Commissions’ views*

11.321 Courts should consider any protection order conditions to which an offender to be sentenced for a family violence offence is subject, where those conditions arise out of the same or substantially the same conduct giving rise to the prosecution for the offence. It is particularly relevant for courts to take into account those conditions which may have caused significant hardship—such as exclusion orders. This approach is consistent with the ALRC recommendation, made in the ALRC’s 2006 report on the sentencing of federal offenders, that relevant sentencing factors include any detriment sanctioned by law to which the offender has been or will be subject.<sup>511</sup>

11.322 To avoid making overlapping orders concerning rehabilitation or counselling programs, a court sentencing an offender must know whether the person has or is attending such a program pursuant to a protection order condition. It is also relevant, in this regard, for the court sentencing an offender for a family-violence related offence to take into account the duration of any protection order to which the offender is subject.

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506 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 77*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

507 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

508 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

509 Law Society of New South Wales, *Submission FV 205*, 30 June 2010. See also Confidential, *Submission FV 198*, 25 June 2010.

510 Local Court of NSW, *Submission FV 101*, 4 June 2010.

511 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), 192–196, Rec 6–1.

11.323 A court's legislative obligation to take such matters into account should be complemented by guidance in the proposed national bench book on family violence.<sup>512</sup> As recommended in Chapter 13, the national bench book should contain a section that addresses sentencing in family violence matters.

11.324 The Commissions note that some stakeholders have expressed the view that attendance at rehabilitation programs should not be a mitigating factor in sentencing.<sup>513</sup> In the Commissions' view, whether or not attendance at a rehabilitation program can be treated as mitigating depends on a variety of factors—including whether the offender completed the program, whether there is evidence that the offender has changed his or her behaviour since the completion of the program, and the type and duration of the program. Completion of an intensive 12 month program may be more compelling than completion of a program that ran for one or two weeks. The Commissions consider that this is properly a matter for judicial discretion. Moreover, retaining judicial discretion in this way also serves to provide some incentive for those who commit family violence to participate in rehabilitation programs, thereby increasing the prospect of reducing family violence in the long term.

**Recommendation 11–13** State and territory legislation should provide that a court sentencing an offender for a family-violence related offence should take into account:

- (a) any protection order conditions to which the person being sentenced is subject, where those conditions arise out of the same or substantially the same conduct giving rise to the prosecution for the offence; and
- (b) the duration of any protection order to which the offender is subject.

512 See Rec 31–2.

513 The Commissions discuss their views on aggravating and mitigating factors in Ch 13.

# 12. Breach of Protection Orders

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## Contents

Introduction	509
Aid and abet provisions	509
Public justice offences	520
Consent to breaches	526
Charging for breach of protection order rather than underlying offence	533
Penalties and sentencing for breach of protection orders	543

## Introduction

12.1 In each state and territory jurisdiction a breach of a protection order is a criminal offence and, as such, can result in the parties to protection order proceedings entering into the criminal justice system—either as accused persons or witnesses.

12.2 This chapter discusses a number of issues relevant to breach of protection orders including aiding and abetting breaches, consent to breaches, charging practices, maximum penalties for breach, and sentencing practices.

## Aid and abet provisions

12.3 An issue for this Inquiry is the extent to which police may threaten to or actually charge a victim with aiding, abetting, counselling or procuring a breach of a protection order where they believe the victim consented to the breach.

12.4 The Commissions have heard that victims in some jurisdictions, including Western Australia (WA),<sup>1</sup> South Australia (SA)<sup>2</sup> and Tasmania<sup>3</sup> and are being charged with aiding and abetting breaches of protection orders or instigating such breaches. The WA review of family violence legislation found that police were sometimes charging victims, who had obtained protection orders and were deemed complicit in a breach of a protection order, with aiding and abetting the breach.<sup>4</sup>

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1 National Legal Aid, *Submission FV 232*, 15 July 2010.

2 A Cannon, *Submission FV 137*, 23 June 2010.

3 Magistrates Court, *Consultation*, Hobart, 13 May 2010.

4 Department of the Attorney General (WA), *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 32–33.

12.5 In 2006, Professor David Brown and other criminal law academics commented that:

Until fairly recently, the long established common law position was that a person could not be convicted of aiding and abetting the commission of an offence of which he or she was the victim. In *Tyrell* [1894] 1 QB 710, the defendant, a girl under the age of 16, was charged with aiding and abetting the principal to have unlawful sexual intercourse with her. The court found that the defendant could not be guilty of aiding and abetting a crime aimed at protecting girls of her age from sexual intercourse. However, in a number of recent cases, the party for whose benefit an apprehended violence order ... was made has been convicted of aiding and abetting the criminal offence of breaching a domestic violence order.<sup>5</sup>

12.6 In *Keane v Police*, the Supreme Court of SA upheld the conviction of Keane for aiding and abetting the breach of a protection order. The order, protecting Keane, prohibited her partner Smith from being at premises where she resided and from communicating with her in any way. One year after the order was made, Keane telephoned her partner and requested him to look after their children the following day. Arrangements were made for her partner to collect the children from the residence of a third party. However, the partner arrived at Keane's place, wanting to talk. Keane allowed him in. Her partner became abusive when Keane rejected his attempts at reconciliation. The police attended and both parties were charged—one with breach; the other with aiding and abetting the breach by contacting him and allowing him to enter her home. King AJ stated:

I cannot discern any provision or consideration of policy in the *Domestic Violence Act* giving rise to an implication excluding ordinary accessorial liability. There are reasons of justice and convenience why the ordinary principles should apply. Where an order is made for a person's benefit, it would seem unjust that the person should be able to encourage or facilitate a breach of an order thereby causing another to commit an offence, but escape any liability. Moreover, on policy grounds, it is important that curial and police resources should not be wasted in obtaining and enforcing restraining orders, the breach of which the persons for whose benefit they are made, are willing to condone. In the present case, the appellant's actions, in addition to causing distress to the children, resulted in the police having to come to the house to remove the offender.<sup>6</sup>

12.7 In a study of the policing of protection orders from the perspective of Indigenous women, Loretta Kelly nominates aiding and abetting charges as one manifestation of a bias against women who were known to have reconciled with their partners after a report of violence.<sup>7</sup> She cites the following example:

Thelma was charged with aiding and abetting the defendant's breach of the AVO against him. When she asked why she was being charged, the police responded: 'we're sick of this ... you call the police but you're having him back. Thelma corrected the police: 'he doesn't live with me, he just comes back here thinking he

<sup>5</sup> D Brown and others, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Material and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006), 1156.

<sup>6</sup> *Keane v Police* (1997) 69 SASR 481, 484.

<sup>7</sup> L Kelly, 'Indigenous Women's Stories Speak for Themselves: The Policing of Apprehended Violence Orders' (1999) 4(25) *Indigenous Law Bulletin* 89, 4, 5.

owns the place—arguing’. In spite of her response, the police charged her with aiding and abetting.<sup>8</sup>

12.8 One submission to the Victorian Law Reform Commission’s (VLRC) review of family violence laws pointed out:

The threat of being charged with breaching one’s own intervention order is a technique used by perpetrators of family violence to stop the protected person from reporting the breach of the order.<sup>9</sup>

12.9 Both the New South Wales (NSW) Law Reform Commission and the VLRC have recommended against charging victims for whose benefit a protection order has been obtained for aiding and abetting a breach of such an order.<sup>10</sup> The VLRC recommended that if the police believe that a victim has consented to a breach, they should explain the procedure for varying or revoking an order. If necessary, police should apply for a variation or revocation on behalf of the victim with his or her consent.<sup>11</sup> The WA review recommended an amendment to the *Criminal Code* (WA) to preclude victims for whose benefit a protection order has been made from being charged with aiding and abetting a breach of the order.<sup>12</sup> It also recommended that the court should be given power to grant leave to proceed in an application to vary or cancel a protection order, of its own motion, at the hearing of an allegation of a breach, where there is evidence of the person protected being complicit.<sup>13</sup>

12.10 NSW family violence legislation provides that a victim for whose benefit a protection order is obtained cannot be charged with aiding, abetting, counselling or procuring the breach of a protection order.<sup>14</sup> The Victorian family violence legislation provides that a ‘protected person’ does not aid, abet, counsel or procure a breach because the protected person ‘encourages, permits or authorises conduct by the respondent’ that contravenes a protection order.<sup>15</sup> That Act provides, for example, that a protected person is not guilty of aiding or abetting a breach because she or he ‘invited the respondent to have access to the residence’ or ‘allowed the respondent to spend time with the protected person’ in breach of a protection order. The Victorian Act also contains a note stating that, if a victim is dissatisfied with the terms of a protection order, the victim or the police may apply to have the order varied or revoked.<sup>16</sup>

8 Ibid, 5.

9 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), 162.

10 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report 103 (2003), Rec 45; Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 33.

11 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 33.

12 Department of the Attorney General (WA), *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 33.

13 Ibid, Rec 6.

14 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14(7).

15 *Family Violence Protection Act 2008* (Vic) s 125.

16 Ibid note to s 125.

12.11 The family violence legislation of SA provides that a victim for whose benefit a protection order has been made cannot be guilty of aiding and abetting a breach of the order if

the conduct constituting contravention of the intervention order did not constitute contravention of the order in respect of another person protected by the order or of any other intervention order (of which the person was or ought reasonably to have been aware) in force against the defendant and protecting another person.<sup>17</sup>

### ***Submissions and consultations***

#### ***Aid and abet provisions***

12.12 In the Consultation Paper, the Commissions proposed that state and territory legislation should be amended, where necessary, to provide that a person protected by a protection order under family violence legislation cannot be charged with or be found guilty of an offence of aiding, abetting, counselling or procuring the breach of a protection order.<sup>18</sup>

12.13 This proposal was broadly supported by the majority of stakeholders,<sup>19</sup> although as set out below some stakeholders expressed dissent.

12.14 In addition to agreeing with the reasons set out in the Consultation Paper,<sup>20</sup> stakeholders advanced the following reasons for their support:

- It is the responsibility of the person against whom an order is made to adhere to its conditions. It is not the responsibility of the victim to ensure that it is not breached.<sup>21</sup>

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17      *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 31(3).

18      Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Proposal 6–13.

19      Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; A Cannon, *Submission FV 137*, 23 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

20      Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

21      Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

- Any evidence that a victim has played a role in the breach of a protection order is more appropriately taken into account in proceedings against the person who breached the order, rather than forming the basis for proceedings against the victim.<sup>22</sup>

12.15 The North Australian Aboriginal Justice Agency (NAAJA) expressed the view that charging victims will not achieve anything, nor address the issues that parties are having, and emphasised the counter-productive consequences of excessive recourse to punitive criminal sanctions. It also stated:

Our concern with charging a party with aiding and abetting is that it oversimplifies a situation and does not take account of all of the factors that may lead a person to aid or abet a breach, such as that the victim (just as with the respondent) does not fully understand the exact terms of a domestic violence order. These factors are especially pressing in the cases of parties who speak English as a second, third or fourth language or who lack the functional English literacy skills to understand the complex English used in domestic violence orders. There are also instances where a victim may aid or abet a breach due to psychological manipulations. As there are instances when the order has been taken out not so much at the victim's request, but at the instigation of a third party (such as police).<sup>23</sup>

We would be concerned that a policy of charging people with aiding and abetting in any of these circumstances would result in unjust prosecutions.<sup>24</sup>

12.16 One legal service provider also supported the proposal on the basis that charging victims for breach of a protection order would have particularly negative ramifications for Indigenous women in remote communities, due to a number of factors including that many Indigenous women:

- have an order imposed by police application and may not have consented to its issue;
- have difficulty in understanding the legal process, including the consequences of a protection order, given that English may not be their first language, and there is a lack of access to persons to explain legal processes as magistrates may only be available once per month in remote community courts; and
- have significant pressure put on them from their extended family and community 'not to get Indigenous men in trouble with the law' and so 'may not be in a position to tell the defendant to go away even with the [protection order] in place'.<sup>25</sup>

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22 Legal Aid NSW, *Submission FV 219*, 1 July 2010. A magistrate also expressed the view that a court should be able to take the conduct of the victim into account on sentencing for breach of an order: A Cannon, *Submission FV 137*, 23 June 2010.

23 The concern about the impact of such a provision on victims when they may not have had a say in an order being issued was echoed in another consultation: Northern Territory Legal Aid Commission, *Consultation*, Darwin, 26 May 2010.

24 North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010.

25 Confidential, *Submission FV 164*, 25 June 2010.

12.17 One Tasmanian magistrate expressed concern that charging victims for instigating breach of protection orders could deter them from reporting family violence in the future<sup>26</sup>—a concern echoed by NAAJA.<sup>27</sup>

12.18 The Queensland Law Society, which supported the proposal, noted that

anecdotally, clients have reported threats of these prosecutions have arisen in cases of no contact clauses where the victim has spoken to the perpetrator.<sup>28</sup>

12.19 In contrast, a number of stakeholders opposed the proposal.<sup>29</sup> National Legal Aid opposed the proposal although it stated that a number of women have been charged in WA with being parties to breach of a protection order in cases where

it was apparent that the woman was a genuine victim of family violence and the threat or reality of charges only served to undermine their confidence in the legal/justice system.<sup>30</sup>

12.20 National Legal Aid provided the following case study to illustrate this point:

An Aboriginal woman living in the Pilbara had been in a long-term violent relationship. After being physically assaulted again, she obtained an interim violence restraining order against her partner on the advice of the police. Some weeks later after pressure from extended family and her children she allowed her partner to attend her house to see the children. Her partner again assaulted her and the police were called to the house. The police charged her partner with assault and breach of the restraining order. The woman was also charged with breach of restraining order as a party to the offence. She pleaded guilty and was given a fine. She remarked to the refuge that she would never seek a protection order again.<sup>31</sup>

12.21 National Legal Aid identified a further problem with protected persons being charged with breaches—they are potentially liable ‘to receive a record for a violent offence with all the potential consequences. Any criminal record is unlikely to specify that the person is a protected person charged as being party to a breach’.<sup>32</sup>

12.22 Despite these concerns, National Legal Aid expressed the views of the Legal Aid Commission Tasmania in opposing the proposal—views which were substantially echoed by the Department of Premier and Cabinet (Tas). In summary, both submissions noted that the benefits of the system in place in Tasmania under the Safe at Home program which allows, in appropriate cases, victims who invite or encourage a respondent to breach a protection order to be charged with ‘Commit Simple Offence’.

The penalties are, legislatively and in practice, less than those imposed for the actual breach. Most often no conviction is imposed on an undertaking not to commit a

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26 Magistrates Court, *Consultation*, Hobart, 13 May 2010.

27 North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010.

28 Queensland Law Society, *Submission FV 178*, 25 June 2010.

29 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; T McLean, *Submission FV 204*, 28 June 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

30 National Legal Aid, *Submission FV 232*, 15 July 2010.

31 Ibid.

32 Ibid.

similar offence for 6 or 12 months. This reflects, and provides an opportunity to explain to the protected person, the importance of a number of points, ...

- orders have the effect of limiting someone's freedom, to a greater or lesser degree. ... If you have the benefit of a protection order that limits someone else's freedom, you have the responsibility not to do anything that invites or encourages a breach of that order; ...
- orders can usually be changed to allow the protected person to do what needs to be done. It is, however, a process, and takes time. There may need to be a good, objective reason to think that things have changed before the order can be changed;
- when there are children in the household ... the order is in place not just to protect the protected person, but also to protect children from witnessing or being caught up in any more incidents of family violence and suffering harm. By undermining the effectiveness of the order, a victim may be seen to be exposing the children to risk of harm.<sup>33</sup>

12.23 The Law Society of New South Wales submitted that police should have the option to charge in exceptional circumstances.<sup>34</sup>

12.24 Toni Maclean, a partner violence counsellor opposed the proposal, submitting that:

This is a situation which I encountered repeatedly as a case manager for NSW Community Offender Services. Female victims of partner violence, for a range of reasons, were frequently observed to encourage the offending partner in actions which put the offender in breach of the protection order.<sup>35</sup>

12.25 The One in Three Campaign submitted that the proposal

appears to ignore the serious issue of malicious aiding, abetting, counselling or procuring of the breach of a protection order. We have heard many reports of persons who have breached a protection order after the person protected by such an order maliciously aided and abetted its breach with the intent of harming the other person.<sup>36</sup>

#### ***Variation or revocation of protection order in proceedings for breach***

12.26 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should empower a court hearing an allegation of breach of a protection order to grant leave to proceed in an application to vary or cancel the protection order of its own motion where: (a) there is evidence that the victim for whose benefit the protection order was made gave free and voluntary consent to the breach; and (b) the court is satisfied that the victim wants to vary or revoke the protection order.<sup>37</sup>

33 Ibid. See also Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

34 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

35 T McLean, *Submission FV 204*, 28 June 2010.

36 One in Three Campaign, *Submission FV 35*, 12 May 2010.

37 Consultation Paper, Proposal 6–14.

12.27 Stakeholder views on this proposal were divided. Many stakeholders—including a number of legal service providers that made confidential submissions—expressed support.<sup>38</sup> Others expressed qualified support including on the basis that the same tests for varying or revoking a protection order are applied,<sup>39</sup> the court is satisfied that the victim has not been coerced, intimidated or otherwise manipulated,<sup>40</sup> and has indeed explicitly consented.<sup>41</sup>

12.28 For example, National Legal Aid submitted that it would support the proposal on the basis that

there is an appropriate process to ensure that the consent of the victim is truly consent and the court could still make orders that are necessary and desirable to protect the victim and any affected children from further violence.<sup>42</sup>

12.29 One confidential submission stated:

The idea of free and voluntary consent when we are discussing victims of domestic and family violence is not entirely accurate and courts should not cancel protection orders without first taking into account the dynamic of power and control that exists within these relationships. Cancelling or amending a protection order should be done with care and consideration and support should be provided to the protected person to ensure that her voice is heard away from the perpetrator of such violence.<sup>43</sup>

12.30 The Aboriginal Family Violence Prevention and Legal Service Victoria submitted that ‘there should be an obligation to refer the victim for independent legal advice’ to allow the Court to satisfy itself that there is no duress involved.<sup>44</sup> Berry Street Inc, in expressing reservations about the proposal due to the possibility of victim coercion, stated that ‘a more cautious approach would be to counsel and support a victim to apply for a variation or to revoke the protection order if that is their preferred course of action’.<sup>45</sup>

12.31 A few stakeholders opposed the proposal. Legal Aid NSW submitted:

If the defendant is found guilty of breaching a protection order, the fact that the victim may have consented to the breach or wishes to vary the order does not modify the fact

38 J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010.

39 Queensland Law Society, *Submission FV 178*, 25 June 2010. This submission pointed out, for example, that *Domestic and Family Violence Protection Act 1989* (Qld) s 36, significantly, only allows a court to revoke a protection order if the court considers the safety of the aggrieved or a named person would not be compromised by the revocation.

40 T McLean, *Submission FV 204*, 28 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 96*, 2 June 2010.

41 Confidential, *Submission FV 164*, 25 June 2010.

42 National Legal Aid, *Submission FV 232*, 15 July 2010. A similar view was expressed in Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

43 Confidential, *Submission FV 184*, 25 June 2010.

44 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

45 Berry Street Inc, *Submission FV 163*, 25 June 2010.

that the defendant is guilty and should take responsibility for those actions. If the victim wants to vary or revoke the order they can make a separate application to do so and it is not appropriate to consider varying or revoking the order whilst hearing an allegation regarding a breach of that order.<sup>46</sup>

12.32 Women's Legal Services NSW expressed concern that

providing the court with this power would place a victim at risk of being pressured, in the midst of a hearing to agree to changes in a protection order that are not in their best interests.<sup>47</sup>

12.33 The Victorian Government queried that part of the proposal regarding 'consent of a victim to a breach' as the order is between the court and the respondent.<sup>48</sup>

12.34 While not specifically addressing the proposal, NAAJA highlighted difficulties that arise, especially in remote communities, with regard to the variation and revocation of protection orders:

Parties often reconcile and resume their relationship without amending or seeking the revocation of an order that prohibits contact. Parties often lack the knowledge of what steps they need to take to seek a variation or revocation of the order. They have no culturally-appropriate legal services that they can seek advice or assistance from. Or they are so alienated and disenfranchised from the conventional court process that they would rather run the risk of breaching an order than voluntarily attend court to bring an application to vary or revoke an order.

An additional issue contributing to this problem is the infrequency with which courts sit in remote communities. A bush court may sit on a monthly, bi-monthly or three monthly basis. This means that it is simply [impossible] for remote residents to seek variations of orders in a timely manner. This again leaves defendants open to breaching orders.<sup>49</sup>

**Commissions' views**

**Aid and abet provisions**

12.35 On balance, the Commissions remain of the view that relevant state and territory legislation—whether family violence legislation or criminal legislation—should be amended to provide that a person protected by a protection order under family violence legislation cannot be charged with, be or found guilty of, an offence of aiding, abetting, counselling or procuring the breach of such an order.

12.36 The capacity to charge victims of family violence for breach of a protection order undermines the policy intent of family violence legislation.<sup>50</sup> As stated by Brown and other criminal law academics:

While the frustration and concern for 'wasted resources' on the part of police can be appreciated, it is questionable whether the practice of laying breach charges against the person for whose benefit the order has been made is likely to advance the

46 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

47 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

48 Victorian Government, *Submission FV 120*, 15 June 2010.

49 North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010.

50 The purposes of family violence legislation are discussed in Ch 4.

preventative objective of apprehended violence laws. The risk of being charged as an accessory to breach is likely to represent a significant disincentive to victims of domestic violence who are considering applying for an order.<sup>51</sup>

12.37 Charging victims of family violence for aiding and abetting breaches of orders exposes them to further traumatisation, potentially imposing a further form of abuse and undermining their confidence in the legal system. It may deter victims from reporting future occurrences of family violence, and may also have particular deleterious outcomes for Indigenous victims of family violence.

12.38 Moreover, it is inappropriate to charge a victim with aiding and abetting breaches of protection orders because it overshadows the fact that a protection order is made against a person who uses family violence—not the victim.

12.39 In coming to this view the Commissions have considered the concerns expressed by the One in Three Campaign about instances of victims maliciously inducing a breach of a protection order. Empirically, the Commissions are unaware of the frequency with which victims do so. On one view, whether such occurrences are exceptional or more frequent does not detract from the position that there should be some form of recourse within the law to deal with such situations.

12.40 One option to address this concern would be to create an offence of maliciously inducing a breach of a protection order. The offence would need to be tightly defined to cover situations where the victim intentionally sought to induce a breach of a protection order accompanied by malice or an intention to subvert the order of the court. Its creation would not be intended to cover ambiguous situations where a victim may have initiated or acquiesced to contact for non-malicious reasons, such as attempting reconciliation or bowing to pressure from extended family or friends to give the person the subject of the order another chance, or through lack of understanding of the legal process. Rather, the intention of creating such an offence would be to preserve the option of charging victims in those exceptional situations where victims seek to abuse the criminal justice system.

12.41 However, the Commissions have reservations about the creation of such an offence at this time. First and foremost, they are concerned that the creation of such an offence may create a significant risk that, in practice, victims will be charged in inappropriate cases. In expressing this concern, the Commissions note the comments of National Legal Aid about the inappropriate laying of charges of accessorial liability on genuine victims of family violence in WA.

12.42 Second, the Commissions are not presently convinced that the creation of such an offence is necessary, in light of the fact that there are existing criminal offences directed at the abuse of the criminal justice system, such as public justice offences concerning perverting the course of justice—for example, committing ‘acts or omissions with intent in any way whatever to obstruct, prevent, pervert, or defeat the

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51 D Brown and others, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Material and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006), 1157.

due course of justice or the administration of the law<sup>52</sup>—which may be utilised in situations, for example, where a victim maliciously induces a breach of a protection order with the specific intention of having the person subject to the conditions of the order charged with its breach. There are also offences such as making false accusations,<sup>53</sup> conspiring to bring false accusations,<sup>54</sup> fabricating evidence,<sup>55</sup> or giving false evidence or making a false statement,<sup>56</sup> which may also have a role to play in cases of malicious behaviour.

12.43 It may be appropriate, however, for a charge of aiding and abetting a breach to be laid against persons other than the victim for whose benefit a protection order is made. For example, the SA family violence legislation provides that if a protection order prohibits a ‘defendant from being on rented premises at which a protected person resides’ and the landlord had been notified of the prohibition, the landlord is guilty of an offence if he or she assists the defendant to access those premises.<sup>57</sup>

#### ***Variation or revocation of protection order in proceedings for breach***

12.44 The Commissions acknowledge the concerns expressed by stakeholders about empowering a court to vary or revoke a protection order when hearing an allegation of breach of a protection order in circumstances where there is evidence that the victim has given free and voluntary consent to the conduct constituting breach, and the court is satisfied that the victim would like to vary or revoke the order.

12.45 The Commissions agree that applications to vary or revoke protection orders should be considered separately from hearings concerning breach of protection orders, and that conflating the two issues may risk victims being pressured to agree to variations or revocations which are not in their best interests. Accordingly, the Commissions do not make a recommendation in this regard.

12.46 However, the Commissions emphasise that, in appropriate circumstances, family violence advocates and services should support and counsel victims to apply for variations or revocations where: that course of action represents the outcome that they genuinely wish for; is in their best interests; and is uninfluenced by coercion or control on the part of persons against whom protection orders were made.

**Recommendation 12–1** State and territory legislation should provide that a person protected by a protection order under family violence legislation cannot be charged with or found guilty of an offence of aiding, abetting, counselling or procuring the breach of a protection order.

52 *Criminal Code Act 1924* (Tas) s 105. See also *Crimes Act 1900* (NSW) ss 312, 319.

53 See, eg, *Crimes Act 1900* (NSW) s 314.

54 See, eg, *Criminal Code Act Compilation 1913* (WA) s 134.

55 See, eg, *Crimes Act 1900* (NSW) s 317(b); *Criminal Code Act 1924* (Tas) s 97.

56 See, eg, *Crimes Act 1900* (NSW) ss 327, 330.

57 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 32.

## Public justice offences

12.47 Public justice offences can be broadly described as including offences targeting interference with: the administration of justice, judicial officers, jurors and witnesses; as well as perjury and the making of false statements. A corollary to charging victims of family violence with aiding and abetting the breach of a protection order is charging such victims with public justice offences—such as conspiracy to pervert the course of justice for conduct engaged in by them to reduce the culpability of the offender—such as withdrawing their statements.

12.48 The crime of conspiracy is committed where two or more people agree to commit a crime or other unlawful act.<sup>58</sup> On a charge of conspiracy the prosecution must prove the fact of the agreement.<sup>59</sup> Conspiracy originated as an offence to punish persons who entered into agreements to abuse the criminal process by bringing false criminal charges against other people.<sup>60</sup> Conspiracy is a common law offence, and the penalty is within the judicial officer's discretion. However, statutes set out some particular conspiracies with specific penalties.<sup>61</sup>

12.49 While conspiracy may be unrelated to issues arising from the breach of a protection order, it is convenient to deal with it here because of the potential similarities in the policy issues applicable to aiding and abetting the breach of a protection order.

12.50 Below is a case study concerning a victim of severe family violence who was prosecuted for conspiracy. The case study is based on a transcript of the Australian Broadcasting Corporation's 7.30 Report<sup>62</sup> and comments made on the ALRC's Family Violence Online Forum.<sup>63</sup> At the time of writing the remarks on sentencing were unavailable.

58 D Brown and others, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Material and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006), 1088.

59 Ibid, 1092.

60 Ibid, 1088.

61 For example the *Crimes Act 1958* (Vic) s 321C sets out various penalties for conspiracy to commit an offence, depending on the offence.

62 ABC Television, *Changes to Domestic Violence Laws 'Don't Go Far Enough'* The 7.30 Report, 9 March 2010 <[www.abc.net.au/7.30/content/2010/s2841222.htm](http://www.abc.net.au/7.30/content/2010/s2841222.htm)> at 9 March 2010.

63 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers*.

### Case study

In March 2010 a victim of family violence, Deanne Bridgland, was found guilty of conspiracy and attempting to pervert the course of justice, following a five week trial. She was sentenced in the County Court of Victoria to a two year suspended sentence.

Ms Bridgland had been subjected to severe family violence—described by one psychologist as some of the worst that she had ever come into contact with. Her partner—Nicholas Pasinas—had repeatedly bashed her and, on two occasions, snapped her arms. He had also repeatedly raped her and locked her in the garage with her mouth taped shut. Mr Pasinas was remanded in custody for serious assault charges, and despite a protection order being made against him, he called Ms Bridgland up to 12 times a day, and arranged to have her followed.

The police recorded his phone calls to her in which he persuaded her to withdraw her statement against him. While in prison he arranged for a friend of his—Paul Coralis—to pick her up and take her to the police station where she provided police with a statement of ‘non-complaint’ against him, pursuant to his instructions. Evidence was led that she had no choice but to give the statement. She also provided a letter supporting his release on bail. A psychologist commented that Ms Bridgland did what she did ‘in order to survive’. The police officer who laid the charges reportedly testified that she thought Ms Bridgland would be killed if she did not escape the relationship. Ms Bridgland was known to be suffering from battered woman syndrome and learned helplessness.

Ms Bridgland was essentially charged with agreeing with her partner to aid him in either having him released from prison or in reducing his culpability. Her lawyers requested the prosecution not to proceed with the charges on the basis that there was no public interest in prosecuting her. The prosecution refused. Mr Pasinas pleaded guilty to the conspiracy charge and helped the prosecution in its case against Ms Bridgland, for which he received a discount on sentence—his sentence was cut in half to two and a half years imprisonment with a 15 month non-parole period.

12.51 In a submission to this Inquiry, National Legal Aid stated that, in WA it was very common for victims of family violence to resile from or change earlier statements against their partners ‘due to the nature of family violence and the dynamics of the relationships between victims and abusers’.<sup>64</sup> National Legal Aid expressed a concern that ‘police sometimes charge women where it seems that the change in their statements arises from factors such as fear and misplaced loyalty’. It suggested that

64 National Legal Aid, *Submission FV 232*, 15 July 2010.

such concern be met by educating police and prosecutors about the dynamics of family violence.<sup>65</sup>

### **Submissions and consultations**

12.52 In the Consultation Paper, the Commissions proposed that state and territory criminal legislation should be amended to ensure that victims of family violence cannot be charged with, or be found guilty of, offences, such as conspiracy or attempting to pervert the course of justice—where the conduct alleged to constitute such offences is essentially engaged in by victims to reduce or mitigate the culpability of the offender. The Commissions also proposed that legislative reform in this area should be reinforced by appropriate directions in police codes of practice, or operating procedures and prosecutorial guidelines or policies.<sup>66</sup>

12.53 This proposal was supported by the majority of stakeholders who addressed it.<sup>67</sup> For example, in a joint submission, Domestic Violence Victoria and others stated that:

We strongly support this proposal for the reasons given in the Consultation Paper ... As [we and others] are advocating currently in our joint response to the issues raised by the Deanne Bridgland case, the associated non-legislative changes must include enhanced linkages and cooperation between the police, prosecutors, the courts, corrections and service providers, so that all these agencies are engaged to the fullest extent possible in the integrated response to family violence and so that they remain informed about, and participate in, family violence reform initiatives.<sup>68</sup>

12.54 In a confidential submission, one legal service provider, which supported the proposal stated:

Victims need active support, not threats, to maintain their proceedings against perpetrators. It is understandable that police, trying to achieve justice and protection, may want to use such a blunt approach—making victims more frightened of the police than their expartner can seem logical on a level. The problems with this are clear, as

<sup>65</sup> Ibid. A similar concern about the charging of victims with giving false testimony and perverting the course of justice when they withdraw complaints of family violence was also raised in Roundtable, *Consultation*, Hobart, 13 May 2010.

<sup>66</sup> Consultation Paper, Proposal 6–15.

<sup>67</sup> Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; T McLean, *Submission FV 204*, 28 June 2010; Confidential, *Submission FV 198*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010;

<sup>68</sup> Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

the Commissions point out. However, it is not enough just to remove this threat. These women need active support. We have observed the police prosecutor in criminal law proceedings speaking to the women in a way that appears to be discouraging them from pursuing charges, or at least encouraging them to agree to some kind of plea bargain where the evidence is overwhelmingly in her favour.<sup>69</sup>

12.55 However, a number of stakeholders opposed the proposal<sup>70</sup> or otherwise expressed concern about its ‘wide-ranging nature’ and indicated a preference for appropriate police codes of practice or operating procedures and prosecutorial guidelines.<sup>71</sup> For example, the NSW Office of the Director of Public Prosecutions (NSW ODPP) did not support for the proposal for two reasons:

First it would have the effect of creating a class of witnesses who, as they cannot be prosecuted for perjury, would (in all likelihood) be subjected to cross-examination to that effect which could undermine their credibility. Secondly, there will be cases where it would be appropriate to prosecute for perjury, if not to do so would otherwise bring the criminal justice system into disrepute.

It is not the ODPP’s practice, as a rule, to prosecute victims of family violence for conduct that may reduce or mitigate the culpability of the offender. In our view current ODPP Prosecution Guidelines adequately address this situation.<sup>72</sup>

12.56 The Law Society of New South Wales also opposed the proposal.

The threat of criminal prosecution can work towards ensuring the integrity of the judicial process, and be an incentive for a witness to tell the truth. The making of an apprehended violence order has implications and may lead to criminal sanctions including imprisonment if breached.

It is acknowledged that the prospect of a genuine victim of domestic violence being prosecuted and facing criminal sanction for minimising the role of the perpetrator is to be avoided. This is a matter for the courts to determine in the circumstances of each case. It is more dangerous for the Government to legislate away this incentive to tell the truth. It undermines the judicial process to do so.<sup>73</sup>

#### ***Commissions’ views***

12.57 The Commissions have grave concerns about the practice of charging and prosecuting victims of family violence for conspiracy or attempting to pervert the course of justice in relation to conduct engaged in by them to mitigate the culpability of family violence offenders when their conduct can be attributed to the dynamics of duress and coercion exercised over them by such offenders.

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69 Confidential, *Submission FV 164*, 25 June 2010.

70 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

71 Queensland Law Society, *Submission FV 178*, 25 June 2010.

72 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010. The Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines* contains Appendix E—a protocol for reviewing domestic violence offences. This covers, for example, the reasons why a victim of family violence may request that a prosecution is discontinued, the circumstances which a prosecutor must consider in determining the basis for a victim’s wish not to proceed, and the factors a prosecutor must consider in assessing the circumstances of a case which a victim wishes to discontinue.

73 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

12.58 The charging and prosecution of victims of family violence for conduct seemingly undertaken by them to mitigate the culpability of offenders ignores the nature of family violence—particularly the features of coercion and control, the damaging psychological impact that this has on victims, as well as the fear which it instils. It also overlooks the cyclical and complicated nature of family violence relationships, ‘which often lead victims to withdraw charges or underestimate the harm of particular conduct during periods of calm in their relationship’.<sup>74</sup>

12.59 The legal system—including police, prosecutors and courts—should not be used to re-traumatise victims of family violence. The focus of the criminal justice response to family violence should be to make offenders accountable. It is difficult to conceive what public interest is served by the prosecution of victims of family violence for offences arising out of their conduct in seemingly agreeing to mitigate the culpability of offenders, when the nature of such ‘agreement’ in a family violence context is clouded by issues concerning duress, coercion, and learned helplessness.

12.60 However, the Commissions acknowledge the concerns expressed by some stakeholders that the retention of such offences in the family violence context may be appropriate for exceptional cases—and that to remove the application of such offences to a particular class of persons may undermine the judicial process and bring the criminal justice system into disrepute. Accordingly, the Commissions do not make any recommendations for legislative reform in this area.

12.61 In coming to this view, the Commissions are also mindful of their recommendation that state and territory legislation should provide that a person protected by a protection order cannot be charged with or be found guilty of an offence of aiding, abetting, counselling or procuring the breach of a protection order. As discussed above, the Commissions consider that for those exceptional cases where a victim may have acted maliciously in inciting a breach of a protection order it may be appropriate for prosecutors or police to consider the application of general public justice offences.

12.62 While the Commissions do not make any recommendations for legislative reform, they do, however, emphasise the critical importance of education, training and cultural change in this area. A scenario such as that which unfolded in the Deanne Bridgland case is a striking example in point. It is imperative that police and prosecutors receive training in the dynamics of family violence to enable them to assess properly the contextual background in which a victim may be seen to be acting in a way to reduce or mitigate the culpability of an offender.<sup>75</sup> In particular, police and prosecutors need to be trained in how the dynamics of family violence might affect the decisions of victims of family violence to negate the existence of such violence or to withdraw previous allegations of violence.

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74 H Douglas, ‘The Criminal Law’s Response to Domestic Violence: What’s Going On?’ (2008) 30 *Sydney Law Review* 439, 454 (citation omitted).

75 In Ch 31, the Commissions make a general recommendation that covers training police and prosecutors in the dynamics of family violence.

12.63 Such training should be reinforced by appropriate directions and guidance in police codes of practice or operating procedures, and in prosecutorial guidelines or policies. For example, it appears to the Commissions that any decisions to charge or prosecute victims with public justice offences—such as conspiracy or attempts to pervert the course of justice, where the conduct alleged to constitute such offences is essentially conduct engaged in by a victim to reduce or mitigate the culpability of an offender—should only be approved at the highest levels within state or territory police services and by directors of public prosecution. Requiring scrutiny of such decisions by senior persons should reduce the likelihood of charges being laid and prosecutions launched in inappropriate cases which do not serve the public interest.

12.64 Further, police should be trained about the appropriate content of ‘statements of no complaint’. Such statements are often obtained by police attesting to the fact that a victim does not wish to pursue criminal charges—for a variety of legitimate reasons. For example, the Commissions have heard about the tension in Indigenous communities arising from the need to keep women safe but also keeping young Indigenous men out of prison, particularly in light of their being over-represented in the prison system—a factor which renders some victims reluctant to pursue criminal action.<sup>76</sup> In particular, police should not encourage victims to attest that no family violence occurred when the evidence clearly points to the contrary. Including such assertions in ‘statements of no complaint’—in the absence of a sophisticated and informed understanding of why a victim of family violence may wish to negate that violence occurred or to withdraw previous statements made—sets victims up for perjury charges.

**Recommendation 12–2** Federal, state and territory police, and directors of public prosecution should train or ensure that police and prosecutors respectively receive training on how the dynamics of family violence might affect the decisions of victims to negate the existence of family violence or to withdraw previous allegations of violence.

**Recommendation 12–3** Police codes of practice or operating guidelines, and prosecutorial policies should ensure that any decisions to charge or prosecute victims of family violence with public justice offences—such as conspiracy or attempts to pervert the course of justice, where the conduct alleged to constitute such offences is essentially conduct engaged in by a victim to reduce or mitigate the culpability of an offender—should only be approved at the highest levels within state or territory police services, and by directors of public prosecution, respectively.

**Recommendation 12–4** Police should be trained about the appropriate content of ‘statements of no complaint’ in which victims attest to the fact that they do not wish to pursue criminal action. In particular, police should not encourage victims to attest that no family violence occurred when the evidence clearly points to the contrary.

## Consent to breaches

12.65 There is no defence of consent to breach of a protection order in any Australian state or territory. In 1999, the Domestic Violence Legislation Working Group noted in its Report on Model Domestic Violence Laws that stakeholders expressed concern that ‘consent’ to a breach may often have been a response to fear or a threat.<sup>77</sup> The WA family violence legislation was amended in 2004 to remove the defence of consent to a breach. It was thought that the removal would

reduce the potential for parties to abuse the restraining order process by giving, and then withdrawing consent, or by asserting consent as a reason for breach of the order.<sup>78</sup>

12.66 Removal of consent as a defence also sought to signal to the community that a protection order is an order of the court and not an agreement between the parties.<sup>79</sup>

12.67 A related issue that arises on breach of a protection order is whether it is inappropriate to allow a person who has used violence to rely on the consent of the victim to the breach of the order as a mitigating factor in sentencing. The WA review of family violence legislation found that although consent could no longer be relied upon as a defence to a breach, consent was still being raised by way of a plea of mitigation and accepted by courts.

Police prosecutors have reported that part of the problem is that on a plea of guilty to breach of a restraining order the respondent can plead in mitigation that the protected person invited the breach. The prosecutor, in the context of a busy court list, has no notation to that effect on his brief and, rather than set it down for a defended hearing, may feel pressured to allow sentencing to proceed on that basis. This is compounded when many magistrates take a very dim view of the respondent being charged at all in the circumstances and have demanded to know of the police whether the person protected by the restraining order has been charged.<sup>80</sup>

12.68 The WA review recommended that consent be removed as a mitigating factor in sentencing on conviction for breach of a protection order.<sup>81</sup>

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77 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), 215.

78 Explanatory Memorandum, Acts Amendment (Domestic Violence) Bill 2004 (WA), cl 41.

79 Department of the Attorney General (WA), *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 25.

80 Ibid, 26.

81 Ibid, Rec 4.

### ***Submissions and consultations***

#### ***How consent is dealt with in practice***

12.69 In the Consultation Paper, the Commissions asked whether in practice: (a) persons who breach protection orders raise consent of the victim to the breach as a mitigating factor in sentencing; and (b) courts are treating such consent as a mitigating factor in sentencing.<sup>82</sup>

12.70 The majority of submissions which addressed these questions stated that, in practice, persons who breach protection orders raise consent of the victim to the breach as a mitigating factor in sentencing, and that courts treat such consent as mitigating.<sup>83</sup> For example, National Legal Aid submitted that:

There is concern that in some jurisdictions Magistrates are treating consent of the victim as a mitigating factor in sentencing, even when it is apparent that the consent is not genuine.<sup>84</sup>

12.71 Both Legal Aid NSW and the Women's Domestic Violence Court Advocacy Service Network submitted that:

[In our experience] defendants who breach protection orders are arguing that the consent of the victim should be a mitigating factor in sentencing. They are effectively arguing that the victim is responsible for the breach as they invited the defendant to engage in the breaching behaviour. It is our understanding that NSW Local Courts are treating consent of the victim as a mitigating factor in sentencing.<sup>85</sup>

12.72 The Local Court of NSW submitted:

It is not unknown for persons charged with breaching a protection order in NSW to raise the consent of the victim as a mitigating factor in sentencing, and it is taken into account by the Court as such. A fact scenario that frequently arises in cases involving a breach of a protection order is where the protected person has initiated a breach by making contact with the defendant or inviting the defendant to the protected person's home.<sup>86</sup>

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82 Consultation Paper, Question 6–15.

83 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 198*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. The Commissions also heard in consultation that courts take into account the victim's consent to a breach as a mitigating factor in sentencing: Roundtable, *Consultation*, Hobart, 13 May 2010.

84 National Legal Aid, *Submission FV 232*, 15 July 2010.

85 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

86 Local Court of NSW, *Submission FV 101*, 4 June 2010.

12.73 Women's Legal Service Queensland also noted that, in its experience, consent of the victim to the breach of the protection order 'is often raised by the police'.<sup>87</sup>

12.74 One legal service provider submitted that courts treated consent as a mitigating factor in sentencing only 'in some cases',<sup>88</sup> and another legal service provider submitted that consent of the victim was not treated as the primary consideration in sentencing.

The fact that it is a breach of a court order and what the actual breach was constituted by are far more important in practice.<sup>89</sup>

12.75 In a joint submission, Domestic Violence Victoria and others suggested that 'there may be a need for a separate research study or consultation in this area'.<sup>90</sup>

#### ***How consent should be treated***

12.76 In the Consultation Paper, the Commissions asked whether state and territory family violence legislation or sentencing legislation should prohibit a court from considering the consent of a victim to breach of a protection order as a mitigating factor in sentencing.<sup>91</sup>

12.77 Stakeholder opinions on this issue were divided. Many stakeholders did not agree that a court should be prohibited from considering the consent of a victim to a breach of a protection order as a mitigating factor in sentencing.<sup>92</sup> The reasons advanced by stakeholders in this regard focused on considerations of fairness and the preservation of court discretion. For example, both Legal Aid NSW and the Law Society of New South Wales submitted that:

As a matter of fairness this should be available to be put in mitigation. If such consent is obtained through intimidation it will carry little weight. If however, it is genuinely given, it obviously mitigates the seriousness of the offence.<sup>93</sup>

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87 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010. A similar view was expressed in Confidential, *Submission FV 184*, 25 June 2010.

88 Confidential, *Submission FV 77*, 2 June 2010.

89 Confidential, *Submission FV 198*, 25 June 2010.

90 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

91 Consultation Paper, Question 6–16.

92 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010; A Lamb, *Submission FV 121*, 16 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010; Confidential, *Submission FV 96*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Magistrates Court, *Consultation*, Hobart, 13 May 2010.

93 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

12.78 One legal service provider stated in a confidential submission that:

It is our view that courts should take the time to consider the range of circumstances applying to situations where the perpetrator asserts there was consent. It is a fact that individuals, do at times, abuse the system of [domestic violence orders] and obtain them when they are not actually afraid of the ‘perpetrator’ and use them for vengeful purposes. This is rare and should not be considered a likely scenario in the average contested breach. However, for the perpetrator to be not allowed to raise the initiating contact etc would seem unjust.<sup>94</sup>

12.79 The Department of Premier and Cabinet (Tas) submitted that it was justified for courts to take consent into account:

Generally speaking, the fact of agreement (unless the situation deteriorates into another violent/abusive incident) means that the breach is not as distressing for the victim as it would be if it was not agreed. The degree of distress/harm cause must be relevant to sentencing (but not guilt).<sup>95</sup>

12.80 A number of stakeholders emphasised that judicial discretion should not be limited by such a prohibition,<sup>96</sup> and that judicial officers should have the ‘utmost flexibility’ in sentencing such matters.<sup>97</sup> For example, the Law Society of New South Wales submitted that ‘the danger … is that in enacting such a provision the legislators would be taking away from the courts the ability to determine each case on its merits’.<sup>98</sup> Stubbs suggested that ‘it would be better for judicial officers to be adequately trained as to how to take account of this matter in sentencing rather than to limit their discretion in this way’.<sup>99</sup>

12.81 Similarly, the Local Court of NSW cautioned against the removal of such discretion:

Due to the complex and diverse nature of family relationships, in the Court’s submission it would be ill-advised to prevent the courts from taking into account the conduct of the victim that contributes to an offence in the course of sentencing.<sup>100</sup>

12.82 Other stakeholders submitted that a court should be able to take the conduct<sup>101</sup> or the consent of a victim into account as a matter relevant to sentencing, without expressly stating that such conduct or consent should always be treated as a mitigating factor in sentencing.<sup>102</sup> For example, National Legal Aid submitted that a court should be able to take into account the full range of circumstances relating to the offence,

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94 Confidential, *Submission FV 164*, 25 June 2010.

95 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

96 For example, Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; A Lamb, *Submission FV 121*, 16 June 2010. See also J Stubbs, *Submission FV 186*, 25 June 2010.

97 A Lamb, *Submission FV 121*, 16 June 2010.

98 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

99 J Stubbs, *Submission FV 186*, 25 June 2010.

100 Local Court of NSW, *Submission FV 101*, 4 June 2010.

101 A Cannon, *Submission FV 137*, 23 June 2010.

102 National Legal Aid, *Submission FV 232*, 15 July 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010.

including any genuine consent of the victim to a breach of the protection order.<sup>103</sup> The issue then becomes one of weight to be given to the matter, as noted by the Local Court of NSW:

In taking into account the consent of the victim, it is, of course a matter for the Court's discretion in determining what weight to attribute to the fact on sentencing. For instance, in the event of a protected person inviting the offender to her or his home in contravention of a condition not to approach the protected person, and the offender subsequently committing an act of physical violence against the protected person one might expect that the victim's initiation of the original breach might carry limited, if any, weight, as a mitigating factor.<sup>104</sup>

12.83 Two stakeholders expressed qualified support for the proposition that a court should be able to take into account on sentencing the consent of a victim to a breach of a protection order. Support was expressed on the express proviso that the court is satisfied that the victim's consent was given willingly and without coercion.<sup>105</sup>

12.84 Other stakeholders submitted that courts should be prohibited from considering the consent of a victim to breach.<sup>106</sup> Reasons advanced for this position included that:

- it is the responsibility of a defendant to abide by an order;<sup>107</sup>
- the victim's consent is 'irrelevant';<sup>108</sup> and
- 'any consideration of whether conduct is a breach of that order should focus only on the behaviour of the person subject to that order'.<sup>109</sup>

12.85 The Victorian Government noted that the order is between the court and the respondent, and submitted that:

Making the victim accountable for actions of the respondent may undermine the respondent's accountability and re-victimise the victim and considering the consent of a victim as a mitigating factor may prevent the victim from reporting to police.<sup>110</sup>

#### ***Commissions' views***

12.86 Under ordinary sentencing principles courts are usually required to take into account the nature and circumstances of an offence,<sup>111</sup> and the impact of an offence on

103 National Legal Aid, *Submission FV 232*, 15 July 2010.

104 Local Court of NSW, *Submission FV 101*, 4 June 2010.

105 T McLean, *Submission FV 204*, 28 June 2010; Confidential, *Submission FV 96*, 2 June 2010.

106 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Confidential, *Submission FV 184*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 109*, 8 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

107 Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

108 Berry Street Inc, *Submission FV 163*, 25 June 2010.

109 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010.

110 Victorian Government, *Submission FV 120*, 15 June 2010.

111 For example, *Crimes Act 1914* (Cth) s 16A(2)(a); *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(a); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(a).

a victim.<sup>112</sup> On balance, the Commissions consider that for legislation to prohibit a court from considering all of the circumstances of an offence of breaching a protection order would represent an inappropriate fetter on judicial discretion, and an unjustified departure from ordinary sentencing principles. A relevant—although not necessarily mitigating—consideration in assessing all of the circumstances of an offence involving breach of a condition prohibiting contact with a victim is whether the victim initiated contact or gave free and voluntary consent to such contact. The fact that a victim's consent may have been coerced is likely to be a relevant consideration in assessing all of the circumstances of an offence. Indeed, the fact that an offender coerced consent should disqualify consent in such circumstances from being considered as mitigating—and, depending on the seriousness of the offence—may entitle a judicial officer, on the facts of a particular matter, to treat such coercion as aggravating.

12.87 The Commissions agree with the view expressed by the Department of Premier and Cabinet (Tas), that the issue of whether a victim genuinely agreed to prohibited contact has a direct bearing on his or her level of distress caused by the contact, and therefore on the impact of the breach. On this analysis too, a victim's consent to prohibited contact is, at least, a relevant factor in sentencing.

12.88 Therefore, the Commissions are of the view that courts should be able to take the fact of a victim's consent to contact in breach of a protection order into account in sentencing, and to determine what weight to give that fact in the circumstances of a particular case. The Commissions' approach is consistent with that taken in guidelines for sentencing for breach of protection orders developed by the Sentencing Advisory Council in Victoria:

It may be relevant that the conditions of the order were contravened following contact initiated by the victim. However, in assessing the degree to which this may mitigate the seriousness of the offence it is important to consider the history of the relationship between the parties, the nature of the contact and the victim's motivation in making contact (and in particular whether the victim was acting under any pressure or coercion). This may require some consideration of the dynamics of the relationship between the victim and the offender.<sup>113</sup>

12.89 However, clearly while a victim may initiate contact prohibited by a protection order, or give free and voluntary consent to such contact, he or she can never be taken to consent to any family violence committed in breach of a protection order—and nor should any court entertain such an argument.

12.90 The Commissions do not agree that allowing a court to take into account all of the circumstances of a breach of protection order amounts to making a victim accountable for a respondent's breach of a protection order. The responsibility for obeying a court order remains on the respondent to the order. A victim's free and voluntary consent to contact prohibited by a protection order is not relevant to the *guilt*

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112 For example, *Sentencing Act 1991* (Vic) s 5(2)(daa); *Crimes (Sentencing) Act 2005* (ACT) s 33(1)(f).

113 Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report* (2009), App 1 [2.9]. The Victorian Government advised the Commissions that these guidelines have been endorsed by the Victorian Chief Magistrate: Victorian Government, *Submission FV 120*, 15 June 2010.

of the respondent in breaching the order—but it is relevant in determining the objective seriousness of the particular offence and therefore the sentence that ought to be imposed by the court. To disallow unequivocally the consideration of such factors in sentencing would be unfair to those being sentenced for breach of protection orders.

12.91 In expressing these views the Commissions acknowledge the concerns voiced, for example, by National Legal Aid that in some jurisdictions magistrates are treating consent of the victim as a mitigating factor in sentencing when it is apparent that such consent is not genuine. The Commissions consider that proper education and training in this area is critical. The Commissions endorse the recommendation of the National Council to Reduce Violence against Women and their Children for the production of a national bench book on family violence, in consultation with all jurisdictions, and as part of a national professional development program for judicial officers on family violence.<sup>114</sup> In Chapter 13, the Commissions express the view that a national bench book on family violence could play a significant role in guiding judicial officers in sentencing in family violence matters, and they recommend that such a bench book address sentencing in family violence matters.<sup>115</sup> The Commissions consider that the bench book should specifically address sentencing offenders for breach of protection orders, and address the following issues in determining the relevance of a victim's consent to contact prohibited by a protection order:

- it is the responsibility of the person bound by the order to abide by it—not the victim;
- because of the power dynamics in family violence relationships, and how such dynamics might vitiate the victim's initiation of, or agreement to, contact prohibited by a protection order, courts should satisfy themselves that any such initiation or agreement was freely and voluntarily made or given by the victim before contemplating whether to consider such a factor as mitigating;
- it will depend on the circumstances of each case what weight the court is to give to the fact that a victim initiated or agreed to contact prohibited by a protection order. For example, where genuine consent was given but the respondent commits family violence against the victim in breach of the protection order it would be expected that little, if any, weight would be given to the initial agreement to contact; and
- while a victim may have genuinely consented to contact with the respondent of a protection order, such consent can never be taken to extend to physical or non-physical violence or abuse committed in breach of the order.

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114 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 121. In Chapter 31 the Commissions recommend that the Australian, state and territory governments should collaborate with the relevant stakeholders to develop and maintain a national bench book on family violence.

115 Rec 13–1.

**Recommendation 12–5** The national family violence bench book—the subject of Rec 13–1 and Rec 31–2—should contain a section on the sentencing of offenders for breach of protection orders. This section should provide guidance to judicial officers on how to treat the consent of a victim to contact with a respondent that is prohibited by a protection order. In particular, this section should address the following issues:

- (a) that it is the responsibility of the respondent to a protection order to obey its conditions;
- (b) the dynamics of power and control in family violence relationships and how such dynamics might vitiate a victim’s initiation of, or consent to, contact prohibited by a protection order;
- (c) that the weight the court is to give to the fact that a victim initiated or agreed to contact prohibited by a protection order, will depend on the circumstances of each case; and
- (d) while a victim of family violence may have genuinely consented to contact with the respondent to a protection order, a victim can never be taken to have consented to any violence committed in breach of a protection order.

### Charging for breach of protection order rather than underlying offence

12.92 There will be cases where a person breaches a protection order and the only charge available to police is breach of that order because no underlying offence has been committed—for example, if a person breaches a condition of an order not to contact the victim within a certain period of time of being intoxicated. However, where the breach of a protection order also amounts to a criminal offence, one issue for this Inquiry is the extent to which police are charging persons with breach of a protection order—an offence under family violence legislation—as opposed to any potential offence under state or territory criminal law—such as assault.

12.93 Dr Heather Douglas asserts that where family violence matters are charged, ‘it is overwhelmingly’ as a charge of breaching a protection order rather than one of the established criminal offences such as assault.<sup>116</sup> Based on her study of 645 court files related to prosecutions for breach of protection orders under family violence legislation and held at three Magistrates Courts in Queensland, she concluded that:

It is likely that many of the matters charged as breaches of protection orders examined in this study could have been charged as crimes of criminal assault or criminal damage among other matters ... Although the criminal charge of breach of a

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116 H Douglas, ‘The Criminal Law’s Response to Domestic Violence: What’s Going On?’ (2008) 30 *Sydney Law Review* 439, 445.

protection order was initially developed to provide an alternative offence for those situations where it may be difficult to identify the elements and satisfy the burden of proof in relation to a more serious criminal offence, it would appear from the data in this study that the breach charge is the standard response to matters arising in the domestic violence context when an order is in place.<sup>117</sup>

12.94 As Douglas states, various ideological and practical ramifications are associated with charging a person for breach of a protection order as opposed to an underlying criminal offence. These include that:

- such a preference may be interpreted as trivialising or minimising the offending conduct;
- penalties for breach of a protection order are typically less than those associated with criminal offences such as assault, stalking or criminal damage;<sup>118</sup>
- the charge for breach may often fail to reflect the seriousness of the offending conduct; and
- there may be less particularisation in an accused's criminal record resulting from the recording of an offence for breach as compared with another criminal offence, such as assault.<sup>119</sup>

12.95 It is difficult to determine from published court statistics whether there is a trend for offences for breach of protection orders to be typically prosecuted more often than applicable substantive underlying offences. To the extent that courts have published statistics in their annual reports of the number of proven offences or criminal matters lodged:

- no distinction is made as to whether such offences or matters occurred in a family violence context or not; and
- there is no indication of whether the alleged or proven criminal offence occurred in the context of a breach of an existing protection order.

12.96 For example, the Tasmanian Magistrates Court Annual Report of 2006–2007 indicates that there were 778 matters lodged concerning 'breach of domestic violence' orders in 2006–2007.<sup>120</sup> That report also indicates, for example, that there were 2,780 matters lodged concerning 'acts intended to cause injury' and 188 matters concerning 'sexual assault and related offences' in that period but it is unclear how many of these matters—if any—arose in a family-violence context.<sup>121</sup>

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<sup>117</sup> Ibid, 448.

<sup>118</sup> Although, as noted below, in some jurisdictions, including NSW, there is a presumption of imprisonment for breach of protection orders involving violence: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14.

<sup>119</sup> H Douglas, 'The Criminal Law's Response to Domestic Violence: What's Going On?' (2008) 30 *Sydney Law Review* 439, 448–449.

<sup>120</sup> Magistrates Court of Tasmania, *Annual Report 2006–07*, 37.

<sup>121</sup> Ibid, 37.

12.97 The Tasmanian Magistrates Court Annual Report of 2008–2009 does not contain separate statistics of the number of cases involving breach of protection orders—although there are statistics for offences against justice procedures such as breaches of suspended sentences, bails and bond.<sup>122</sup> That report also indicates that there were 2,519 matters lodged concerning ‘acts intended to cause injury’ and 106 matters concerning ‘sexual assault and related offences’ in that period but it is unclear how many of these matters—if any—arose in a family-violence context.<sup>123</sup>

12.98 Similarly, the Magistrates’ Court of Victoria Annual Report for 2008–2009 indicates that there were 3,097 proven offences for ‘breach intervention order’ in this period. That report also indicates that there were 4,234 proven offences for ‘unlawful assault’ for example, but it is not clear how many of these assault matters arose in a family-violence context.<sup>124</sup>

12.99 Where a person is charged and convicted for both breach of a protection order and any underlying offence, the Commissions have heard that any custodial sentences imposed are often concurrent—or partially concurrent—rather than consecutive. The Commissions also heard that where two offences are charged—such as breach of the protection order and the underlying offence—the court has flexibility to set different types of sentencing options tailored to meet the circumstances of the case.<sup>125</sup>

### **Submissions and consultations**

#### **Practical trends concerning charges**

12.100 In the Consultation Paper, the Commissions asked in practice, where breach of a protection order also amounts to another criminal offence, the extent to which police in each state and territory are charging persons with breach of a protection order, as opposed to any applicable offence under state or territory criminal law.<sup>126</sup>

12.101 Responses to this question varied. Some stakeholders stated that practices vary, particularly according to the nature and extent of a breach.<sup>127</sup> For example, the Queensland Law Society stated that:

Sometimes police charge only with breach of a protection order which can, at times, minimise the effect of the offender’s behaviour. On other occasions, police charge the offender with the whole gamut of offences.<sup>128</sup>

122 Magistrates Court of Tasmania, *Annual Report 2008–09*, 31–32.

123 Ibid, 31.

124 Magistrates’ Court of Victoria, *Annual Report 2008–09*, 90.

125 G Zdenkowski, *Consultation*, Sydney, 6 November 2009.

126 Consultation Paper, Question 6–17.

127 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

128 Queensland Law Society, *Submission FV 178*, 25 June 2010.

12.102 Similarly, Women's Legal Services NSW stated that:

In our experience it depends on the extent of the breach. Police in NSW vary in their practice across and within local area commands, however it is not uncommon for criminal charges for offences other than a breach of a protection order to also be laid.<sup>129</sup>

12.103 Other stakeholders submitted that police generally charge the breach of a protection order in addition to any other criminal offence 'that has different elements but relates to the one incident'.<sup>130</sup> For example, the Victorian Government submitted that:

Victoria Police charges for any offences arising from breaches of intervention orders separately from the breach of the intervention order. This trend has increased since the introduction of the Code of Practice in 2004. In 2008–2009 there were 7790 breach offences recorded and nearly 4000 co-occurring offences linked to the breaches of family violence intervention orders. There has been a 22 per cent increase in offences arising from breaches of intervention orders since the introduction of the Code of Practice in August 2004 ...

It is Victoria's Police experience that it is often easier to prove a breach when police have found the offender breaching the order, but it has been more difficult in proving an assault beyond reasonable doubt as the police do not often witness the assault.<sup>131</sup>

12.104 Other stakeholders, however, submitted that police tended to lay charges for breach of a protection order as opposed to any applicable state or territory criminal offence.<sup>132</sup> The Northern Territory Legal Aid Commission submitted that this happened in the Northern Territory (NT) 'to an excessive extent'.<sup>133</sup> Other legal service providers based in the NT also commented that their observations were that 'police, particularly in Indigenous communities, were not always pressing assault charges in addition to breach charges',<sup>134</sup> and that prosecutors in the NT 'tend not to proceed with both the assault charge and the breach' as they are regarded as duplicating one another.<sup>135</sup>

12.105 Similarly, Women's Legal Service, Queensland stated:

It is our experience (as reported in Heather Douglas' research) that, unless [there is] very serious harm or damage, the police would usually just charge for the breach of the protection order, rather than the substantive charge.<sup>136</sup>

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129 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

130 National Legal Aid, *Submission FV 232*, 15 July 2010. Similar views were expressed in Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010.

131 Victorian Government, *Submission FV 120*, 15 June 2010.

132 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

133 Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

134 Confidential, *Submission FV 164*, 25 June 2010.

135 Confidential, *Submission FV 198*, 25 June 2010.

136 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

12.106 Stubbs observed that while she had no basis for answering this question, ‘research suggests that police too often fail to take any action on a breach’.<sup>137</sup> An Indigenous women’s family violence service also stated that it had observed ‘a tendency to not pursue a criminal charge where there is no serious harm to a victim, for example, where the victim did not need to seek medical attention’.<sup>138</sup>

#### ***Addressing concerns regarding practical trends in charging***

12.107 In the Consultation Paper, the Commissions asked how best to address any identified practice of police preferring to lay charges for breach of a protection order, as opposed to any applicable underlying criminal offence, to ensure that victims’ experiences of family violence are not underrated.<sup>139</sup>

12.108 Most stakeholders suggested that any such practice could be addressed appropriately through non-legislative measures such as:

- the education and training of police, including on the dynamics of family violence, and cultural awareness;<sup>140</sup>
- increased resourcing for policing to hold those who breach protection orders accountable;<sup>141</sup>
- directions to police to charge with both offences<sup>142</sup> or ‘reinforcing the need to consider both’,<sup>143</sup> or making it clear that charges for breach or an underlying offence ‘should not be withdrawn on the basis of duplicity’;<sup>144</sup>
- greater systemic support for the collection of evidence such as digital photographing, support for victims to make statements—‘given that charging is related to police perception of strength of evidence’;<sup>145</sup>
- police guidelines that ‘require a superior officer to sign off that the offence was just a breach and not a criminal offence’;<sup>146</sup>

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137 J Stubbs, *Submission FV 186*, 25 June 2010.

138 Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

139 Consultation Paper, Question 6–18.

140 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010. The Queensland Law Society emphasised the need for police expertise: Queensland Law Society, *Submission FV 178*, 25 June 2010, and one legal service provider emphasised the need for ‘police education about the impact of the actions taken or not taken by police in perpetuating the cycle of violence a victim experiences’: Confidential, *Submission FV 183*, 25 June 2010.

141 Migrant Women’s Emergency Support Service trading as Immigrant Women’s Support Service, *Submission FV 61*, 1 June 2010.

142 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

143 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

144 Confidential, *Submission FV 198*, 25 June 2010.

145 Berry Street Inc, *Submission FV 163*, 25 June 2010.

146 Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

- ‘building in performance indicators for the police that deal with such issues’ as the fact is it is less work to bring an application for breach than to do the investigative work required for a substantive charge;<sup>147</sup>
- requiring police to document why they have not pressed relevant criminal charges that were otherwise applicable;<sup>148</sup>
- considering including in the criminal record of a conviction for breach of a protection order some detail about the breach;<sup>149</sup> and
- better information recording and data capture.<sup>150</sup> For example, Women’s Legal Services Australia submitted that:

One of the ways that the issue of police preferring to lay charges for breach of a protection order as opposed to any applicable underlying criminal offences can be remedied is through the use of accurate record keeping. There are currently no desegregated data available as to the trend for offences for breach of protection orders—no distinction is made as to whether such offences occurred in a family violence context or not; and there is no indication of whether the alleged or proven criminal offences occurred in the context of a breach of an existing protection order. There should also be a system for obtaining desegregated data on domestic violence offences on the basis of gender, race etc.<sup>151</sup>

- 12.109 However, one stakeholder emphasised the need for police discretion:

The police do what they do for valid reasons. They are the investigating officers and at the scene.<sup>152</sup>

#### ***Better data capture***

- 12.110 In the Consultation Paper, the Commissions proposed that state and territory courts, in recording and maintaining statistics about criminal matters lodged, or criminal offences proven, in their jurisdiction should ensure that such statistics capture separately criminal matters or offences that occur in a family-violence related context.<sup>153</sup>

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147 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

148 Confidential, *Submission FV 164*, 25 June 2010.

149 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010. Centacare Safer Family Support Services suggested that breaches of protection orders which feature physical violence, wilful damage, controlling behaviour or threats should be called aggravated breaches so that they can be recorded in this way on a criminal history and taken into account in sentencing: Centacare Safer Families Support Service, *Submission FV 118*, 15 June 2010.

150 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010. Better data capture is discussed further below.

151 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

152 Better Care of Children, *Submission FV 72*, 24 June 2010.

153 Consultation Paper, Proposal 6–16.

12.111 This proposal was overwhelmingly supported.<sup>154</sup> For example, the Queensland Law Society supported it as ‘part of the desire to have meaningful and open statistics’,<sup>155</sup> and the Women’s Domestic Violence Court Advocacy Service Network stated that the separate capture of such statistics would allow those relating to domestic violence to ‘be easily identified’.<sup>156</sup>

12.112 One NT legal service provider gave the following justification for supporting the proposal:

In recent times women’s networks have been keen to draw to the public’s attention just how high the death rates from domestic violence are here in the Northern Territory, but deaths are not recorded in a way that provides a reliable statistical connection between domestic violence and death.<sup>157</sup>

12.113 Both National Legal Aid and Legal Aid NSW—in supporting the case for the separate capture of statistics on family-violence related offences—noted the provision in s 12(2) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).<sup>158</sup> This section requires a court to direct that an offence be recorded on a person’s criminal record as a domestic violence offence if the court is satisfied that an offence in respect of which a person has pleaded or is found guilty, is a domestic violence offence.

12.114 However, one individual opposed the proposal without explanation,<sup>159</sup> and the Queensland Government noted that:

This information is not currently recorded on the court database in Queensland. The resourcing implications for the Queensland Government would need to be assessed before determining whether the Queensland Government is in a position to implement this proposal.<sup>160</sup>

### ***Commissions’ views***

12.115 There may be valid reasons why police only lay charges for breach of protection orders in circumstances where an underlying criminal offence may also have

154 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010;

155 Queensland Law Society, *Submission FV 178*, 25 June 2010.

156 Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

157 Confidential, *Submission FV 164*, 25 June 2010.

158 National Legal Aid, *Submission FV 232*, 15 July 2010, Legal Aid NSW, *Submission FV 219*, 1 July 2010.

159 Confidential, *Submission FV 162*, 25 June 2010.

160 Queensland Government, *Submission FV 229*, 14 July 2010.

been committed—principally, but not exclusively, linked to an assessment of the adequacy of the evidence to support such a charge. Clearly, police cannot be directed to lay both types of charges in all cases. As one stakeholder emphasised, there needs to be some room to accommodate the proper exercise of police discretion.

12.116 However, the Commissions acknowledge the force of stakeholder concerns about the lack of police enforcement of protection orders, and the tendency—particularly in certain jurisdictions such as Queensland and the NT—for police to prefer to lay charges for breach of a protection order to the exclusion of other appropriate and available criminal charges. Such practices or tendencies undermine the efficacy of protection orders and potentially trivialise the criminal justice response to family violence. Accordingly, the Commissions consider that there is a compelling need for a range of measures to address these practices and tendencies.

12.117 First, the Commissions note stakeholder observations that police are sometimes not laying both charges for breach of a protection order and the underlying criminal offence, on the basis that they consider that the laying of both charges involves duplication. The Commissions consider that this issue should be addressed in police guidelines or codes of practice. Police should be given guidance that concerns about duplication should not be a reason for not charging an offender with both types of offences, and that courts in sentencing for both offences would apply the totality principle in assessing the appropriate sentences to be imposed. The totality principle has been described as a ‘limitation on excess’.<sup>161</sup> It ensures that an offender who is sentenced for multiple offences receives an appropriate sentence overall and not one that is ‘crushing’.<sup>162</sup> In particular, courts would consider whether sentences for breach of a protection order and for an offence underlying the breach should be served concurrently—that is at the same time; cumulatively—that is, one after another; or partly concurrently and cumulatively in order to reflect the total criminality of the conduct charged.

12.118 Police guidelines should also address the disadvantages of choosing to charge for breach as opposed to, or in addition to, an underlying criminal offence—including that there may be less particularisation in an accused’s criminal record resulting from the recording of an offence for breach as compared with another criminal offence, such as assault.

12.119 Further, the Commissions consider that the utilisation of specialised police trained in family violence is a critical measure necessary to address inappropriate police responses to family violence. In Chapter 32, the Commissions recommend that, as a minimum, each state and territory police force should ensure that: all police receive appropriate education and training consistent with the *Australasian Policing Strategy on the Prevention and Reduction of Family Violence*; foster specialised police units; victims have access to a primary contact person trained in family violence; and specially trained police have responsibility for supervising, monitoring or assuring the

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161      *R v Patison* (2003) 143 A Crim R 118, 113.

162      *Johnson v The Queen* (2004) 205 ALR 346, 355.

quality of police responses to family violence.<sup>163</sup> The implementation of this recommendation should go a considerable way to addressing concerns about inappropriate police responses to breach of protection orders. In particular, having specially trained police responsible for assuring the quality of police responses to family violence will encompass responsibility for ensuring that breaches of protection orders are taken seriously and, that where appropriate, charges for underlying criminal conduct constituting the breach are also laid.

12.120 In addition, ensuring accountability for police decision making in family violence matters is also addressed in the recommendation the Commissions make in Chapter 9 about the need for either family violence legislation and/or police codes of practice to impose a duty on police to investigate family violence where it has been committed, to record when they decide not to take further action, and their reasons for not taking further action.<sup>164</sup> The implementation of this recommendation will require police to investigate breaches of protection orders, and to record when they decide not to take further action, and their reasons for doing so.

12.121 Finally, the Commissions consider that victim support has a critical role to play in ensuring that victims feel comfortable about initially giving evidence and not later withdrawing evidence that corroborates the pressing and prosecution of charges concerning protection orders, as well as underlying offences, such as assault, that may have constituted such breaches. In Chapters 29 and 32, the Commissions make a number of recommendations about integrated responses to family violence and the development of specialised family violence courts, which incorporate elements of victim support,<sup>165</sup> as well as mainstreaming victim support into courts that deal with family violence.<sup>166</sup> The implementation of these recommendations—combined with those concerning appropriate police guidelines; police specialisation, training and education; and measures to increase police accountability in decision-making—should ensure, to the maximum extent possible, that police bring appropriate charges where there is a breach of a protection order, and that victims are supported in giving evidence to support the laying and prosecution of such charges.

**Recommendation 12–6** State and territory police guidelines or codes of practice should provide guidance to police about charging an offender with breach of a protection order and any underlying criminal offence constituting the breach. In particular, such guidance should address the issue of perceived duplication of charges and how that issue is properly addressed by a court in sentencing an offender for multiple offences based on the totality principle and principles relating to concurrent and cumulative sentences.

163 Rec 32–5.

164 Rec 9–2.

165 Recs 29–3, 32–1–32–3.

166 Rec 32–4.

**Better data capture**

12.122 Proper data capture is essential to the formulation and development of policy. This complements the key strategy of building the evidence base recommended in *Time for Action*.<sup>167</sup> As stated by the Commissions in Chapter 31, a commitment to quality data collection and evaluation is crucial to ensuring systemic change and improvement.

12.123 The Commissions reiterate their views expressed in the Consultation Paper, that it would be beneficial for state and territory courts to capture separately statistical data about criminal matters lodged or criminal offences proven in their jurisdictions that arise in a family-violence related context.

12.124 However, the Commissions acknowledge that not all state and territory courts maintain statistics about criminal matters lodged or proven in their jurisdictions in the first instance. The key outcome which the Commissions wish to achieve is the capture of separate data about criminal matters or offences that occur in a family-violence related context, acknowledging, for example, the role that such statistics can play in highlighting the number of deaths that occur as a result of family violence. The agency upon which the responsibility for such data capture should be placed is a secondary issue. Each state and territory government may need to decide the body or agency within their respective jurisdictions to which these responsibilities should be delegated.

12.125 Therefore, the Commissions recommend that, to the extent that state and territory courts do record and maintain such statistics, they should ensure that those statistics capture separately criminal matters or offences that occur in a family-violence related context. In all other cases, state and territory governments should ensure the separate capture of statistics about criminal matters or offences in a family-violence related context within their jurisdictions.

**Recommendation 12–7** To the extent that state and territory courts record and maintain statistics about criminal matters lodged or criminal offences proven in their jurisdiction, they should ensure that such statistics capture separately criminal matters or offences that occur in a family-violence related context. In every other case, state and territory governments should ensure the separate capture of statistics of criminal matters and offences in their jurisdictions that occur in a family-violence related context.

<sup>167</sup> National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), [1.5], [2.4], [3.4], [4.5], [5.4], [6.3].

## **Penalties and sentencing for breach of protection orders**

12.126 The maximum penalties for breach of a protection order vary significantly across state and territory jurisdictions.<sup>168</sup> The table below sets out the maximum penalties in each jurisdiction.

Jurisdiction	Maximum Penalty
NSW	Imprisonment for two years or 50 penalty units (\$5,500) or both (s 14 of NSW Act)
Victoria	Imprisonment for two years or 240 penalty units (\$27,220.80) or both (ss 123 and 27 of Victorian Act)
Queensland	Imprisonment for one year or 40 penalty units (\$40,000) for first offence, and imprisonment for two years for third and subsequent offences within a period of three years (s 80 of Qld Act)
WA	Imprisonment for two years and fine of \$6,000 or both (s 61 WA Act)
SA	Imprisonment for two years—but if breach of ‘intervention order’ under s 13 (order to undertake intervention program)—maximum penalty is \$1,250 (s 31 of SA Act)
Tasmania	Tiered penalties: imprisonment for one year or fine of 20 penalty units (\$2,400) for first offence to imprisonment for five years for fourth or subsequent offence (s 35 of Tas Act)
ACT	Imprisonment for 5 years or 500 penalty units (\$50,000) or both (s 90 of ACT Act)
NT	Imprisonment for 2 years or 400 penalty units (\$44,000) or both (ss 121, 122 of NT Act)

12.127 As stated by the Australian Government Solicitor there are, however, some difficulties in making straightforward comparisons concerning the different maximum penalties because of reasons including the following:

—while the applicable fine in one jurisdiction may be lower than in others, the maximum term of imprisonment in that jurisdiction may be higher than in some others; ...

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<sup>168</sup> The Australian Government Solicitor highlighted maximum penalties on breach of a protection order as one of the areas of family violence legislation in respect of which there is significant variation across the jurisdictions: Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), 14.

—some, but not all, jurisdictions have a tiered penalty system for first and subsequent breaches.<sup>169</sup>

12.128 Under the Model Domestic Violence Laws, breach of a protection order is a summary offence which attracts a maximum penalty of:

- \$24,000 or imprisonment for one year for a first offence; and
- imprisonment for two years for a second offence.<sup>170</sup>

12.129 In 2008 the Sentencing Advisory Council (Victoria) recommended that imprisonment for two years should be the maximum penalty for a breach of protection orders—as well as breach of police-issued family violence safety notices and stalking intervention orders.<sup>171</sup>

12.130 Whatever the maximum penalty for breach of protection orders, a key issue is how such breaches are treated in sentencing. For example, the WA review of family violence legislation noted a concern that breaches of protection orders are being treated leniently.<sup>172</sup> It noted that despite legislative amendments to increase penalties for breaches, in some cases actual penalties imposed are low and do not reflect the gravity of the breach and its consequences:

Offenders are being charged more by the Police however court sentencing is very lenient with offenders usually given small fines as can be seen by our tracking and monitoring of court outcomes at our local court.

Some of the penalties given to respondents for breaching were so insignificant that they did not act as a deterrent and made women feel like the order or the seriousness of the situation had been trivialised. ie. \$100 fine—‘a speeding ticket costs more than that’.<sup>173</sup>

12.131 Similarly, in respect of sentencing for breach of protection orders in Queensland, Douglas has stated that ‘penalties are often inappropriate and generally very low for breach matters’:<sup>174</sup>

In 40 per cent of cases no conviction was recorded. ... The study showed that 42 per cent of matters resulted in fines. In most of the matters where fines were ordered, the fines were less than \$500. ... Fines are inappropriate in the context of breach matters as there are potential problems associated with this form of penalty in the context of domestic violence. Considering the frequently ongoing connections between the victim and the defendant in the domestic violence context there is a risk that it will actually be the victim of the breach who will pay the fine from the family income. Alternatively, there is a risk that the fine will be paid from money that should be paid as child support.<sup>175</sup>

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169 Ibid, 28.

170 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), s 64.

171 Sentencing Advisory Council (Victoria), *Breaching Intervention Orders Report* (2008), Rec 1.

172 Department of the Attorney General (WA), *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 23.

173 Ibid, 26 (citations omitted).

174 H Douglas, ‘The Criminal Law’s Response to Domestic Violence: What’s Going On?’ (2008) 30 *Sydney Law Review* 439, 464.

175 Ibid, 464 (citations omitted).

12.132 The Sentencing Advisory Council (Victoria) produced a report in 2009 on sentencing practices for breach of protection orders, which made the following observations:

All of the stakeholders consulted considered breach of a family violence intervention order to be a serious criminal offence; however, few were of the opinion that current sanctions reflect this seriousness. There is significant frustration amongst some stakeholder groups at what they perceive to be leniency in sentencing these matters.

The Council's data analysis confirms stakeholder perceptions that there is a predominance of lower-end orders (particularly fines and adjourned undertakings) for breach offences. For example, the most common sentence imposed on people sentenced for breaching an intervention order between July 2004 and June 2007 was a fine (37.2 per cent), and the second most common sentence was an adjourned undertaking (18.5 per cent). The most common fine was between \$500 and \$1000.

Courts also imposed these lower-end orders relatively frequently on repeat offenders.<sup>176</sup>

12.133 The Sentencing Advisory Council (Victoria) developed guiding principles for sentencing breaches of protection orders to promote appropriate and consistent sentencing practices.<sup>177</sup> As stated by the Victorian Government in a submission to this Inquiry:

The guidelines are designed to help magistrates place appropriate weight on the sentencing considerations that are most relevant to the offence. [There is] a section examining the different sentencing orders and some relevant considerations for the court when sentencing for particular types of breaches. The guidelines were developed in consultation with a number of stakeholders, including magistrates, and are not intended to displace judicial discretion. The Victorian Chief Magistrate has endorsed the guidelines.<sup>178</sup>

12.134 The NSW family violence legislation provides that a person who breaches a protection order must be sentenced to a term of imprisonment if the act constituting the offence was an act of violence against a person, unless the court orders otherwise.<sup>179</sup> Where the court determines not to impose a sentence of imprisonment it must give its reasons for doing so.<sup>180</sup>

12.135 The NT family violence legislation contains a number of provisions regulating the sentencing of protection orders which are said to apply despite the *Sentencing Act 1995* (NT).<sup>181</sup> Those provisions include that where an adult breaches a protection order the court must record a conviction and sentence the person to imprisonment for at least seven days if the person has previously been found guilty of contravening a protection order. However, this requirement does not apply if:

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176 Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report* (2009), viii.

177 Ibid, App 1.

178 Victorian Government, *Submission FV 120*, 15 June 2010.

179 This directive does not apply if the person convicted was under 18 years of age at the time of the alleged offence.

180 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14.

181 *Domestic and Family Violence Act 2007* (NT) s 121.

- the offence does not result in harm being caused to a protected person; and
- the court is satisfied it is not appropriate to record a conviction and sentence the person under the subsection in the particular circumstances of the offence.

12.136 The NT family violence legislation also provides that if the person sentenced to serve a term of imprisonment for breaching a protection order is already serving another term of imprisonment for another offence, the court must direct the term of imprisonment to start from the end of the other term of imprisonment.<sup>182</sup>

12.137 The Victorian sentencing legislation makes it clear that the sentencing option of home detention is not available where an offender has breached a protection order—whether that order was made in Victoria or in another state or territory.<sup>183</sup>

### ***Submissions and consultations***

#### ***Consistency of maximum penalties***

12.138 In the Consultation Paper, the Commissions asked whether there should be consistency of maximum penalties for breach of protection orders across the jurisdictions and, if so, why and what the maximum penalty should be.<sup>184</sup>

12.139 Stakeholder views on these issues were divided. Some stakeholders expressed concern about consistency of maximum penalties on the basis that: it might reduce maximum penalties in some jurisdictions,<sup>185</sup> might ‘not translate into consistent sentences’,<sup>186</sup> and it was more important that a court consider the circumstances of breach on a case by case basis.<sup>187</sup>

12.140 Better Care for Children expressed the view that ‘raising the bar on penalty is irrelevant to the outcome’.<sup>188</sup> A legal service provider also expressed the view that it is not the maximum penalties which are the issue because ‘they are never applied. It is the minimum penalties [in the NT] that are most often drawn on’.<sup>189</sup> Another service provider echoed this, stating that in its experience ‘offenders breaching protection orders are not given the maximum penalties’.<sup>190</sup>

12.141 There was, however, considerable support for national consistency in the level of maximum penalty.<sup>191</sup> For example, in a joint submission, Domestic Violence Victoria and others supported consistency,

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182 Ibid.

183 *Sentencing Act 1991* (Vic) s 18ZV.

184 Consultation Paper, Question 6–19.

185 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010.

186 National Legal Aid, *Submission FV 232*, 15 July 2010.

187 Ibid; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

188 Better Care of Children, *Submission FV 72*, 24 June 2010.

189 Confidential, *Submission FV 164*, 25 June 2010.

190 Confidential, *Submission FV 162*, 25 June 2010.

191 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal

provided that orders, their conditions and the interpretative framework in each family violence statute are broadly consistent across all jurisdictions ... Consistency of maximum penalties is also important in the context of planned mutual recognition and national registration of domestic/family violence protection orders.<sup>192</sup>

12.142 Berry Street Inc supported consistency because

it makes a clear statement about the gravity of the issue and the right of victims to be protected equally regardless of the jurisdiction they fall within.<sup>193</sup>

12.143 One service provider made no comment regarding maximum penalties but submitted that ‘consistency of sentence is an important factor in ensuring fairness across the country’.<sup>194</sup>

12.144 Of those stakeholders that supported consistent maximum penalties, they expressed divergent views about what the maximum penalty should be. Stakeholders variously expressed support for maximum penalties of imprisonment for two,<sup>195</sup> three<sup>196</sup> and five years,<sup>197</sup> with one supporting escalating penalties for subsequent breaches with a maximum of two years for recidivist offenders.<sup>198</sup>

12.145 The Victorian Government, for example, noted that the maximum penalty in Victoria for breach of two years and/or 240 penalty units is the level advised as appropriate by the Sentencing Advisory Council. It submitted that this penalty ‘is specific to the Victorian context and has been developed on the basis of research and consultation’.<sup>199</sup>

12.146 Stubbs noted that the ‘question of the maximum penalty for a breach becomes more significant if police are failing to charge for criminal offences that might make up the breach’.<sup>200</sup> Another stakeholder also emphasised the need for police to take breaches of protection orders seriously.<sup>201</sup>

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Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; A Lamb, *Submission FV 121*, 16 June 2010; Confidential, *Submission FV 77*, 2 June 2010;

192 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

193 Berry Street Inc, *Submission FV 163*, 25 June 2010. A similar view was expressed in Confidential, *Submission FV 89*, 3 June 2010.

194 Confidential, *Submission FV 171*, 25 June 2010.

195 Confidential, *Submission FV 198*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

196 A Lamb, *Submission FV 121*, 16 June 2010.

197 C Pragnell, *Submission FV 70*, 2 June 2010.

198 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010. A similar view was expressed in Confidential, *Submission FV 184*, 25 June 2010.

199 Victorian Government, *Submission FV 120*, 15 June 2010.

200 J Stubbs, *Submission FV 186*, 25 June 2010.

201 Confidential, *Submission FV 184*, 25 June 2010.

***Sentences imposed for breach***

12.147 In the Consultation Paper, the Commissions asked in practice, what issues or concerns arise about the sentences actually imposed on offenders for breach of protection orders.<sup>202</sup>

12.148 While stakeholders acknowledged that there is ‘diverse variation in the practices of different jurisdictions and even within the one jurisdiction’,<sup>203</sup> a constant theme that arose in submissions was either that no sentences are being imposed or that those that are imposed for breach of protection orders are often low.<sup>204</sup> For example, Women’s Legal Services Australia submitted that:

WLSA … is concerned by situations where relatively lenient sentences are imposed on offenders for breaches of protection orders that involve violence, and in particular the use of violence with instruments such as wheel braces or other metal instruments. One of the women’s legal services has witnessed \$11.00 good behaviour bonds being given out for breaches … even on subsequent violations of good behaviour bonds. Such penalties trivialise the seriousness of family violence and send out a message of tolerance of family violence to the community.<sup>205</sup>

12.149 An advocacy organisation in WA expressed a similar view:

Sentences imposed for breaches of violence restraining orders in WA are minimal to say the least. Most sentences impose a fine of around \$200 and sentences do not appear to increase on a second or third breach. Breaches … need to be taken seriously and dealt with as serious criminal offences. Without harsher penalties, violence restraining orders are seen ‘as not worth the paper they are written on’ … particularly in rural and remote areas.<sup>206</sup>

12.150 In a joint submission, Domestic Violence Victoria and others, affirmed the concerns identified in the Sentencing Advisory Council Report: *Sentencing Practices for Breach of Family Violence Intervention Orders* concerning leniency in the sentencing of offenders and repeat offenders in Victoria who breach protection orders.<sup>207</sup> The Victorian Government also referred to this report, and stated that ‘it is currently considering [its] recommendations’.<sup>208</sup>

12.151 The Department of Premier and Cabinet (Tas) submitted that:

Multiple breaches are dealt with together and this can result in a lesser sentence than would be awarded had they been dealt with separately. Magistrates are also refusing

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202 Consultation Paper, Question 6–20.

203 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

204 Ibid; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 184*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

205 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

206 Confidential, *Submission FV 184*, 25 June 2010.

207 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

208 Victorian Government, *Submission FV 120*, 15 June 2010.

to record a conviction for breach of an order thereby avoiding the possible imposition of a period of imprisonment.<sup>209</sup>

12.152 Some expressed concerns about lack of police enforcement as well as leniency in sentencing.<sup>210</sup> For example, the Queensland Law Society stated:

Too often there is no sentence actually imposed or a minimal fine. Too often offenders continue to commit acts of domestic violence including breaches of protection orders for which they are not prosecuted by police, confident in their belief that they will only receive a minimal penalty, if they are prosecuted at all.<sup>211</sup>

12.153 Some stakeholders stated that the effect of lenient sentencing is to undermine victims' confidence and respect in the legal system;<sup>212</sup> stop victims from reporting offences because their experiences have not 'been validated by the court',<sup>213</sup> and fail to act as a deterrent to future family violence.<sup>214</sup> One stakeholder also noted that lenient sentencing can have fatal repercussions for victims, and suggested consideration be given to 'stronger monitoring [of offenders] after release'.<sup>215</sup>

12.154 However, some stakeholders noted concerns countervailing those expressed about leniency in sentencing. One legal service provider in the NT noted that there is a tension in that jurisdiction between keeping Indigenous men out of prison and keeping Indigenous women safe. It stated 'currently we have mandatory sentencing provisions for breaches. We do not know what the answer is'.<sup>216</sup>

12.155 Similarly, the Local Court of NSW identified further complicating factors in sentencing, including that:

the punishment of an offender may well have an adverse impact upon the victim or any children of a relationship, particularly in circumstances where there is an ongoing relationship. This might include financial hardship due to the imposition of a fine, emotional, relational and financial hardship due to the imposition of a custodial sentence, or more generally the risk of reprisal against a victim by an offender who regards the punishment as being the 'fault' of the victim. ...

This is of particular concern because in NSW, the imprisonment of offenders for breach of a protection order is not an infrequent occurrence ... The available sentencing statistics indicate that, in NSW, an offender is almost twice as likely to be sentenced to a period of imprisonment for breaching [a family violence protection

209 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

210 Queensland Law Society, *Submission FV 178*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010. One confidential submission noted that police often do not enforce breaches involving the sending of text messages on the basis that such messages 'could have been sent by anyone': Confidential, *Submission FV 96*, 2 June 2010.

211 Queensland Law Society, *Submission FV 178*, 25 June 2010.

212 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

213 Confidential, *Submission FV 77*, 2 June 2010.

214 Ibid. See also C Pragnell, *Submission FV 70*, 2 June 2010.

215 Confidential, *Submission FV 89*, 3 June 2010.

216 Confidential, *Submission FV 164*, 25 June 2010.

order] than for breach of a personal violence order and is likely to receive a more serious sentence ... in general.<sup>217</sup>

12.156 Other general concerns expressed about current sentencing practices for breach include that: there is inconsistency in sentencing,<sup>218</sup> the courts' treatment of mitigating factors—such as victim's consent to mitigate sentence;<sup>219</sup> and the tendency for courts to minimise breaches concerning conditions about access in relation to children. Three stakeholders stated that magistrates often perceive these kinds of breaches to be related more to the existence of inappropriate family law orders.<sup>220</sup>

#### ***Legislative direction to courts regarding sentencing for breach of protection orders***

12.157 In the Consultation Paper, the Commissions asked whether state and territory family violence legislation should contain provisions which direct courts to adopt a particular approach on sentencing for breach of a protection order—for example, a provision such as that in s 14(4) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which requires courts to sentence offenders to imprisonment for breach of protection orders involving violence, unless they otherwise order and give their reasons for doing so.<sup>221</sup>

12.158 Stakeholder views on this issue were divided. Many stakeholders supported such an approach.<sup>222</sup> For example, Legal Aid NSW and the Women's Domestic Violence Court Advocacy Network Service expressed the view that breaches with violence should automatically result in a custodial sentence.<sup>223</sup>

12.159 The Queensland Law Society submitted that those who commit violence 'need to get the message loud and clear to stop committing acts of domestic violence and to start complying with orders'.<sup>224</sup> Women's Legal Services NSW, in supporting

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217 Local Court of NSW, *Submission FV 101*, 4 June 2010.

218 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. An Indigenous family violence service noted very different outcomes in terms of severity of sentencing across the Northern Territory, Western Australia and South Australia: Ngaanyatjarrpa Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

219 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

220 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

221 Consultation Paper, Question 6–21.

222 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. Another stakeholder supported the 'consideration of such issues in response to breaches of protection orders involving violence': No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

223 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

224 Queensland Law Society, *Submission FV 178*, 25 June 2010.

the approach, noted that the requirement to give reasons for not ordering imprisonment is an important safeguard in the NSW legislation.<sup>225</sup>

12.160 The Department of Premier and Cabinet, Tasmania expressed qualified support on the basis that ‘there are directions given for the sort of circumstances in which a lesser penalty is appropriate and still some discretion for mitigating circumstances’.<sup>226</sup>

12.161 However, many stakeholders expressed concern about providing legislative direction to courts on how to sentence for breach of a protection order,<sup>227</sup> or opposed it outright.<sup>228</sup>

12.162 A key theme which emerged in the submissions was an opposition to mandatory sentencing or to presumptions of imprisonment. For example, National Legal Aid stated that ‘it was not generally supportive of mandatory penalties’,<sup>229</sup> and SA Deputy Chief Magistrate Andrew Cannon and the Victorian Government expressed opposition to mandatory sentencing or to presumptions of imprisonment for criminal offences.<sup>230</sup> Concerns were expressed about mandatory sentencing, for example, on the basis that it undermines judicial discretion,<sup>231</sup> and acts as a deterrent for victims to report violence and breaches<sup>232</sup>—including in the NT where there is an identified tension between keeping victims safe and striving to reduce the incarceration of Indigenous men.<sup>233</sup> The Local Court of NSW also observed that some of its members had noted that:

It appears Indigenous individuals, especially those in country areas with high rates of unemployment, are particularly reluctant to report breach of protection order, due to a perception that the perpetrator who is also the family income-earner will most likely be imprisoned.<sup>234</sup>

12.163 The Queensland Government also expressed caution about how such legislative directions might affect vulnerable groups—including Indigenous peoples—and stated that this issue is to be considered in the review of Queensland’s family violence legislation.<sup>235</sup>

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225 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

226 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

227 Queensland Government, *Submission FV 229*, 14 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010.

228 Confidential, *Submission FV 198*, 25 June 2010; A Cannon, *Submission FV 137*, 23 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

229 National Legal Aid, *Submission FV 232*, 15 July 2010.

230 A Cannon, *Submission FV 137*, 23 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010. See also Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010, which expressed opposition to mandatory sentencing for breaches.

231 Queensland Government, *Submission FV 229*, 14 July 2010.

232 Confidential, *Submission FV 198*, 25 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010.

233 Confidential, *Submission FV 164*, 25 June 2010.

234 Local Court of NSW, *Submission FV 101*, 4 June 2010.

235 Queensland Government, *Submission FV 229*, 14 July 2010.

12.164 In addition, mandatory imprisonment was said not to always represent the best solution to the problem.<sup>236</sup> For example, Cannon stated that he was

unconvinced that immediate imprisonment in most cases will remedy [the] problem. Early police intervention, victim support and offender programs, including dealing with issues of substance abuse, will be more productive in most cases than imprisonment.<sup>237</sup>

12.165 Stubbs also highlighted the drawbacks of imprisonment:

The use of imprisonment is costly in both financial and human terms, including for families. It may be an important means for providing some period of safety for victims, at least in the interim while the offender is in custody, as well as serving other traditional sentencing objectives, but it can be damaging. The alleged benefits of incarceration should not be overstated. Offenders may not necessarily receive access to appropriate treatment or other programs while in custody. The negative effects of prison may further undermine the offender's capacity to live a socially productive life. Imprisonment should be used sparingly and when justified by the facts.<sup>238</sup>

12.166 As an alternative to mandatory sentencing or presumptions of imprisonment, the Victorian Government said that 'a better approach would be to support judicial officers to ensure that they have all of the information they need to make sentencing decisions'.<sup>239</sup> In this regard, it referred to the guiding principles for sentencing breaches of protection orders developed by the Sentencing Advisory Council (Victoria), and endorsed by the Victorian Chief Magistrate. The Aboriginal Family Violence Prevention and Legal Service Victoria also preferred guidance for judicial officers to mandatory sentencing.<sup>240</sup>

12.167 While 'philosophically opposed to any form of mandatory sentencing', Women's Legal Service Queensland submitted that 'there needs to be some way of directing the courts to take these offences seriously':

Alternate sentencing options are worth investigating (eg being more innovative and creative in the crafting of continuing orders and also having severely escalating penalties for repeat offenders).<sup>241</sup>

#### ***Sentencing for non-violent breaches***

12.168 In the Consultation Paper, the Commissions asked what types of non-financial sanctions are appropriate to be imposed for breach of protection orders where the breach does not involve violence or involves relatively low levels of violence.<sup>242</sup>

12.169 Responses in submissions to this question fell into two broad categories. The first group expressed concerns about the notion of 'low levels of violence'. The second group offered suggestions about appropriate sanctions.

236 A Cannon, *Submission FV 137*, 23 June 2010.

237 Ibid.

238 J Stubbs, *Submission FV 186*, 25 June 2010.

239 Victorian Government, *Submission FV 120*, 15 June 2010.

240 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

241 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

242 Consultation Paper, Question 6–22.

12.170 Some stakeholders stressed that the issue is not whether a breach involves no violence or ‘low-levels’ of violence but its impact on the victim—in particular, whether it causes fear or damages a victim’s sense of security.<sup>243</sup> National Legal Aid said this is particularly relevant ‘when breaches are not considered within the historical context of the violence but are treated as single incidents’.<sup>244</sup> Legal Aid NSW stated that ‘where a breach involves violence the breach should be considered seriously and an appropriate sanction imposed, financial or otherwise’.<sup>245</sup>

12.171 Women’s Legal Services Australia expressed some concern about defining ‘low level violence’ and considering offences that involved no element of physical violence to be low level.<sup>246</sup>

12.172 Some stakeholders stated that, in some circumstances, financial sanctions in the form of compensation for financial abuse or property damage—such as the cost of changing locks—might be appropriate sanctions.<sup>247</sup> The overwhelming majority of stakeholders that addressed this issue were in favour of sanctions that could help to change the behaviour of those who commit violence.<sup>248</sup> Therefore, there was support for ‘perpetrator programs’ such as violence and drug and alcohol rehabilitation programs;<sup>249</sup> probation with special conditions, such as attending ‘perpetrators’ courses or counselling;<sup>250</sup> men’s behaviour programs;<sup>251</sup> psychiatric assessment and treatment;<sup>252</sup> anger management programs;<sup>253</sup> and educational programs on family violence with ‘therapeutic interventions’.<sup>254</sup>

243 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; Confidential, *Submission FV 109*, 8 June 2010.

244 National Legal Aid, *Submission FV 232*, 15 July 2010.

245 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

246 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

247 National Legal Aid, *Submission FV 232*, 15 July 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010.

248 For example, No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010; Confidential, *Submission FV 96*, 2 June 2010.

249 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Confidential, *Submission FV 77*, 2 June 2010.

250 Queensland Law Society, *Submission FV 178*, 25 June 2010. Counselling was also supported in the following submissions: Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010.

251 Berry Street Inc, *Submission FV 163*, 25 June 2010.

252 C Pragnell, *Submission FV 70*, 2 June 2010.

253 Confidential, *Submission FV 164*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010.

254 Confidential, *Submission FV 109*, 8 June 2010.

12.173 There was also broad support for community service orders,<sup>255</sup> with some stakeholders stressing the need for such work to be ‘meaningful’,<sup>256</sup> ‘constructive and rehabilitative’.<sup>257</sup>

12.174 One stakeholder supported the idea of good behaviour bonds or adjournments with a requirement to report back to the court, incorporating ‘active review’ by the court of the offender’s conduct.<sup>258</sup> Women’s Legal Services NSW also expressed support for good behaviour bonds for low level breaches because of the element of accountability built into them in the event of breach.<sup>259</sup>

12.175 The Commissioner for Victims’ Rights (South Australia) also submitted that victim impact statements should be utilised more widely and that victims should be allowed to give an indication of the type or nature of sentence they would like the court to consider.<sup>260</sup>

### ***Commissions’ views***

#### ***Consistency of maximum penalties***

12.176 The Commissions do not make any recommendations about consistency of maximum penalties for breach of protection orders for a number of reasons. First, in the Commissions’ view, the issue of the level of maximum penalties does not appear to be the key issue of concern identified by stakeholders. Rather, issues of more pressing concern are the lack of enforcement of breaches and, where they are enforced, their lenient treatment on sentencing. Increasing maximum penalties will not necessarily lead to the imposition of sentences with higher maximum penalties—particularly in light of statistical data and stakeholder observations which support the proposition that courts do not, generally, tend to impose the maximum penalty for breach of a protection order.

12.177 Further, the Commissions note the wide disparity of views about an appropriate maximum penalty, and do not consider that they have an appropriate empirical basis for supporting one level of maximum penalty over another. For example, the Commissions acknowledge the comments made by the Victorian Government that the maximum penalty in Victoria is the level advised by the Sentencing Advisory Council (Victoria), developed on the basis of research and consultation with Victorian stakeholders—and accept that such maximum penalty appears to be appropriate in the Victorian context. However, further detailed consideration and consultation would need to be undertaken to assess whether such a

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255 Confidential, *Submission FV 198*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 109*, 8 June 2010; Confidential, *Submission FV 96*, 2 June 2010.

256 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

257 Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010.

258 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

259 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

260 Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010.

maximum penalty was appropriate in other jurisdictions, for example, in light of their different sentencing legislation.

12.178 In addition, the Commissions consider that consistency in sentencing—as opposed to consistency of maximum penalties—is the more pertinent issue in practice, and that there are many ways of achieving this, including through a national bench book, guidelines—such as those developed by the Sentencing Advisory Council (Victoria)—education and training, and the use of sentencing databases which are intended to assist a court in deciding whether a proposed sentence ‘is in any way inside or outside the normal range of penalties imposed for similar offences in past cases’.<sup>261</sup> The use of guidance in a national bench book on family violence is addressed below.

#### ***Guidance for sentencing for breaches of protection orders***

12.179 The Commissions note the significant concerns expressed by stakeholders about leniency in sentencing for breach of protection orders, as well as concerns about inconsistency in sentences. The Commissions maintain their preliminary views expressed in the Consultation Paper that a national bench book on family violence could play a significant and valuable role in guiding judicial officers in sentencing in family violence matters.<sup>262</sup> In particular, courts should be given guidance on how to sentence for breaches of protection orders.

12.180 The Commissions have considered the *Guiding Principles for Sentencing Contraventions of Family Violence Intervention Orders* prepared by the Sentencing Advisory Council (Victoria) and consider that these guidelines provide an instructive model for guiding judicial discretion in the sentencing for breach of protection order offences. In particular, some of the content of these guidelines could form the basis of material to be included in a national bench book, with adjustments made to accommodate jurisdictional differences in maximum penalty levels for breaches, and in sentencing options.

12.181 Some of the key matters addressed by the Victorian guidelines, which the Commissions consider worthy of consideration in guidelines in a section on sentencing for breach of protection orders in a national bench book on family violence include:

- The purposes of sentencing an offender for breach of a protection order. The Sentencing Advisory Council stated that the primary purpose ‘is to achieve compliance with the [protection] order or future orders to ensure the safety and protection of the victim’,<sup>263</sup> and that other purposes are denunciation, deterrence and punishment. The Council stated that ‘caution should be exercised that these [other] purposes do not conflict with considerations of community protection, particularly as regards the victim’, noting that immediate incarceration may

261 I Potas, ‘The Use and Limitations of Sentencing Statistics’ (2004) 31 *Sentencing Trends & Issues* 1, 6–7. See also Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), Chs 19, 20 and 21, which considered measures to promote better and more consistent federal sentences.

262 See Recs 13–1 and 31–2.

263 Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report* (2009), App 1, [1.2]. The purposes of sentencing are discussed in Ch 4.

provide short term protection but that the long-term protection of a victim is also an important consideration.<sup>264</sup>

- The potential impact of particular sentencing options on a victim of family violence, including the possible deleterious repercussions of imposing fines on offenders for family-violence related offences. In this regard, the Council's guidelines note that 'measures intended to protect the victim can place them at increased risk, and sentences designed to punish the offender may indirectly punish the victim'.<sup>265</sup> The guidelines further state:

there will be occasions where a sentence with coercive rehabilitation requirements (such as mandatory attendance at a behavioural change course) as well as a punitive element (such as community work or a financial condition) strikes a better balance between the purposes of sentencing than a sentence such as a fine.<sup>266</sup>

- The identification of sentencing factors relevant to the victim<sup>267</sup>—including the nature of the contravention and its impact on the victim; abuse of power; the presence of children; the contribution of the victim;<sup>268</sup> and the vulnerability of the victim.<sup>269</sup>
- The identification of sentencing factors relating to the offender—including the culpability of the offender which entails a consideration of whether the offence was committed intentionally, recklessly or negligently and the offender's level of understanding of the order; findings of guilt about other family violence offences; and the timing of the breach. On the latter issue, the guidelines provide, 'where an order is contravened only a short time after [its making] or there has been an earlier contravention, this should be an aggravating factor'.<sup>270</sup>
- Factors relevant to determining the severity of sentencing range and the appropriateness of particular sanctions for levels of severity of breach. In this respect, the guidelines usefully set out factors and sanctions appropriate for breaches of varying degrees of seriousness—categorised as low, medium and high.

12.182 In addition, the Commissions consider that the guidance to be provided in the national bench book should address the benefits of sentencing options that aim to change the behaviour of the offender. Sentencing options with a rehabilitative aspect have an important role to play in long term strategies to break the cycle of violence.

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<sup>264</sup> Ibid, App 1,

<sup>265</sup> Ibid, App 1, [1.1]–[1.3].

<sup>266</sup> Ibid, App 1, [1.5].

<sup>267</sup> Ibid, App 1, [2.1]–[2.10].

<sup>268</sup> The Commissions' views on the treatment of consent to contact by a victim in sentencing for breach of protection orders are discussed above.

<sup>269</sup> Sentencing Advisory Council, *Sentencing Practices for Breach of Family Violence Intervention Orders: Final Report* (2009), App 1, [2.1]–[2.10].

<sup>270</sup> Ibid, App 1, [2.15].

12.183 The Commissions agree the level of seriousness of a breach may not necessarily be linked to the level of violence used by an offender in breaching the order, or to whether the violence was physical, and that a key factor is the impact a breach has on a victim's sense of security. That is why they consider guidance in sentencing should address specifically the impact of an offence on a victim. In addition, the Commissions consider that the guidance in the bench book should also make the point—as is made in the Council's guidelines—that 'breaches not involving physical violence can have a significant impact on the victim and should not necessarily be treated as less serious than those breaches involving physical violence'.<sup>271</sup>

12.184 Because of the significance of the impact on the victim of a breach of a protection order, the Commissions further consider that police operational guidelines—reinforced by training—should require police when preparing witness statements to ask victims about the impact on them of the breach, and advise them that they may wish to make a victim impact statement—which is one way of informing a court about the harm and injury suffered by a victim as result of a breach.<sup>272</sup> Police should also be required to explain what use can be made of victim impact statements.

12.185 However, while the Commissions consider that victims should be encouraged and supported in the making of victim impact statements which explain the impact a breach has had on them, they do not agree that victims should be allowed to indicate the type or nature of sentences that they would like the court to consider. A victim's desire for retribution, for example, should not be a legitimate consideration in sentencing.<sup>273</sup> The Commissions endorse the view expressed in ALRC Report 103, *Same Crime, Same Time: Sentencing of Federal Offenders*, that victims should be precluded from expressing an opinion about the sentence that should be imposed on a federal offender.<sup>274</sup> However, that is not to say, that a victim should be precluded from informing the court about the impact which he or she thinks a particular sentencing option will have on the victim.

**Recommendation 12–8** The national family violence bench book (see Recs 13–1 and 31–2) should contain a section guiding courts on how to sentence offenders for breach of protection orders, addressing, for example:

- (a) the purposes of sentencing an offender for breach of a protection order;

271 Ibid, App 1, [2.2].

272 The ALRC considered the use of victim impact statements in Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), Ch 14.

273 *Sentencing Act 1995* (WA) s 25(2) prohibits a victim impact statement from addressing the way in which or the extent to which an offender ought to be sentenced. Compare *Sentencing Act 1995* (NT) s 106B(5A) which provides that a victim impact statement may contain a statement as to the victim's wishes in respect of the sentencing order to be made by the court.

274 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), Rec 14–1(d).

- (b) the potential impact of particular sentencing options, especially fines, on a victim of family violence;
- (c) sentencing factors relating to the victim, including the impact of the offence on the victim;
- (d) sentencing factors relating to the offender, including the timing of the breach;
- (e) factors relevant to determining the severity of sentencing range and the appropriateness of particular sanctions for different levels of severity of breach;
- (f) that breaches not involving physical violence can have a significant impact on a victim and should not necessarily be treated as less serious than breaches involving physical violence; and
- (g) the benefits of sentencing options that aim to change the behaviour of those who commit violence.

**Recommendation 12–9** Police operational guidelines—reinforced by training—should require police, when preparing witness statements in relation to breach of protection order proceedings, to ask victims about the impact of the breach, and advise them that they may wish to make a victim impact statement and about the use that can be made of such a statement.

#### *Repeal of mandatory sentencing and mandatory imprisonment provisions*

12.186 In the Commissions' view, the preservation of judicial discretion in sentencing is essential to enable individualised justice to be done on a case-by-case basis. The Commissions do not support the inclusion in state and territory family violence legislation of provisions directing courts to adopt a particular approach on sentencing for breach of a protection order where such legislative direction removes the exercise of judicial discretion.

12.187 In particular, the Commissions oppose mandatory sentencing for breach of protection orders—including specification of mandatory minimum penalties, or directions to impose imprisonment in particular circumstances. In this regard, the Commissions acknowledge the concerns expressed by stakeholders that such provisions can have an adverse impact on vulnerable offenders, particularly Indigenous offenders; act as a deterrent for victims to report violence and breaches; and that imprisonment may not necessarily represent the best outcome in any particular case. Sometimes imprisonment will be an appropriate sentencing option for breaches of protection orders involving violence. However, as a general principle, the

Commissions consider that imprisonment should be regarded as a sentencing option of last resort.<sup>275</sup>

12.188 As noted in ALRC Report 103, mandatory sentencing has been the subject of considerable criticism by commentators, and by government bodies and committees that have examined the issue. Criticisms of mandatory sentencing include: that such schemes escalate sentence severity; are unable to take account of the particular circumstances of the case; redistribute discretion so that decisions by the police and prosecuting authorities become increasingly important; and contravene a number of accepted sentencing principles—including proportionality, parsimony and individualised justice—and international human rights standards.<sup>276</sup>

12.189 The maintenance of individualised justice and broad judicial discretion are essential attributes of our criminal justice system, outweighing any potential deterrent effect that mandatory sentencing might have. The Commissions thus recommend that state and territory family violence should not impose mandatory minimum penalties or mandatory imprisonment for the breach of a protection order.

12.190 The Commissions consider that the provision of guidance to judicial officers in a national bench book on family violence on how to sentence for breach of protection orders is preferable to mandatory sentencing provisions.

**Recommendation 12–10** State and territory family violence legislation should not impose mandatory minimum penalties or mandatory imprisonment for the offence of breaching a protection order.

275 This endorses the view expressed in *Ibid*, [7.64].

276 See, *Ibid* [21.59]–[21.61]. The principle of proportionality requires courts to impose sentences that bear a reasonable or proportionate relationship to the criminal conduct in question. The principle of parsimony operates to prevent the imposition of a sentence that is more severe than is necessary to achieve the purpose or purposes of the sentence. The principle of individualised justice requires the court to impose a sentence that is just and appropriate in all the circumstances of the particular case: see *Ibid* Ch 5.



# 13. Recognising Family Violence in Offences and Sentencing

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## Contents

Introduction	561
Recognising family violence in criminal offences	563
Criticisms of the incident-focused nature of criminal offences	563
Current approaches to recognising family violence in criminal offences	565
An umbrella offence of family violence	565
Aggravated offences	567
Designated family violence offences not attracting higher maximum penalty	572
Offences of economic and emotional abuse	573
Leading evidence of an accused person's history of family violence	574
Federal offences relevant in the family violence context	576
Options for reform	577
Submissions and consultations	578
Commissions' views	587
Recognising family violence in sentencing	594
Recognising courses of family-violence related conduct in sentencing	594
Circumstances of aggravation and mitigation	597
Sentencing guidance	600
Submissions and consultations	602
Commissions' views	613

## Introduction

13.1 This and the following chapter consider whether there should be an expanded role for the criminal law in recognising family violence. This chapter considers the recognition of family violence in criminal offences and sentencing. Chapter 14 considers the recognition of family violence in defences to homicide where a victim of family violence kills the person who was violent towards him or her. It also considers the recognition of categories of family relationships for the purposes of criminal laws<sup>1</sup>—for example where a family relationship between the offender and the victim is prescribed as an element of a criminal offence or defence, or as a sentencing factor.

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1 Chapter 7 considers the categories of family relationships recognised for the purposes of identifying persons in need of protection under state and territory family violence legislation.

13.2 The underlying issue in Chapters 13 and 14 is the way in which the criminal law accounts for the nature and dynamics of family violence. Criminal laws are traditionally perceived as ‘incident-based’, in that they are focused upon discrete acts forming the basis of individual offences.<sup>2</sup> As identified in Chapter 5, family violence is characterised by patterns of controlling, coercive or dominating behaviour and may include both physical and non-physical violence.

13.3 The Commissions consider these issues in light of the direction in the Terms of Reference to consider what, if any, improvements can be made to the current criminal law framework to protect victims of family violence, and in particular, women and children. This Inquiry presents the Commissions with a unique opportunity to explore ways in which legal frameworks can be improved in order to better protect victims of family violence—even where no issues arise from the practical interaction of family violence laws with the criminal law. In the Commissions’ view, a broad interpretation of the Terms of Reference calls for an assessment of how well the criminal justice system deals with family violence. A key consideration in undertaking this assessment is the Commissions’ guiding principle of fairness. That is, ensuring that legal responses to family violence are fair and just—holding those who use family violence accountable for their actions, providing protection to victims and ensuring that accused persons are treated in accordance with Australia’s human rights obligations.<sup>3</sup>

13.4 Criminal law responses are not, however, a stand-alone solution to family violence. The Commissions acknowledge that there is a more general issue about whether escalating a penal response to family violence is the best or only way for society to mark its condemnation of what is clearly abhorrent behaviour. The Commissions have heard that, in some cases, a blunt penal response can escalate violent behaviour and fail to address its causes. Such an approach can also have particularly adverse impacts upon Indigenous peoples.<sup>4</sup> Consistent with the Commissions’ guiding principle of seamlessness, the measures considered in this chapter and Chapter 14 are intended to form part of an integrated response to family violence, which focuses on prevention as well as punishment.

13.5 The Commissions recognise that several state and territory governments have given considerable attention to some of the issues addressed in this and the following chapter. Some matters have been the subject of dedicated reviews and consequent legislative reforms.<sup>5</sup> In some cases, jurisdictions have taken divergent approaches to certain issues. Some differences appear to reflect jurisdiction-specific policy positions on matters extending beyond family violence. In acknowledging these matters, the Commissions have approached this chapter and Chapter 14 from the perspective of facilitating the continuous improvement of criminal law responses to family violence.

2 However, as noted below, there is precedent in some offence provisions for the recognition of courses of conduct in respect of certain criminal behaviour.

3 See, eg, *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), arts 14 and 26. See further Ch 2.

4 See, eg, Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [29.40]–[29.73].

5 For example, numerous reports and reviews in the last few decades have considered the issue of defences to homicide in cases involving family violence. These are considered in Ch 14.

## Recognising family violence in criminal offences

### Criticisms of the incident-focused nature of criminal offences

#### Case study

*'Some of the women I have assisted have experienced years of violence, including rapes, which have been reduced to one charge of common assault. There is no way a just sentence for her suffering and trauma, and the harm done to society by his actions, can be applied to a single charge of common assault no matter how sensitive and insightful the magistrate is.'*

One woman experienced a year of social isolation, food deprivation, constant sexual assault and severe physical violence. The police pressed one charge of common assault and one charge of actual bodily harm in respect of injuries they were able to photograph. At court the police prosecutor accepted a plea bargain and dropped one of the charges without consulting the woman who was present in court ready to appear and give evidence. The offender admitted to a third party that he had been assaulting his wife but the evidence was not used because it did not relate to a specific incident of assault. The offender received a good behaviour bond.<sup>6</sup>

13.6 The above case study echoes the criticisms advanced by some commentators about the way in which the dynamics of family violence are viewed in criminal offences. Some have argued that the predominantly incident-focused nature of most criminal offences fails to take account of the ‘patterns of power and control’ in family violence cases and, consequently, ‘the full measure of injury that these patterns inflict’.<sup>7</sup> Where offences are framed in terms of discrete incidents—for example, an assault occurring in the context of family violence<sup>8</sup>—the investigation and prosecution will focus on conduct relevant to establishing each element of the offence. A broader history of abuse may be perceived as irrelevant to the immediate offence charged.<sup>9</sup>

13.7 During the Inquiry, lawyers representing victims of family violence informed the Commissions that persons who have committed family violence over a period of time are often prosecuted for only a small number of incidents.<sup>10</sup> It may be difficult to

6 Comment on ALRC Family Violence Online Forum: Women’s Legal Service Providers.

7 D Tuerkheimer, ‘Recognizing and Remedyng the Harm to Battering: A Call to Criminalize Domestic Violence’ (2003) 94 *Journal of Criminal Law & Criminology* 959, 972. See also A Burke, ‘Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization’ (2006) 75 *George Washington Law Review* 552.

8 For a recent summary of offences commonly charged in the family violence context in NSW see C Ringland and J Fitzgerald, *Factors which Influence the Sentencing of Domestic Violence Offenders*, New South Wales Bureau of Crime Statistics and Research Issues Paper 48 (July 2010).

9 However, evidence of broader histories of abuse may be admissible in the prosecution of individual offences where relevant to a fact in issue and subject to exclusionary rules. This point is discussed below.

10 Comment on ALRC Family Violence Online Forum: Women’s Legal Service Providers.

prove specific incidents in the course of ongoing violence to the requisite standard because:

- victims may be unable to recall the dates or times of particular incidents;
- victims may not have reported incidents at the time, which may be due to reasons including: fear; unawareness of the criminal nature of the violent behaviour; a desire to protect the person committing the violence from criminal sanctions; unawareness or inaccessibility of services; or lack of confidence in the legal response;
- victims may have explained away their injuries to third parties, for the above reasons;
- evidence of the victim's disclosures to third parties, such as friends or counsellors, may be inadmissible as hearsay evidence;
- corroborating evidence may be of limited probative value—for example, the evidence of neighbours who heard incidents through a wall, or that of young children present in the home; and
- there may be no evidence of injuries or harm suffered at the time a complaint is made, particularly where non-physical abuse is alleged.<sup>11</sup>

13.8 Some commentators have argued that the incident-based focus of the criminal law has several adverse consequences in a family violence context. Where a course of violent behaviour is reduced to a small number of charges, it is said that the criminal law fails to punish adequately the harm done to the victim, and does not publicly recognise and condemn the seriousness of family violence.<sup>12</sup>

13.9 Others have suggested that isolating specific incidents from a victim's broader history of violence can damage the credibility of his or her evidence in respect of the offences prosecuted. It is said that a break in the 'natural sequence of narrative evidence', can render the victim's account of specific incidents 'incoherent' and 'unpersuasive'.<sup>13</sup> A narrow recognition of family violence in criminal offences can have a flow-on effect to other legal frameworks that depend on the criminal law—such as victims' compensation—with the result that family violence victims are under-compensated.<sup>14</sup>

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11 Ibid.

12 V Tadros, 'The Distinctiveness of Domestic Abuse: A Freedom Based Account' (2004) 65 *Louisiana Law Review* 989.

13 D Tuerkheimer, 'Recognizing and Remedyng the Harm to Battering: A Call to Criminalize Domestic Violence' (2003) 94 *Journal of Criminal Law & Criminology* 959, 983–984.

14 See, eg, C Forster, 'The Failure of Criminal Injuries Compensation Schemes for Victims of Intra-Familial Abuse: The Example of Queensland' (2002) 10 *Torts Law Journal* 143; I Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview* (2010), prepared for the Australian Domestic and Family Violence Clearinghouse.

### Current approaches to recognising family violence in criminal offences

13.10 Notwithstanding the traditionally incident-focused nature of criminal law, family violence has received varying degrees of recognition in criminal offences in Australian and overseas jurisdictions. Forms of recognition—separately addressed below—have included:

- a specific offence of family violence, based upon a course of conduct;
- course of conduct-based offences, covering certain family violence related conduct—for example, offences in the nature of the persistent sexual abuse of children;
- aggravated forms of existing offences where they are committed against persons in a defined family relationship with the offender—which attract higher maximum penalties;
- the designation of certain offences as ‘family violence offences’ which do not attract higher maximum penalties;
- specific offences of economic and emotional abuse;
- in the prosecution of offences under general criminal laws, the admission of evidence of the relationship between the accused person and the victim—including previous violence—where it is relevant to the facts in issue; and
- in federal jurisdictions in which primary responsibility for criminal law is vested in state and territory governments—federal offences relevant to the family violence context.

### An umbrella offence of family violence

13.11 Family violence is not a specific offence in most common law jurisdictions, including Australia, Canada, New Zealand, the United Kingdom and the United States. In 2003, the United Kingdom government rejected an umbrella offence of family violence on the basis that a separate offence would reduce the range of available charging options from among existing offences, and thereby ‘diminish the offence’.<sup>15</sup>

13.12 In the United States, the Maine legislature considered the introduction of a discrete family violence offence in 2007.<sup>16</sup> However, it ultimately enacted a series of individual ‘domestic violence crimes’ based upon existing offences committed against persons defined as ‘family or household members’.<sup>17</sup> The Joint Standing Committee on

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15 Crime Reduction Centre Information Team, *Safety and Justice: The Government’s Proposals on Domestic Violence* (2003), 30.

16 *A Bill to Protect Families and Enhance Public Safety by Making Domestic Violence a Crime 2007 SP 571 LD 1627*, 123rd session (Maine).

17 *An Act To Protect Families and Enhance Public Safety by Making Domestic Violence a Crime 2008 17-A MRSA (Maine) §§ 207-A, 209-A, 210-B, 210-C, and 211-A*. The ‘domestic violence crimes’ are: domestic violence assault; domestic violence criminal threatening; domestic violence terrorising; domestic violence stalking; and domestic violence reckless conduct.

Criminal Justice and Public Safety recommended the use of specific offence provisions rather than an umbrella offence in order to conform to technical drafting standards.<sup>18</sup>

13.13 Several European jurisdictions have recognised a specific offence of family violence. A Council of Europe Report indicates that the following countries have specific offences: Andorra, Croatia, the Czech Republic, Hungary, Iceland, Montenegro, Norway, Poland, Portugal, Romania, Serbia, Slovakia, Slovenia, Spain, and Sweden.<sup>19</sup> Sweden explained the introduction of its specific offence as follows:

Its purpose is to deal with repeated male violence towards women with whom they have a close relationship. The introduction of the new offence will make it possible for the courts to substantially increase the penal value for the acts committed against the woman, when the acts are part of a process which constitutes a violation of integrity. Thus it will be possible, in a much better way than with existing legislation, to take the entire situation of the abused woman into account. The new crime does not exclude that the perpetrator at the same time can be prosecuted, for instance, for rape or other gross crimes.<sup>20</sup>

13.14 The Indian Penal Code includes an offence of cruelty to women.<sup>21</sup> In 2005, a study conducted on the operation of this section concluded that, of 30 cases it had studied, no prosecution had succeeded under that section. Although many in the legal system were of the view that the section was being misused, the study concluded that victims thought the section required strengthening and non-governmental organisations considered it the only effective mechanism of redress for victims of family violence.<sup>22</sup>

13.15 A potential umbrella offence has received limited consideration in Australian jurisdictions. For example, in 2000, the Taskforce on Women and the *Criminal Code* (Qld) recommended that the Queensland Government investigate the creation of a ‘specific offence of domestic or family violence’, in order to ‘specifically name the behaviour and encourage the prosecution of it’.<sup>23</sup> The Taskforce recommended that an investigation should ‘canvass the creation of a course-of-conduct offence’, in similar terms to the offence of torture in s 320A of the *Criminal Code* (Qld).<sup>24</sup>

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18 Committee Amendment, Criminal Justice and Public Safety, Filing No S-276, June 11, 2007.

19 Directorate General of Human Rights—Council of Europe, *Legislation in the Member States of the Council of Europe in the Field of Violence Against Women* (2007).

20 ‘Statement by Ms Ingegerd Sahlström, State Secretary for Equality Affairs’ (Press Release, 3 March 1998).

21 *Indian Penal Code 1860* s 498A, introduced by *Criminal Law (Second Amendment) Act 1983* (India). This provision prohibits husbands, or relatives of husbands, from subjecting a woman to ‘cruelty’, with a maximum sentence of three years. ‘Cruelty’ is defined to include any wilful conduct likely to drive the woman to commit suicide, or to cause grave injury or danger to life, limb or health (whether mental or physical) of the woman; or harassment of the woman, with a view to coercing her or a related person to meet unlawful demands for property or security, or as a consequence of a failure to meet such a demand.

22 Centre for Social Research, *A Research Study on the Use and Misuse of Section 498A of the Indian Penal Code* (2005).

23 Queensland Government Office for Women, *Report of the Taskforce on Women and the Criminal Code* (2000), Rec 52.1.

24 Ibid, 81.

13.16 While there is academic support for a specific course of conduct-based offence,<sup>25</sup> there is no consensus on its precise formulation. For example, Professor Deborah Tuerkheimer advocates legislation that would require proof of ‘a course of conduct’ that the defendant ‘knows or reasonably should know ... is likely to result in substantial power or control over the victim’.<sup>26</sup> Professor Alafair Burke has suggested that the offence should instead require that the defendant engaged in a pattern of family violence with the intention of gaining power or control over the victim.<sup>27</sup>

13.17 There is precedent for course of conduct-based offences in Australian criminal laws. For example, all states and territories have introduced offences in the nature of the persistent sexual abuse of children.<sup>28</sup> These offences are considered in detail in Chapter 25. In short, they were enacted to recognise the difficulties of particularising incidents of repetitive conduct.<sup>29</sup> They generally capture a number of unlawful sexual acts, and in some cases expressly provide that it is not necessary to prove the dates or exact circumstances of individual incidents.

13.18 Where available, offences in the nature of torture—namely, those covering the intentional infliction of severe pain or suffering on the victim over a period of time—may also be relevant in the family violence context.<sup>30</sup> In 2000, the Taskforce on Women and the *Criminal Code* (Qld) recommended that the offence of torture in s 320A of the *Criminal Code* (Qld) be amended to include an example of how the offence could be used for offences involving domestic and family violence.<sup>31</sup>

### Aggravated offences

13.19 The criminal legislation of South Australia and Western Australia makes provision for aggravated offences that are committed in a family violence context. In South Australia, the *Criminal Law Consolidation Act 1935* (SA) creates an aggravated offence where the offender committed an offence knowing that the victim was:

25 See, eg, A Burke, ‘Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization’ (2006) 75 *George Washington Law Review* 552; D Tuerkheimer, ‘Recognizing and Remedyng the Harm to Battering: A Call to Criminalize Domestic Violence’ (2003) 94 *Journal of Criminal Law & Criminology* 959; and D Tuerkheimer, ‘Renewing the Call to Criminalize Domestic Violence: An Assessment Three Years Later’ (2006) 75 *Georgetown Washington University Law Review* 613.

26 D Tuerkheimer, ‘Recognizing and Remedyng the Harm to Battering: A Call to Criminalize Domestic Violence’ (2003) 94 *Journal of Criminal Law & Criminology* 959, 1019–1020.

27 A Burke, ‘Domestic Violence as a Crime of Pattern and Intent: An Alternative Reconceptualization’ (2006) 75 *George Washington Law Review* 552, 556.

28 *Crimes Act 1900* (NSW) s 66EA; *Crimes Act 1958* (Vic) s 47A; *Criminal Code* (Qld) s 229B; *Criminal Code* (WA) s 321A; *Criminal Law Consolidation Act 1935* (SA) s 50; *Criminal Code* (Tas) s 125A; *Crimes Act 1900* (ACT) s 56; *Criminal Code* (NT) s 131A. See also Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), cl 5.2.14.

29 See, eg, Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 133–137. See also, *S v The Queen* (1989) 168 CLR 266.

30 See, eg, *Criminal Code* (Qld) s 320A; *Crimes Act 1900* (ACT) s 36.

31 Queensland Government Office for Women, *Report of the Taskforce on Women and the Criminal Code* (2000), Rec 52.3.

- a spouse, former spouse, domestic partner or former domestic partner of the offender; or
- a child in the custody of, or who normally resides with: the offender, a spouse, former spouse, domestic partner or former domestic partner of the offender.<sup>32</sup>

13.20 The section also creates aggravated offences where the offender abused a position of trust or authority in committing the offence, and where the offender committed the offence in the course of deliberately and systematically inflicting severe pain on the victim.<sup>33</sup> These factors appear to be based upon the provisions in the Standing Committee of Attorneys-General (SCAG) Model Criminal Code.<sup>34</sup>

13.21 In respect of sentencing, the Act appears to modify the operation of the common law principle articulated in *R v De Simoni*,<sup>35</sup> whereby an accused person who is convicted of a basic offence cannot be sentenced on the basis of circumstances of aggravation which would have warranted a conviction for a more serious offence. Section 5AA(6) provides that the section does not prevent a court from taking into account, in the usual way, the circumstances of and surrounding the commission of an offence for the purpose of determining sentence. The section applies notwithstanding the fact that the relevant circumstances would have justified an aggravated form of the charge and sets out the following example to illustrate this point:

A person is charged with a basic offence and the court finds that the offence was committed in circumstances that would have justified a charge of the offence in its aggravated form. In this case, the court may, in sentencing, take into account the circumstances of the aggravation for the purpose of determining penalty but must (of course) fix a penalty within the limits appropriate to the basic offence.

13.22 In Western Australia, offences against the person are treated as aggravated if, among other things, the offender is in a ‘family and domestic relationship with the victim’,<sup>36</sup> a child was present at the time of the offence, or the conduct of the offender constituted a breach of a protection order.<sup>37</sup> The criminal legislation sets out higher penalties for a number of offences, including assault and causing grievous bodily harm where those offences are committed in aggravating circumstances.<sup>38</sup>

13.23 In both jurisdictions the existence of a family relationship between the victim and offender is expressed as a circumstance of aggravation.<sup>39</sup> There is limited precedent for aggravated offences in a family violence context in European countries. In some cases, jurisdictions with mandatory minimum sentencing schemes provide for

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32      *Criminal Law Consolidation Act 1935 (SA)* s 5AA(1)(g).

33      *Criminal Law Consolidation Act 1935 (SA)* ss 5AA(1)(a), 5AA(1)(i).

34      *Model Criminal Code* (1<sup>st</sup> ed, 2009), cl 5.1.41.

35      *R v De Simoni* (1981) 147 CLR 383.

36      ‘Family and domestic relationship’ in s 221 has the same meaning that it has in the *Restraining Orders Act 1997 (WA)* s 4: *Criminal Code Act Compilation 1913 (WA)* s 221(2).

37      *Criminal Code Act Compilation 1913 (WA)* s 221.

38      The *Criminal Code Act Compilation 1913 (WA)* s 297, sets out a maximum penalty of imprisonment for 10 years for grievous bodily harm, and imprisonment for 14 years where grievous bodily harm is committed in circumstances of aggravation.

39      The recognition of family relationships in criminal laws is considered further in Ch 14.

a higher minimum sentence in their aggravated family-violence related offences. For example, art 172 of the Criminal Code of Bosnia and Herzegovina provides that:

Aggravated Bodily Injury

- (1) Whoever inflicts a serious bodily injury upon another person or severely impairs his health, shall be punished by imprisonment for a term between six months and five years.
- (2) Whoever perpetrates the criminal offence referred to in paragraph 1 of this Article against his spouse, common-law partner, or to the parent of his child with whom he does not share a household, shall be punished by imprisonment for a term between one and five years.<sup>40</sup>

13.24 In the United States, several states recognise aggravated forms of assault or battery in respect of offences committed against persons with whom the offender is in a defined family relationship. Most criminal family-violence related provisions incorporate existing offences by reference—or are based upon the elements of existing offences—with an additional requirement of a specified relationship between the victim and defendant.<sup>41</sup> Offences against persons in defined family relationships typically carry higher penalties than basic offences. For example, in Georgia, a simple assault committed against a spouse, parent, child, sibling, co-habitant or other protected person is punishable ‘for a misdemeanour of a high and aggravated nature’, whereas a simple assault in the absence of a family relationship is punishable as a misdemeanour only.<sup>42</sup>

***The relationship between aggravated offences and sentencing factors***

13.25 Another issue is the relationship between aggravated offences and sentencing factors—in particular, aggravating sentencing factors, that is, those that increase the penalty to be imposed within the prescribed maximum for the offence. One relevant issue is when a particular circumstance ought to be specified as an element of an aggravated offence, or left to general sentencing discretion in respect of basic offences—or prescribed as an aggravating factor in sentencing legislation. In practical terms, key differences between these alternatives include the following:

- an aggravated offence attracts a higher maximum penalty than the basic offence—whereas an aggravating sentencing factor justifies a higher penalty

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40 See Directorate General of Human Rights—Council of Europe, *Legislation in the Member States of the Council of Europe in the Field of Violence Against Women* (2007), 18.

41 See, eg *Alabama Code* §§ 13A–6–130 (domestic violence offences based upon assaults committed against family members); *Mississippi Code* § 97–3–7(3),(4) (domestic violence offences based upon assaults committed against family members); *Missouri Annotated Statutes* § 565.072–074 (domestic violence offences based upon various offences against the person, including attempted murder and causing physical injury); *Montana Code* § 45–5–206(3) (partner or family member assault); *Nevada Revised Statutes* § 200.485(1) (battery which constitutes domestic violence); and *Ohio Revised Code* § 2919.25(D) (domestic violence offence based upon causing or threatening to cause physical harm to a family member).

42 *Georgia Code* § 16–5–20(d).

within the existing maximum for the basic offence,<sup>43</sup> and a non-mitigating sentencing factor will neither increase nor decrease culpability;<sup>44</sup>

- in respect of aggravated offences, it is generally accepted that the relevant circumstance of aggravation should be specified in the charge;<sup>45</sup> and
- aggravated offences require proof of the circumstances of aggravation beyond reasonable doubt—whereas the applicable standard of proof in sentencing is determined by reference to whether the factor is adverse or favourable to the interests of the accused person.<sup>46</sup>

13.26 The Commissions have not identified any existing guidelines delineating when a factor should be prescribed as an element of an aggravated offence and when it should be treated as a circumstance of aggravation in sentencing. The former Standing Committee of Attorneys-General Model Criminal Code Officers Committee (MCCOC)—now the Model Criminal Law Officers Committee (MCLOC)—considered this issue in its 1998 *Report on the Model Criminal Code—Chapter 5: Non-Fatal Offences Against the Person*. The Committee observed that ‘there are no generally articulated or agreed guidelines in existence on the question whether and when it is desirable, as a matter of principle, to make a matter one for trial or sentence’. The Committee took the view that a principal guiding criterion should be ‘whether the legislature desires that the aggravating criterion should be the subject of decision by a jury for the purposes of guilt or innocence, and whether it is sensible to ask the jury to make such a decision’.<sup>47</sup>

13.27 The Committee proposed a series of factors of aggravation for non-fatal offences against the person, including:

- in the case of the model offence of intentionally causing serious harm, the commission of the offence during torture (defined as the deliberate and systemic infliction of pain on the victim over a period of time);
- the commission of an offence by the use or threatened use of an offensive weapon;
- the commission of an offence against a child under the age of 10 years;
- the commission of an offence against a person in abuse of a position of trust; and

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<sup>43</sup> Subject to the principle in *R v De Simoni* (1981) 147 CLR 383, discussed further below.

<sup>44</sup> The use of non-mitigating sentencing factors in the family violence context is discussed below in relation to sentencing.

<sup>45</sup> *Kingswell v The Queen* (1985) 159 CLR 264, 281; *R v Meaton* (1986) 160 CLR 359, 363–364.

<sup>46</sup> Matters adverse to the interests of an accused person must be established beyond reasonable doubt, whereas matters favourable to his or her interests need only be established on the balance of probabilities: *R v Olbrich* (1999) 199 CLR 270, 281. The labelling of factors as aggravating or mitigating is not necessarily determinative of their characterisation as adverse or favourable: *R v Storey* [1998] 1 VR, 371.

<sup>47</sup> Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Non-Fatal Offences Against the Person* (1998), 113.

- the commission of an offence against a person in abuse of a position of authority.<sup>48</sup>

13.28 The Committee considered the inclusion of breach of a court order—for example, a protection order—directed against the kind of conduct involved in the offence. The Committee commented that this factor ‘generalised a factor of aggravation common to a number of stalking laws’.<sup>49</sup> However, the Committee concluded that this factor was ‘not in the same order’ as the other factors, and could be dealt with by way of sentencing discretion. It therefore raised the model maximum penalty for stalking from three years to five years.<sup>50</sup>

13.29 However, the Model Criminal Code provisions have not been implemented consistently in state and territory legislation. For example, the NSW sentencing legislation includes some of the model provisions on aggravated offences—or broadly similar circumstances of aggravation—as aggravating factors in sentencing.<sup>51</sup> As identified above, the family-violence related aggravated offences in the South Australian criminal legislation include, but are not limited to, the Model Criminal Code provisions.<sup>52</sup>

13.30 A further issue relevant to the relationship between any new aggravated family-violence related offences and circumstances of aggravation in sentencing is the principle articulated in *R v De Simoni* as noted above. It provides that:

a judge, in imposing sentence, is entitled to consider all of the conduct of the accused—including that which would aggravate the offence—but cannot take into account circumstances of aggravation which would have warranted a conviction for a more serious offence.<sup>53</sup>

13.31 Consequences of this principle include the following:

- where an accused person is convicted of a basic offence—the facts of which involve a particular circumstance that may constitute both the elements of an uncharged, aggravated form of that offence, and an aggravating factor in sentencing the basic offence—a court may not treat that circumstance as an aggravating factor in sentencing the basic offence;<sup>54</sup> and
- where a sentencing court is considering an aggravating factor in the sentencing of an offence—but that factor could have formed the basis of a charge for a different offence—it is necessary to determine whether that other offence would

48 Ibid, cl 5.1.38, 111–117. These provisions appear in the consolidated *Model Criminal Code* (1<sup>st</sup> ed, 2009) as cl 5.41.

49 Ibid, 115.

50 Ibid, 115.

51 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) ss 21A(2)(a),(c), (ea), (k).

52 See, eg, *Criminal Law Consolidation Act 1935* (SA) ss 5AA (a)-(d), 5AA(i). See also s 5AA(1)(e), which adopts the Model Criminal Code provision for the commission of an offence against a child but specifies different age ranges.

53 *R v De Simoni* (1981) 147 CLR 383, 389.

54 See, eg, *Huntingdon v R* [2007] NSWCCA; *Rend v R* [2006] NSWCCA; *R v Newham* [2005] NSWCCA.

have made the offender liable to a ‘more serious’ penalty. If so, the factor cannot be treated as an aggravating factor in sentencing the first-mentioned offence.<sup>55</sup>

13.32 Further, issues of double punishment may arise where a person is convicted of an aggravated offence, and the relevant circumstance of aggravation is also an aggravating factor in sentencing. The *Crimes (Sentencing Procedure) Act 1999* (NSW) makes provision for this contingency. Section 21A(2) provides that the court is not to have additional regard to an enumerated aggravating sentencing factor if it is an element of the offence. This provision has been interpreted as prohibiting the ‘double counting’ of circumstances of aggravation in both the elements of an offence and in sentencing.<sup>56</sup> However, the phrase ‘*additional* regard’ contemplates that a sentencing court may have some regard to the aggravated elements of an offence. The extent to which a court may do so is a question of degree—for example, a circumstance of aggravation may be relevant to a sentencing court’s consideration of the nature and seriousness of the facts of the offence.<sup>57</sup>

13.33 The NSW Court of Criminal Appeal has held that, where a circumstance of aggravation in the offence is particularly heinous, in that it ‘transcends that which would be regarded as an inherent characteristic of the offence’, it may be regarded as an aggravating factor in sentencing.<sup>58</sup> The Court has further identified the necessity of adopting a purposive approach to the comparison of circumstances of aggravation in offences and aggravating factors in sentencing.<sup>59</sup>

13.34 The introduction of any aggravated family-violence related offences would therefore require consideration of their relationship to existing circumstances of aggravation in sentencing legislation. For example—in addition to the prohibition on ‘double counting’ discussed above—the NSW sentencing legislation preserves the *De Simoni* principle. Section 21(4) provides that the Court is not to have regard to any legislatively prescribed aggravating or mitigating factors in sentencing if it would be contrary to any Act or rule of law to do so. As mentioned earlier, South Australia appears to have taken a different approach, enabling the court to take into account circumstances that would have justified a charge for an aggravated offence in sentencing a basic offence, provided that the sentence is within the prescribed limit for the basic offence.<sup>60</sup>

### **Designated family violence offences not attracting higher maximum penalty**

13.35 As discussed in Chapter 5, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) designates as ‘domestic violence offences’ certain offences committed against persons with whom the offender is in a defined family relationship.<sup>61</sup>

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55       *R v De Simoni* (1981) 147 CLR 383, 391.

56       *R v Youkhana* [2004] NSWCCA; *R v Solomon* (2005) 153 A Crim R 32; *Elyard v R* [2006] NSWCCA, [39].

57       *R v Way* (2004) 60 NSWLR 168, 189–190.

58       *Elyard v R* [2006] NSWCCA, [43].

59       *Ibid*, [9]–[10].

60       *Criminal Law Consolidation Act 1935* (SA) s 5AA(6).

61       *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 12.

Convictions for domestic violence offences are specifically identified on offenders' criminal records.<sup>62</sup> This enables the court to build a progressive record of family-violence related criminal conduct, which may be taken into account in the trial of subsequent offences. For example, the *Bail Act 1978* (NSW) excludes the presumption in favour of bail in respect of domestic violence offences where the accused person has 'a history of violence'.<sup>63</sup> The latter term is defined as including a guilty finding within the last 10 years of a 'personal violence offence'.<sup>64</sup> The *Crimes (Sentencing Procedure) Act 1999* (NSW) provides that a record of previous convictions is an aggravating factor in sentencing.<sup>65</sup>

13.36 While the ACT family violence legislation recognises 'domestic violence offences' for the purpose of defining domestic violence, it does not make express provision for a scheme for the recording and subsequent consideration of convictions for domestic violence offences.<sup>66</sup> However, previous convictions for domestic violence offences—or those not specifically designated but nevertheless committed in circumstances of family violence—may be relevant to the general exercise of discretion in relation to bail applications and in sentencing.

### Offences of economic and emotional abuse

13.37 Tasmania is the only Australian jurisdiction with specific offences in respect of economic and emotional abuse in the context of family violence. In respect of economic abuse, the *Family Violence Act 2004* (Tas) requires the offender to have an intention to unreasonably control or intimidate his or her spouse or partner (the victim), or cause mental harm, apprehension or fear in committing certain acts of economic abuse. These acts include:

- coercing the victim to relinquish control over assets or income;
- disposing of relevant property without the consent of the victim or affected child;
- preventing the victim from accessing joint assets to meet normal household expenditure; and
- withholding financial support reasonably necessary for the maintenance of the victim and any affected child.<sup>67</sup>

62 In addition, the recording of a domestic violence offence enables the prosecution to make an application to the court requesting that previous convictions are similarly recorded as domestic violence offences: *Ibid* s 12(3)–(6).

63 *Bail Act 1978* (NSW) s 9(1A)(1). The *Bail Act* also displaces the presumption in favour of bail where the accused person has been violent to the other person in the past, whether or not the accused person has been convicted of an offence in respect of the violence: s 9A (1A)(b).

64 *Bail Act 1978* (NSW) s 9(1A)(2). Bail is discussed in Ch 10.

65 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d).

66 *Domestic Violence and Protection Orders Act 2008* (ACT) s 13, sch 1. But see *Bail Act 1992* (ACT) s 9F.

67 *Family Violence Act 2004* (Tas) s 8.

13.38 In respect of emotional abuse, the *Family Violence Act* prohibits a person from pursuing ‘a course of conduct that he or she knows, or ought to know, is likely to have the effect of unreasonably controlling or intimidating, or causing mental harm, apprehension or fear in, his or her spouse or partner’.<sup>68</sup>

13.39 The Tasmanian Attorney-General explained the rationale for the economic and emotional abuse offences as recognising the non-physical dimensions of family violence, addressing the tendency of such abuse to undermine victims’ capacity to take action, and acknowledging the need to take a more holistic view of family violence.<sup>69</sup> The Commissions are not aware of any prosecutions under the *Family Violence Act* for either economic or emotional abuse.<sup>70</sup>

### **Leading evidence of an accused person’s history of family violence**

13.40 Where a person is charged with an offence alleged to have been committed as part of a broader course of family violence, family-violence related evidence—including evidence of uncharged acts of prior violence and the nature of the relationship between the parties—may be admissible, provided that it is relevant to a fact in issue.<sup>71</sup>

13.41 For example, certain family-violence related evidence has been admitted to:

- prove motive or to establish the intent of the accused, or to negative a defence of accident, self-defence or provocation;<sup>72</sup>
- assist the trier of fact to understand evidence that may otherwise be disjointed or implausible<sup>73</sup>—for example, evidence demonstrating the accused person’s or victim’s state of mind;<sup>74</sup> and
- establish a tendency on the part of an accused person to resort to violence in specific circumstances, in support of a contention he did not act in self-defence.<sup>75</sup>

68     *Family Violence Act 2004* (Tas) s 9. ‘Course of conduct’ is defined to include limiting the freedom of movement of a person’s spouse or partner by means of threats or intimidation.

69     Tasmania, *Parliamentary Debates*, House of Assembly, 18 November 2004, 166 (J Jackson—Attorney General and Minister for Justice and Industrial Relations), 100–101.

70     The 2008 review of the *Family Violence Act 2004* (Tas) commented that stakeholders were awaiting the first case based on the offence of economic abuse. While no charge had been brought for emotional abuse and intimidation, that ground has been used in support of applications for protection orders: Urbis, *Review of the Family Violence Act 2004* (2008), prepared for the Department of Justice (Tas), 11–12.

71     *Wilson v R* (1970) 123 CLR 334, 339. Such evidence may also be excluded where its prejudicial value outweighs its probative value.

72     *R v Anderson* (2000) 1 VR 1, 12. For example, evidence of a victim’s fear of her partner has been admitted to support an inference that she did not provoke him to murder her: *R v Gojanovic* (2002) 130 A Crim R 179. See also *R v Parsons* (2000) 1 VR 161.

73     See, eg, *R v AH* (1997) 42 NSWLR 702.

74     See, eg *Rodden v R* [2008] NSWCCA; *Gipp v The Queen* (1998) 194 CLR 106.

75     *R v Middendorp* [2010] VSC. The accused was found guilty of the defensive homicide of his partner: see *R v Middendorp* [2010] VSC.

### ***Legislative guidance on family-violence related evidence***

13.42 Victoria and Queensland have legislatively confirmed the potential relevance of family-violence related evidence in respect of certain criminal defences. These provisions are discussed in detail in the discussion of homicide defences in Chapter 14. In general terms, in Victoria, s 9AH of the *Crimes Act 1958* (Vic) provides that where circumstances of family violence are alleged in murder, defensive homicide or manslaughter cases, evidence of family violence may be relevant to establishing self-defence or duress. The section provides guidance about particular facts in issue to which evidence of family violence may be relevant, and the types of evidence that may be relevant.

13.43 The Queensland provision is framed in more general terms. Section 132B(2) of the *Evidence Act 1977* (Qld) provides that ‘relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed’ is admissible in criminal proceedings against a person for certain offences against the person, including homicide offences, offences endangering life or health and assaults.<sup>76</sup> However, the provision has been judicially criticised as redundant because relevant evidence is, by definition, generally admissible.<sup>77</sup> In 2000, the Taskforce on Women and the *Criminal Code* (Qld) recommended that s 132B be repealed and replaced with:

a new scheme detailing the admissibility of evidence of the domestic relationship between the accused and the complainant/victim, and including the use of expert and lay testimony, the use to which the evidence can be put, and to which offences or defences it applies.<sup>78</sup>

### ***Judicial guidance on family-violence related evidence***

13.44 Judicial bench books in some states and territories also provide some guidance about the admissibility of family-violence related evidence.<sup>79</sup> Notwithstanding these resources, some commentators have expressed concern about inconsistent judicial approaches to the admissibility of such evidence.<sup>80</sup>

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76 See *Criminal Code* (Qld) Chs 28–30.

77 *R v PAB* [2006] QCA, [28]. See also, Victorian Law Reform Commission, *Defences to Homicide: Consultation Paper* (2003), 134–135.

78 Queensland Government Office for Women, *Report of the Taskforce on Women and the Criminal Code* (2000), Rec 55.

79 See, eg, Judicial College of Victoria, *Victorian Criminal Charge Book* (updated 12 July 2010), 4.16, which refers to family-violence related case law; Supreme Court of Queensland, *Equal Treatment Bench Book* (2005), 14.4.2.

80 See, eg, P Easteal and C Feerick, ‘Sexual Assault by Male Partners: Is the Licence Still Valid?’ (2005) 8(2) *Flinders Journal of Law Reform* 185, 197–201. The authors identify inconsistencies in the treatment of relationship evidence in ‘partner rape’ trials from 1993 to 2002.

## **Federal offences relevant in the family violence context**

### ***Australian federal offences***

13.45 Federal criminal laws have limited relevance in the family violence context because they are confined to subject matters within Commonwealth legislative power.<sup>81</sup> Chapter 5 identifies relevant federal offences including:

- the use of carriage or postal services to make threats, or menace, harass or cause offence; and
- conduct constituting economic abuse—for example, offences against social security legislation in respect of coercing a family member to claim a social security payment.

13.46 Chapter 5 also identifies potentially relevant federal offences, including:

- the use of carriage services for child abuse or child pornography material; and
- sexual servitude offences where the person committing the offence is in a defined family relationship with the victim.

### ***United States federal offences***

13.47 In the United States, the *Violence Against Women Act* created federal offences in respect of acts of family violence committed across state boundaries, including:

- travelling interstate with the intent to kill, injure, harass or intimidate a spouse, intimate partner, or dating partner and—in the course, or as a result, of such travel—committing or attempting to commit a crime of violence against that person, or placing that person in reasonable fear of death or serious bodily injury or causing substantial emotional distress to that person or a family member;
- travelling interstate with the intention to violate a protection order, and subsequently engaging in such conduct in violation of the order;
- causing another person to travel interstate by force, coercion, duress or fraud—and in the course, or as a result, of such conduct—violating a protection order, or attempting to commit a crime of violence against that person; and
- using mail, an interactive computer service or any facility of interstate or foreign commerce with the intent to kill, injure, harass or cause substantial emotional distress to another person.<sup>82</sup>

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81 The *Australian Constitution* does not give the Australian Parliament a general power to make criminal laws. States and territories have primary constitutional responsibility for criminal law as part of their plenary powers to legislate for the peace, order and good government of their jurisdictions. The Commonwealth derives its constitutional authority primarily from specific heads of power in the *Australian Constitution*—for example, the enumerated legislative powers in s 51 and the executive power in s 61. See further Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [1.40]–[1.48].

82 *Violence Against Women Act of 1994* 18 USC (US) §§ 2261, 2261A, 2262.

13.48 The *Gun Control Act* similarly creates federal offences in relation to the possession and use of firearms and ammunition by persons who are the subject of protection orders, and those who are convicted of a ‘misdemeanour crime of domestic violence’. A ‘misdemeanour crime of domestic violence’ is defined as an offence under federal or state law which involves an element of the use or attempted use of physical force or threatened use of a deadly weapon, and is committed against an individual with whom the offender maintains a domestic relationship.<sup>83</sup>

13.49 Maximum penalties for offences against the *Violence Against Women Act* are gradated according to the extent of bodily injury to the victim—ranging from life imprisonment if death of the victim results, to 5, 10 or 20 years imprisonment depending on the severity of bodily injury or the use of a dangerous weapon.<sup>84</sup> Offences against the *Gun Control Act* carry a maximum penalty of 10 years imprisonment.<sup>85</sup>

### ***Canadian federal offences***

13.50 As criminal law is generally a federal responsibility in Canada, its federal offences provide limited insights for comparative purposes. Family violence is prosecuted pursuant to federal offences of general application—for example: offences against the person;<sup>86</sup> stalking, intimidation and harassment-based offences;<sup>87</sup> child abuse and abduction offences;<sup>88</sup> and breaching protection orders.<sup>89</sup> Some aggravated offences of general application are relevant to the family violence context—for example, the *Criminal Code* recognises murder committed in the course of stalking as first-degree murder, where the offender intended to instil fear in the victim for his or her safety, or that of anyone known to him or her.<sup>90</sup>

### **Options for reform**

13.51 In the Consultation Paper, the Commissions sought stakeholder views on the following non-exclusive options for the recognition of family violence in state and territory criminal law offences:

- an umbrella offence of family violence, capturing courses of conduct committed by an offender who is in a family relationship with the victim, where such behaviour is part of a pattern of power and control over the victim;<sup>91</sup>

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83     *Gun Control Act of 1968* 18 USC (US) § 922(d), (g).

84     *Violence Against Women Act of 1994* 18 USC (US) §§ 2261(b), 2262(b).

85     *Gun Control Act of 1968* 18 USC (US)§ 924(2).

86     *Criminal Code 1985* RSC c C-46 (Canada) ss 229–231, 235, 265–268.

87     Ibid ss 264, 264.1, 372, 423, 430.

88     Ibid ss 151–153, 155, 170–172, 215, 218, 280–283.

89     Ibid ss 127, 145(3), 733.1, 811.

90     Ibid s 231(6).

91     Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 7–1.

- an aggravated offence in respect of offences committed against victims with whom the offender is in a family relationship, and where the offence committed formed part of a pattern of controlling, coercive or dominating behaviour;<sup>92</sup>
- sub-categories of existing offences committed by an offender who is in a family relationship with the victim but which do not attract higher maximum penalties;<sup>93</sup> and
- offences of economic and emotional abuse committed in a family violence context.<sup>94</sup>

13.52 The Commissions also considered the recognition of family violence in federal criminal offences. In particular, the Commissions sought stakeholder views about the possibility of aggravated federal offences, or sub-categories of existing federal offences committed in the context of family violence.<sup>95</sup>

### ***Submissions and consultations***

13.53 While many submissions supported improvements to the criminal justice response to family violence, there was considerable division of opinion on the preferable form of response.

#### ***An umbrella offence of family violence***

13.54 In the Consultation Paper, the Commissions sought stakeholder views about the necessity and feasibility of creating a specific offence of family violence, and how such an offence might be conceptualised. On the latter issue, the Commissions asked whether it would be feasible to create a two-tiered offence that captured both coercive conduct and physical violence committed in a family violence context.<sup>96</sup> There was a relatively even division of views among the limited number of submissions responding to this question.

#### ***In support of an umbrella offence***

13.55 A common theme in those submissions and consultations supporting an umbrella offence was an identified need to recognise the pattern-based nature of family violence and its full impact upon victims.<sup>97</sup> For example, one legal service provider stated that existing offences and other measures—such as the use of representative charges in sentencing—do not ‘fully paint the picture of the ongoing humiliation, terror

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92 Ibid, Questions 7–2(a), 7–3, 7–4.

93 Ibid, Question 7–2(b).

94 Ibid, Question 5–5.

95 Ibid, Question 7–4.

96 Ibid, Question 7–1.

97 Confidential, *Submission FV 190*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; P Easteal, *Submission FV 38*, 13 May 2010. A small number of submissions from individuals supported a discrete offence without providing reasons: Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 125*, 20 June 2010; Confidential, *Submission FV 109*, 8 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 82*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010. See also Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010, which commented that ‘the sector is generally supportive’ of a discrete offence.

and suffering' experienced by victims of family violence. It suggested that 'a specific offence of family violence may allow for all of this evidence to be put to a court through establishing a pattern of behaviour'.<sup>98</sup>

13.56 Other submissions argued that it would be preferable to recognise the dynamics of family violence through means other than sentencing—including by way of an umbrella offence. For example, in supporting a discrete offence, Professor Patricia Easteal argued that judicial sentencing discretion in intra-familial sexual assault cases can be affected by 'mythology that characterises assault as perpetrated by strangers in unfamiliar places ... and involving physical injury'.<sup>99</sup> Easteal referred to a body of research on the trial and sentencing of sexual assaults committed in the family violence context, which found that sentences did not consistently recognise the degree of suffering experienced by victims—in particular that associated with a breach of trust. She commented that:

this research suggests that although judges today generally reject the view that a prior relationship is a mitigating factor in sentencing, they do not appear to focus on breach of trust as an aggravating variable as they do in cases of parenting-type relationships ... Despite breach of trust being stressed more in intra-family cases, sentences in those cases remained lower than where the offender was unknown to the victim and where the rape included violence rather than merely coercion.<sup>100</sup>

13.57 While not expressing a view on a discrete offence, the NSW Office of the Director of Public Prosecutions (NSW ODPP) commented that—in light of problems associated with the admissibility of uncharged conduct in sentencing—the best way to ensure that a pattern of violent behaviour is placed before the court is by the use of an offence incorporating a course of conduct.<sup>101</sup>

13.58 Some family violence service providers and individuals suggested that a discrete offence would perform an educative function. In particular, it would convey the seriousness and pattern-based nature of family violence to the community, offenders, and other participants in the criminal justice system—including judicial officers and legal representatives.<sup>102</sup>

#### *Against an umbrella offence*

13.59 Stakeholders opposing a discrete offence of family violence raised two common issues. First, some stakeholders endorsed the Commissions' preliminary views on the

98 Confidential, *Submission FV 164*, 25 June 2010. See also C Pragnell, *Submission FV 70*, 2 June 2010, who suggested that a discrete offence was necessary to recognise that family violence includes elements of violence that are not usually present in violence committed against persons unrelated to the offender.

99 P Easteal, *Submission FV 38*, 13 May 2010.

100 Ibid, citing studies including: J Kennedy, P Easteal and C Taylor, 'Rape Mythology and the Criminal Justice System: A Pilot Study of Sexual Assault Sentencing in Victoria' (2009) 23 *Australian Centre for the Study of Sexual Assault Aware Newsletter* 13; P Easteal and C Feerick, 'Sexual Assault by Male Partners: Is the Licence Still Valid?' (2005) 8(2) *Flinders Journal of Law Reform* 185; P Easteal and M Gani, 'Sexual Assault by Male Partners: a Study of Sentencing Variables' (2005) 9 *Southern Cross University Law Review* 39; C Taylor, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (2004).

101 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

102 Confidential, *Submission FV 190*, 25 June 2010; Confidential, *Submission FV 105*, 6 June 2010.

difficulties associated with conceptualising and particularising the offence.<sup>103</sup> For example, the Local Court of NSW commented that it would be difficult to conceptualise the elements of the offence, ‘given the spectrum of criminality of conduct that may amount to family violence’.<sup>104</sup> The Magistrates’ Court and the Children’s Court of Victoria commented that a discrete offence may introduce unnecessary complexity in the criminal justice process.<sup>105</sup>

13.60 The Deputy Chief Magistrate of South Australia, Dr Andrew Cannon, commented that a discrete offence may raise constitutional issues.<sup>106</sup> A failure to identify conduct captured by the offence with sufficient precision may ‘give the police and the courts … a legislative function in defining criminal conduct unknown to the existing law’.<sup>107</sup> The No To Violence Male Family Violence Prevention Association commented that the broad parameters of an umbrella offence may result in police reluctance to lay such a charge.<sup>108</sup>

13.61 A second common issue in submissions and consultations was a preference for other approaches to recognising family violence in the criminal law. Several stakeholders suggested that conduct constituting family violence is adequately recognised in existing criminal offences.<sup>109</sup> In addition, some agencies and organisations supported the NSW model of designating certain offences as ‘family violence offences’ where they are committed against persons in a defined relationship with the offender. As noted above, this creates a history of family-violence related conduct that is relevant in future proceedings—for example, in relation to bail, sentencing and protection orders. National Legal Aid, Legal Aid NSW and the Women’s Domestic Violence Court Advocacy Service Network argued that this was a preferable means of providing the courts with offenders’ histories of family violence.<sup>110</sup>

13.62 Other submissions argued that sentencing laws and practices were more appropriate forms of recognition than a new offence. For example, the Local Court of NSW referred to s 21A(2) of the *Crimes (Sentencing Procedure) Act 1999* (NSW), which provides for specific aggravating factors in sentencing. The Court noted that some factors were included specifically to address offences committed in the family violence context.<sup>111</sup> The Court considered that this provision—together with ‘the

<sup>103</sup> A Cannon, *Submission FV 137*, 23 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010; Office of the Director of Public Prosecutions (WA), *Consultation*, Perth, 4 May 2010.

<sup>104</sup> Local Court of NSW, *Submission FV 101*, 4 June 2010.

<sup>105</sup> Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

<sup>106</sup> A Cannon, *Submission FV 137*, 23 June 2010.

<sup>107</sup> Ibid.

<sup>108</sup> No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

<sup>109</sup> National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; A Cannon, *Submission FV 137*, 23 June 2010; Office of the Director of Public Prosecutions (WA), *Consultation*, Perth, 4 May 2010.

<sup>110</sup> National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

<sup>111</sup> Local Court of NSW, *Submission FV 101*, 4 June 2010.

consistent approach of the courts in NSW ... to reinforce the need for general deterrence and denunciation'—was preferable to an umbrella offence.<sup>112</sup> The Law Society of NSW made a general comment that the options for reform appeared to assume that family violence 'is not sufficiently taken into account in the sentencing process'.<sup>113</sup> It emphasised the importance of sentencing discretion to take account of the 'varied and dynamic' situations of family violence that attract criminal sanctions.<sup>114</sup>

13.63 Some submissions argued that a more effective response would be to improve the practical application of existing laws.<sup>115</sup> The Queensland Law Society identified the 'real issue' as 'the desire, ability and resources of police' to prosecute family-violence related offences, and 'the granting of appropriate penalties by courts in sentencing'.<sup>116</sup> It supported a coordinated community response and the deployment of specialist police to family justice centres.<sup>117</sup> Women's Legal Service Queensland argued that a new offence would not address the 'existing problems of a lack of understanding of the dynamics of violence' on the part of lawyers, judicial officers and police.<sup>118</sup>

13.64 Other arguments against the introduction of a new offence were that the consolidation of existing offences into a single category would not necessarily improve outcomes,<sup>119</sup> and the desirability of maintaining parity of criminal law responses to all types of violence.<sup>120</sup> Two stakeholders suggested that a separate offence should be the subject of further inquiry.<sup>121</sup>

#### *Conceptualising an umbrella offence*

13.65 The majority of submissions did not make any specific proposals about how an umbrella offence could be conceptualised. Easteal supported the illustrative example in the Consultation Paper of a two-tiered offence incorporating coercive conduct and physical violence.<sup>122</sup> Easteal recommended the inclusion of sexual violence as an element of the offence and emphasised the need to clearly define the types of coercion and control captured by the offence.<sup>123</sup> The Magistrates' Court and the Children's

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112 Ibid.

113 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

114 Ibid. See also North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010, which expressed similar views on sentencing discretion in family violence cases generally. Sentencing is considered further below.

115 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

116 Queensland Law Society, *Submission FV 178*, 25 June 2010.

117 Ibid.

118 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

119 Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

120 Confidential, *Submission FV 198*, 25 June 2010.

121 Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192*, 25 June 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010. See also Berry Street Inc, *Submission FV 163*, 25 June 2010 which acknowledged the need to recognise the nature and dynamics of family violence and discussed the merits and drawbacks of various options, but expressed uncertainty as to how best to proceed.

122 P Easteal, *Submission FV 38*, 13 May 2010.

123 Ibid.

Court of Victoria commented on the potential difficulty of conceptualising a two-tiered approach.<sup>124</sup>

#### ***Aggravated offences occurring in a family violence context***

13.66 In the Consultation Paper, the Commissions sought stakeholder views as to whether state and territory criminal legislation should provide that offences are aggravated where the offender is in a family relationship with the victim, and where the offence formed part of a pattern of controlling, coercive or dominating behaviour.<sup>125</sup> The Commissions asked whether a similar approach should be taken in respect of federal offences, and sought stakeholder views on relevant federal offences.<sup>126</sup>

13.67 The Commissions also sought stakeholder views on the family relationships that should be recognised for the purposes of aggravated offences.<sup>127</sup> As the recognition of categories of family relationships in criminal laws is relevant to offences, defences and sentencing, it is considered separately in Chapter 14.

13.68 There was no identifiable consensus among stakeholders on the desirability of an aggravated offence. Submissions were divided between recognising family violence as an aggravated offence or as an aggravating factor in sentencing basic offences.<sup>128</sup> Of those submissions supporting an aggravated offence, there were differences of opinion about the appropriate basis for aggravation.<sup>129</sup>

#### ***Submissions and consultations supporting an aggravated offence***

13.69 The majority of stakeholders supporting an aggravated offence did not advance reasons for their positions.<sup>130</sup> However, some stakeholders considered that an aggravated offence—and the associated higher maximum penalties—would appropriately recognise the seriousness and unacceptability of family violence.<sup>131</sup> One legal service provider suggested that an aggravated offence was preferable to an umbrella offence because it was based on existing criminal offences.<sup>132</sup> Another

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124 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

125 Consultation Paper, Question 7–2.

126 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 7–4.

127 Ibid.

128 Aggravating and mitigating factors in sentencing are considered below.

129 As outlined below.

130 See, eg, J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; N Ross, *Submission FV 129*, 21 June 2010.

131 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010

132 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

recommended that an aggravated offence should also attract higher *minimum* penalties, on the basis that minimum penalties are more commonly applied.<sup>133</sup>

### **The basis of aggravation**

13.70 The majority of submissions supporting an aggravated offence concurred with the Commissions' preliminary view that a family relationship alone was an insufficient basis for aggravation.<sup>134</sup> However, one legal service provider argued that a family relationship should be recognised as a circumstance of aggravation of itself, because it may be difficult to prove, in addition, a pattern of behaviour.<sup>135</sup> Conversely, Professor Julie Stubbs submitted that a pattern of behaviour should be the sole basis for aggravation rather than a family relationship per se. Stubbs argued that proceeding on the basis of a family relationship would undesirably import an assessment of 'the importance of family versus strangers'.<sup>136</sup>

### **Submissions and consultations opposing an aggravated offence**

13.71 Several stakeholders argued that aggravating circumstances associated with family-violence related conduct are more appropriately addressed in sentencing,<sup>137</sup> or that patterns of behaviour are matters for judicial education and training.<sup>138</sup> Some NSW-based agencies favoured the legislative designation of aggravating circumstances in sentencing, suggesting that existing provisions in s 21A of the *Crimes (Sentencing Procedure) Act 1999* (NSW) already address most family-violence related offences in an adequate manner.<sup>139</sup>

13.72 Others emphasised the importance of judicial sentencing discretion.<sup>140</sup> The North Australian Aboriginal Justice Agency (NAAJA) recommended that 'courts should retain unfettered discretion to sentence a defendant according to the seriousness of a particular case'.<sup>141</sup> It argued that:

aggravated factors, of themselves, are of little utility and can result in unjust sentencing outcomes. For example, a court may consider itself compelled to sentence

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133 Confidential, *Submission FV 164*, 25 June 2010.

134 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

135 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

136 J Stubbs, *Submission FV 186*, 25 June 2010.

137 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010. See also Law Society of New South Wales, *Submission FV 205*, 30 June 2010, which commented on the importance of sentencing discretion generally.

138 National Legal Aid, *Submission FV 232*, 15 July 2010.

139 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010. See also National Legal Aid, *Submission FV 232*, 15 July 2010.

140 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010.

141 North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010.

more harshly on the basis of a so-called aggravating factor where the circumstances of the case would not otherwise warrant it to sentence in that manner.<sup>142</sup>

13.73 NAAJA considered that the concept of ‘controlling, coercive or dominating’ behaviour is ambiguous and may capture non-criminal behaviour—for example, parental discipline of children.<sup>143</sup> National Legal Aid expressed concerns that reliance on a pattern of controlling, coercive or dominating behaviour as an aggravating factor may risk taking into account uncharged conduct. It considered that the significance of the family relationship is a matter appropriate for education and training.<sup>144</sup>

#### ***Sub-categories of existing offences—no higher maximum penalty***

13.74 In the alternative to umbrella or aggravated offences of family violence, in the Consultation Paper the Commissions sought stakeholder views on the creation of specific offences committed by an offender who is in a family relationship with the victim, but which do not attract a higher maximum penalty.<sup>145</sup>

13.75 Few stakeholders commented on this issue. One stakeholder expressly supported this option without explanation;<sup>146</sup> another opposed it without explanation.<sup>147</sup> The Magistrates’ Court and the Children’s Court of Victoria and No To Violence acknowledged the potential educative function of separate offences but ultimately supported an aggravated offence.<sup>148</sup> The Magistrates’ Court and the Children’s Court of Victoria also suggested that this approach would not unnecessarily clutter state and territory criminal laws due to the existence of other legislation addressing the relationship between the offender and the victim.<sup>149</sup>

13.76 The National Association of Services Against Sexual Violence opposed this option on the basis that it ‘maintains the false dichotomy that sexual assaults on family members are not sexual assaults or a crime in the same way other sexual assaults are’.<sup>150</sup>

#### ***Federal offences***

13.77 In the Consultation Paper, the Commissions sought stakeholder views about the recognition of family violence in federal criminal offences. They asked whether federal

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142 Ibid.

143 Ibid. NAAJA also referred to circumstances of aggravation in relation to assault offences in the Northern Territory *Criminal Code* that it considered inappropriately removed judicial sentencing discretion—for example, where the victim is female and the defendant is male, or where the victim is a child under the age of 16 years and the defendant is an adult. NAAJA submitted that it is not always just or appropriate to mandate these circumstances as aggravating.

144 National Legal Aid, *Submission FV 232*, 15 July 2010. See also Law Society of New South Wales, *Submission FV 205*, 30 June 2010, which expressed the general view that, as a matter of fairness, an offender should not be sentenced on the basis of uncharged conduct.

145 Consultation Paper, Question 7–2(b).

146 P Easteal, *Submission FV 38*, 13 May 2010.

147 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

148 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

149 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

150 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

criminal legislation should be amended to include specific offences committed by an offender who is in a family relationship with the victim, and whether such offences should attract a higher maximum penalty. The Commissions sought stakeholder views on specific federal offences suitable for recognition in the family violence context.<sup>151</sup>

13.78 Several stakeholders supported a consistent approach among federal, state and territory laws to the designation of aggravated or separate family-violence related offences.<sup>152</sup> However no submissions identified specific, existing federal offences suitable for such an approach.<sup>153</sup> The Magistrates' Court and the Children's Court of Victoria commented on the desirability of federal legislation governing the contravention of protection orders occurring across state or territory borders. The courts stated that 'it is very difficult to enforce ... orders that are breached by threats, intimidation or harassment when the offender is in one state and the victim in another'.<sup>154</sup>

### ***Economic and emotional abuse***

13.79 In the Consultation Paper, the Commissions sought stakeholder views about the necessity and desirability of creating specific criminal offences for economic and emotional abuse committed in a family violence context.<sup>155</sup> Responses to this question were divided.

#### ***Submissions supporting new offences***

13.80 Some stakeholders supported the criminalisation of both economic and emotional abuse, primarily on the basis that these forms of abuse are often core components of family violence.<sup>156</sup> The Department of Premier and Cabinet (Tas) submitted that the economic and emotional abuse offences in the Tasmanian criminal legislation are necessary and desirable because they can improve understanding of the severity and unacceptable nature of such conduct.<sup>157</sup> The Department identified several beneficial flow-on effects, including: strengthening the basis for making protection orders in cases of economic and emotional abuse; acting as a general deterrent; and enlivening victims' compensation entitlements in the event of a successful prosecution.<sup>158</sup>

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151 Consultation Paper, Question 7–4.

152 See, eg, J Stubbs, *Submission FV 186*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

153 However one legal service provider expressed a general view that federal offences pertaining to sexual assault should be included in any such approach: Confidential, *Submission FV 183*, 25 June 2010.

154 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

155 Consultation Paper, Question 5–5.

156 See, eg, C Pragnell, *Submission FV 70*, 2 June 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

157 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

158 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010. National Legal Aid also commented upon these particular effects, without expressing a view on the desirability of creating discrete offences: National Legal Aid, *Submission FV 232*, 15 July 2010.

13.81 The Department submitted that the absence of prosecutions for these offences to date suggests that they are not being utilised in inappropriate circumstances. It noted that economic abuse is difficult to prove—in particular where some instances of conduct are merely frugal or greedy, while others are coercive or controlling.<sup>159</sup> The Department submitted that ‘generally, the kinds of examples of economic abuse which could be prosecuted occur in cases where there is long-term and extremely violent conduct occurring’.<sup>160</sup>

13.82 Some organisations and individuals expressed particular support for an offence of emotional abuse.<sup>161</sup> For example, the Australian Domestic and Family Violence Clearinghouse argued:

Emotional abuse which causes harm which undermines community safety and the public interest ought to be addressed under criminal laws. There are many anecdotes from within our sector of emotional abuse of women and children which would have the requisite seriousness and severity to suggest applicability of criminal laws.<sup>162</sup>

#### *Submissions opposing new offences*

13.83 Many submissions opposed new offences for similar reasons to those applying to an umbrella offence. Stakeholders identified difficulties in defining, proving, administering and enforcing the offences.<sup>163</sup> For example, the Victorian Government argued that emotional abuse would be ‘very difficult to define with the degree of specificity necessary to constitute a criminal offence’.<sup>164</sup> While neither supporting nor opposing new offences, National Legal Aid cited the difficulty in distinguishing between merely frugal or greedy and coercive and controlling conduct as a potential problem in defining an economic abuse offence, rather than as a protection against inappropriate use.<sup>165</sup>

13.84 Some stakeholders considered that economic and emotional abuse are adequately addressed by existing offences such as fraud, blackmail and fraudulently inducing a person to invest.<sup>166</sup> NAAJA expressed ‘grave concerns’ that criminalising

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159 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010. See also, the submission of National Legal Aid, which cited these factors as potential impediments to the creation and appropriate use of an economic abuse offence: National Legal Aid, *Submission FV 232*, 15 July 2010.

160 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

161 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; T Searle, *Submission FV 108*, 2 June 2010.

162 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

163 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiyia Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Police Association of New South Wales, *Submission FV 145*, 24 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

164 Victorian Government, *Submission FV 120*, 15 June 2010. See also Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

165 National Legal Aid, *Submission FV 232*, 15 July 2010, cf the views of the Department of Premier and Cabinet (Tas); Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

166 Victorian Government, *Submission FV 120*, 15 June 2010. See also Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

economic and emotional abuse ‘would result in more Aboriginal people being incarcerated with little or no idea why’.<sup>167</sup>

### Commissions’ views

#### *Overall approach to new criminal offences*

13.85 Overall, the Commissions take the view that it would be premature to recommend any new forms of family-violence related criminal offences at the present time. In taking this position, the Commissions are guided by a number of factors, including:

- the necessarily high-level analysis of criminal offences in this Inquiry, having regard to the breadth of the Commissions’ Terms of Reference;
- the substantial difficulties associated with conceptualising and defining effective and enforceable new offences;
- the identified scope for improvements to existing criminal justice responses to family violence—including in the enforcement of existing offences;
- the absence of detailed evidence about the operation of recent reforms in some jurisdictions—for example, aggravated offences in Western Australia and South Australia, and economic and emotional abuse offences in Tasmania; and
- the significant divisions of stakeholder opinions on the preferable form of any new offence provisions.

13.86 The Commissions regard the third factor as particularly determinative. Most submissions supporting new criminal offences did so on the basis that existing criminal law responses—in particular, sentencing discretion—failed to recognise adequately the nature and dynamics of family violence. A key theme was that new offence provisions would provide direction and guidance. While new offences may be one means of achieving this outcome, the Commissions consider that new offences are justified only where it can be established that the mischief sought to be addressed cannot be adequately dealt with under the existing legislative framework. To this end, the Commissions make recommendations for practical reforms aimed at improving the understanding of the dynamics of family violence in criminal justice responses. These include recommendations directed at the sentencing of family-violence related offences<sup>168</sup> and the development of specialised family violence courts and police units.<sup>169</sup> The Commissions consider that these measures should be implemented and given an opportunity to take effect as a precondition to any future consideration of creating new criminal offences. The Commissions reiterate their view that improvements in the criminal justice response are only part of an integrated response to family violence.

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<sup>167</sup> North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010.

<sup>168</sup> See Recs 13–1(b) and 13–3 below.

<sup>169</sup> See Ch 32.

13.87 In taking this position, the Commissions do not categorically oppose the development of new offences in the future. Rather, they emphasise the importance of an incremental and evidence-based approach to the recognition of family violence in criminal laws. In the Commissions' view, a preferable approach would be for jurisdictions to focus on improving their existing practices, undertaking ongoing evaluations of current measures—particularly recent reforms—and remaining open to considering new offences in the longer term, on a needs basis.

#### ***An umbrella offence of family violence***

13.88 The Commissions do not support the creation of an umbrella offence of family violence at this time. The Commissions maintain their preliminary view expressed in the Consultation Paper that there are significant difficulties in conceptualising the exact parameters of an umbrella offence, and in particular whether such an offence should be framed to include conduct that is not generally recognised under existing criminal laws—for example, economic and emotional abuse. This raises a fundamental issue concerning the proper delineation of civil and criminal redress. As discussed below, the Commissions are not satisfied that it is necessary or appropriate to criminalise such conduct.

13.89 The Commissions agree with those submissions identifying practical difficulties in particularising the conduct captured by an umbrella offence. In addition to potential constitutional impediments and prosecutorial reluctance to lay charges, an umbrella offence may present difficulties in providing accused persons with adequate particulars of the conduct constituting the charge. The Commissions acknowledge that these difficulties are not necessarily insurmountable—as demonstrated by the existence of course of conduct-based offences in Australian criminal laws in relation to persistent child sexual abuse. However, these offences have received limited use, and have been the subject of legal challenges necessitating amendments in some jurisdictions. In the Commissions' view, this suggests a need to accumulate and evaluate experience in using course of conduct-based offences before they are replicated in other areas.<sup>170</sup>

13.90 The Commissions acknowledge, however, that an umbrella offence may potentially recognise and facilitate understanding of the dynamics of family violence in the criminal justice system. The significant anecdotal evidence presented by stakeholders suggests that there is currently an inconsistent understanding of the dynamics of family violence on the part of system participants—including police, lawyers and judicial officers. However, the Commissions consider that there is insufficient evidence to conclude that improvements cannot be realised within existing frameworks, or that an umbrella offence would necessarily achieve the desired outcomes.

13.91 The Commissions agree with stakeholder suggestions that a preferable approach would be for state and territory governments to examine the operation of—and consider making improvements to—existing responses before contemplating an umbrella offence. To this end, the Commissions make recommendations in respect of

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170 The specific offences pertaining to persistent child sexual abuse are considered in Ch 25.

recognising courses of conduct in sentencing,<sup>171</sup> integrated responses and best practice,<sup>172</sup> and specialised prosecution and policing measures.<sup>173</sup>

13.92 The Commissions further acknowledge the importance of education and training measures to improve understanding of the dynamics of family violence within the system. This includes the relevance of family violence-related evidence in the prosecution of existing criminal offences. The Commissions endorse the recommendation of the National Council to Reduce Violence Against Women and their Children for the production of a national bench book on family violence, in consultation with jurisdictions, and as part of a national professional development program for judicial officers on family violence. The Commissions consider that such a bench book should, among other things, specifically address the potential relevance of family-violence related evidence in respect of offences committed in the family violence context. This matter is the subject of Recommendation 13–1(a) below.

#### ***Aggravated offences with a higher maximum penalty***

13.93 Similarly, the Commissions do not recommend the development of aggravated offences committed in the family violence context at this time. Aggravated offences may potentially serve educational or denunciatory functions, and may be a more feasible option than an umbrella offence in that they are based on existing criminal offences. However, the Commissions consider that there is insufficient evidence on which to make a recommendation for the creation of such offences.

13.94 The division of stakeholder preferences between aggravated offences and aggravating factors in sentencing make necessary further analysis of these alternatives before the enactment of aggravated offences can be considered. In particular, it would be necessary to examine the sufficiency and appropriateness of the range of existing basic and aggravated offences relevant to the family violence context and their application in practice, including:

- the sufficiency of existing maximum penalties in punishing basic and aggravated offences committed in the family violence context;
- the exercise of sentencing discretion in these cases;<sup>174</sup> and
- in respect of existing basic offences—the substance and application of any relevant statutory sentencing factors in the family violence context.

13.95 Given the Commissions' preference for incremental reform that first addresses matters of operation and implementation, they do not make any recommendations in relation to potential aggravated offences at this time. However, the matters listed above would be appropriate for detailed research and analysis by state and territory

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171 Recommendations 13–1, 13–2 and 13–3 below.

172 Ch 29.

173 Ch 32.

174 For example, the extent to which circumstances of family violence are recognised as aggravating factors in appropriate cases. See, eg, *R v MFP* [2001] VSCA .

governments contemplating the introduction of aggravated family-violence related offences in the future.

13.96 As a general proposition, the Commissions consider that national consistency of criminal laws is a desirable objective. To that end, they recognise the benefit of considering aggravated family-violence related offences in a national forum such as the SCAG MCLOC. The considerable work undertaken on the *Model Criminal Code*—in particular the aggravated non-fatal offence provisions in Chapter 5<sup>175</sup>—should inform any future consideration of aggravated offences in the family violence context.

13.97 The Commissions note, however, that the *Model Criminal Code* provisions have been implemented inconsistently across jurisdictions. National consideration of aggravated offences in the family violence context may provide an opportunity to identify the reasons the aggravated offence provisions do not appear to have received uniform support. It may also facilitate consensus about the conceptual basis for the designation of aggravated offences, as distinct from allowing for aggravating circumstances to be taken into account in sentencing.

13.98 If jurisdictions elect to consider enacting aggravated family-violence related offences, the Commissions make four observations about the substance of such provisions. First, the Commissions caution against the prescription of minimum penalties as suggested in one submission.<sup>176</sup> In the context of discussing sentencing options in relation to federal offenders in the report *Same Crime, Same Time: Sentencing of Federal Offenders* (Report ALRC 103) the ALRC expressed the view that mandatory terms of imprisonment are generally incompatible with sound practice and principle. The ALRC emphasised the importance of sentencing discretion to enable justice to be done in individual cases, and concluded that the legislature should not prejudge the appropriate minimum penalty in legislation without regard to the facts of individual cases.<sup>177</sup> The Commissions endorse this view, which is consistent with the guiding principle of fairness identified in Chapter 3.

13.99 Secondly, the Commissions maintain their views expressed in the Consultation Paper that a defined family relationship between the victim and offender should not be the sole basis for aggravating an offence. In the Commissions' view, this elevates, by definition, the status of offences committed against family members over those committed against strangers, without principled justification.<sup>178</sup> It further creates an unacceptable risk that persons may be charged with aggravated offences in circumstances where it may not always be just and appropriate to do so—for example, where an alleged offender has a mental illness, is a child with substance abuse issues, or is a victim of family violence who uses defensive force to protect themselves or another family member. While prosecutorial discretion may reduce the likelihood of

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<sup>175</sup> *Model Criminal Code* (1<sup>st</sup> edn, 2009) cl 5.1.41.

<sup>176</sup> Confidential, *Submission FV 164*, 25 June 2010.

<sup>177</sup> Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [6.61], [6.65]–[6.61], Rec 6–1.

<sup>178</sup> The Commissions emphasise, however, that this point is distinct from the recognition, where appropriate, of a family relationship between the offender and the victim as an aggravating factor in sentencing, as a matter of sentencing discretion: see *R v MFP* [2001] VSCA , discussed below.

prosecutions for aggravated offences in such circumstances, the Commissions consider that it is undesirable to leave open this possibility, given the gravity of the potential consequences for accused persons in these circumstances.

13.100 The Commissions acknowledge that factors additional or alternative to the existence of a family relationship may be more difficult to prove. However, the Commissions consider that the concept of family violence itself necessitates some form of proof of the underlying dynamics of power and control in the relationship. The mere existence of a family relationship between parties is inconclusive of this matter. Requiring proof of such matters is also proportionate to the increased gravity of the consequences for persons convicted of aggravated offences.

13.101 Thirdly, the Commissions take the view that the relevant factors of aggravation for offences should be the subject of further examination by those state and territory governments that elect to pursue aggravated family-violence related offences. This includes the question of whether aggravated offences should be created specifically in relation to family violence, or whether they should encompass offences committed in the context of relationships of power and control more generally. The Commissions tend towards the latter option because it would avoid the potential problems of elevating the status of violence committed against a family member over similar violence committed against a stranger. The Commissions also reiterate their comments about the desirability of national consistency.

13.102 In the Consultation Paper, the Commissions cited the commission of an offence within a pattern of coercive, controlling or dominating behaviour as an example of a potential circumstance warranting a charge for an aggravated offence. The Commissions agree with stakeholder contentions that this exact formulation may be problematic. In particular, it may capture non-criminal conduct or take into account uncharged conduct. The Commissions consider that the circumstances of aggravation contained in the *Model Criminal Code* pertaining to the commission of offences during torture or in the abuse of a relationship of trust or authority may provide an instructive basis for further consideration. In particular, the Commissions note that such offences are capable of application to all forms of violence without distinction on the basis of the relationship between the accused person and the victim.

13.103 Finally, the Commissions suggest that jurisdictions considering the introduction of aggravated family-violence related offences should clearly address the relationship between these offences and existing circumstances of aggravation in sentencing legislation. For example, where an accused person is charged with a basic offence in respect of conduct that could have sustained a charge under an aggravated offence, the sentencing legislation should make express provision as to the relevance, if any, that the aggravating circumstances may have in sentencing. The Commissions also emphasise the importance of prosecutorial guidelines, education and training addressing the appropriate use of any aggravated family-violence related offences.

***Sub-categories of existing offences committed in a family violence context, without a higher maximum penalty***

13.104 The Commissions do not make any recommendations in respect of separate offences—which do not attract higher maximum penalties—where they are committed against persons who are in a defined family relationship with the offender. The Commissions acknowledge that such offences could play a potential educative function, and that they may not necessarily ‘clutter’ existing criminal laws. However, the Commissions consider that the creation of new offences for educative purposes should be undertaken only where there is a demonstrated need for this particular form of response. The Commissions are not convinced that the options for implementing educative measures within existing frameworks have been exhausted.<sup>179</sup>

***Federal offences***

13.105 The Commissions do not make any recommendations in respect of the creation of new federal family-violence related offences. The Commissions consider that the absence of adequate statistics on the types of existing federal offences committed against family members<sup>180</sup> precludes the making of further recommendations about the creation of new offences and the nature of penalties. This matter would be appropriate for further consideration once such baseline evidence is available.

13.106 The Commissions acknowledge the concerns expressed by stakeholders about the enforcement of breaches of protection orders that are committed by offenders located in other states. However, the Commissions are unconvinced that a new scheme of federal offences—such as the United States *Violence Against Women Act*—is an appropriate response at this time. In Chapter 30, the Commissions endorse the recommendation of the National Council for the development of a national protection orders database, as part of the Australian Government’s commitment to the implementation of a system for the registration and recognition of protection orders. The Commissions consider that these measures will facilitate the enforcement of protection orders across state and territory boundaries, however they emphasise the importance of undertaking ongoing monitoring and evaluation of outcomes. The Commissions further observe that any future consideration of new federal offences in the nature of the United States *Violence Against Women Act* would require identification of an appropriate head of Commonwealth constitutional power.

***Economic and emotional abuse offences***

13.107 The Commissions do not make any recommendations in respect of economic or emotional abuse offences. Overall, stakeholder views confirmed the Commissions’ preliminary concerns about the feasibility of criminalising economic and emotional abuse, and the absence of evidence to justify the creation of new offences. In particular,

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179 In Ch 5, the Commissions express their views on the separate issue of linking the definitions of family violence in family violence legislation to the criminal law, through the designation of specific ‘family violence offences’.

180 See Ch 5.

the Commissions note the difficulties in defining the conduct captured by these offences with sufficient particularity. They also note the potential difficulties in enforcing and proving these offences beyond reasonable doubt. The Commissions further note that there have been no prosecutions for such offences in Tasmania—the only jurisdiction to have embraced this approach. Accordingly, there is no evidence base to allow adequate consideration of this issue at this stage.

13.108 In addition, a discrete offence for economic abuse appears to be unnecessary given the existence of other criminal offences such as: obtaining a financial advantage or causing financial disadvantage;<sup>181</sup> obtaining property belonging to another;<sup>182</sup> fraud;<sup>183</sup> and failure to provide the necessities of life.<sup>184</sup> As noted above, coercing a family member to claim a social security payment is recognised as economic abuse amounting to family violence in some jurisdictions.<sup>185</sup> Such behaviour could conceivably also fall within the ambit of offences under social security legislation or the *Criminal Code* (Cth) relating to fraudulent conduct.

13.109 Evidence of economic and emotional abuse may also have broader relevance to existing criminal offences and defences where patterns of family-violence related behaviour are relevant to the facts in issue. For example, evidence of patterns of past abuse may be relevant to defences where victims of family violence commit crimes under duress or in self-defence.

13.110 In addition, as identified in Chapter 5, economic and emotional abuse may be the subject of a civil family violence protection order. Breach of a protection order is a criminal offence in all Australian states and territories. Existing civil laws may also provide remedies for some instances of economic abuse. For example, contracts review legislation<sup>186</sup> or common law or equitable remedies may be used to set aside or vary unjust financial contracts—such as where a family violence victim is coerced to sign a document transferring property. The Commissions note that there may arguably be a material inequality in the bargaining power of a victim of family violence and an aggressor, such that it may not be reasonably practicable for a victim of family violence to negotiate a contract with or for the benefit of the aggressor.

13.111 The Commissions make no recommendations in respect of the existing offences in the Tasmanian family violence legislation, in the absence of evidence about their operation. However, the Commissions emphasise the importance of the ongoing monitoring and evaluation of these provisions, with a view to ensuring that they are enforceable in practice.

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181 See, eg, *Crimes Act 1900* (NSW) s 192D.

182 See, eg, *Ibid* s 192C.

183 See, eg, *Ibid* s 192E.

184 These offences are discussed in the context of child protection in Ch 20.

185 See, eg, *Family Violence Protection Act 2008* (Vic) s 6.

186 See, eg, *Contracts Review Act 1980* (NSW) s 7.

## **Recognising family violence in sentencing**

13.112 The dynamics of family violence can also be recognised to some extent in the sentencing of offenders who are found guilty of crimes committed in circumstances of family violence. This includes by way of the following forms of recognition:

- the fact that the offence being sentenced was committed as part of a broader course of family-violence related conduct; and
- the presence of any jurisdiction-specific aggravating or non-mitigating circumstances relevant to the family violence context—for example, the existence of a family relationship between the offender and victim, or the commission of the offence in abuse of a position of trust or authority in relation to the victim, or in breach of a protection order.

13.113 These matters are the focus of this section. In addition, the Commissions consider practical strategies to promote the consistent recognition and treatment of family-violence related factors in sentencing, in line with the Commissions' guiding principle of fairness.<sup>187</sup>

### **Recognising courses of family-violence related conduct in sentencing**

13.114 One stakeholder commented that:

Perhaps there is space for evidence of a pattern of domestic violence to be a factor in sentencing. By this I mean that the standard assault charges be laid, but when it comes to sentencing, evidence that establishes a pattern of domestic violence would result in a premium being added to whatever sentence is assigned to the proved assault. This way there is no diminishing of the seriousness of the assault charge by putting it in a special category of ‘domestic violence’ but the fact that it is not a simple one-off assault is also taken into account.<sup>188</sup>

13.115 This raises the following issues—which are examined below:

- the available legal mechanisms for taking a course of conduct into account in sentencing specific offences;
- the particulars of these mechanisms, including: the stage at which such a course of conduct is proved; the manner of proof and the standard of proof; and whether the course of conduct is limited to proven acts of a criminal nature—as opposed to unproven criminal acts, or acts which are not generally criminal such as economic or emotional abuse; and
- the extent to which these mechanisms are currently used in respect of offences committed in circumstances of family violence.

13.116 The emphasis of this chapter is upon courses of conduct comprising *uncharged* conduct, or a combination of uncharged conduct and a small number of charges. As mentioned earlier in this chapter, the Commissions have heard concerns

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187 See Ch 3.

188 *Comment on ALRC Family Violence Online Forum: Women’s Legal Service Providers.*

from stakeholders that persons who have committed family violence over a period of time are often prosecuted for only a small number of incidents, due to difficulties in proving specific incidents in the course of ongoing violence. Accordingly, the Commissions have not given consideration to the sentencing of multiple offences in circumstances where most or all incidents forming part of a course of conduct are the subject of individual charges. In particular, the Commissions have not addressed issues relating to the imposition of concurrent or cumulative sentences in respect of multiple offences that form part of a course of conduct.<sup>189</sup>

### **Sentencing legislation**

13.117 Most state and territory sentencing legislation does not expressly refer to a course of conduct as a sentencing factor. One exception is the sentencing legislation of the ACT, which provides that a court sentencing an offender must take into account, where relevant and known:

if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character—the course of conduct.<sup>190</sup>

13.118 There is also reference to a course of conduct in the sentencing legislation of South Australia. Under that legislation, in order to assist a court to determine the sentence for an offence, a prosecutor is required to furnish the court with particulars of injury, loss or damage resulting from

a course of conduct consisting of a series of criminal acts of the same or a similar character of which the offence for which sentence is to be imposed forms part.<sup>191</sup>

13.119 The absence of express recognition of a course of conduct in sentencing legislation may be attributable to legal uncertainty about whether a sentencing court can take into account conduct in respect of which an offender has not been charged.

13.120 The ACT provision is expressed in the same terms as the federal sentencing legislation—s 16A(2)(c) of the *Crimes Act 1914* (Cth).<sup>192</sup> There has been case law in respect of the federal provision which reveals judicial disagreement about its meaning and ambit. In *Weininger v The Queen*, Kirby J stated that s 16A(2)(c) did not allow ‘uncharged criminal acts’ to be taken into account in sentencing and expressed the view that the section was an attempt to express the totality principle.<sup>193</sup> Callinan J, however, expressed the view that the section allowed a court to consider relevant conduct,

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189 The term ‘concurrent’ refers to sentences for multiple offences to be served at the same time. The term ‘cumulative’ refers to sentences for multiple offences to be served one after the other.

190 *Crimes (Sentencing) Act 2005* (ACT) s 33.

191 *Criminal Law (Sentencing) Act 1988* (SA) s 7(1)(b)(ii).

192 *Crimes Act 1914* (Cth) s 16A sets out factors a court must take into account in the sentencing of federal offenders.

193 *Weininger v The Queen* (2003) 212 CLR 629, 647. The totality principle is relevant to the sentencing of offenders for multiple offences. It ensures that an offender who is sentenced for multiple offences receives an appropriate sentence overall and not a ‘crushing sentence’. See Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [5.12]–[5.15].

albeit that it might involve criminal acts which in turn might not have resulted in charged and established (by verdict or plea) facts constituting other offences.<sup>194</sup>

13.121 Submissions and consultations in the course of the ALRC's inquiry into the sentencing of federal offenders reflected confusion about the meaning and operation of s 16A(2)(c), and the ALRC recommended that the section be redrafted to provide greater clarity.<sup>195</sup>

### ***Representative charges***

13.122 A provision allowing a course of conduct to be taken into account is also relevant where representative charges are used—that is, where a court sentences an offender for a limited or representative number of offences on the basis that those offences are part of a wider course of conduct. Representative charges have been used in sexual assault cases, those involving the apprehension of ‘serial offenders’ and corporate criminal and fraud matters.<sup>196</sup> The uncharged offences cannot be used to increase the maximum penalties available for the offences charged, but may provide a basis for refusing to extend any leniency that may otherwise have been extended if the charged offences were isolated incidents.<sup>197</sup>

13.123 However, there are diverging judicial views as to whether multiple admitted or proven offences may also be viewed as a course of conduct for the purposes of placing each individual offence in a higher range of objective seriousness than would otherwise be the case. The Victorian Court of Criminal Appeal has determined the issue in the affirmative, holding that:

As recent decisions of this Court have made clear, the fact that a count is a representative count has a twofold relevance to sentencing. First, it is to be understood as the absence of a mitigating factor, in the sense that a plea of guilty to a representative count prevents the defendant from claiming ‘any leniency that might have been permitted on the basis that the offence was an isolated event’. Secondly, the sentencing court must look at the conduct represented by the count in order to judge the offending in its full context, ‘which is likely to bear upon such matters as the extent of culpability, need for specific deterrence and prospects of rehabilitation’.<sup>198</sup>

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194 *Weininger v The Queen* (2003) 212 CLR 629, 665.

195 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [6.61], [6.65]–[6.66], Rec 6–1.

196 See, eg, N Cowdery, ‘Negotiating with the DPP’ (Paper presented at Legal Aid Commission of NSW Criminal Law Conference, Sydney, 3 August 2006).

197 *R v D* (1997) 69 SASR 413, 419. This approach has also been adopted by the NSW Court of Criminal Appeal. See, eg, *R v JCW* (2000) 112 A Crim R 466, [67]–[68]. However, the Queensland Court of Appeal has rejected this approach. See *R v D* [1996] 1 Qd R, but cf *R v Bettridge* (Unreported, Queensland Court of Appeal, 27 May 1998). This matter is discussed below.

198 *Director of Public Prosecutions v CPD 2* (2009) 22 VR 533, 542, citing *Director of Public Prosecutions v McMaster* [2008] 19 VR, 202 and *R v CJK* (2009) 22 VR 104, 111. See also *R v LFJ* [2009] VSCA, [8].

13.124 The Supreme Court of South Australia has limited the relevance of representative charges to the first ground in the above quotation.<sup>199</sup> The NSW Court of Criminal Appeal, however, is divided on this issue.<sup>200</sup>

13.125 In addition, the Queensland Court of Appeal has held that uncharged conduct which may amount to a separate offence cannot be considered for *any* purpose at all in sentencing—including to deny leniency.<sup>201</sup> However, the court has subsequently recognised that it may be necessary to revisit this position, ‘some points of which are arguably inconsistent with other authorities both in this court and in other jurisdictions’.<sup>202</sup>

### Circumstances of aggravation and mitigation

13.126 Another means of recognising family violence in sentencing is either to treat the fact that a crime was committed in the context of a family relationship as an aggravating factor in sentencing, or prevent it from being considered a mitigating factor in sentencing.

13.127 Aggravating factors increase the culpability of an offender and act to increase the penalty to be imposed on sentencing—but never beyond the maximum penalty for an offence. Mitigating factors decrease the culpability of an offender and act to decrease the extent to which the offender should be punished.

13.128 Not all sentencing legislation of the states and territories sets out aggravating or mitigating factors. Some sentencing legislation states that a court must have regard to the presence of any mitigating or aggravating factor concerning the offender,<sup>203</sup> or must have regard to any mitigating or aggravating factor in determining the seriousness of an offence<sup>204</sup> without listing examples of such factors.<sup>205</sup> In addition, the sentencing legislation of some states and territories identifies certain factors that must be treated as non-mitigating in all cases.<sup>206</sup>

13.129 The sentencing legislation of NSW, by comparison, sets out a list of aggravating and mitigating factors that a court must take into account.<sup>207</sup> In NSW, it is not an aggravating factor that the victim of an offence is a spouse, intimate partner or related to the offender. However, the sentencing legislation of NSW specifies some aggravating factors that may be relevant to the sentencing of offenders who are found guilty of crimes committed in circumstances of family violence. These include that: the

199 *R v Bukvic* [2010] SASC 195, [48].

200 *Giles v Director of Public Prosecutions* [2009] NSWCCA, [67]–[68] (Basten JA), [85]–[86] (Hulme JA), [102]–[104] (Johnson JA).

201 *R v D* [1996] 1 Qd R.

202 *R v Bettridge* (Unreported, Queensland Court of Appeal, 27 May 1998).

203 For example, *Sentencing Act 1991* (Vic) s 5(2)(g); *Penalties and Sentences Act 1992* (Qld) s 9(2)(g).

204 *Sentencing Act 1995* (WA) s 6(2)(c), (d).

205 Although the *Sentencing Act 1995* (WA) s 8 provides that a plea of guilty, and facilitation by the offender of criminal property confiscation in certain cases are mitigating factors.

206 See, eg, *Sentencing Act 1995* (WA) s 8(3) and *Crimes (Sentencing) Act 2005* (ACT) s 34(2). See, further, Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [6.186], Rec 6–6.

207 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A.

crime was committed in the home of the victim or any other person; in the presence of a child; the offender had a record of previous convictions, particularly those for serious personal violence offences as defined in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW); or the offender abused a position of trust or authority in relation to the victim.<sup>208</sup>

13.130 Case law in NSW supports the proposition that the fact that an offence is committed in the context of a family relationship is not a mitigating factor. In *Raczkowski v The Queen*, for example, the NSW Court of Criminal Appeal stated:

The Court was invited to consider that the offences occurred in the context of a (broken down) domestic relationship ... That a violent and pre-planned attack occurred in what might be classified as a domestic setting is not a matter of mitigation.<sup>209</sup>

13.131 Case law in NSW also indicates that the fact that an offence is committed while an offender is subject to the conditions of a protection order to protect the victim of the offence, may be treated as an aggravating factor.<sup>210</sup>

13.132 The Tasmanian family violence legislation specifies some aggravating factors that may be relevant to the sentencing of offenders who are found guilty of crimes committed in circumstances of family violence, in addition to circumstances not involving family violence. These include the fact that the offender knew or was reckless as to whether a child was present at the time of the offence or knew that the affected person was pregnant.<sup>211</sup> The latter factor has particular relevance in family violence circumstances because studies have shown that pregnancy increases a woman's vulnerability to family violence.<sup>212</sup>

13.133 The South Australian sentencing legislation specifies the following as a relevant factor, without classifying it as an aggravating (or mitigating) factor:

if the offence was committed by an adult in circumstances where the offending conduct was seen or heard by a child (other than the victim (if any) of the offence or another offender)—those circumstances.<sup>213</sup>

13.134 In other jurisdictions, case law indicates that a family relationship between the offender and the victim may, in certain cases, be treated as an aggravating factor, as a matter of sentencing discretion. For example, in *R v MFP* the Victorian Court of Criminal Appeal stated, with respect to the offence being committed in a 'domestic' context:

Moreover, I think it can be seen to be aggravating both as to its potential consequences and also inasmuch as a husband (or a wife) is in a privileged position in relation to a spouse. They each know the everyday movements, the habits, the likes

208 Ibid s 21A(2)(d), (ea), (eb), (k).

209 *Raczkowski v The Queen* [2008] NSWCCA , [46].

210 *Kennedy v The Queen* (2008) 181 A Crim R 185, [8].

211 *Family Violence Act 2004* (Tas) s 13(a).

212 Parliament of Australia—Parliamentary Library, *Domestic Violence in Australia: An Overview of the Issues* (2003, updated 2006).

213 *Criminal Law (Sentencing) Act 1988* (SA) s 10(1)(ed).

and dislikes, the fears and pleasures of their spouse, which might enable them not only to effect an attack more easily on their victim but also to devise the kinds of attack which could more seriously affect their spouse, not merely physically, but so as to cause mental anguish ... The matter need not be examined any further, for in truth the advantages that he had, including that of surprise, justified the judge in holding that it was proper to view more seriously this attack occurring in the domestic context of this family.<sup>214</sup>

13.135 The sentencing legislation of some overseas jurisdictions provides that the commission of a crime in the context of a family relationship is an aggravating factor in sentencing. In Canada, the *Criminal Code* was amended in 1996 to provide that it is an aggravating factor if there is evidence that the offender, in committing the offence, abused the offender's spouse or common-law partner.<sup>215</sup> On 3 April 2006, the Parliament of Iceland passed an amendment to art 70 of the General Penal Code with regard to family violence, as follows:

In the event that an infraction was directed against a man, woman or child closely related to the perpetrator and their family connection is believed to have aggravated the violence of the act, this should generally be taken into account to increase the severity of the punishment.

13.136 The New Zealand sentencing legislation lists as an aggravating factor the fact that the case involved violence against, or neglect of, a child under the age of 14 years.<sup>216</sup>

#### ***The ALRC's previous consideration of aggravating factors***

13.137 In the context of discussing the range of sentencing factors relevant to the sentencing of federal offenders, ALRC Report 103 expressed the view that federal sentencing legislation should not distinguish between sentencing factors that aggravate a sentence, and those that mitigate a sentence.

13.138 The relationship between mitigating and aggravating factors is complicated by the fact that the opposite of a mitigating factor is not necessarily an aggravating factor, and vice versa. For example, a plea of guilty could be a mitigating factor, but it is improper to treat a plea of not guilty as an aggravating factor. Similarly, while youth or old age may be a mitigating factor, the fact that an offender's age does not fall into either extreme is not an aggravating factor. Some factors may be either aggravating or mitigating depending on the circumstances. Other factors may serve neither to increase nor to decrease the severity of a sentence, but may guide the court in selecting an appropriate sentencing option or in specifying certain conditions tailored to the needs and circumstances of the offender. Factors that could fall into this category include the cultural background, age, and physical and mental condition of an offender.

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214 *R v MFP* [2001] VSCA , [20].

215 *Criminal Code* 1985 RSC c C-46 (Canada) s 718.2(a)(ii). It is also an aggravating factor if the person abused a position of trust or authority in relation to the victim: s 718.2(a)(iii).

216 *Sentencing Act* 2002 (NZ) s 9A. Section 9 lists general aggravating factors, some of which may be relevant to family violence, such as an abuse of power or authority.

13.139 Rather than distinguishing between aggravating and mitigating factors, ALRC Report 103 took the approach of recommending factors that should not be treated as either aggravating or mitigating. For example, it stated that because an offender's consent is integral to effective participation in a restorative justice process or initiative, it would be improper to treat the absence of consent to participate as an aggravating factor.<sup>217</sup>

### **Sentencing guidance**

13.140 Another means of recognising the dynamics of family violence in sentencing offences is the use of specific sentencing guidance. For example, the Sentencing Guidelines Council in the UK has published a guideline on sentencing in the context of family violence.<sup>218</sup> This guideline must be considered by courts pursuant to s 172 of the *Criminal Justice Act 2003* (UK) and

makes clear that offences committed in a domestic context should be regarded as being no less serious than offences committed in a non-domestic context. Indeed, because an offence has been committed in a domestic context, there are likely to be aggravating factors present that make it more serious.<sup>219</sup>

13.141 These aggravating factors include: an abuse of trust and power; the particular vulnerability of the victim; exposure of children to violence; where contact arrangements are exploited in order to commit an offence; a proven history of violence or threats by an offender in a domestic setting; a history of disobedience to court orders; and if the victim is forced to leave home.<sup>220</sup>

13.142 The guideline also provides guidance on the application of mitigating and other factors in the family violence context. For example, it provides that the offender's 'good character in relation to conduct outside the home' should generally be 'of no relevance where there is a proven pattern of behaviour'.<sup>221</sup>

13.143 The guideline also cautions against taking the expressed wishes of the victim into account in sentencing in the context of family violence. Reasons for this include:

- it is undesirable that a victim should feel responsibility for the sentence imposed;
- there is a risk that the plea for mercy made by a victim will be induced by threats made by, or by a fear of, the offender; and
- the risk of such threats will be increased if it is generally believed that the severity of the sentence may be affected by the wishes of the victim.<sup>222</sup>

13.144 Guidance on sentencing is provided in a number of ways in Australian states and territories. For example, the Judicial Commission of NSW and the Judicial College

217 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [6.153], [6.157], [6.159].

218 Sentencing Guidelines Council, *Overarching Principles: Domestic Violence* (2006).

219 Ibid.

220 Ibid, 4–5.

221 Ibid, 5–6.

222 Ibid, 6.

of Victoria each produce sentencing bench books.<sup>223</sup> A bench book outlines what judicial officers ‘may need to know, understand and do on a day-to-day basis’, in the form of a practice manual.<sup>224</sup> Bench books are not intended to lay down or develop the law.<sup>225</sup> Bench books have an important role to play as part of a national judicial education and support program.<sup>226</sup>

13.145 The National Council recommended the production of a model bench book, in consultation with jurisdictions, and as part of a national professional development program for judicial officers on family violence. The National Council commented that such a bench book would ‘provide a social context analysis and case law to complement existing resources and enhance the application of the law’.<sup>227</sup>

13.146 Another form of guidance is through the use of ‘guideline judgments’ by criminal courts of appeal, as provided for in NSW, Victoria, Western Australia and South Australia.<sup>228</sup> As the ALRC stated in ALRC Report 103, guideline judgments are generally delivered by an appellate court in the context of a particular case, but go further than the points raised on appeal to suggest a sentencing scale for the category of crime before the court. They may indicate how particular aggravating or mitigating factors should be reflected in a sentence or suggest how sentences are to be determined for a category of offences or type of offender.<sup>229</sup>

13.147 The advantages of guideline judgments are said to be that they foster consistency while retaining judicial discretion; accommodate special or exceptional cases while serving the aims of rehabilitation, denunciation and deterrence; allow a judge to respond to all the circumstances of a case; result in fewer appeals by the prosecution; and lower pressure on the executive arm of government to respond to media attention.<sup>230</sup> On the other hand, the potential disadvantages of guideline judgments include erosion of judicial discretion, and the possibility of greater use of imprisonment due to a new emphasis on establishing exceptional circumstances to justify departure from a guideline.<sup>231</sup>

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223 Judicial Commission of New South Wales, *Sentencing Bench Book* (2009) <[www.judcom.nsw.gov.au/publications/benchbks/sentencing/index.html](http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/index.html)> at 21 February 2010; Judicial College of Victoria, *Victorian Sentencing Manual* (2009). For a brief overview of bench books—including those that deal with ethnic, gender and cultural issues, such as the *Aboriginal Bench Book for Western Australian Courts*: see Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), 498–500.

224 L Armytage, ‘Developing Bench Books for Tribunals: Some Guidelines’ (Paper presented at Sixth Annual Australasian Institute of Judicial Administration Conference, Sydney, 5 June 2003), 2.

225 *R v Forbes* (2005) 160 A Crim R 1, [72]–[76].

226 Judicial education and use of bench books is further discussed in Ch 31.

227 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 121.

228 *Crimes (Sentencing Procedure) Act 1999* (NSW), Pt 3 Div 4; *Sentencing Act 1991* (Vic); *Sentencing Act 1995* (WA) ss 143, 143A; *Criminal Law (Sentencing) Act 1988* (SA) ss 29A–29C.

229 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [21.22].

230 R Johns, *Sentencing Law: A Review of Developments in 1998–2001* (2002), 25–26.

231 P Byrne, ‘Guideline Sentencing: A Defence Perspective’ (1999) 11 *Judicial Officers’ Bulletin* 81, 81.

13.148 Regardless of the merits of guideline judgments, it is clear that in federal criminal matters a court cannot give a guideline judgment in the nature of an advisory opinion.<sup>232</sup> In *Wong v The Queen*,<sup>233</sup> the High Court appears to have cast doubt on the constitutional validity of guideline judgments at the federal level in some other circumstances. *Wong* has created a climate of uncertainty around guideline judgments—at least in the federal sphere—which does not provide a firm foundation for law reform in this area.<sup>234</sup>

13.149 While guideline judgements at the federal level are constitutionally problematic, they remain an option at the state and territory level. Such judgements do not have to specify penalty levels. However, guideline judgements do not appear to have been used outside of NSW,<sup>235</sup> and no such judgment has been made in relation to family violence in NSW.<sup>236</sup> Research suggests that guideline judgments are now less frequently used in NSW because of the introduction of standard minimum sentencing.<sup>237</sup>

### ***Submissions and consultations***

#### ***Recognising courses of conduct***

13.150 In the Consultation Paper, the Commissions sought stakeholder views about the extent to which courses of conduct are currently recognised in the sentencing of family-violence related offences. This included: the use of representative charges by prosecutors; whether offenders pleading guilty to family-violence related charges acknowledge that the offences charged form part of a broader course of conduct including uncharged offences; and judicial recognition of courses of conduct in sentencing.<sup>238</sup> Most submissions and consultations indicated that:

- representative charges are not commonly used in the prosecution of family-violence related offences;<sup>239</sup> and

232 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357.

233 *Wong v The Queen* (2001) 207 CLR 584.

234 Australian Law Reform Commission, *Same Crime, Same Time: Sentencing of Federal Offenders*, Report 103 (2006), [21.37]; see also [21.28]–[21.35].

235 The Full Court of the South Australian Supreme Court has considered, and rejected, one application for such a judgment: *R v Payne* (2004) 89 SASR 49. The Western Australian Supreme Court has also rejected applications for such a judgment: *Yates v Western Australia* [2008] WASCA ; *Herbert v The Queen* (2003) 27 WAR 330; *Jones v The Queen* [1998] WASCA .

236 Supreme Court of New South Wales, *Guideline Judgments* <[www.lawlink.nsw.gov.au/lawlink/supreme\\_court/l1\\_sc.nsf/pages/SCO\\_guidelinejudg](http://www.lawlink.nsw.gov.au/lawlink/supreme_court/l1_sc.nsf/pages/SCO_guidelinejudg)> at 1 April 2010.

237 J Anderson, ‘Guideline Judgments and Standard Minimum Sentencing: An Uneasy Alliance in the Way of the Future’ (Paper presented at Sentencing: Principles, Perspectives and Possibilities Conference, Canberra, 10 February 2006).

238 Consultation Paper, Questions 7–5, 7–6, 7–7.

239 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010.

- offenders pleading guilty to family-violence related charges rarely acknowledge that the charges are representative of broader criminality additionally comprising uncharged conduct.<sup>240</sup>

13.151 However, stakeholders were divided about:

- the extent to which courts currently consider courses of conduct in sentencing family-violence related offences;<sup>241</sup> and
- the preferable extent to which courses of conduct should be taken into account in sentencing family-violence related offences, including the appropriate use of representative charges.<sup>242</sup>

#### ***Current practices in using representative charges***

13.152 Most submissions addressing current practices were based upon anecdotal evidence of stakeholders' experiences. Some legal service providers commented that, in their experience, representative charges are rarely used in family violence cases.<sup>243</sup> The Local Court of NSW suggested that the limited use of representative charges in the Local Court is reflective of their limited use in NSW more generally. The Court observed that the practice appears to be used more frequently in sexual assault cases in higher courts.<sup>244</sup> The Magistrates' Court and the Children's Court of Victoria commented that representative charges do not appear to be considered as an option in most cases.<sup>245</sup> Two stakeholders suggested a need for further research into the use of representative charges in the family violence context.<sup>246</sup>

13.153 In contrast, the NSW ODPP expressed the view that representative charges are not being under-utilised in NSW, notwithstanding the complexities associated with sentencing for uncharged conduct.<sup>247</sup> While not commenting specifically on the frequency with which representative charges are utilised in the family violence context, the Commonwealth Director of Public Prosecutions stated that it uses representative charges where they are the most appropriate charges given the evidence available, in

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240 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

241 National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010. cf Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

242 Consultation Paper, Proposal 7–1.

243 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

244 Local Court of NSW, *Submission FV 101*, 4 June 2010.

245 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

246 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

247 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

accordance with the *Prosecution Policy of the Commonwealth*.<sup>248</sup> The Prosecution Policy relevantly refers to the ‘criminality principle’—namely, that the charges laid should adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and provide the court with an appropriate basis for sentence.<sup>249</sup>

#### ***Current practices in relation to guilty pleas***

13.154 Similarly, some stakeholders observed that, in their experience, guilty pleas are not usually accompanied by an acknowledgement by the offender that the offences charged are representative of broader criminality, including uncharged conduct.<sup>250</sup> However, the Aboriginal Family Violence Prevention and Legal Service Victoria commented that such acknowledgement appears to occur more regularly in the Victorian Koori Court. It noted that Aboriginal elders assisting the court have questioned offenders about their previous conduct, in some cases because they have personal knowledge of their behaviour.<sup>251</sup>

#### ***Current practices in recognising courses of conduct in sentencing***

13.155 The majority of stakeholders commenting on current practices observed that, in their experience, courses of conduct are rarely taken into account in sentencing.<sup>252</sup> National Legal Aid observed that, in some cases, a number of individual charges are laid, or the offender is charged with a course of conduct-based offence. It identified a practice in Western Australia whereby multiple breaches of protection orders are charged individually and, ‘where there are a number of breaches constituting stalking behaviour, the offender is charged with stalking’.<sup>253</sup> However, some stakeholders suggested that courses of conduct are routinely taken into account in sentencing family-violence related charges. The Magistrates’ Court and the Children’s Court of Victoria stated that, in practice, courts do take into account offending forming part of a course of conduct of family violence.<sup>254</sup> NSW Legal Aid and the Women’s Domestic Violence Court Assistance Service suggested that the NSW model of designated ‘domestic violence offences’ enables the court to accumulate progressively histories of family violence and take them into consideration in sentencing.<sup>255</sup>

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248 Commonwealth Director of Public Prosecutions, *Submission FV 76*, 2 June 2010.

249 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, [2.19]. See also [2.20]—circumstances in which a less serious charge may be favoured.

250 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

251 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010

252 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

253 National Legal Aid, *Submission FV 232*, 15 July 2010.

254 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010. The Department of Premier and Cabinet (Tas) also indicated, without further elaboration, that courts in Tasmania are taking courses of conduct into account in sentencing family-violence related offences: Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

255 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

13.156 Stakeholders did not generally distinguish between judicial consideration of uncharged criminal conduct, and abusive or violent conduct that does not amount to an offence. However, the Magistrates' Court and the Children's Court of Victoria stated that courts are unlikely to take into account uncharged criminal conduct or non-criminal family violence, but—as discussed below—suggested that there may be scope to do so.<sup>256</sup> As further discussed below, other submissions expressed general reservations about taking uncharged conduct into account in sentencing.<sup>257</sup>

***The appropriate use of representative charges and course of conduct evidence in sentencing family-violence related offences***

13.157 In the Consultation Paper, the Commissions sought stakeholder views about three issues. First, the Commissions proposed that police and prosecutors should be encouraged—by way of prosecutorial guidelines, education and training—to pursue, to the maximum extent possible, the option of representative charges as a way of presenting a course of conduct to the court.<sup>258</sup>

13.158 Secondly, the Commissions asked whether the court should also consider the following matters in sentencing, for the purpose of rejecting any claim to mitigation:

- whether the offence forms part of a series of proved or admitted criminal offences of the same or similar character;
- whether an offender has pleaded guilty to charges and has acknowledged that they are representative of criminality that also comprises uncharged conduct; and
- whether the offence forms part of a broader pattern or proved or admitted family violence, which may include violence of a non-physical nature against the victim—such as economic or emotional abuse—which is typically not, of itself, criminal.<sup>259</sup>

13.159 Thirdly, the Commissions asked stakeholders whether the sentencing legislation of states and territories should expressly provide for a course of conduct to be taken into account in sentencing, to the extent that it does not already do so.<sup>260</sup>

13.160 A common theme emerging from submissions on these matters was the need to balance multiple public interests, including that:

- sentences accurately reflect the nature and extent of criminal conduct;

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256 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

257 National Legal Aid, *Submission FV 232*, 15 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010.

258 Consultation Paper, Proposal 7–1.

259 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), [7.38]–[7.40], Question 7–6.

260 *Ibid*, Question 7–8.

- offenders are not punished for crimes for which they have not been convicted; and
- trials are conducted as efficiently as possible.

13.161 While several stakeholders expressed in-principle support for the use of guidelines and training in the use of representative charges, without specific comments as to detail,<sup>261</sup> some did so in qualified terms, on the basis of the second and third points identified above. For example, National Legal Aid and the Aboriginal Family Violence Prevention and Legal Service Victoria supported the use of prosecutorial guidelines, education and training on the use of representative charges where appropriate, but noted the importance of limiting their use to charged and proven or admitted conduct.<sup>262</sup> National Legal Aid further commented that representative charges and course of conduct evidence may ‘complicate proceedings and lead to evidentiary disputes and delay in the early resolution of cases’.<sup>263</sup> Other submissions expressed similar cautions about the use of representative charges—in particular, reliance upon uncharged conduct—without taking a firm view on the proposal.<sup>264</sup>

13.162 The Magistrates’ Court and the Children’s Court of Victoria commented that it may be desirable for sentencing courts to consider both uncharged criminal conduct and acts of non-criminal family violence in order to put evidence of the offending in a social context. The courts suggested that greater specialisation and training in family violence may facilitate this practice.<sup>265</sup>

13.163 The National Association of Services Against Sexual Violence similarly supported the use of representative charges to place a ‘more realistic picture’ of the offending before the court. It commented, in the context of intimate partner sexual assaults and child sexual abuse, that:

Where there are many incidents, but sufficient evidence for only one or two to meet the threshold of ‘beyond reasonable doubt’, the other incidents just evaporate as if they never occurred.<sup>266</sup>

13.164 Conversely, the Local Court of NSW did not support the proposal that representative charges should be encouraged in the family violence context on three

<sup>261</sup> Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; M Payne, *Submission FV 193*, 28 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

<sup>262</sup> National Legal Aid, *Submission FV 232*, 15 July 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

<sup>263</sup> National Legal Aid, *Submission FV 232*, 15 July 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010, which cited the same reason as ground of opposition to the increased use of representative charges.

<sup>264</sup> Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

<sup>265</sup> Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

<sup>266</sup> National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

broad grounds.<sup>267</sup> First, it cited the unsettled issue of whether multiple offences admitted or proven as a course of conduct can be used to place each individual offence at a higher level of objective seriousness. The court noted that the question remains open in NSW following the division of opinion among members of the Court of Criminal Appeal in *Giles v Director of Public Prosecutions (NSW)*.<sup>268</sup>

13.165 Secondly, the court noted the practical necessity of maintaining the safeguards associated with the current use of representative charges—namely that a court must be satisfied that the conduct relied upon by the prosecution is:

- identified with a degree of precision; and
- either proved or admitted by the offender.

13.166 The court expressed concern that the proposal may compromise the first-mentioned safeguard, and thus undermine the entitlement of an accused person ‘to be made aware with precision of the alleged facts giving rise to charges against him or her’.

13.167 Thirdly, the court expressed concern that the practice of representative charging may ‘unintentionally have the effect of hindering or protracting the prosecution of family-violence related offences’. The court referred to practice notes directed towards ensuring that guilty pleas are entered at the first available opportunity, and that not guilty pleas proceed expeditiously to hearing. Directions include prescribed dates for the service of the main parts of the prosecution brief, the entry of a plea, the listing of hearing dates and the service of the remainder of the prosecution brief. The court stated that these procedures stemmed from an observation that

the longer it takes to finalise a family-violence related charge, the more prone the matter becomes to a ‘cooling off’ of the victim’s complaint, with the victim becoming reluctant or unwilling to maintain her or his original statement.

13.168 The court further expressed concern about:

the impact that complicating the factual scenarios and charges underlying prosecutions for family violence offences through the use of representative charging might have upon the numbers of defendants prepared to plead guilty to a charge, the extent to which statements of facts are agreed between the prosecution and the defence, and/or the willingness of victims to make or continue to maintain a complaint.<sup>269</sup>

13.169 Some submissions suggested that courses of conduct should be recognised in the substantive elements of offences rather than in sentencing. The NSW ODPP commented that—given the problems arising from the admissibility of uncharged conduct—the best way of ensuring that a course of conduct is placed before the courts is by way of a course of conduct-based offence, such as the persistent sexual abuse of a child.<sup>270</sup> Women’s Legal Service Queensland suggested that potential problems

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267 Local Court of NSW, *Submission FV 101*, 4 June 2010.

268 *Giles v Director of Public Prosecutions* [2009] NSWCCA.

269 Local Court of NSW, *Submission FV 101*, 4 June 2010.

270 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

associated with the use of uncharged conduct in sentencing are best addressed by way of substantive offences—including encouraging police to ‘charge all charges’, and recognising the dynamics of family violence in new, aggravated offences.<sup>271</sup>

13.170 Most stakeholders supported the express recognition of courses of conduct as a sentencing factor in sentencing legislation, without explanation or any comments as to the detail of such provisions.<sup>272</sup> However, two legal service providers expressed qualified support, to the extent that legislative provisions address only conduct which has been charged and proved or admitted by the offender.<sup>273</sup>

#### *Aggravating and mitigating circumstances*

13.171 In the Consultation Paper, the Commissions proposed that state and territory sentencing legislation should provide that the fact that an offence was committed in the context of a family relationship should not be treated as a non-mitigating factor in sentencing.<sup>274</sup>

13.172 The Commissions also asked stakeholders whether:

- the commission of an offence in the context of a family relationship should be prescribed in state and territory sentencing legislation as an aggravating factor;
- if so, whether making a specific link between a family relationship and the escalation of violence would be an appropriate model; and
- which family relationships should be taken into account for the purposes of prescribing a family relationship as either a non-mitigating or an aggravating sentencing factor.<sup>275</sup>

#### *A family relationship as an aggravating factor in sentencing*

13.173 Several stakeholders supported the treatment of a family relationship between the offender and the victim as an aggravating factor in sentencing, however no consistent rationale was advanced for this position.<sup>276</sup> Some stakeholders suggested

271 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

272 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010; N Ross, *Submission FV 129*, 21 June 2010.

273 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

274 Consultation Paper, Proposal 7–2.

275 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 7–9. The issue of recognising categories of family relationships for the purposes of criminal laws is considered in Ch 14.

276 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 183*, 25 June 2010; Peninsula Community Legal Centre, *Submission*

that such an approach would ensure the recognition of the serious nature of family violence and, in doing so, perform an educative function.<sup>277</sup> Others suggested that it would recognise the exploitation of a relationship of trust between the offender and the victim.<sup>278</sup> Easteal supported an aggravated sentencing factor in the form of repeated sexual assaults committed in the family violence context. While expressing reservations about ‘gradating’ violence, Easteal supported a linkage between a family relationship and the escalation of violence over time as a basis for aggravation.<sup>279</sup>

13.174 The Aboriginal Family Violence Prevention and Legal Service Victoria (AFVPLS) favoured the use of a non-mitigating sentencing factor and an aggravated offence, but suggested that an aggravating factor in sentencing would be appropriate in cases where there is no charge or conviction on an aggravated offence.<sup>280</sup>

13.175 Other stakeholders opposed the designation of a family relationship as an aggravated sentencing factor for various reasons. The NSW ODPP considered the range of aggravating factors currently available under NSW sentencing legislation to be sufficient. It suggested that an additional requirement of a family relationship may duplicate existing sentencing factors, and would introduce the additional complexity of defining a family relationship.

13.176 Other submissions suggested that the mere existence of a family relationship should not constitute an aggravating factor.<sup>281</sup> Stubbs commented that this approach would involve weighing the seriousness of offences committed against family members with those committed against strangers exclusively on the basis of the relationship. Stubbs suggested that a preferable basis for aggravation would be a course of conduct or the escalation of violence.<sup>282</sup>

13.177 The Queensland Law Society supported the enactment of an aggravated offence in the family violence context.<sup>283</sup> NAAJA emphasised the importance of judicial sentencing discretion based solely upon the objective seriousness of the particular case, rather than pre-defined circumstances of aggravation.<sup>284</sup>

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FV 174, 25 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; P Easteal, *Submission FV 38*, 13 May 2010.

277 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

278 National Legal Aid, *Submission FV 232*, 15 July 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

279 P Easteal, *Submission FV 38*, 13 May 2010.

280 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

281 J Stubbs, *Submission FV 186*, 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

282 J Stubbs, *Submission FV 186*, 25 June 2010.

283 Queensland Law Society, *Submission FV 178*, 25 June 2010.

284 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010.

***A family relationship as a non-mitigating factor in sentencing.***

13.178 Almost all submissions supporting the existence of a family relationship as an aggravating sentencing factor also supported its designation as a non-mitigating factor, without commenting expressly on issues of interaction between the two approaches.<sup>285</sup> Several other stakeholders supported a non-mitigating factor only.<sup>286</sup> In a joint submission, Domestic Violence Victoria and others supported the use of a non-mitigating sentencing factor in conjunction with an aggravated offence that is based upon a relationship of coercion and control between the offender and the victim.<sup>287</sup>

13.179 Notwithstanding this division of views on the appropriate interactions between reform options, two broad themes emerged from those submissions supporting the recognition of family relationships as a non-mitigating factor in sentencing: that the mere existence of a family relationship should not, of itself, diminish the seriousness of an offence;<sup>288</sup> and the concern that the severity of family-violence related offences—in particular sexual assaults—may be minimised if left entirely to judicial discretion.<sup>289</sup> Several other submissions supporting this proposal did so without explanation.<sup>290</sup>

13.180 Two stakeholders opposed the proposal on the basis that it may have unintended consequences for victims of family violence who are charged with offences—for example, social security fraud committed under duress, or offences against the person committed in the course of defending themselves against family violence.<sup>291</sup>

285 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; P Easteal, *Submission FV 38*, 13 May 2010.

286 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010; N Ross, *Submission FV 129*, 21 June 2010.

287 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

288 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

289 P Easteal, *Submission FV 38*, 13 May 2010. See also Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010, which commented on the use of judicial discretion in relation to aggravating factors in sentencing. AVPLS stated that, in its experience in Victoria, the recognition of family violence as an aggravating factor depends largely on the sensibilities of individual judicial officers.

290 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010; N Ross, *Submission FV 129*, 21 June 2010.

291 J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

### Sentencing guidance

13.181 In the Consultation Paper, the Commissions proposed that the Australian Government—in conjunction with state and territory governments, the National Judicial College of Australia, the Judicial Commission of NSW and the Judicial College of Victoria—develop and maintain the currency of a national model bench book on family violence, incorporating a section on sentencing family-violence related offences.<sup>292</sup> This proposal received widespread support from stakeholders.<sup>293</sup> Some submissions commented on the importance of community consultation—in particular with Indigenous Australians—in the development of this resource.<sup>294</sup> Several submissions suggested that the Canadian resource, *Violence and Family Law in Canada: a Handbook for Judges*,<sup>295</sup> would provide an instructive model for the development of similar tools in an Australian context.<sup>296</sup> Others supported the production of a model bench book as part of a national professional development program for judicial officers on family violence.<sup>297</sup>

13.182 Few stakeholders commented specifically on the appropriate body or bodies to develop and maintain the currency of a bench book—or whether it should be a ‘model’ resource for individual jurisdictions to adapt for their own use, or a single, national product to complement existing jurisdiction-specific resources. The Magistrates’ Court and the Children’s Court of Victoria expressed the view that:

We do not see this as a ‘model’ bench book, but rather a joint state/Commonwealth bench book addressing family violence, sexual assault and family law in all states and

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292 Consultation Paper, Proposal 7–3.

293 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010; P Easteal, *Submission FV 38*, 13 May 2010.

294 Confidential, *Submission FV 184*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

295 The Canadian bench book is considered in further detail in Ch 31.

296 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

297 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Victorian Government, *Submission FV 120*, 15 June 2010. A model bench book and a national professional development program were recommendations of the National Council. See National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009).

the Commonwealth. The bench book would require government funding but should be developed by a judicial college or commission.<sup>298</sup>

13.183 While supporting a bench book, Stubbs commented that the pursuit of a national approach may be time-consuming and should not preclude the updating of existing resources in individual jurisdictions.<sup>299</sup>

#### ***Summary of the key themes arising from submissions and consultations***

13.184 The key theme emerging from submissions and consultations is that—while there is a broad consensus among stakeholders that there is scope to improve the recognition of the features and dynamics of family violence in sentencing—there is significant division about the appropriate form that such recognition should take. In particular, there is division about:

- whether there is a need to reform either substantive sentencing laws,<sup>300</sup> practices<sup>301</sup> or both; and
- the nature of any potential reforms—in particular, the content of any prosecutorial guidelines or training about the appropriate use of representative charges in the family violence context, and the substance of any statutory sentencing factors.<sup>302</sup>

13.185 In addition, the fact that many stakeholders supported a combination of options, without commenting on the relationship between them, requires further consideration of the issues of interaction considered below.

#### ***Interactions between sentencing reform options***

13.186 Several submissions supported, without explanation, the recognition of a family relationship between the offender and victim as both an aggravating and non-mitigating factor in sentencing.<sup>303</sup> This raises questions about the legal possibility—and practical desirability—of such an approach.

#### ***Interactions between sentencing reform options and those on offences***

13.187 Some submissions supported both the creation of aggravated offences committed in the context of family violence, and aggravating factors in sentencing

298 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

299 J Stubbs, *Submission FV 186*, 25 June 2010.

300 For example, statutory sentencing factors.

301 For example, the use of representative charges, and measures directed towards the application of existing sentencing laws and principles such as sentencing guidance.

302 That is, whether a family relationship between the offender and victim—or some other circumstance—should constitute an aggravating or non-mitigating sentencing factor; and whether sentencing legislation should expressly recognise courses of conduct as a sentencing factor, and if so how—for example, how uncharged or non-criminal acts of family violence should be treated.

303 See, eg: National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; P Easteal, *Submission FV 38*, 13 May 2010.

basic offences—based upon the same circumstances of aggravation.<sup>304</sup> Another stakeholder suggested that courses of conduct should be recognised in substantive offences rather than in sentencing.<sup>305</sup> This raises questions of procedural fairness in sentencing, and policy questions about the appropriate means of recognising courses of conduct in the criminal law.

***Interactions between sentencing reform options, existing sentencing laws and principles, and existing offences***

13.188 Given the divergent approaches taken in state and territory sentencing legislation to both sentencing factors and aggravated offences, any uniform sentencing reforms will inevitably raise jurisdiction-specific issues. For example, as one submission suggested, the recognition of new family-violence related sentencing factors may duplicate, or create inconsistencies with, existing sentencing factors in some jurisdictions.<sup>306</sup>

13.189 Similarly, in those jurisdictions with aggravated offences relevant to the family violence context, the imposition of new sentencing factors may duplicate the elements of aggravated offences.

**Commissions' views**

***Recognising courses of conduct in sentencing***

***Representative charges***

13.190 In the Consultation Paper, the Commissions proposed that—to the maximum extent possible in criminal matters involving a course of family-violence related conduct—police and prosecutors should be encouraged to pursue the option of using representative charges as a way of presenting a course of conduct to the court.

13.191 Two issues emerge from this proposal. First, the reference to the use of representative charges to the ‘maximum extent possible’ raises the policy question of the circumstances in which it is appropriate to use representative charges in the prosecution of family-violence related offences. The second issue is the implementation of any such policy position by way of prosecutorial guidelines, education and training.

13.192 The Commissions do not make any recommendations in respect of the policy underlying the use of representative charges in the prosecution of family-violence related offences. Representative charging is properly a matter for prosecutorial discretion in individual cases, based upon an assessment of the evidence and the public interest. The Commissions agree that the matters of concern identified by stakeholders—including the efficient conduct of trials and the maintenance of procedural fairness towards accused persons—are relevant to the exercise of prosecutorial discretion. Any presumptive policy position favouring the use or non-use

<sup>304</sup> See, eg, Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010.

<sup>305</sup> Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

<sup>306</sup> Ibid.

of representative charges in the family violence context would undermine such discretion, and may produce outcomes that are contrary to the public interest. Similarly, the Commissions consider that decisions to pursue alternatives to representative charges—such as ‘charging all charges’ or relying upon course of conduct-based offences where available—must be made on a case-by-case basis.

13.193 The Commissions’ reference to the use of representative charges ‘to the maximum extent possible’ is directed towards encouraging the routine consideration of representative charges in the prosecution of family-violence related offences *within* the existing decision-making framework, to ensure that they are used wherever appropriate. Prosecutorial guidelines, education and training on the use of representative charges in the family violence context are an appropriate means of developing expertise and promoting consistency in prosecutorial decision-making in this context. The Commissions acknowledge that charge negotiations and negotiations relating to statements of agreed facts are integral to the use of representative charges. These are appropriately the subject of prosecutorial guidelines, education and training in the family violence context. Recommendation 13–2 below reflects these matters. Similarly, the Commissions acknowledge the importance of professional education and training for criminal defence lawyers in conducting charge negotiations and negotiations as to agreed statements of facts in the family violence context.<sup>307</sup>

13.194 The Commissions do not make any recommendations as to whether an admitted or proven course of conduct should be taken into account to place the individual offences charged in a higher range of objective seriousness. While such an approach may be beneficial in enabling sentencing courts to consider family-violence related offending in its full context, the Commissions acknowledge that such an approach will have ramifications beyond the parameters of family violence.

#### ***Statutory sentencing factors.***

13.195 The Commissions do not make any recommendations about the statutory recognition of a course of conduct as a sentencing factor. While acknowledging the substantial support from stakeholders for this measure, the Commissions consider that it would be premature for two reasons. First, it would be necessary to address the uncertainty identified in ALRC Report 103 about the application of such a provision to uncharged conduct. Secondly, as the provision would be one of general application, it would be necessary to consider its operation beyond the family violence context.

#### ***A family relationship as an aggravating or non-mitigating sentencing factor***

13.196 The Commissions maintain their views expressed in the Consultation Paper that the existence of a family relationship between an offender and a victim should be prescribed as a non-mitigating factor in sentencing, rather than an aggravating factor.

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<sup>307</sup> Issues of training and education are considered in Ch 31. Further issues of relevance to the prosecution of family-violence related offences are considered in Ch 32 on specialisation.

***A family relationship should not be an aggravating factor in sentencing***

13.197 The Commissions recommend that a family relationship between the offender and the victim should not be prescribed as an aggravating sentencing factor per se for three reasons. First, while acknowledging the potential educative and denunciatory function of an aggravating sentencing factor, the Commissions have reservations about introducing a legislative requirement that would remove judicial sentencing discretion. Consistent with the Commissions' position on aggravated offences, the universal treatment of a family relationship as an aggravating factor could mandate higher penalties in circumstances where they are not just and appropriate—for example, in the sentencing of child offenders or persons with a mental illness.

13.198 Secondly, the Commissions agree that the designation of a family relationship as an aggravating factor in sentencing is too blunt an instrument to recognise the nature and dynamics of family violence. Such a provision would capture criminal conduct committed outside the family violence context—that is, where the relevant behaviour does not involve elements of coercion or control. Such an approach would also elevate the gravity of violence committed against a family member solely on the basis of the relationship. The Commissions consider that such an approach would undesirably require a value judgment about the relative severity of offences committed against family members, as opposed to those committed against strangers, notwithstanding that the relevant conduct may be identical.

13.199 Thirdly, the Commissions agree that the prescription of a family relationship as an aggravated sentencing factor may involve the duplication of existing sentencing factors—for example, the commission of an offence in the home of another person, in the presence of a child or in the abuse of a relationship of trust or authority. The Commissions agree that such factors already 'address the evil of the offending in the sense that the perpetrator is someone known and trusted and the victim is not safe within their home'.<sup>308</sup>

***A family relationship as a non-mitigating factor in sentencing***

13.200 The Commissions consider that it would be appropriate for sentencing legislation to provide expressly that the commission of an offence in the context of a family or domestic relationship should not be treated as a mitigating factor. The Commissions agree that the mere existence of a family relationship should not, of itself, diminish the seriousness of an offence. To treat such factors as mitigating would undesirably appear to trivialise family violence.

13.201 The Commissions acknowledge concerns expressed by stakeholders that this approach may preclude the recognition of a family relationship as a mitigating factor in some circumstances in which mitigation may be appropriate. This could include, for example, family violence victims who commit crimes under duress or in the course of self-defence. However, the Commissions consider that the existence of a family relationship is not the relevant mitigating factor in such cases, but rather the

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308 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

circumstances of duress or self defence. The recognition of a family relationship as a non-mitigating factor would not displace existing sentencing discretion. In addition, the commission of an offence under duress or in self-defence would ordinarily form the basis of a defence, and may inform prosecutorial decisions not to lay charges or prosecute such offences.

13.202 Accordingly, the Commissions endorse the ALRC's view in ALRC Report 103 that sentencing legislation should not distinguish between aggravating and mitigating factors, but rather prescribe factors that should not be treated as either aggravating or mitigating.

13.203 However, the Commissions acknowledge that such an approach is contrary to the approaches taken in some state and territory sentencing legislation. If jurisdictions continue the practice of prescribing aggravating and mitigating sentencing factors, the Commissions consider that such factors must target the dynamics of family violence with greater precision than the mere existence of a family relationship. These factors may include, for example, the abuse of a relationship of trust or authority between the offender or the victim, the commission of an offence in a person's home, or the commission of an offence as part of a course of conduct—provided that the application or otherwise of such a provision to uncharged conduct is made clear.

13.204 The Commissions do not make any formal recommendations about specific aggravating factors that may apply in the family violence context, should jurisdictions continue the practice of expressly designating aggravating and mitigating factors. In part, this is because it would be necessary to consider the potential application of such factors beyond the family violence context. In addition, a uniform or nationally consistent approach would be a complex exercise requiring significantly further consideration, given the divergent approaches taken by individual jurisdictions to aggravating sentencing factors and aggravated offences.

13.205 In particular, consideration of a uniform or consistent approach would require a review of the aggravated offences and sentencing factors in individual jurisdictions, in order to identify and avoid potential duplication. This would be necessary to:

- prevent 'double counting' where a particular circumstance constitutes both an element of an aggravated offence and an aggravated sentencing factor;
- avoid infringing the *De Simoni* principle, which would operate to prevent a sentencing court from taking into account aggravating sentencing factors that also comprise the elements of a more serious offence; and
- ensure that any new aggravating sentencing factors do not duplicate or contradict existing provisions.

13.206 Given the jurisdiction-specific nature of these reviews, the Commissions consider that they are matters for further consideration by state and territory governments, under the auspices of a national coordinating body such as SCAG.

13.207 The Commissions consider, however, that if jurisdictions continue the practice of designating certain sentencing factors as aggravating, it would be preferable for such factors to be capable of applying equally to family and non-familial violence, for example, the commission of an offence in abuse of a relationship of trust or authority.

#### ***The relationship between aggravating and non-mitigating sentencing factors***

13.208 The Commissions note that several submissions favoured the recognition of a family relationship between the offender and victim as both an aggravating and non-mitigating sentencing factor. However, the Commissions consider that it is not possible to mandate the same circumstance as both aggravating and non-mitigating. The designation of an aggravating factor would operate to increase an offender's culpability and justify a higher maximum penalty in all cases. The same factor cannot simultaneously be treated as a basis for neither increasing nor decreasing culpability. However, it may be possible for a family relationship to be recognised as a non-mitigating factor and another family-violence related circumstance, for example, abuse of trust, to be considered an aggravating factor.

#### ***The relationship between sentencing factors and offences***

13.209 Some stakeholders proposed various combinations of new sentencing factors and aggravated offences. As identified in the discussion of submissions and consultations above, these included:

- the creation of an aggravating sentencing factor and aggravated offences based upon the same circumstance of aggravation—namely, a family relationship—with the intention that the aggravating sentencing factor would operate only in those cases where there is no charge or conviction upon an aggravated offence;<sup>309</sup>
- the creation of a non-mitigating sentencing factor, and the creation of aggravated offences, both of which are based upon the same circumstance—namely a family relationship;<sup>310</sup> and
- the creation of aggravated offences based upon a relationship of coercion and control between the victim and the offender, and the designation of a family relationship as a non-mitigating sentencing factor.<sup>311</sup>

13.210 The Commissions emphasise the importance of recognising potential interaction issues arising from the *De Simoni* principle and the avoidance of double counting. In particular, the Commissions make the following observations on proposed combinations:

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309 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

310 Ibid.

311 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

- the *De Simoni* principle would preclude the creation of an aggravated sentencing factor that operates in those cases where there is no charge or conviction upon an aggravated family-violence related offence that is based upon the same circumstance of aggravation. In such cases, the offender should be charged with the aggravated offence;<sup>312</sup>
- the *De Simoni* principle would, however, technically permit a non-mitigating sentencing factor also to form the basis of an aggravated offence,<sup>313</sup> however the Commissions question the utility of this approach. Where an offender is charged with an aggravated offence, the circumstance of aggravation self-evidently cannot be taken into account as a mitigating factor in sentencing. The Commissions reiterate their reservations about the prescription of a family relationship as a circumstance of aggravation in either offences or sentencing;
- it would be possible for an aggravated offence to operate in conjunction with an aggravating sentencing factor, where the respective circumstances of aggravation are purposively distinct,<sup>314</sup> and
- it would not be possible, however, for an aggravated offence to operate in conjunction with an aggravated sentencing factor where the circumstances of aggravation are identical, or purposively the same. This would result in the double counting of the circumstances of aggravation of the offence.

#### ***Sentencing guidance***

13.211 The Commissions' view remains that a national bench book on family violence could play a significant and valuable role in guiding judicial officers in sentencing in family violence matters. Such a resource could draw attention to the particular features and dynamics of family violence of which judicial officers should be aware in sentencing. It would also consolidate the guidance contained in existing case law and research and present it in an accessible format. Such guidance would promote both national consistency and consistency within individual states and territories. This matter is the subject of Recommendation 13–1(b) below.

13.212 In particular, as noted in Chapter 12, there is merit in providing courts with guidance about particular issues arising in sentencing for breaches of protection orders. The Commissions consider there would be merit in providing courts with guidance about the particular repercussions on victims of imposing fines on offenders for family-violence related offences. The Commissions further consider that a national bench book could improve consistency in the identification and consideration of relevant sentencing factors in the family violence context.

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312 As proposed in Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

313 As proposed in *Ibid*.

314 As proposed in Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

13.213 The Commissions agree with those stakeholders who emphasised the importance of a participatory and consultative approach to the development of a national bench book—including with Indigenous Australians. As discussed in Chapter 31, the Commissions acknowledge the importance of recognising the particular impacts of family violence upon persons identifying with specific cultural, linguistic and social groups.

13.214 The Commissions also concur that the judicious use of existing international resources would assist in identifying best practice and applying it in the Australian context. In this respect, the Canadian bench book, *Violence and Family Law in Canada: a Handbook for Judges*, may provide a useful starting point for the development of an Australian resource.<sup>315</sup>

13.215 The Commissions agree with the submission of the Magistrates' Court and the Children's Court of Victoria that there is merit in a single, national resource consolidating all relevant state, territory and Commonwealth laws.<sup>316</sup> This approach would promote consistency and the sharing of experience to a greater extent than would be possible using jurisdiction-specific resources. The Commissions acknowledge, however, that such an initiative may be time and resource intensive. The development of a national bench book should not preclude the ongoing updating of existing resources in individual jurisdictions. Rather, it should be an additional, complementary resource. The Commissions further consider that it would be desirable for existing state and territory judicial resources to cross-refer to the national bench book to promote awareness of this resource.

**Recommendation 13–1** The national family violence bench book (see Rec 31–2) should include a section that:

- (a) provides guidance about the potential relevance of family-violence related evidence to criminal offences and defences—for example, evidence of a pre-existing relationship between the parties, including evidence of previous violence; and
- (b) addresses sentencing in family violence matters.

**Recommendation 13–2** Federal, state and territory police, and Commonwealth, state and territory directors of public prosecution respectively, should ensure that police and prosecutors are encouraged by prosecutorial guidelines, and training and education programs, to use representative charges wherever appropriate in family-violence related criminal matters, where the charged conduct forms part of a course of conduct. Relevant prosecutorial guidelines, training and education programs should also address matters of charge negotiation and negotiation as to agreed statements of facts in the prosecution of family-violence related matters.

<sup>315</sup> See also Ch 31.

<sup>316</sup> Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

**Recommendation 13–3** State and territory sentencing legislation should provide that the fact that an offence was committed in the context of a family relationship should not be considered a mitigating factor in sentencing.

# **14. Homicide Defences and Family Relationships in Criminal Laws**

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## **Contents**

Introduction	621
Recognising family violence in homicide defences	621
Self-defence and excessive self-defence	622
Provocation	632
A separate partial defence of family violence	638
Summary of jurisdictional approaches	642
Submissions and consultations	643
Commissions' views	648
Recognising family relationships in criminal law responses to family violence	654
Current approaches to recognising family relationships in criminal laws	655
Submissions and consultations	658
Commissions' views	660

## **Introduction**

14.1 This chapter is concerned with the extent to which the criminal law should recognise family violence as relevant to a defence to homicide, in circumstances where a victim of family violence kills the family member who was violent towards him or her. This raises the related issue of whether current defences to homicide for victims in family relationships are adequate. This chapter also considers the categories of relationships that should be recognised where a family relationship between the offender and the victim is prescribed as an element of a criminal offence or defence, or as a sentencing factor.

### **Recognising family violence in homicide defences**

14.2 In Chapter 6, the Commissions recommend that, where a state or territory's criminal legislation expressly refers to the term 'family violence'—including in the context of homicide defences—the term should be defined consistently with the civil law definition in Recommendation 5–1.<sup>1</sup> In the Commissions' view, the different policy objectives of the criminal law and family violence legislation are not compromised by the adoption of a common understanding of what constitutes family

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<sup>1</sup> Rec 6–1.

violence in the context of recognising family violence as relevant to a defence to homicide.

14.3 Each state and territory has different laws in relation to the offences of murder and manslaughter and different defences to those offences.<sup>2</sup> The most relevant defences to homicides committed in a family violence context are provocation, self-defence, and excessive self-defence. Provocation and excessive self-defence are partial defences to murder, reducing it from an offence of murder to manslaughter. Self-defence is a complete defence to criminal liability.

14.4 Several states and territories have given substantial consideration to recognising family violence in the context of defences to homicide.<sup>3</sup> A number of important statutory reforms have resulted from this, with a view to accommodating the experiences of family violence victims who kill. These reforms are considered below.

## **Self-defence and excessive self-defence**

### **Common law**

14.5 **Self-defence.** The common law has long recognised that a person is justified in using some force in legitimate self-defence. It is lawful to act in self-defence, and therefore it acts as a complete defence to criminal liability, with the onus on the prosecution to negate self-defence.<sup>4</sup> The common law doctrine of self-defence limits the use of force to situations where it is necessary for the accused to use force, and the degree of force is not excessive in the circumstances.<sup>5</sup> The test, as articulated by the High Court in *Zecevic v Director of Public Prosecutions (Vic)*, imports both a subjective and an objective element:

The question to be asked in the end is quite simple. It is whether the accused believed on reasonable grounds that it was necessary in self-defence to do what he [or she] did. If he [or she] had the belief and there were reasonable grounds for it, or if the jury is left in reasonable doubt as to the matter, then he [or she] is entitled to an acquittal.<sup>6</sup>

2 Sentencing options for persons convicted of murder or manslaughter also differ across states and territories. Most jurisdictions have abolished mandatory life sentences for murder convictions but they remain in place in Queensland, South Australia and the Northern Territory: *Criminal Code* (Qld) s 315; *Criminal Law Consolidation Act 1935* (SA) s 11; *Criminal Code* (NT) ss 157, 161.

3 See, eg, Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007); Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), see especially chs 2–4; New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants* (2001), [13]; Northern Territory Law Reform Committee, *Self Defence and Provocation* (2000), iii, 43–45; Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5, Fatal Offences Against the Person: Discussion Paper* (1998); New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (1997); Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), [12.3]–[12.6]; Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 2, General Principles of Criminal Responsibility: Final Report* (1992); New South Wales Task Force on Domestic Violence, *Report of New South Wales Task Force on Domestic Violence to Honourable NK Wran QC, MP Premier of New South Wales* (1981).

4 D Brown and others, *Brown, Farrier, Neal and Weisbrot's Criminal Laws: Material and Commentary on Criminal Law and Process in New South Wales* (4th ed, 2006), 627.

5 *Ibid.*

6 *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 661.

14.6 The common law test, therefore, imports two elements—that the accused person genuinely believed that it was necessary to do what he or she did, and that he or she had reasonable grounds for that belief. Reasonableness is assessed according to the ‘belief of the accused, based upon the circumstances as he [or she] perceived them to be’, rather than ‘the belief of the hypothetical person in his [or her] position’.<sup>7</sup>

14.7 Accordingly, in determining whether an accused person’s belief was based upon reasonable grounds, a jury may consider, in broad terms, evidence of the surrounding circumstances, all facts within the accused’s knowledge, the personal characteristics of the accused, and the prior conduct of the victim.<sup>8</sup>

14.8 The common law test does not import a requirement of an ‘imminent threat’ or a ‘proportionate response’ to the threat. Such considerations are, however, relevant to an assessment of the existence and reasonableness of the accused person’s belief that his or her actions were necessary for self-preservation.<sup>9</sup>

14.9 In the family violence context, some commentators have observed that the common law of self-defence is, at least theoretically, capable of requiring the fact-finder to ‘walk in the shoes of the battered woman in assessing her claim to self-defence’.<sup>10</sup> Evidence of the nature and history of the accused’s relationship with the deceased may include:

- evidence of prior violence against the accused, including: patterns of ongoing abuse; the escalation of violence over time; evidence of how the relevant threat was the same or different from previous threats; and the cumulative effects of violence upon the accused;
- relevant physical and psychological characteristics of the accused, as well as his or her cultural background and personal circumstances, such as social support structures, financial means and other social or cultural barriers to reporting or escaping from violence; and
- the means available to the accused to respond to the threat, and his or her efforts to resist or minimise it—for example, previous attempts to defend him or herself, flee or seek assistance, and reasons for returning to the relationship.<sup>11</sup>

14.10 Such evidence may take the form of one of more of the following:

- evidence of the accused person;
- evidence of other persons such as family members, neighbours, friends or professionals who witnessed violence or observed injuries, or who were told about it by the accused or the deceased;

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<sup>7</sup> *R v Hawes* (1994) 35 NSWLR 294, 306. See also *R v Hendy* (2008) 191 A Crim R 81, 87; *R v Portelli* (2004) 10 VR 259, 272.

<sup>8</sup> See, eg, *R v Wills* [1983] 2 VR 201; *R v Hector* [1953] VLR 543; *R v Besim* (2004) 148 A Crim R 28.

<sup>9</sup> *Osland v The Queen* (1998) 197 CLR 316, 382; *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 662.

<sup>10</sup> A Hopkins and P Easteal, ‘Walking in Her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland’ (2010 - in press) 35(3) *Alternative Law Journal*.

<sup>11</sup> Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), [4.19]–[4.20].

- the testimony of expert witnesses about the nature and dynamics of family violence, both generally and specifically in relation to the accused's circumstances. Expert witnesses may give evidence about a range of matters including: why people remain in abusive relationships; barriers to reporting or fleeing violence; the accused's ability to perceive danger; relevant cultural factors; and explanations of other aspects of the accused's conduct, such as why he or she might have acted in self-defence despite planning the attack; and
- documentary evidence, including protection orders or criminal family-violence related proceedings.<sup>12</sup>

14.11 Notwithstanding that the legal concept of self-defence is, at least theoretically, capable of accommodating the nature and dynamics of family violence, its interpretation and application in practice have been criticised as having largely 'excluded the experience of battered women, and undermined their claims to reasonableness'.<sup>13</sup> The Victorian Law Reform Commission (VLRC) identified the following impediments in its 2004 report on defences to homicide:

- the traditional association of self-defence as a 'one-off' spontaneous encounter, such as a pub brawl scenario, between two people (usually men) of relatively equal strength—whereas killings in the family violence context are typically in response to an ongoing threat rather than an attack; and
- the fact that men are often physically stronger than their female partners means that women who are victims of family violence more often kill their abusive partners in non-confrontational circumstances—such as when they are asleep or have their guard down—use a weapon, or enlist the assistance of others.<sup>14</sup>

14.12 The VLRC commented that these factors may adversely influence a jury's assessment of self-defence. It noted that juries may find that the accused either lacked a genuine belief as to the necessity of his or her actions, or that such a belief was not reasonable because the:

- threat lacked immediacy—for example, where the accused has waited until the deceased was asleep;
- threat lacked seriousness—for example, where the accused has responded to what may appear to be a relatively minor threat; or
- accused person had avenues available to them to escape or seek help.<sup>15</sup>

14.13 Other commentators have observed that outcomes are largely dependent upon an understanding of the relevance of family-violence related evidence on the part of

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12 Ibid [4.5], citing Taskforce on Women and the Criminal Code (Qld), *Report of the Taskforce on Women and the Criminal Code* (2000), 120.

13 A Hopkins and P Easteal, 'Walking in Her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland' (2010 - in press) 35(3) *Alternative Law Journal*.

14 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), [3.11].

15 Ibid, [3.12].

judges, jurors and legal representatives. This includes an understanding of the relevance of evidence of the accused person's history of abuse and evidence of the general dynamics or 'social framework' of family violence.<sup>16</sup> In particular, commentators have suggested that misunderstandings about the relevance of such evidence may arise in those cases in which the accused person does not seek to attribute his or her actions to a psychological syndrome or an abnormality of the mind, but argues rather that the killing was a rational and reasonable response—as informed by all of the circumstances in which the accused found him or herself.<sup>17</sup>

**14.14 Excessive self defence.** Excessive self-defence can, in certain circumstances, operate as a partial defence at common law. The common law position on excessive self-defence, stated by the High Court in *Viro v The Queen* is that self-defence which was necessary but involved the use of excessive force involving death, should lead to a verdict of either manslaughter or murder—depending on whether the accused believed that the force the accused used was reasonably proportionate to the danger which the accused believed he or she faced.<sup>18</sup>

#### **Model Criminal Code**

14.15 In 1992, the Standing Committee of Attorneys-General (SCAG) Model Criminal Code Officers Committee (MCCOC)—now the Model Criminal Law Officers Committee (MCLOC)—published the *Model Criminal Code—Chapter 2, General Principles of Criminal Responsibility Report*. That report recommended the following legislative definition of self-defence:

##### **313. Self-defence**

A person is not criminally responsible for an offence if the conduct constituting the offence was carried out by him or her in self-defence.

313.1 Conduct is carried out by a person in self-defence if

the person believed that the conduct was necessary

- to defend himself or herself or another person; or
- to prevent or terminate the unlawful imprisonment of himself or herself or another person; or
- to protect property from unlawful appropriation, destruction, damage or interference; or
- to prevent criminal trespass to any land or premises; or

16 A Hopkins and P Easteal, 'Walking in Her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland' (2010 - in press) 35(3) *Alternative Law Journal*. J Stubbs and J Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on Battered Woman Syndrome' (1997) 23 *Melbourne University Law Review* 709; E Sheedy, J Stubbs and J Tolmie, 'Defending Battered Women on Trial: the Battered Woman Syndrome and its Limitations' (1992) 16 *Criminal Law Journal* 369.

17 J Stubbs and J Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on Battered Woman Syndrome' (1997) 23 *Melbourne University Law Review* 709, 722.

18 *Viro v The Queen* (1978) 141 CLR 88, 146–147.

- to remove from any land or premises a person who is committing criminal trespass; and

his or her conduct was a reasonable response in the circumstances as perceived by him or her.

- 313.2 This section does not apply if force involving the intentional infliction of death or really serious injury is used in protection of property or in the prevention of criminal trespass or in the removal of such a trespasser.
- 313.3 This section does not apply if the conduct to which the person responded was lawful and that person knew that it was lawful.
- 313.3.1 Conduct is not lawful for the purposes of section 313.3 merely because the person carrying it out is not criminally responsible for it.<sup>19</sup>

14.16 The MCCOC indicated that the definition of self-defence retains the subjective and objective elements of *Zecevic*, but is designed to simplify the law:

The test as to necessity is subjective, but the test as to proportion is objective. It requires the response of the accused to be objectively proportionate to the situation which the accused subjectively believed she or he faced (the words ‘as perceived by him or her’ were added to make this clear).<sup>20</sup>

14.17 The MCCOC also discussed excessive self-defence in its 1998 discussion paper on fatal offences against the person and recommended that a partial defence of this nature not be re-introduced:

On balance, the Committee is not in favour of re-introducing excessive self-defence, particularly in the context of abolishing provocation. As a concept, excessive self-defence is inherently vague. This aspect has to date resulted in no satisfactory test being promulgated.<sup>21</sup>

#### *State and territory legislation*

14.18 Legislative provisions govern self-defence in NSW,<sup>22</sup> Victoria,<sup>23</sup> Queensland,<sup>24</sup> Western Australia,<sup>25</sup> South Australia,<sup>26</sup> Tasmania,<sup>27</sup> ACT<sup>28</sup> and the Northern

19 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 2, General Principles of Criminal Responsibility: Final Report* (1992), 70.

20 Ibid, 71.

21 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5, Fatal Offences Against the Person: Discussion Paper* (1998), 113.

22 *Crimes Act 1900* (NSW) s 418.

23 *Crimes Act 1958* (Vic) ss 9AC, 9AE. See also s 9AH.

24 *Criminal Code Act 1899* (Qld) ss 271, 272.

25 *Criminal Code Act Compilation 1913* (WA) s 248(4). These provisions follow the example of the Model Criminal Code: Western Australia, *Parliamentary Debates*, Legislative Council, 15 May 2008, 3123 (S Ellery—Minister for Child Protection).

26 *Criminal Law Consolidation Act 1935* (SA) s 15(1).

27 *Criminal Code Act 1924* (Tas) s 46.

28 *Criminal Code* (ACT) s 42.

Territory.<sup>29</sup> While the wording of specific provisions differs, all statutes—with the exception of the Queensland *Criminal Code*—expressly recognise the context-specific nature of the reasonableness requirement. The Commissions consider recent reforms to and other notable aspects of these defences below.

### **New South Wales**

14.19 In 2002, NSW introduced new laws in relation to self-defence and reintroduced the defence of excessive self-defence.<sup>30</sup> The Attorney General stated in the Second Reading Speech of the *Crimes Amendment (Self-Defence) Bill 2001* (NSW), that:

The Bill follows the general concept of self-defence laid down by the Model Criminal Code, so that a defendant who actually believed it was necessary to do what he did to repel an attack, even if he was wrong about that perception, may seek to rely on self-defence, so long as it was a reasonable response in the circumstances as perceived by the defendant. However, the bill contains two departures from the Model Criminal Code. The first departure is the re-introduction of the law of excessive self-defence ... This was the common law position as previously stated by the High Court in *Viro* ...

... The second difference to the Model Criminal Code relates to self-defence in the context of defence of property ... The Model Criminal Code limits the defence of property and criminal trespass by not permitting death or really serious harm to be occasioned.

This limit has been modified under the Bill. Obviously, it is not desirable to encourage persons to defend their property with excessive force. The Model Criminal Code emphasised the need to consider the value of human life by indicating that really serious injury or death could never enliven a self-defence issue in defence of property or to prevent criminal trespass. ...

There can be no circumstances where it is appropriate to intentionally or recklessly take a human life in the protection of property or to prevent criminal trespass, although it may be permissible to do serious bodily harm in certain circumstances if necessary and reasonable.<sup>31</sup>

### **Victoria**

14.20 The Victorian *Crimes (Homicide) Act* came into effect in 2005. The Act implemented a series of recommendations of the 2004 VLRC report on defences to homicide.<sup>32</sup> Key reforms included:

- the abolition of provocation as a partial defence to murder.<sup>33</sup>

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29 *Criminal Code* (NT) s 43BD. The Northern Territory provision largely adopts the self-defence provisions from the Model Criminal Code, following the recommendation in Northern Territory Law Reform Committee, *Self Defence and Provocation* (2000), 3–4.

30 *Crimes Amendment (Self-Defence) Act 2001* (NSW).

31 New South Wales, *Parliamentary Debates*, Legislative Assembly, 28 Nov 2001, 19093 (B Debus—Attorney General).

32 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004).  
33 Discussed below.

- defining the law of self-defence in respect of homicide offences;<sup>34</sup>
- recognising excessive self-defence through the creation of a new offence of defensive homicide;<sup>35</sup> and
- providing legislative guidance on the admissibility of evidence of family violence in the context of homicide defences.<sup>36</sup>

14.21 The new offence of defensive homicide is contained in the *Crimes Act 1958* (Vic) s 9AD. It applies where an accused kills, believing the conduct to be necessary to defend himself or herself or another from the infliction of death or serious injury, but where he or she did not have reasonable grounds for that belief.

14.22 The VLRC further recommended that the Victorian Department of Justice review the operation of s 9AD after it had been in force for five years, with a view to identifying how the defence is being used, in what circumstances, and with what outcome.<sup>37</sup> This review is in progress.<sup>38</sup>

#### ***Queensland***

14.23 The Queensland formulation of self-defence is distinct from that of other jurisdictions in that it does not expressly recognise the contextual nature of reasonableness, and requires acts of self-defence to be undertaken in response to an unlawful assault.<sup>39</sup> Section 271 relevantly provides that:

- (1) When a person is unlawfully assaulted, and has not provoked the assault, it is lawful for the person to use such force to the assailant as is reasonably necessary to make effectual defence against the assault, if the force used is not intended, and is not such as is likely, to cause death or grievous bodily harm.
- (2) If the nature of the assault is such as to cause reasonable apprehension of death or grievous bodily harm, and the person using force by way of defence believes, on reasonable grounds, that the person can not otherwise preserve the person defended from death or grievous bodily harm, it is lawful for the

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34 The statutory definition of self-defence applies to murder and manslaughter only. The common law test as outlined in *Zecevic v Director of Public Prosecutions (Vic)* (1987) 162 CLR 645, 661 continues to apply to all other offences where self-defence is applicable: P Priest, *Defences to Homicide* (2005) <www.vicbar.com.au/webdata/CLEFiles/Defences%20to%20Homicide.pdf> at 22 January 2010. However, the Victorian Supreme Court has held that—as the statutory definitions of self-defence in the *Crimes Act 1958* (Vic) ss 9AC (murder) and 9AE (manslaughter) do not expressly abrogate the common law—as a matter of fairness juries should be directed on both common law and statutory self-defence: *Director of Public Prosecutions (Vic) v Samson Rimoni (Ruling No 1)* [2010] VSC 26, [26]–[33]. This matter is under consideration by the Victorian Government: Department of Justice (Vic), *Defensive Homicide—Review of the Offence of Defensive Homicide: Discussion Paper* (2010) <http://www.justice.vic.gov.au/> at 01 September 2010, [285]–[291].

35 Discussed below.

36 Discussed below.

37 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), [3.112], Rec 10.

38 Victorian Government, *Submission FV 120*, 15 June 2010. See also Department of Justice, Victoria *Review of the Offence of Defensive Homicide* Discussion Paper, August 2010.

39 The Queensland self-defence provisions have been the subject of judicial criticism for lacking clarity and simplicity. See, eg, *R v Gray* (1998) 98 A Crim R, 589, 592.

person to use any such force to the assailant as is necessary for defence, even though such force may cause death or grievous bodily harm.<sup>40</sup>

14.24 The requirement for defensive action to be taken in response to an assault means that evidence of family violence is relevant in the more limited context of assessing the accused person's reaction to a particular assault that precipitated the killing. That is—a particular assault must have caused the accused to reasonably apprehend death or grievous bodily harm, and reasonably believe that there was no other means of preserving him or herself.

14.25 This requirement has been criticised as fundamentally inconsistent with the dynamics of family violence—in particular that killings in response to family violence usually stem from ongoing patterns of abuse, and often occur in non-confrontational circumstances. It has been argued that—by effectively viewing the reasonableness requirement through the prism of a response to an assault—the Queensland formulation of self-defence reduces the likelihood that victims of family violence who kill their abusers will be able to meet the conditions of self-defence.<sup>41</sup>

14.26 Some commentators have criticised the sentencing regime of mandatory life imprisonment for murder in Queensland.<sup>42</sup> It has been argued that the lack of sentencing discretion has rendered self-defence an ‘all-or-nothing’ defence for victims of family violence who kill. Such persons are either acquitted or are convicted of murder and sentenced to life imprisonment.<sup>43</sup>

14.27 These factors led to the introduction of the separate, partial defence of killing in an abusive relationship into the *Criminal Code* (Qld) in February 2010,<sup>44</sup> in response to the recommendations of an independent review commissioned by the Queensland Government.<sup>45</sup> This provision is discussed separately below.

#### *Western Australia*

14.28 In introducing amendments to self-defence in Western Australia, Suzanne Ellery, the Minister for Child Protection stated in the Second Reading Speech of the Criminal Law Amendment (Homicide) Bill 2008 that:

Another important change contained in this bill is that the harmful act that the person believes it is necessary to act against in self-defence will not have to be imminent. By providing that the threat need not be imminent, the defence will more readily apply to

40 See also *Criminal Code* (Qld) s 272 in respect of provoked assault.

41 G Mackenzie and E Colvin, *Homicide in Abusive Relationships: A Report on Defences* (2009), prepared for the Attorney-General and Minister for Industrial Relations (Qld), 26; A Hopkins and P Easteal, ‘Walking in Her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland’ (2010 - in press) 35(3) *Alternative Law Journal*. Queensland Government Office for Women, *Report of the Taskforce on Women and the Criminal Code* (2000), Ch 6. While identifying limitations in the self-defence provisions, the Taskforce reported that its members were divided on the need for legislative reform and, therefore, did not make any recommendations in this respect.

42 *Criminal Code* (Qld) s 305.

43 A Hopkins and P Easteal, ‘Walking in Her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland’ (2010 - in press) 35(3) *Alternative Law Journal*.

44 *Criminal Code* (Qld) s 304B.

45 G Mackenzie and E Colvin, *Homicide in Abusive Relationships: A Report on Defences* (2009), prepared for the Attorney-General and Minister for Industrial Relations (Qld).

women who are the victims of domestic violence in the so called ‘battered spouse’ situation. It will still be necessary for persons to show that there are reasonable grounds for the person’s belief that the act of self-defence was necessary and that the force used must be objectively reasonable in the circumstances the person believed to exist. It is not expected that this provision will apply to situations in which it would be reasonable for the person to take other steps, such as going to the police or escaping from the harmful situation.<sup>46</sup>

#### ***South Australia***

14.29 In South Australia, it is also a partial defence to a charge for murder—thereby reducing the offence to manslaughter—if the accused genuinely believed the conduct to which the charge relates to be necessary and reasonable for a defensive purpose; but the conduct was not reasonably proportionate to the threat the accused genuinely believed to exist.<sup>47</sup> As noted above, a provision to similar effect is contained in the crimes legislation of NSW<sup>48</sup>—as well as that of Western Australia.<sup>49</sup>

#### ***Leading evidence of family violence in the context of self-defence***

14.30 As identified in Chapter 13 in relation to offences, evidence of family violence is generally admissible where it is relevant to a fact in issue. In the context of self-defence, such evidence may be probative of both the existence of an accused person’s belief that his or her actions were necessary to preserve himself or herself, and the reasonableness of that belief.

14.31 The Victorian and Queensland parliaments have provided legislative guidance on the potential relevance of evidence of family violence in the context of homicide defences, including self-defence.

#### ***Victoria***

14.32 As noted in Chapter 13, where family violence is alleged, s 9AH of the *Crimes Act 1958* (Vic) provides that evidence of family violence<sup>50</sup> may be relevant to defences to murder,<sup>51</sup> defensive homicide<sup>52</sup> and manslaughter.<sup>53</sup> This provision does not operate as a separate defence, but confirms the potential relevance of family-violence related evidence to self-defence. Under s 9AH, where family violence is alleged, self-defence is available even if an accused person is responding to harm that is not immediate; or his or her response uses disproportionate force.

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46 Western Australia, *Parliamentary Debates*, Legislative Council, 15 May 2008, 3123 (S Ellery—Minister for Child Protection).

47 *Criminal Law Consolidation Act 1935* (SA) s 15(2).

48 *Crimes Act 1900* (NSW) s 421.

49 *Criminal Code Act Compilation 1913* (WA) s 248(3). The partial defence of excessive self-defence was introduced by the *Criminal Law Amendment (Homicide) Act 2008* (WA).

50 Ch 6 discusses the definition of family violence used in *Crimes Act 1958* (Vic), as compared with that used in the *Family Violence Protection Act 2008* (Vic).

51 *Crimes Act 1958* (Vic) s 9AC.

52 *Ibid* s 9AD.

53 *Ibid* s 9AE.

14.33 Types of evidence that can be adduced include:

- evidence about the history of the relationship between the accused person and a family member;
- the general nature and dynamics of relationships affected by family violence;
- the cumulative effects, including psychological effects, on the person or a family member of family violence; and
- social, cultural or economic factors that impact on the person or a family member who has been affected by family violence.

14.34 In introducing the amendments, the Victorian Attorney-General, Rob Hulls, stated that the section ‘highlights the types of relationship and social context evidence that may be relevant in such cases’.<sup>54</sup> The Explanatory Memorandum to the *Crimes (Homicide) Bill 2005* (Vic) indicates that the word ‘may’ is used in the sense of possibility, rather than to denote the conferral or exercise of a discretionary power.<sup>55</sup>

14.35 The Victorian model has, however, been criticised by one lawyer as a ‘breathtaking extension’ of the law of self-defence:

Taken to their logical (or, perhaps, illogical) conclusion, these new provisions suggest that a number of acts of trivial ‘harassment’ (whatever that term might embrace) by a family member, which do not involve actual or threatened abuse, might permit a person to use disproportionate force to kill that family member even where ‘harm’ is not ‘immediate’.<sup>56</sup>

14.36 The first case in which s 9AH was applied was *DPP v Anthony Sherna*.<sup>57</sup> In that case, Sherna—the accused—strangled his de facto wife and led evidence of family violence, including economic and psychological abuse, inflicted upon him over a period of 18 years.<sup>58</sup> Justice Beach rejected an application by the prosecution to take the issue of self-defence and defence of another away from the jury, even if such pleas may have been ‘weak’ and ‘tenuous’.<sup>59</sup> Sherna was found guilty of manslaughter and sentenced to 14 years imprisonment with a non-parole period of 10 years.

### *Queensland*

14.37 As identified in Chapter 13, the *Evidence Act 1977* (Qld) s 132B provides that ‘relevant evidence of the history of the domestic relationship between the defendant and the person against whom the offence was committed’ is admissible in criminal proceedings against a person for offences defined in Chapters 28 to 30 of the *Criminal*

54 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1349 (R Hulls—Attorney-General), 1350.

55 Explanatory Memorandum, *Crimes (Homicide) Bill 2005* (Vic), 4.

56 P Priest, *Defences to Homicide* (2005) <[www.vicbar.com.au/webdata/CLEFiles/Defences%20to%20Homicide.pdf](http://www.vicbar.com.au/webdata/CLEFiles/Defences%20to%20Homicide.pdf)> at 22 January 2010, 8.

57 *Director of Public Prosecutions (Vic) v Sherna* [2009] VSC.

58 A forensic psychologist testified that Sherna showed signs of ‘battered woman syndrome’ including chronic depression, low and decreasing self-esteem and learnt helplessness: I Munro, ‘Anthony Sherna Jailed for Strangling Abusive Partner’, *The Age (Melbourne)*, 20 November 2009.

59 *Director of Public Prosecutions (Vic) v Sherna* [2009] VSC.

*Code* (Qld).<sup>60</sup> However, the provision has been criticised as redundant because relevant evidence is, by definition, generally admissible.<sup>61</sup>

14.38 In their 2009 report to the Queensland Attorney-General, *Homicide in Abusive Domestic Relationships: a Report on Defences*, Professors Geraldine Mackenzie and Eric Colvin recommended that an evidentiary provision—based on the *Crimes Act 1958* (Vic) s 9AH—be attached to their recommended partial defence.<sup>62</sup> This recommendation was not implemented in the new defence of killing in an abusive domestic relationship in s 304B of the *Criminal Code* (Qld).

### **Provocation**

#### *Model Criminal Code*

14.39 In 1998, the MCCOC recommended that the partial defence of provocation should be abolished, and that:

Those considerations which currently provide a basis for the partial defence should be considered for their relevance to the determination of an appropriate sentence after conviction.<sup>63</sup>

14.40 In considering whether or not provocation should be abolished, the MCCOC noted that:

The balance of opinion sees provocation to operate in practice in a gender biased fashion. Although the courts have tinkered with the legal principles, formulations of the doctrine which reduce the suddenness requirement are artificial and contrary to its historical foundation. The theory underlying battered woman syndrome does not comfortably co-exist with that of provocation.

The real issue in deciding whether the partial defence of provocation should be retained is one of culpability—whether the defendant should be culpable for murder, or for the lesser crime of manslaughter ... [W]hile provocation in its modern setting is designed to afford a middle ground to better reflect criminal culpability, it falls significantly short of that goal by reason of its limited focus which inescapably gears the partial defence towards male patterns of aggression and loss of self-control (its origin) at the expense of the sanctity of human life.<sup>64</sup>

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60 These relevantly include homicide offences, offences endangering life or health—for example, grievous bodily harm, torture, wounding and dangerous operation of a vehicle—and assaults.

61 *R v PAB* [2006] QCA 212, [28]. See also, Victorian Law Reform Commission *Defences to Homicide*, Options Paper (2003), 134–135.

62 G Mackenzie and E Colvin, *Homicide in Abusive Relationships: A Report on Defences* (2009), prepared for the Attorney-General and Minister for Industrial Relations (Qld), 58–59.

63 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5, Fatal Offences Against the Person: Discussion Paper* (1998), 107.

64 *Ibid*, 103.

### ***State and territory legislation***

#### ***Abolition of defence***

14.41 Provocation has been abolished in Western Australia,<sup>65</sup> Victoria,<sup>66</sup> and Tasmania.<sup>67</sup>

14.42 The Law Reform Commission of Western Australia recommended that the defence be abolished, but only if the mandatory penalty of life imprisonment for murder was replaced with a presumptive sentence of life imprisonment.<sup>68</sup> It expressed the view that there was no clear justification for retaining the defence of provocation except the continued existence of mandatory life imprisonment for murder.<sup>69</sup>

14.43 The Tasmanian Attorney-General in the Second Reading Speech of the Criminal Code Amendment (Abolition of Defence of Provocation) Bill 2003 also stated that provocation was an anachronism ‘now that the death penalty and mandatory life imprisonment have been removed’.<sup>70</sup> A similar statement was made by the Victorian Attorney-General in the Second Reading Speech of the Crimes (Homicide) Bill 2005:

The courts developed the partial defence of provocation at a time when murder carried a mandatory death penalty. The partial defence is outdated now that provocation can simply be taken into account, if relevant, alongside a range of other factors in the sentencing process.<sup>71</sup>

14.44 A number of other reasons were advanced for the abolition of the defence by the Law Reform Commission of Western Australia, the VLRC and the Tasmanian Attorney-General.<sup>72</sup> These included the following:

- The jury must take into account the personal characteristics and background of the accused when assessing the gravity of the provocation, but then the jury is expected to disregard these factors for the second stage of the test in assessing the power of self-control of an ordinary person.<sup>73</sup> The ‘correct balance between subjective and objective factors is difficult to strike’.<sup>74</sup>

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65 *Criminal Law Amendment (Homicide) Act 2008* (WA) s 12.

66 *Crimes (Homicide) Act 2005* (Vic).

67 *Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003* (Tas).

68 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007), Rec 29.

69 In Western Australia, a person who is guilty of murder must be sentenced to life imprisonment unless that sentence would be clearly unjust given the circumstances of the offence and the person; and the person is unlikely to be a threat to the safety of the community when released from imprisonment in which case the person is liable to imprisonment for 20 years: *Criminal Code Act Compilation 1913* (WA) s 279(4).

70 Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (J Jackson—Attorney-General and Minister for Justice and Industrial Relations).

71 Victoria, *Parliamentary Debates*, Legislative Assembly, 6 October 2005, 1349 (R Hulls—Attorney-General).

72 See also Office of the Director of Public Prosecutions (Tas), *Annual Report 2000–01*, 6 in which the DPP also raised concerns about the defence of provocation.

73 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007), 207.

74 *Ibid*, 209.

- The defence of provocation creates two categories of intentional killing when the distinction ought to be between intentional killing and unintentional killing.<sup>75</sup>
- The moral basis of provocation is incompatible with contemporary community values and views on what is excusable behaviour:
 

The continued existence of provocation as a separate partial defence to murder partly legitimates killings committed in anger. It suggests there are circumstances in which we, as a community, do not expect a person to control their impulses to kill or to seriously injure a person. This is of particular concern when this behaviour is in response to a person who is exercising his or her personal rights, for instance to leave a relationship or to start a new relationship with another person.<sup>76</sup>
- Retaining a partial defence of provocation also sends a message that the homicide victim must bear some of the blame for his or her own death. This can be deeply distressing for friends and family of homicide victims.<sup>77</sup>
- Provocation is and can be adequately considered as a factor during sentencing.<sup>78</sup>
- The defence of provocation is gender biased and unjust. The defence fails to recognise that men kill women in very different circumstances from those where women kill men. Men are motivated to kill their partners out of jealousy, and a need for control based on threats to leave and issues of infidelity whilst women kill their partners because of a history of family violence.<sup>79</sup> Further:
 

The ‘suddenness’ element of the defence is more reflective of male patterns of aggressive behaviour. The defence was not designed for women and it is argued that it is not an appropriate defence for those who fall into the ‘battered women syndrome’.<sup>80</sup>
- The defence of provocation can be subject to abuse.<sup>81</sup>

#### *Retention of defence*

14.45 Provocation remains a defence in NSW, Queensland, the ACT and the Northern Territory.

14.46 In NSW, provocation is available as a partial defence to murder.<sup>82</sup> In 1997, the NSW Law Reform Commission (NSWLRC) recommended that the defence of

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75 Ibid, 218.

76 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), 56.

77 Ibid.

78 Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (J Jackson—Attorney General and Minister for Justice and Industrial Relations).

79 Victorian Law Reform Commission, *Defences to Homicide: Final Report*, (2004), 29.

80 Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (J Jackson—Attorney General and Minister for Justice and Industrial Relations). See also Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007), 214, 216 which refers to provocation being based on male behaviour and the gender inequality in the application of the defence to women who kill long-term abusive partners.

81 Tasmania, *Parliamentary Debates*, House of Assembly, 20 March 2003, 60 (J Jackson—Attorney General and Minister for Justice and Industrial Relations).

82 *Crimes Act 1900* (NSW) s 23.

provocation be retained.<sup>83</sup> It expressed the view that there are circumstances in which a person's mental state is impaired by a loss of self control, thereby reducing the culpability of a person who kills; and not warranting that person being labelled a 'murderer':

A conviction of manslaughter ensures a greater likelihood that the community will understand and accept a reduced sentence which reflects a lesser degree of culpability.<sup>84</sup>

14.47 The NSWLRC considered the application of the defence of provocation in family violence circumstances. It acknowledged that concern is sometimes expressed that the defence of provocation is used inappropriately to excuse offenders who kill their partners because of sexual jealousy or possessiveness:

[T]here may be a risk that a particular accused will seek to rely on the defence of provocation to excuse an act of violence which was in fact premeditated and was committed in the context of a history of violence and domestic abuse. However, that risk hardly justifies abolishing the defence. To do so would exclude other, deserving cases from the reduction of murder to manslaughter by way of the defence of provocation and, in effect, would be to throw the baby out with the bathwater.<sup>85</sup>

14.48 The NSWLRC made a number of recommendations to reform the defence of provocation, none of which has been adopted. In particular, it recommended the abolition of the 'ordinary person' test with the result that:

women whose power to exercise self-control has been impaired by reason of a long history of abuse are not excluded from the defence through the imposition of some objective standard which does not take that factor into account in determining 'ordinary' powers of self-control. Under our reformulation, all factors which may affect a woman's power of self-control, including a long history of being abused, are to be considered by the jury in arriving at their verdict.<sup>86</sup>

14.49 The NSWLRC also recommended that legislative amendments make it clear that the defence of provocation may apply to provocative conduct occurring outside the accused's presence.<sup>87</sup> It noted that this approach ensures

that the defence of provocation is not automatically excluded from cases where a woman kills her partner following incidents of abuse by that partner which are not witnessed personally by the woman, such as sexual and physical assaults on her children.<sup>88</sup>

14.50 In Queensland, the partial defence of provocation to murder is limited to circumstances in which the accused kills 'in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool'.<sup>89</sup> In 2008, the

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<sup>83</sup> New South Wales Law Reform Commission, *Partial Defences to Murder: Provocation and Infanticide* (1997), Rec 1.

<sup>84</sup> Ibid, [2.24].

<sup>85</sup> Ibid, [2.37].

<sup>86</sup> Ibid, [2.144].

<sup>87</sup> Ibid, [2.91].

<sup>88</sup> Ibid, [2.144] (citation omitted).

<sup>89</sup> *Criminal Code Act 1899* (Qld) s 304.

Queensland Law Reform Commission (QLRC) recommended that the partial defence should remain, given the ‘constraint of the [Queensland] Government’s stated intention to make no change to the existing penalty of mandatory life imprisonment for murder’.<sup>90</sup> However, the QLRC recommended the following amendments to the defence:

- other than in circumstances of an ‘extreme and exceptional character’, the partial defence should not be based upon ‘words alone, or conduct consisting substantially of words’, or upon ‘the deceased’s choice about a relationship’; and
- the defendant should bear the onus of proof of the partial defence, on the balance of probabilities.<sup>91</sup>

14.51 On 12 September 2010, the Queensland Attorney-General, Cameron Dick, stated that the Queensland Government intends to introduce a Bill into Parliament in 2010 containing these amendments to the *Criminal Code* (Qld).<sup>92</sup>

14.52 Provocation is a partial defence in the ACT<sup>93</sup> and the Northern Territory,<sup>94</sup> and in each case the conduct of the deceased provoking the offender may have occurred immediately before the act or omission causing death or at any previous time.

14.53 In 2000, the Law Reform Committee of the Northern Territory recommended that the defence of provocation should be amended to abolish the requirement for the accused to have ‘acted on the sudden and before there was time for his passion to cool’.<sup>95</sup> In 2006, the Northern Territory introduced a new provision dealing with the defence of provocation.<sup>96</sup> The revised provision, currently in force, imposes an objective test as to whether the provocation was sufficient to have induced an ordinary person to have so far lost self control as to have formed an intent to kill or cause serious harm to the deceased.<sup>97</sup> A person’s gender, cultural background or ethnicity is not relevant when applying this test of assessing the power of self control of a person. In the Second Reading Speech of the Criminal Reform Amendment Bill (No 2) 2006

90 Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report 64 (2008), Rec 21–1. The QLRC expressed the view that, unless the penalty of mandatory life imprisonment for murder was replaced with that of presumptive life imprisonment—which would enable circumstances of provocation to be taken into account in sentencing—the partial defence of provocation should remain: *Ibid*, [21.177].

91 *Ibid*, Recs 21–2; 21–3; 21–5. As discussed below, the QLRC further recommended consideration of a separate defence for ‘battered persons’ in ‘seriously abusive’ relationships who kill the person who was violent towards him or her: *Ibid*, Rec 21–4.

92 C Dick (Queensland Attorney-General and Minister for Industrial Relations), ‘State Government to Amend Laws Relating to Accident, Provocation’ (Media Release, 12 September 2010).

93 *Crimes Act 1900* (ACT) s 13. In the ACT, a person who is guilty of committing murder is liable to imprisonment for life but a court may impose a sentence for a stated term: *Crimes (Sentencing) Act 2005* (ACT) s 32(1); *Crimes Act 1900* (ACT) s 12.

94 *Criminal Code* (NT) s 158. In the Northern Territory, a person who is guilty of murder is liable to a mandatory term of imprisonment for life: s 157. A person who is guilty of manslaughter is liable to imprisonment for life but this penalty is not mandatory: s 161.

95 Northern Territory Law Reform Committee, *Self Defence and Provocation* (2000), 47.

96 *Criminal Reform Amendment Act (No 2) 2006* (NT) ss 8, 17.

97 *Criminal Code* (NT) s 158(2).

the Attorney-General noted that the revised defence would address family violence issues:

The revised provision also removes the requirement for the defendant to have acted ‘on the sudden and before there was a time for his passion to cool’. This requirement has to date made the defence unavailable in cases where there has been a history of serious abuse inflicted on the defendant, which ultimately leads them into attacking their abuser. This is the situation in what is commonly referred to as ‘battered women’ cases.

The bill also clarifies that the defence is available in circumstances where the provocation is directed at someone other than the accused, for example towards children of the defendant. The government considers that this revised provision will reflect the best law on this defence.<sup>98</sup>

### *Overseas*

14.54 On 8 December 2009 the defence of provocation was repealed in New Zealand. This followed two reports by the New Zealand Law Commission (NZLC) which recommended abolition of the partial defence—one published in 2001,<sup>99</sup> and the other published in 2007.<sup>100</sup> In the latter report, the NZLC specifically considered the effect of the defence of provocation on battered defendants. It concluded that:

For the majority of battered defendants, self defence will tactically offer a preferable alternative to provocation, because it results in an acquittal. ... [P]rovocation is not benefiting battered defendants sufficiently to warrant its retention, and our review of case law confirms this.<sup>101</sup>

14.55 In contrast, the defence of provocation is available in England and Wales.<sup>102</sup> In 2006, the United Kingdom Law Commission reviewed the defence of provocation and recommended that there be legislative reform to include circumstances in which the defendant acted in response to ‘fear of serious violence towards the defendant or another’.<sup>103</sup> The Law Commission considered that this reform would be sufficient to meet the criticisms that the defence of provocation ‘makes no provision for fear of serious violence to reduce murder to manslaughter’,<sup>104</sup> and that it permits the reduction of the offence from murder to manslaughter in cases ‘where the provoked murder may have been little more than a reflection of the continuing cultural acceptability of men’s use of violence in anger’.<sup>105</sup>

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98 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 31 August 2006, 3021 (P Toyne—Minister for Justice and Attorney-General).

99 New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants* (2001).

100 New Zealand Law Commission, *The Partial Defence of Provocation*, Report 98 (2007). This report identified a number of fundamental flaws with the defence of provocation including that it was a defence biased in favour of heterosexual men: 48–49.

101 *Ibid*, 58.

102 *Homicide Act 1957* (UK) s 3.

103 The Law Commission (UK), *Murder, Manslaughter and Infanticide*, Report 304 (2006), 78.

104 *Ibid*, 91.

105 *Ibid*. The defence of provocation is also available in Ireland, and in 2009, the Law Reform Commission of Ireland accepted that the defence was unsatisfactory and made a number of recommendations concerning its reform: Law Reform Commission (Ireland), *Defences in Criminal Law* (2009), [7.23]–[7.35].

## A separate partial defence of family violence

### *Queensland*

14.56 The *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010* (Qld) amended the *Criminal Code* (Qld) by inserting a new s 304B, which introduced a new partial defence to murder of ‘killing in an abusive domestic relationship’. Section 304B provides that murder will be reduced to manslaughter if:

- the accused unlawfully killed the deceased in circumstances that would constitute murder;
- the deceased has committed ‘serious acts of domestic violence’ against the accused in the course of an ‘abusive domestic relationship’;
- the accused believes that it is necessary to do the act or make the omission causing death, in order to preserve him or herself from death or grievous bodily harm; and
- the accused has reasonable grounds for that belief, having regard to the abusive domestic relationship and all the circumstances of the case.<sup>106</sup>

14.57 The terms ‘domestic violence’ and ‘domestic relationship’ are defined by reference to the *Domestic and Family Violence Protection Act 1989* (Qld).<sup>107</sup> The word ‘serious’ has been left deliberately undefined as a matter for the jury to determine in the circumstances of individual cases. The Queensland Attorney-General, Cameron Dick, stated in the Second Reading Speech that:

The use of the term ‘serious’ within the provision in relation to the level of domestic violence is used as a matter of emphasis to place the nature of the domestic violence in the Supreme Court murder trial in context. ... All domestic violence must be condemned not only by government but in all our communities and in our homes. However, the use of the term ‘serious’ in the bill acts to create an appropriate threshold for the application of this partial defence to a charge of murder.<sup>108</sup>

14.58 Sections 304(4)–(7) confirm the relevance of the full circumstances of the relationship between the accused and the deceased. They provide that:

- a history of acts of serious domestic violence may include acts that appear minor or trivial when considered in isolation;
- the partial defence is available even if the killing was in response to a particular act of domestic violence committed by the deceased that would not—if the history of acts of serious domestic violence were disregarded—warrant the response;

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<sup>106</sup> *Criminal Code* (Qld) s 304B(1).

<sup>107</sup> *Ibid* s 304B(2).

<sup>108</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 26 November 2009, 3669 (C Dick—Attorney-General and Minister for Industrial Relations), 3670.

- the partial defence is available even if the accused has sometimes committed acts of domestic violence in the relationship; and
- in assessing the reasonableness of the accused's belief that his or her actions were necessary for self-preservation, regard may be had to circumstances including acts of the deceased that were not acts of domestic violence.

14.59 This partial defence only applies to murder, and the victim of family violence. Unlike self-defence, it is not available to persons acting in the defence of third persons who are family violence victims.<sup>109</sup> In further contrast to self-defence, s 304B does not require the killing to occur in response to an assault by the deceased.

14.60 The Explanatory Notes to the *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009* (Qld) indicate that the provision is intended to be additional rather than an alternative to other defences or excuses:

A victim of abuse charged with the murder of their abuser may wish to raise the complete defence of self-defence for the purposes of an acquittal, the partial defence of diminished responsibility or provocation to reduce a charge of murder to manslaughter, as well as the new partial defence depending on the circumstances of the case. It will then be a matter for the jury having regard to all the defences/excuses left to them to determine criminal responsibility.<sup>110</sup>

14.61 The Explanatory Notes express an intention to achieve 'a balance between necessarily punishing those who would otherwise be guilty of murder, and providing some legal protections for victims of serious abuse'.<sup>111</sup> The Explanatory Notes indicate that the provision is designed to respond to two key problems, namely:

- a lack of sentencing discretion in respect of victims of family violence who are convicted of murder, due to the sentencing regime of mandatory life imprisonment; and
- the limited effectiveness of existing defences for family violence victims who kill, due to the way in which it has been identified that they kill—for example, in non-confrontational circumstances, in response to an ongoing threat rather than a 'one-off' attack.<sup>112</sup>

14.62 Section 304B was enacted following an independent report commissioned by the Queensland Government,<sup>113</sup> after a recommendation made by the QLRC that:

Consideration should be given, as a matter of priority, to the development of a separate defence for battered persons which reflects the best current knowledge about

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<sup>109</sup> As noted above, in Queensland, a mandatory life sentence applies if a person is convicted of murder, unlike in several other jurisdictions where there is discretion in sentencing for murder.

<sup>110</sup> Explanatory Notes, *Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill 2009*, 4.

<sup>111</sup> *Ibid*, 3.

<sup>112</sup> *Ibid*, 1–2.

<sup>113</sup> G Mackenzie and E Colvin, *Homicide in Abusive Relationships: A Report on Defences* (2009), prepared for the Attorney-General and Minister for Industrial Relations (Qld), which recommended that the defence should be framed as a separate defence, applicable only where homicide occurs in the context of an abusive relationship, rather than as general amendment to the law of self-defence: [1.3.2.4].

the effects of a seriously abusive relationship on a battered person, ensuring that the defence is available to an adult or a child and is not gender-specific.<sup>114</sup>

14.63 The independent report, written by Mackenzie and Colvin, recommended against a new, complete defence for family violence victims who kill, or the amendment of existing self-defence provisions. The authors referred to stakeholders' arguments that these approaches would risk protecting unmeritorious defendants, and that self-defence is adequate as a complete defence because it has led to acquittals in family violence cases. Mackenzie and Colvin concluded that:

In light of the diverse views expressed, we cannot recommend the reform of the general law of self-defence in this Report. While there may be deficiencies in the existing law and lessons to be learned from the experiences of other jurisdictions, a broader inquiry should be conducted before reform is initiated.

We have considered whether it would be appropriate to recommend the introduction of a separate version of self-defence, restricted to the victims of seriously abusive relationships. On balance, however, we have concluded that, at this time, there is insufficient support within the legal community for any complete defence outside the conditions of the existing defence of self-defence. We suggest that options be reconsidered when sufficient time has passed to permit assessment of the impact of the developments in other jurisdictions.<sup>115</sup>

14.64 Some recommendations of the independent report were not adopted in s 304B. These included recommendations that:

- the partial defence should be available to the victims of seriously abusive relationships and family members of the victim who are or have been parties to the domestic relationship in which the abuse has occurred and who act in defence of the victim;<sup>116</sup>
- the person claiming the partial defence need only believe that the killing was necessary for self-defence generally rather than specifically to preserve his or her life;<sup>117</sup> and
- as mentioned above, the inclusion of an evidentiary provision, based on the Victorian model, providing guidance about the potential relevance of evidence of family violence.<sup>118</sup>

14.65 At the time of writing, s 304B had not been utilised. In the murder trial of *R v Falls*, the jury was directed on the section, however the accused was acquitted of murder on the basis of self-defence.<sup>119</sup>

<sup>114</sup> Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report 64 (2008), Rec 21–4.

<sup>115</sup> G Mackenzie and E Colvin, *Homicide in Abusive Relationships: A Report on Defences* (2009), prepared for the Attorney-General and Minister for Industrial Relations (Qld), [3.32]–[3.33].

<sup>116</sup> *Ibid*, [4.29].

<sup>117</sup> *Ibid*, [4.3]. Compare Explanatory Notes, Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill (Qld) 2009, 10.

<sup>118</sup> G Mackenzie and E Colvin, *Homicide in Abusive Relationships: A Report on Defences* (2009), prepared for the Attorney-General and Minister for Industrial Relations (Qld), [5.30].

<sup>119</sup> *R v Falls* (Unreported, Supreme Court of Queensland, Applegarth J, 2–3 June 2010).

14.66 Some commentators have criticised the Queensland approach. For example, Anthony Hopkins and Professor Patricia Easteal described the reform as ‘a compromised outcome, leaving battered women who kill in Queensland in an invidious position as compared to their interstate counterparts’.<sup>120</sup> They argue that, while the section may reduce the number of murder convictions for persons who kill in response to serious family violence, it will not increase the prospect of acquittal for such persons, and may potentially undermine their claims to self-defence.<sup>121</sup>

14.67 The authors commented on the partial nature of the defence in the following terms:

In echo of the standard common law formulation of self-defence, s 304B requires that the defendant believed his or her act was necessary in self-preservation from death or grievous bodily harm. And, that the defendant had ‘reasonable grounds for the belief having regard to the abusive domestic relationship and all of the circumstances of the case’.

Under the common law, and the formulations of the test of self-defence in Victoria and Western Australia, the existence of such a belief warrants acquittal. This result is almost a self-evident consequence of the finding that the use of lethal force was reasonable and rational. By contrast, s 304B operates as a *partial* defence, reducing murder to manslaughter. Thus, despite the existence of reasonable grounds for a belief that it was necessary to use lethal force in self-defence, the killer remains subject to punishment—a clear though contradictory indication that their actions were neither reasonable nor rational.

The enactment of s 304B leaves untouched the test of self-defence in Queensland—the last remaining in Australia to require defensive action is taken in response to an assault. Where a battered woman seeks an acquittal, the reform does nothing to ensure that the reasonableness of her actions are assessed by reference to all of the situational and psychological circumstances in which she finds herself.<sup>122</sup>

14.68 Hopkins and Easteal also express concern that s 304B ‘substantially duplicates’ existing self-defence provisions in ss 271 and 272 of the Queensland *Criminal Code*. They comment that such duplication may create confusion in the minds of jurors about the relevance of family-violence related evidence where they are directed to consider both self-defence and s 304B:

Where a woman kills her batterer in circumstances where she is subject to a threat of serious violence, such as to constitute an assault, she may seek to rely upon both defences. In such a case, the same essential elements must be considered by the jury. That is, did she honestly believe that it was necessary to do as she did to preserve her life or protect herself from grievous bodily harm? And, did she have reasonable grounds for that belief?

Given the level of conformity, judicial directions may focus on the fact that s 304B expressly requires consideration of [an] ‘abusive relationship and all of the circumstances of the case’, whereas s 271 and s 272 do not. Whilst this distinction

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<sup>120</sup> A Hopkins and P Easteal, ‘Walking in Her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland’ (2010 - in press) 35(3) *Alternative Law Journal*.

<sup>121</sup> Ibid.

<sup>122</sup> Ibid.

may be insignificant as a matter of law, it may be a matter of great practical importance. Where a choice must be made, jurors may incline towards the view that a battered woman's actions were *only* reasonable taking into account the violent antecedents. The result: a manslaughter verdict where otherwise a battered woman would have been entitled to an acquittal. Disturbingly, such an outcome would run counter to the overall objective of the reform, intended as it was to ensure that the *Criminal Code* (Qld) further embrace the experiences of those who kill after suffering prolonged abuse.<sup>123</sup>

### ***Consideration of separate defences in other jurisdictions***

#### ***Victoria***

14.69 The VLRC, in its 2004 report on defences to homicide, recommended against the introduction of a separate defence for persons who kill in response to family violence. It concluded that reforms should focus on 'ensuring that self-defence properly accommodates women's experiences, rather than on creating a special defence for women who kill in response to family violence'. The Commission considered that clarification of self-defence and evidence law could 'take adequate account of women's experiences of violence'.<sup>124</sup>

#### ***Western Australia***

14.70 Similarly, the Law Reform Commission of Western Australia in its 2007 Report, *Review of the Law of Homicide*, concluded that, rather than introduce a separate defence for victims of family violence, 'it is preferable to amend the law so that it better accommodates the experiences of victims of domestic violence who kill'.<sup>125</sup>

#### ***New Zealand***

14.71 The NZLC, in its 2001 report, *Some Criminal Defences with Particular Reference to Battered Defendants*, did not support the introduction of a specific defence for victims of family violence who kill or assault their abusers, because it was of the view that the availability of self-defence was adequate. The NZLC recognised that there may be some difficulties for battered persons demonstrating that their conduct was in self-defence, but was of the view that these could be addressed by reforming the provisions relating to self-defence.<sup>126</sup>

### ***Summary of jurisdictional approaches***

14.72 In summary, several jurisdictions have given substantial consideration to recognising family violence in the context of defences to homicide. A number of important statutory reforms have resulted from this, including:

- reforms to the defence of self-defence—including removal of the requirement for the threat to be imminent (Western Australia);

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123 Ibid.

124 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), [3.26].

125 Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007), 289.

126 New Zealand Law Commission, *Some Criminal Defences with Particular Reference to Battered Defendants* (2001), 29–30.

- reforms to the defence of provocation—including the removal for the requirement for the defendant to have ‘acted on the sudden and before there was a time for his passion to cool’ (Northern Territory), and removal of the requirement for the provocative conduct of the deceased to have occurred immediately prior to the act or omission causing death (for example, NSW);
- abolition of the defence of provocation in part because of its unsuitability for female victims of family violence (Victoria, Western Australia, Tasmania);
- expanding self-defence to take family violence into account, including express provision for the leading of evidence about family violence (Victoria); and
- creating a new defence of family violence (Queensland).

14.73 With the exception of the Queensland legislation, most reforms have not introduced a separate defence to accommodate victims of family violence.

### **Submissions and consultations**

14.74 In the Consultation Paper the Commissions proposed that state and territory criminal legislation should:

- provide defences to homicide which accommodate the experiences of family violence victims who kill, recognising the dynamics and features of family violence;<sup>127</sup> and
- expressly allow defendants to lead evidence about family violence in the context of a defence to homicide. The Commissions noted that s 9AH of the *Crimes Act 1958* (Vic) is an instructive model in this regard.<sup>128</sup>

14.75 More generally, the Commissions sought stakeholder views on the adequacy of current homicide defences in the family violence context, and on the preferable means of recognising family violence as a defence to homicide.<sup>129</sup>

14.76 The majority of stakeholders responding to these issues strongly supported the principle of recognition—namely, that the nature and dynamics of family violence should be recognised in homicide defences and supporting evidentiary provisions. However, stakeholders were divided about the appropriate form of recognition.

#### ***Recognising the nature and dynamics of family violence in homicide defences***

##### ***‘In-principle’ recognition of family violence in homicide defences***

14.77 Submissions responding to the proposal that jurisdictions should provide defences to homicide, which accommodate the experiences of family violence victims

127 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Proposal 7–4.

128 Ibid, Proposal 7–5. See also G Mackenzie and E Colvin, *Homicide in Abusive Relationships: A Report on Defences* (2009), prepared for the Attorney-General and Minister for Industrial Relations (Qld), [5.30].

129 Consultation Paper, Questions 7–10, 7–11.

who kill, strongly supported the principle of recognition of the dynamics of family violence.<sup>130</sup> The majority of submissions did not advance reasons for their positions or provide further comments as to detail. Two submissions, however, emphasised the importance of a nationally consistent approach to recognition.<sup>131</sup> One legal service provider commented that any form of recognition should not result in the differential treatment of killings in response to family violence, and those in response to other forms of violence.<sup>132</sup>

14.78 Professor Julie Stubbs submitted that homicide defences should not be treated in isolation, and any forms of recognition should also include evidentiary rules and sentencing law and policy. Stubbs further submitted that any consideration of defences should include an examination of their use or potential use by family violence offenders who are charged with homicide offences.<sup>133</sup>

#### *Adequacy of current homicide defences*

14.79 Submissions and consultations indicated that, on balance, stakeholders considered that current approaches to homicide defences are inadequate.<sup>134</sup> Stakeholders expressed various concerns about individual jurisdictional approaches and issues of general application including:

- the absence of national consistency in approaches to defences;<sup>135</sup>

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130 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; S Bronitt, 'The Rules of Recent Complaint: Rape Myths and the Legal Construction of the "Reasonable" Rape Victim' in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998); P Easteal and A Hopkins, *Submission FV 36*, 12 May 2010. See also: S Bronitt, 'The Rules of Recent Complaint: Rape Myths and the Legal Construction of the "Reasonable" Rape Victim' in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998).

131 Confidential, *Submission FV 171*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

132 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010. See also J Stubbs, *Submission FV 186*, 25 June 2010, who made the same point in respect of preferable forms of recognition.

133 J Stubbs, *Submission FV 186*, 25 June 2010. See also Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

134 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; A Cannon, *Submission FV 137*, 23 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010; P Easteal and A Hopkins, *Submission FV 36*, 12 May 2010.

135 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

- ‘unintended consequences’ associated with the use of defensive homicide provisions in Victoria—in particular their use by persons who have committed family violence against the deceased;<sup>136</sup>
- aspects of Queensland laws and sentencing policy, including—the existence of mandatory life sentencing for murder; the partial nature of the defence in the *Criminal Code* s 304B; the risk that s 304B may be misapplied by juries because it ‘substantially duplicates’ the existing self-defence provisions in the *Criminal Code* ss 271–272; and the requirement in ss 271–272 that actions taken in self-defence must be in response to an assault;<sup>137</sup>
- the Western Australian reforms to self-defence have primarily focused on the doctrinal content of the law and, in doing so, have not directly addressed issues of application;<sup>138</sup> and
- the continued existence of provocation defences in some jurisdictions.<sup>139</sup>

**Forms of recognition.**

14.80 There was divergence in stakeholder views about the preferable form of recognition of the dynamics of family violence in homicide defences.

14.81 The majority of stakeholders commenting on this issue supported self-defence as the basis for recognition,<sup>140</sup> however there was division as to whether such recognition should occur within existing self-defence provisions of general application, or whether a specific family-violence related form of self-defence is necessary. Three stakeholders supported a generally applicable formulation of self-defence that encapsulates the social context of homicides, including circumstances of family violence.<sup>141</sup> The

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136 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010. See also Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010 which referred to concerns about recent Victorian cases on this issue, including *R v Middendorp* [2010] VSC 202.

137 A Hopkins and P Easteal, ‘Walking in Her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland’ (2010 - in press) 35(3) *Alternative Law Journal*. See also Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010. Compare Queensland Government, *Submission FV 229*, 14 July 2010.

138 P Easteal and A Hopkins, *Submission FV 36*, 12 May 2010, citing A Hopkins and P Easteal, ‘Walking in Her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland’ (2010 - in press) 35(3) *Alternative Law Journal*. See also National Legal Aid, *Submission FV 232*, 15 July 2010, which referred to the views of Legal Aid Western Australia (LA WA). LA WA generally supports the recommendations of the Law Reform Commission on Western Australia on this issue in Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Project 94 (2007) referred to above.

139 Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010. See also A Cannon, *Submission FV 137*, 23 June 2010, who commented generally that a reform of homicide laws and defences was necessary in South Australia.

140 National Legal Aid, *Submission FV 232*, 15 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

141 National Legal Aid, *Submission FV 232*, 15 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

predominant basis for this view was equality in the treatment of family violence victims charged with homicide—namely, that ‘family violence victims should not be seen in an atypical context’.<sup>142</sup> Hopkins and Easteal further commented that self-defence appropriately recognises that killings are ‘rational or reasonable’ responses to serious threats, rather than products of ‘the extraordinary psychology of battered women’.<sup>143</sup>

14.82 In their comparison of the legislative reforms to self-defence in Victoria, Queensland and Western Australia, Hopkins and Easteal concluded that the Victorian reforms have

gone furthest to ensure engagement with the experience of battered women. Despite retaining the common law formulation of self-defence, those amendments put beyond doubt that reasonableness must be considered by reference to [the victim’s] full situational and psychological predicament.<sup>144</sup>

14.83 Other stakeholders expressly supported the Victorian reforms as a basis for recognition.<sup>145</sup>

14.84 The NSW Office of the Director of Public Prosecutions (NSW ODPP) favoured recognition of family violence within existing self-defence provisions of general application, or as a family-violence specific partial defence in the nature of provocation, without expressing a firm view on the preferred option:

Because family violence is such an insidious and often long experienced phenomenon, and the effects of it can make it very difficult for the victim to speak freely about it, there is a good argument for developing specific rules for it to be available either as a full defence (within the self-defence part of the *Crimes Act*) or partial defence to murder (like provocation). Provocation in our experience is very difficult to explain to a jury because of the subjective/ordinary person test, and for this reason we submit it could be accommodated separately from the general partial defence of provocation, but having the same sort of rationale.<sup>146</sup>

14.85 Several stakeholders supported a holistic approach to homicide defences in the family violence context—incorporating revisions of defences, sentencing and evidence laws, and ongoing judicial and legal professional education about the dynamics of

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142 J Stubbs, *Submission FV 186*, 25 June 2010. See also Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

143 P Easteal and A Hopkins, *Submission FV 36*, 12 May 2010, citing A Hopkins and P Easteal, ‘Walking in Her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland’ (2010 - in press) 35(3) *Alternative Law Journal*.

144 P Easteal and A Hopkins, *Submission FV 36*, 12 May 2010.

145 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

146 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

family violence.<sup>147</sup> The No To Violence Male Family Violence Prevention Association further expressed a preference for a nationally consistent approach to defences.<sup>148</sup>

14.86 Other stakeholders favoured a separate family-violence related defence, but did not advance a firm view on the form it should take.<sup>149</sup> Some stakeholders submitted that it was too early to assess the impact of recent reforms—in particular the partial defence of killing in an abusive domestic relationship in the Queensland *Criminal Code* s 304B—and identified a need for ongoing monitoring and future reviews of their operation in practice.<sup>150</sup>

#### ***Leading evidence of family violence for the purposes of homicide defences***

14.87 Stakeholders unanimously supported the Commissions' proposal for the enactment of legislative guidance about the potential admissibility of family-violence related evidence in the context of homicide defences.<sup>151</sup> The majority of submissions supported provisions along the lines of the *Crimes Act 1958* (Vic) s 9AH without elaboration.<sup>152</sup> Hopkins and Easteal commented that such a provision would assist juries to comprehend “what it must really be like to live in a situation of ongoing violence” and why her ultimate response was truly reasonable.<sup>153</sup>

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147 J Stubbs, *Submission FV 186*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

148 No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

149 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Victims of Crime Assistance League Inc NSW, *Submission FV 23*, 23 February 2010.

150 Confidential, *Submission FV 190*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010. See also Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010 and Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010, which referred to the current review of the Victorian defensive homicide and associated provisions.

151 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; P Easteal and A Hopkins, *Submission FV 36*, 12 May 2010. See also A Cannon, *Submission FV 137*, 23 June 2010 who commented generally about the relevance of family-violence related circumstances to homicide defences, and the need for evidence of family violence to be admissible in this context.

152 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010.

153 P Easteal and A Hopkins, *Submission FV 36*, 12 May 2010 citing the submission of Dr Rebecca Bradfield to the VLRC Inquiry into Defences To Homicide: Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), [4.18].

14.88 The Magistrates' Court and Children's Court of Victoria suggested that jurisdictions considering enacting provisions in the nature of the *Crimes Act 1958* (Vic) s 9AH should consider concerns raised in Victoria in relation to the use of the provision by defendants who have committed family violence against the deceased and who seek to rely upon defensive homicide.<sup>154</sup>

### **Commissions' views**

14.89 The Commissions have taken a high-level approach to the issues raised in this part, and have focused on the identification of relevant considerations and guiding principles for recognising the dynamics of family violence in homicide defences. The Commissions do not make recommendations about specific forms of defences or individual provisions in state and territory criminal legislation. In taking this approach, the Commissions acknowledge that:

- state and territory governments and law reform agencies have given substantial consideration to homicide defences in the family violence context;
- jurisdictions have taken divergent approaches to accommodating the dynamics of family violence in their respective homicide defences;
- in some cases, variations reflect different approaches to broader matters of criminal justice policy extending beyond the Commissions' Terms of Reference—for example, mandatory sentencing regimes;
- there is an insufficient evidence base upon which to evaluate the operation of recent reforms in some jurisdictions because they have not yet been utilised or utilised only to a limited extent; and
- individual jurisdictions are best placed to review the operation of specific provisions, within the broader context of their respective criminal justice policies.

14.90 However, the Commissions identify several matters that should be taken into account in ensuring that the dynamics of family violence are accommodated in homicide defences. These matters—which are discussed below—are directed towards:

- ensuring that homicide defences promote substantive equality in the treatment of persons who kill in response to family violence and those who kill in response to other forms of violence;
- addressing technical limitations within existing homicide defences to recognise the full range of situational and psychological circumstances associated with family violence; and
- ensuring that relevant homicide defences are applied consistently in individual cases involving persons who kill in response to family violence.

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<sup>154</sup> Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010. The Courts referred to *R v Middendorp* [2010] VSC 202 and *Director of Public Prosecutions (Vic) v Sherna (No 2)* [2009] VSC 526.

### ***Recognising the nature and dynamics of family violence in homicide defences***

14.91 The Commissions' view is that jurisdictions should ensure that their defences to homicide accommodate the experiences of family violence victims who kill. A common theme throughout this Inquiry has been that legal frameworks should recognise the nature and dynamics of family violence—including its impact upon victims. In the Commissions' view, such recognition must include victims' responses to violence. The Commissions concur that defences must recognise that:

Contemporary research on the actions of victims of abuse who kill their abusers ... demonstrates they are usually motivated by fear, desperation and a belief that there is no other viable way of escaping the danger. The option of leaving the relationship is often seen as an unrealistic option; research indicates that persons who suffer violence may perceive a lack of alternatives. The history of abuse in the relationship can allow a person who has suffered violence to read cues and note changes in the abuser's behaviour which signal the onset of escalating violence.

Decisive action for self-preservation can then be taken before the abuser is in a position to physically overpower them; that action carried out with no loss of self-control and without a deficiency in cognitive processes.

The use of violence against the abuser may be reasonable under the circumstances as the person who has suffered prolonged abuse perceives them to be, but to an ordinary person may be judged as unnecessary or excessive. Even though there may be a history of extensive abuse, because the immediate threat may be modest (viewed in isolation) the hyper-vigilance typical of a battered person may result in a killing that is not proportionate to the threat.<sup>155</sup>

14.92 For the reasons identified above, the Commissions do not recommend a particular approach as to how each jurisdiction should ensure the recognition of family violence as a defence to homicide. However, the following considerations should be taken into account in the framing of any defences.

### ***Relevant considerations in framing defences***

#### ***Equality of legal responses to family violence and non-familial violence***

14.93 The Commissions consider that criminal defences should not recognise the circumstances of family violence victims in an 'atypical context', or typecast the reactions of family violence victims who kill as the product of 'extraordinary psychology'.<sup>156</sup> There is substantial force in stakeholders' arguments that separate, family-violence specific defences may result in the differential treatment of persons who have killed in response to family violence, compared with those who have killed in response to non-familial violence. To this end, it is preferable for family-violence related circumstances to be integrated into existing defences of general application. In the Commissions' view, existing defences—in particular self-defence—are doctrinally

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155 Explanatory Notes, Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Bill (Qld) 2009, 2.

156 J Stubbs and J Tolmie, 'Falling Short of the Challenge? A Comparative Assessment of the Australian Use of Expert Evidence on Battered Woman Syndrome' (1997) 23 *Melbourne University Law Review* 709, 730.

capable of accommodating the diverse situational and psychological circumstances of family violence victims.

14.94 Consistent with the Commissions views on the creation of specific family violence offences, the Commissions have reservations about creating discrete defences to address problems associated with the practical application of general defences, and recommend a cautious approach. The Commissions consider that it is preferable to focus on improving the application and effectiveness of existing defences in the family violence context through legislative clarification and guidance where necessary, and judicial and legal professional education and training. These matters are discussed further below.

14.95 In the Commissions' view, the circumstances of family violence ought to be recognised in both complete and partial defences, given the different purposes served by each form of defence. In recognising circumstances of family violence for the purposes of an acquittal, complete defences are intended to remove all criminal liability associated with fatal responses to family violence. However, partial defences recognise the circumstances of family violence only for the purposes of avoiding a murder conviction. An exclusive focus on partial defences falls short of accommodating the circumstances of family violence because it 'leaves untouched' limitations in complete defences.<sup>157</sup>

#### ***Addressing technical limitations in existing defences***

14.96 Given the disparate and jurisdiction-specific nature of existing approaches to homicide defences, the Commissions recommend that individual jurisdictions review their existing defences with a view to assessing the extent to which they accommodate the experiences of family violence victims who kill. Such reviews should encompass:

- defences specific to family violence victims, as well as those of general application that may apply to victims of family violence; and
- both complete and partial defences, recognising the discrete purposes that each form of defence is intended to serve.

14.97 The Commissions recommend that reviews should consider:

- how the relevant defences are being used—including in charge negotiations—by whom and with what results; and
- the impact of rules of evidence and sentencing law and policy on the operation of defences.

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157 A Hopkins and P Easteal, 'Walking in Her Shoes: Battered Women who Kill in Victoria, Western Australia and Queensland' (2010 - in press) 35(3) *Alternative Law Journal*.

14.98 To accommodate recent reforms in some jurisdictions, the Commissions recommend that reviews are conducted after relevant provisions have been in force for five years.<sup>158</sup> These matters are the subject of Recommendation 14–2 below.

#### ***The consistent application of defences***

14.99 The Commissions acknowledge that a focus on the doctrinal content of defences is insufficient to ensure that the experiences of family violence victims who kill are accommodated in practice. Continuing legal professional and judicial education is essential to ensuring that judges and lawyers practising in criminal law understand the nature and dynamics of family violence, and how evidence of family violence may be relevant to criminal defences.

14.100 In Chapter 31, the Commissions endorse the recommendation of the National Council to Reduce Violence Against Women and their Children for the production of a national family violence bench book, in consultation with states and territories, and as part of a national professional development program for judicial officers on family violence.<sup>159</sup> In addition to their recommendation about the inclusion of guidance on sentencing in the family violence context, and the admission of family-violence related evidence,<sup>160</sup> such a bench book should specifically address the application of defences to homicide where victims of family violence are charged with homicide offences. This is the subject of Recommendation 14–3 below.

14.101 The Commissions further endorse the recommendations of the VLRC in its 2004 report on defences to homicide, that bodies offering continuing professional development should include sessions on family violence in the criminal law.<sup>161</sup> In Chapter 31, the Commissions recommend a national audit of family violence training conducted by government and non-government agencies. Such an audit should cover criminal law training, including in relation to homicide defences and criminal defences more generally.

14.102 The Commissions note that matters of legal professional education in relation to family violence in Victoria are currently under consideration in the Victorian Government review of defensive homicide.<sup>162</sup> The outcomes of this review may contribute to the recommended national audit.

#### ***National consistency***

14.103 The Commissions support the development of a consistent or harmonious approach by the states and territories to the recognition of family violence in defences

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158 This recommendation is framed in similar terms to that of the VLRC in respect of excessive self-defence/defensive homicide: Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), Rec 10. The Commissions agree with the VLRC's statement that the five-year period is intended as a guide and 'may need to be reconsidered in light of the number of [relevant] cases ... over this period', [3.112].

159 Rec 31–2.

160 Rec 13–1.

161 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), Rec 35.

162 Department of Justice, Victoria *Review of the Offence of Defensive Homicide* Discussion Paper, August 2010, [318]–[343].

to homicide. The Commissions consider that there is no principled justification for the differential treatment of victims of family violence solely on the basis of jurisdiction. While acknowledging that states and territories have taken different approaches to homicide defences in their respective jurisdictions, the Commissions consider that there is merit in national collaboration to identify strategies to improve inter-jurisdictional consistency. National consideration of this matter may also facilitate the sharing of information, experiences and expertise between jurisdictions about approaches to defences.

14.104 The Commissions consider that the SCAG MCLOC would be a suitable body to undertake such a task, in light of its substantial work on homicide defences in the *Model Criminal Code*. Consideration of this matter through the MCLOC would further provide an opportunity to identify approaches or model provisions that do not appear to have uniform support based upon jurisdictions' implementation responses, and which may require reconsideration. This may include, for example, further discussion of the abolition of provocation and excessive self-defence, and the appropriate elements of self-defence. The issue of national consistency in homicide defences in the family violence context is addressed in Recommendation 14–4 below.

#### ***Leading evidence of family violence in homicide defences***

14.105 The Commissions maintain their view expressed in the Consultation Paper that state and territory criminal legislation should provide express guidance about the potential relevance of family-violence related evidence in the context of homicide defences, in similar terms to s 9AH of the *Crimes Act 1958* (Vic). This is the subject of Recommendation 14–5 below.

14.106 The Commissions consider that there is considerable merit in focusing attention on the potential relevance of such evidence in homicide defences, given its importance in these circumstances. The Commissions endorse the views of the VLRC that such a provision would assist in avoiding ‘unnecessary arguments concerning ... relevance and ensure the range of factors which may be necessary to represent the reality of the accused’s situation are readily identified’.<sup>163</sup>

14.107 The Commissions acknowledge the concerns identified by some stakeholders that a provision in the nature of s 9AH of the *Crimes Act 1958* (Vic) may be relied upon by accused persons who have committed acts of family violence against the deceased and who are raising self-defence or defensive homicide. However, the Commissions note that the provision does not extend or otherwise alter the general rules concerning the admissibility of family-violence related evidence. In the Commissions’ view, the relevance of family-violence related evidence in these circumstances is appropriately determined by the court in individual cases. Similarly, the weight afforded to such evidence is a matter for the trier of fact in individual cases.

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163 Victorian Law Reform Commission, *Defences to Homicide: Final Report* (2004), [4.29].

***Leading evidence of family violence in defences to non-fatal offences against the person***

14.108 The Commissions have focused on defences to homicide due to the gravity of the consequences for family violence victims whose situational and psychological circumstances are not adequately taken into account. The Commissions acknowledge, however, that family violence victims may not always respond to violence using fatal means, or may commit offences under duress or in circumstances that may attract a defence based upon an altered state of mind as a consequence of family violence.

14.109 This raises the question of whether legislative guidance about the potential admissibility of family-violence related evidence is necessary in the context of other defences, including defences to non-fatal offences against the person, attempted fatal offences and non-violent offences committed as a consequence of family violence. The Commissions consider that state and territory governments should review whether criminal legislation should expressly allow defendants to lead evidence about family violence in the context of defences to non-fatal offences against the person.

**Recommendation 14–1** State and territory criminal legislation should ensure that defences to homicide accommodate the experiences of family violence victims who kill, recognising the dynamics and features of family violence.

**Recommendation 14–2** State and territory governments should review their defences to homicide relevant to family violence victims who kill. Such reviews should:

- (a) cover defences specific to victims of family violence as well as those of general application that may apply to victims of family violence;
- (b) cover both complete and partial defences;
- (c) be conducted as soon as practicable after the relevant provisions have been in force for five years;
- (d) include investigations of the following matters:
  - (i) how the relevant defences are being used—including in charge negotiations—by whom, and with what results; and
  - (ii) the impact of rules of evidence and sentencing laws and policies on the operation of defences; and
- (e) report publicly on their findings.

**Recommendation 14–3** The national family violence bench book (see Rec 31–2) should include a section that provides guidance on the operation of defences to homicide where a victim of family violence kills the person who was violent towards him or her.

**Recommendation 14–4** The Model Criminal Law Officers’ Committee of the Standing Committee of Attorneys-General—or another appropriate national body—should investigate strategies to improve the consistency of approaches to recognising the dynamics of family violence in homicide defences in state and territory criminal laws.

**Recommendation 14–5** State and territory criminal legislation should provide guidance about the potential relevance of family-violence related evidence in the context of a defence to homicide. Section 9AH of the *Crimes Act 1958* (Vic) is an instructive model in this regard.

## Recognising family relationships in criminal law responses to family violence

14.110 In Chapter 7, the Commissions consider the categories of relationships covered by state and territory family violence legislation.<sup>164</sup> A further issue is how—if at all—a family relationship should be defined where it is prescribed as an element of an offence, defence or as a sentencing factor in the family violence context. In particular, this raises the following matters:

- whether it is necessary or appropriate to define a family relationship between the offender and the victim for the purposes of criminal law responses to family violence;
- if so—the categories of relationships that should be recognised in any criminal law definitions; and
- whether it is necessary or feasible to align the categories of relationships recognised in criminal law definitions with those recognised in family violence legislation.

14.111 As noted in Chapter 13, the Commissions consider this issue in the Consultation Paper in the context of potential family-violence related offences.<sup>165</sup> However, the Commissions consider that it is necessary to consider the issue in a broader context, given that state and territory criminal laws have variously prescribed a family relationship between the offender and the victim as an element of aggravated offences,<sup>166</sup> and an element of some defences.<sup>167</sup> At common law, sentencing courts have also recognised a family relationship between the offender and the victim as an aggravating factor in appropriate cases.<sup>168</sup>

<sup>164</sup> Rec 7–6.

<sup>165</sup> Consultation Paper, Question 7–2.

<sup>166</sup> *Criminal Code Act Compilation 1913* (WA); *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(g).

<sup>167</sup> *Crimes Act 1958* (Vic) s 9AD and *Criminal Code* (Qld) s 304B.

<sup>168</sup> See, eg, *R v MFP* [2001] VSCA and the discussion of this case in Ch 13.

14.112 In considering this issue, however, the Commissions reiterate views expressed in Chapter 13 that the existence of a family relationship between the offender and the victim should not form the *sole* basis of aggravation in relation to offences or sentencing, or the *sole* basis for any family-violence specific criminal defences. Rather, the Commissions tend to the view that criminal laws must target the underlying dynamics of family violence.<sup>169</sup>

### **Current approaches to recognising family relationships in criminal laws State and territory criminal laws**

14.113 This part of the chapter considers the categories of family relationships currently incorporated in defences, aggravated offences and sentencing factors in state and territory criminal laws.

#### **Homicide defences**

14.114 The Victorian *Crimes Act 1958* defines a ‘family member’ of the accused person for the purposes of defences to murder, defensive homicide or manslaughter in circumstances of family violence. Section 9AH defines a ‘family member’ as including:

- a person who is or has been married to the accused person, or who has had an intimate personal relationship with the accused person;
- a person who has been the father, mother, step-father or step-mother of the accused person;
- a child who normally or regularly resides with the accused person;
- a guardian of the accused person; or
- another person who is or has ordinarily been a household member with the accused person.<sup>170</sup>

14.115 A key difference between the above criminal law definition and the definition of the same term in the *Family Violence Protection Act 2008* (Vic) s 8 is that the criminal law definition is drafted in inclusive terms—whereas the definition in the family violence legislation is exhaustive. In addition—and potentially as a consequence of its exhaustive nature—the definition in the *Family Violence Protection Act* makes express reference to spouses, domestic partners and relatives, which are defined terms in the Act.<sup>171</sup> The *Family Violence Protection Act* definition also includes a functional element, encompassing any other person whom the relevant person reasonably regards as being ‘like a family member’, having regard to nine enumerated factors.<sup>172</sup>

14.116 In Queensland, a ‘domestic relationship’ is an element of the defence of killing in an abusive domestic relationship in *Criminal Code* s 304B. The term

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<sup>169</sup> See Ch 13.

<sup>170</sup> *Crimes Act 1958* (Vic) s 9AH(4).

<sup>171</sup> *Family Violence Protection Act 2008* (Vic) ss 8(1), 9, 10.

<sup>172</sup> *Ibid* s 8(3).

‘domestic relationship’ is defined by reference to the *Domestic and Family Violence Protection Act 1989* (Qld) s 11A.<sup>173</sup> The latter section defines a ‘domestic relationship’ as comprising a spousal relationship, intimate personal relationship, family relationship or an informal care relationship—as defined in the Act. Accordingly, the definition in both civil and criminal laws is exhaustive in nature.

14.117 The term ‘domestic relationship’ is referred to but not defined in the *Evidence Act 1977* (Qld) s 132B, which confirms the admissibility of evidence of a domestic relationship between the offender and the victim, where such evidence is relevant to defending certain charges of offences against a person.<sup>174</sup>

#### ***Aggravated offences***

14.118 The criminal legislation of South Australia and Western Australia makes reference to certain family relationships between the offender and the victim as elements of aggravated offences. The relevant family relationships are defined exhaustively in both jurisdictions. In South Australia, the *Criminal Law Consolidation Act 1935* (SA) s 5AA(1)(g) lists the following relationships between the offender and the victim as circumstances of aggravation:

- spouses—defined as persons who are legally married;<sup>175</sup>
- domestic partners—defined by reference to the *Family Relationships Act 1975* (SA);<sup>176</sup> and
- a child of whom the offender or his or her present or former spouse or domestic partner has custody as a parent or guardian; or who regularly resides with the aforementioned persons.<sup>177</sup>

14.119 The *Intervention Orders (Prevention of Abuse) Act 2009* (SA) deems that two persons will be in a relationship for the purposes of identifying ‘domestic abuse’ in a broader range of circumstances than the criminal legislation. These include marriage, domestic partners, children, relatives, Indigenous kinship relationships or other culturally recognised family groups and unpaid care relationships.<sup>178</sup>

14.120 The Western Australian criminal legislation provides for aggravated offences against the person where the offender is in a ‘family and domestic relationship’ with the victim.<sup>179</sup> The term ‘family and domestic relationship’ is defined by reference to the *Restraining Orders Act 1997* (WA) s 4. The latter provision defines the term as a

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173     *Criminal Code* (Qld) s 304B(2).

174     See Chapters 28 to 30 of the *Criminal Code* (Qld) which include offences relating to homicide, endangerment of life or health and assaults.

175     *Criminal Law Consolidation Act 1935* (SA) s 5AA.

176     The *Family Relationships Act 1975* (SA) s 11A defines ‘domestic partners’ as persons living together in a close personal relationship—as defined in the Act—for a prescribed period, or who have had a child together.

177     A ‘child’ is defined in the *Criminal Law Consolidation Act 1935* (SA) s 5AA as a person under the age of 18 years. The terms ‘parent’ and ‘guardian’ are not defined in the Act.

178     *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 8(8).

179     *Criminal Code Act Compilation 1913* (WA) s 221.

relationship between two persons who are or were in marital, de facto, intimate personal or other personal relationships; persons who are related to each other; and children who reside or stay with, or who are under the parental care or guardianship, of the other.

### **Sentencing factors**

14.121 As noted in Chapter 13, the sentencing legislation of states and territories does not expressly prescribe a family relationship between the offender and the victim as a sentencing factor. However, at common law, the existence of a family or domestic relationship between the offender and victim is relevant to an assessment of the gravity of an offence.<sup>180</sup> In particular, in some jurisdictions the commission of an offence in a domestic context cannot be a mitigating factor,<sup>181</sup> and may be an aggravating factor in appropriate cases. For example, as noted in Chapter 13, in *R v MFP*, the Victorian Court of Appeal upheld the finding of the trial judge that the commission of an offence against a marital partner in ‘a domestic context’ was an aggravating circumstance.<sup>182</sup> Sentencing courts have made similar findings in respect of offences committed against de facto or former de facto partners,<sup>183</sup> children<sup>184</sup> and step-children<sup>185</sup>—particularly in circumstances involving a breach of trust.<sup>186</sup> However, the boundaries of the concept of a family relationship or the ‘domestic context’ for the purposes of common law sentencing factors do not appear to have been comprehensively delineated.

### **Criminal law provisions referring to the dynamics of family violence**

14.122 As canvassed in Chapter 13, other provisions in state and territory criminal laws refer exclusively to the dynamics of the relationship between the accused person and the victim, without express reference to familial connection. In particular, these include aggravated offences<sup>187</sup> and aggravating sentencing factors<sup>188</sup> in respect of offences committed in abuse of a relationship of trust or authority between the offender and the victim.

### **United States**

14.123 By way of comparison, as noted in Chapter 13, several US states recognise aggravated forms of offences against the person where they are committed against persons with whom the offender is in a defined family or domestic relationship. Most provisions define family or domestic relationships in exclusive terms, by reference to categories of relationships. For example, common categories of relationships recognised in the six illustrative US jurisdictions identified in Chapter 13 include:<sup>189</sup>

180 See, eg, *R v Kibble* [2002] VSC 52, [57], [64]–[66].

181 See, eg, *Raczkowski v The Queen* [2008] NSWCCA .

182 *R v MFP* [2001] VSCA , [20].

183 See, eg, *R v Kibble* [2002] VSC 52.

184 See, eg, *R v CSG* [1998] VSCA 117.

185 See, eg, *R v VZ* [1998] 7 VR 693.

186 *Ibid*, 699.

187 *Criminal Law Consolidation Act 1935* (SA), ss 5AA(1)(a) and (i).

188 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 21A(2)(d),(ea),(eb),(k).

189 These jurisdictions are: Georgia, Mississippi, Missouri, Montana, Nevada and Ohio.

- spouses and former spouses;<sup>190</sup>
- adults who have a child in common irrespective of whether they have been married or have resided together;<sup>191</sup>
- romantic, dating or intimate personal relationships;<sup>192</sup>
- parents, children and siblings—including relationships created by adoption or marriage;<sup>193</sup>
- persons related by blood or consanguinity, marriage or affinity to the offender,<sup>194</sup> and
- household members or persons residing together or who have resided together.<sup>195</sup>

14.124 There is a substantial degree of alignment between criminal and civil definitions in the abovementioned illustrative jurisdictions.<sup>196</sup> In addition, the federal offences in the *Violence Against Women Act* apply to offences committed against spousal, intimate or dating partners as defined in the Act, and—in respect of offences involving the crossing of state boundaries to breach protection orders—persons who are the subject of protection orders under the relevant state or tribal legislation.<sup>197</sup>

### **Submissions and consultations**

14.125 In the Consultation Paper the Commissions sought stakeholder views on the types of family relationships that ought to be recognised for the purposes of any potential aggravated offences, or discrete categories of family-violence related offences that do not attract higher maximum penalties, if such measures were to be implemented.<sup>198</sup> On balance, stakeholders expressed a preference for the inclusion of a broad range of family relationships, in similar terms to family violence legislation.<sup>199</sup> A

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190 *Georgia Code* § 16-5-20(d); *Mississippi Code* § 97-3-7(3),(4); *Missouri Annotated Statutes* § 455.101(5); *Montana Code* § 45-5-206(2); *Nevada Revised Statutes* § 33.018; *Ohio Revised Code* § 2919.25(F).

191 *Georgia Code* § 16-5-20(d); *Mississippi Code* § 97-3-7(3),(4); *Missouri Annotated Statutes* § 455.101(5); *Montana Code* § 45-5-206(2).

192 *Mississippi Code* § 97-3-7(3),(4); *Missouri Annotated Statutes* § 455.101(5); *Montana Code* § 45-5-206(2); *Nevada Code* § 33.018.

193 *Georgia Code* § 16-5-20(d) (excluding siblings); *Mississippi Code* § 97-3-7(3),(4); *Missouri Annotated Statutes* § 455.101(5); *Montana Code* § 45-5-206(2); *Nevada Revised Statutes* § 33.018; *Ohio Revised Code* § 2919.25(F).

194 *Mississippi Code* § 97-3-7(3),(4); *Nevada Revised Statutes* § 33.018; *Ohio Revised Code* § 2919.25(F).

195 *Missouri Annotated Statutes* § 455.101(5); *Montana Code* § 45-5-206(2); *Nevada Revised Statutes* § 33.018.

196 See, eg, *Georgia Code* § 19-13-10; *Mississippi Code* § 93-21-3(a); *Missouri Annotated Statutes* § 455.010.

197 *Violence Against Women Act of 1994* 18 USC (US) §§ 2266 (7), (10).

198 Consultation Paper, Question 7–3.

199 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission*

small number of stakeholders responding to this issue expressly considered whether there is a need for criminal law responses to family violence to define or otherwise incorporate family relationships,<sup>200</sup> and the issue of alignment between civil and criminal laws.<sup>201</sup> These views are addressed below.

***Is there a need for criminal laws to define or incorporate family relationships?***

14.126 Two stakeholders cautioned against prescribing a family relationship between the offender and the victim as an element of any potential family-violence specific criminal offences. As noted in Chapter 13, Professor Julie Stubbs commented that such an approach would require the criminal law to ‘weigh the importance of the family versus strangers’, and that a preferable basis for a criminal law response to family violence is the existence of ‘a pattern of controlling, coercive or dominating behaviour’ on the part of the accused towards the victim.<sup>202</sup>

14.127 The NSW ODPP commented that a criminal law definition of a family relationship would duplicate existing provisions incorporating the dynamics of family violence—for example, sentencing factors directed towards offences committed in the home, in the presence of a child or in abuse of a relationship of trust or authority. The ODPP commented that any definition of ‘family relationship’ would be ‘problematic in determining the precise extent of the family’.<sup>203</sup>

***Categories of family relationships and alignment with civil law definitions***

***Categories of family relationships***

14.128 The majority of stakeholders supporting a criminal law definition of a family ‘relationship’ in the context of offences expressed a preference for the broadest possible definition, recognising, for example, past or current relationships including: dating, cohabiting and spousal relationships; family members; relatives; children of an intimate partner; those who fall within Indigenous concepts of family; and those who fall within culturally recognised groups. These categories of relationships are consistent with the Commissions’ approach in Recommendation 7–6.

14.129 While few stakeholders advanced reasons for their positions, some legal service providers emphasised the importance of recognising same-sex, transgender and intersex relationships, Indigenous kinship relationships, and other culturally recognised

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FV 164, 25 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010; P Easteal and A Hopkins, *Submission FV 36*, 12 May 2010.

<sup>200</sup> J Stubbs, *Submission FV 186*, 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

<sup>201</sup> National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

<sup>202</sup> J Stubbs, *Submission FV 186*, 25 June 2010.

<sup>203</sup> Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

familial relationships.<sup>204</sup> Two stakeholders expressly supported the recognition of care relationships.<sup>205</sup>

#### ***Alignment of relationships recognised in criminal and civil laws***

14.130 A small number of stakeholders commented on the alignment of the relationships recognised in family-violence related criminal laws with those contained in family violence legislation.<sup>206</sup> The majority of these respondents supported alignment<sup>207</sup>—in particular with the Victorian family violence legislation<sup>208</sup>—without explanation. One legal service provider suggested that the *Family Law Act 1975* (Cth) should provide the basis for alignment.<sup>209</sup>

#### **Commissions' views**

14.131 The Commissions do not make any recommendations in respect of defining or recognising family relationships for the purposes of criminal law responses to family violence. However, the Commissions advance four broad views on the approach which ought to be taken to such recognition.

#### ***A family relationship should not be the sole or predominant element of criminal law responses to family violence***

14.132 As a general proposition, the Commissions consider that a family relationship between the offender and the victim should not be the sole or predominant element of any form of criminal law response to family violence. As stated in Chapter 13, the Commissions consider that the criminal law must target the underlying nature and dynamics of family violence with greater precision, and should avoid discriminating between violence committed by family members and that committed by strangers.

#### ***In limited circumstances, it may be necessary to prescribe a family relationship as an element of certain criminal law responses to family violence***

14.133 The Commissions acknowledge, however, that in some limited circumstances it may be necessary for criminal laws responding to family violence to

204 Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010.

205 Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; P Eastal and A Hopkins, *Submission FV 36*, 12 May 2010.

206 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

207 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

208 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010.

209 Confidential, *Submission FV 83*, 2 June 2010.

make specific reference to a family relationship between the offender and victim. The Commissions consider that this approach will be necessary in two categories of case.

14.134 First, reference to a family relationship may be necessary in respect of provisions that are directed towards promoting substantive equality between legal responses to family violence and non-familial violence. In particular, this category includes laws that are designed to rectify or avoid inequalities arising from the interpretation and application of general provisions in the family violence context—for example, the designation of a family relationship between the offender and the victim as a non-mitigating factor in sentencing,<sup>210</sup> and the provision of legislative guidance about the potential relevance of family-violence related evidence.<sup>211</sup> Reference to a family relationship between the offender and the victim may also be necessary where state and territory criminal laws have established separate defences specific to family violence victims who commit offences. As noted above and in Chapter 13, however, the Commissions favour criminal laws—including defences—of general application.

14.135 Secondly, it may be necessary to expressly incorporate a family relationship between the offender and the victim as an element of those offences in which the nature of the wrongdoing sought to be addressed is the exploitation of the family relationship itself—as distinct from the underlying dynamics of that relationship. The Commissions contemplate that offences in this category would be those imposing strict liability on the basis of a family relationship between the victim and the offender. For example, offences in the nature of incest may require a discrete definitional approach. Beyond making this observation, however, the Commissions do not comment specifically on the approach to be taken to identifying family relationships recognised in this category. This matter is appropriately determined in the context of drafting individual offences.

14.136 Given the confined nature of these categories, the Commissions consider that expressly recognising categories of family relationships in these circumstances would not duplicate existing criminal laws that address the dynamics of family violence but do not specifically refer to a family relationship between the offender and the victim. For example, the designation of a family relationship as a non-mitigating factor in sentencing would not displace existing aggravating sentencing factors of general application or matters of sentencing discretion that may be relevant to the family violence context.

14.137 The Commissions consider that it would not be unduly complex to define family relationships for these purposes. The Commissions note existing statutory definitions of categories of family relationships in various civil and criminal laws, and the recognition at common law that the commission of an offence in ‘the domestic context’ may be an aggravating sentencing factor in appropriate circumstances.

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210 Rec 13–3.

211 *Crimes Act 1958* (Vic) s 9AH; *Evidence Act 1977* (Qld) s 132B. See Rec 14–5.

***Where it is necessary to prescribe a family relationship as an element of criminal law responses to family violence, an inclusive definition is generally preferable***

14.138 The Commissions consider that—in the limited circumstances in which it is necessary to refer specifically to a family relationship between the offender and the victim for the purposes of the first category of case identified above—an inclusive approach to recognising categories of relationships is preferable.

14.139 The Commissions consider that criminal law definitions of family relationships for these purposes should be expressed as including the same categories of relationships identified in Recommendation 7–6—namely:

- past or current intimate relationships, including dating, cohabiting and spousal relationships irrespective of the gender of the parties and whether the relationship is of a sexual nature;
- family members;
- relatives;
- children of an intimate partner;
- those who fall within Indigenous concepts of family; and
- those who fall within culturally recognised family groups.

14.140 A significant advantage of an inclusive—as opposed to an exhaustive—approach is that it maintains scope for judicial discretion in individual cases. This includes discretion in the application of categories of relationships in the inclusive list, and the identification of analogous categories in individual cases. An inclusive approach based upon the relationships identified in Recommendation 7–6 would further avoid the possibility that the categories of family relationships covered by the criminal law may be broader than those recognised under family violence legislation. This minimises the likelihood that circumstances of family violence may be relevant in proving and sentencing an offence, but the victim could not obtain a protection order in respect of the same conduct because he or she is incapable of being identified as a ‘person in need of protection’.

***Alignment of the relationships recognised in criminal and family violence legislation should be considered on a case-by-case basis***

14.141 Beyond the categories of relationships listed in Recommendation 7–6, however, the Commissions do not recommend the automatic alignment of relationships recognised under criminal and family violence laws. As identified in Chapter 7, the list of relationships in Recommendation 7–6 is intended as a minimum standard. Individual jurisdictions may recognise additional categories of relationships in their respective family violence legislation—for example, care relationships, housemates who are not in an intimate personal relationship, or persons who reasonably consider themselves to be family members having regard to a range of prescribed factors. Where family violence legislation recognises relationships exceeding the minimum stipulated categories in Recommendation 7–6, the question arises as to whether it is appropriate

to extend the boundaries of criminal redress to such relationships. The Commissions consider that this matter is appropriately one for jurisdictions to consider on a case-by-case basis, in light of the purposes served by the particular legislation in question.

14.142 Further, where jurisdictions have currently aligned the categories of relationships recognised under criminal and family violence laws,<sup>212</sup> it may be necessary to reconsider the appropriateness of ongoing alignment following potential implementation of Recommendation 7–6. Reconsideration will be particularly important where the relationships recognised in criminal laws are incorporated by reference to family violence legislation, and Recommendation 7–6 would expand the categories of relationships currently recognised in the relevant family violence legislation.

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212 See, eg, *Criminal Code Act Compilation 1913* (WA) s 221; *Criminal Code* (Qld) s 304B.





Australian Government

Australian Law Reform Commission



NSW  
Law Reform  
Commission  
Justice & Attorney General

# Family Violence —A National Legal Response

FINAL REPORT

## Volume 2

ALRC Report 114  
NSWLRC Report 128

October 2010

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# Contents

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## Volume 2

<b>Part D – Family Violence and Family Law</b>	<b>671</b>
<b>15. Family Law Interactions: An Introduction</b>	<b>673</b>
Introduction	673
Family violence in family law matters	674
Family courts	676
State and territory courts exercising jurisdiction under family violence legislation	683
Key interaction issues	689
Corresponding jurisdictions	694
<b>16. Family Law Interactions: Jurisdiction and Practice of State and Territory Courts</b>	<b>695</b>
Introduction	695
Current jurisdiction of state and territory magistrates courts	696
Section 68R of the <i>Family Law Act</i>	698
Obligations on state and territory courts making protection orders	725
Improving practice	734
Personal property directions in protection orders	738
<b>17. Family Law Interactions: Jurisdiction and Practice of Federal Family Courts</b>	<b>757</b>
Introduction	757
Consideration of protection orders and family violence	758
Injunctions for personal protection	796
Hague Convention	824
<b>18. Evidence of Family Violence</b>	<b>831</b>
Introduction	831
Difficulties in giving evidence	832
Common risk assessment framework	838
Improving evidence in protection order proceedings	843
Outcomes of protection order proceedings	864
<b>Part E – Child Protection</b>	<b>889</b>
<b>19. The Intersection of Child Protection and Family Laws</b>	<b>891</b>
Introduction	891
Interconnectedness of family violence and child abuse	892
Legal intervention in child protection	896

The relationship between family law and child protection law	903
Family courts and their relationship with child protection agencies	905
The power of children's courts to make parenting orders	917
Families in both courts—duplication of proceedings	928
<b>20. Family Violence, Child Protection and the Criminal Law</b>	<b>933</b>
Introduction	933
Criminal offences relating to child protection	935
Information sharing between child protection agencies and the police	944
Protection orders and children—the current legal framework	960
Child protection and juvenile justice	973
<b>Part F – Alternative Dispute Resolution</b>	<b>981</b>
<b>21. Family Dispute Resolution</b>	<b>983</b>
Introduction	983
Family Dispute Resolution	985
FDR in family law legislation	987
FDR in cases involving family violence	990
Screening and risk assessment practices	998
FDR practitioners and lawyers	1008
Culturally responsive FDR	1013
<b>22. Confidentiality and Admissibility</b>	<b>1019</b>
Introduction	1019
FDR and family counselling confidentiality	1022
Admissibility of FDR and family counselling communications	1034
Section 60I Certificates: information about family violence	1045
<b>23. Intersections and Inconsistencies</b>	<b>1055</b>
Introduction	1055
ADR in family violence legislation	1056
Interaction between FDR and protection orders	1063
Dispute resolution in child protection—law and practice	1073
Family law, child protection and family violence intersections in ADR	1085
Restorative justice	1092
<b>Part G – Sexual Assault</b>	<b>1095</b>
<b>24. Sexual Assault and Family Violence</b>	<b>1097</b>
Introduction	1097
The prevalence of sexual violence	1100
Sexual assault in the family violence context	1106
History of activism and legal change	1111
Law reform	1119
The implementation gap	1125

---

<b>25. Sexual Offences</b>	<b>1129</b>
Introduction	1129
Overview of sexual offences	1130
‘Rape’: the penetrative sexual offence	1130
Sexual offences against children and young people	1136
Persistent sexual abuse of a child	1142
Sexual offences against people with cognitive impairment	1146
Consent	1147
Jury directions about consent	1170
Guiding principles and objects clauses	1176
<b>26. Reporting, Prosecution and Pre-trial Processes</b>	<b>1183</b>
Introduction	1183
Decision points	1184
Attrition in sexual assault cases	1187
Recognising and reporting sexual assault	1193
The prosecution phase	1196
Giving evidence at committals	1214
Joint or separate trial	1218
Pre-recorded evidence	1225
<b>27. Evidence in Sexual Assault Proceedings</b>	<b>1235</b>
Introduction	1235
Evidence issues	1236
Sexual reputation and experience	1237
Sexual assault communications privilege	1257
Expert opinion evidence and children	1266
Tendency and coincidence evidence	1274
Relevance and consent	1291
Relationship evidence	1294
Evidence of recent and delayed complaint	1299
<b>28. Other Trial Processes</b>	<b>1309</b>
Introduction	1309
Jury warnings	1309
Warnings about unreliable evidence and corroboration	1311
<i>Murray</i> warning	1313
Warnings about delay in complaint	1316
<i>Longman</i> warning	1317
<i>Crofts</i> warning	1324
Cross-examination	1334
Other aspects of giving evidence	1343
Evidence on re-trial or appeal	1344

---

<b>Part H – Overarching Issues</b>	<b>1347</b>
<b>29. Integrated Responses</b>	<b>1349</b>
Introduction	1349
Integrated responses in the context of family violence	1352
Integrated responses in the context of child protection	1360
Essential elements of integrated responses	1369
<b>30. Information Sharing</b>	<b>1397</b>
Introduction	1397
Benefits of and impediments to information sharing	1398
Information flow to the family law system	1399
Information flow to the family violence system	1416
Information sharing between agencies	1427
Strategies to improve information sharing	1443
<b>31. Education and Data Collection</b>	<b>1459</b>
Introduction	1459
Education and training	1460
Key focus areas for education and training	1462
Ensuring quality and best practice	1474
National approach to education and training	1477
Data collection	1479
<b>32. Specialisation</b>	<b>1485</b>
Introduction	1485
Advantages and challenges of specialisation	1486
Specialised family violence courts	1488
Existing specialised family violence courts in Australia	1494
Expanding specialised family violence courts in Australia	1501
Mainstreaming specialised practices	1512
Specialised police	1514
<b>Appendix 1. List of Submissions</b>	<b>1523</b>
<b>Appendix 2. List of Agencies, Organisations and Individuals Consulted</b>	<b>1535</b>
<b>Appendix 3. List of Abbreviations</b>	<b>1541</b>
<b>Table of Legislation</b>	<b>1549</b>

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**Part D**

**Family Violence**

**and Family Law**

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# 15. Family Law Interactions: An Introduction

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## Contents

Introduction	673
Family violence in family law matters	674
Prevalence of family violence in family law matters	674
The effect of family violence on parenting arrangements	675
Family courts	676
Powers	677
Procedures	679
State and territory courts exercising jurisdiction under family violence legislation	683
Powers	683
Procedures	685
Key interaction issues	689
Inconsistent orders	690
Culture and practice of state and territory courts	691
Culture and practice of federal family courts	692
Unclear pathways	693
Corresponding jurisdictions	694

## Introduction

15.1 Matters that raise issues of family violence form a significant part of the work of federal family courts and state and territory courts. Dealing with family violence has been described as ‘core business’ of the federal family courts,<sup>1</sup> with more than half of the parenting cases that come to the family courts involving allegations of family violence.<sup>2</sup> Proceedings for family violence protection orders also form a substantial part of the work of state and territory magistrates courts.

15.2 Family law and state and territory family violence legislation both deal with families at a time of crisis and change. Both laws seek to address family violence, but in different ways. Protection orders made under state and territory family violence legislation are aimed at providing immediate and future personal protection from family violence. Family law resolves disputes about separation—such as issues about parental responsibility and financial matters—which may arise in circumstances where

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1 L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies, vii.

2 R Chisholm, *Family Courts Violence Review* (2009), 4.

family violence has arisen in the past and where a person fears family violence in the future.

15.3 As a consequence of this overlap, family law orders and protection orders may both regulate contact between family members. In some circumstances, family law and protection orders may also both deal with property of the parties. This means that there is potential for inconsistency and conflict between a protection order made by a state or territory court and orders made by a federal family court in relation to the same family.

15.4 For example, a protection order may specify that a person is not to communicate with, or come within a certain distance of, the person protected by the order. However, a parenting order made by a federal family court may require contact between separated parents for the purposes of facilitating arrangements for each parent to spend time with the children. Gaps in the protection of victims of family violence may arise because of the operation of the laws about which orders—state or federal—prevail, and uncertainty about the interoperation of the orders by those who must follow and enforce them.

15.5 Part D of this Report considers the interaction in practice of state and territory family violence laws with the *Family Law Act 1975* (Cth). This chapter provides an overview of the powers and procedures of state and territory courts exercising jurisdiction under state and territory family violence legislation as well as the powers and procedures of federal family courts exercising jurisdiction under the *Family Law Act*.

15.6 In addition, this chapter sets out the key issues experienced by people affected by family violence who seek orders under state and territory family violence legislation and the *Family Law Act*. These issues—and options for reform to address them—are discussed in detail in the following chapters.

## **Family violence in family law matters**

### **Prevalence of family violence in family law matters**

15.7 Family law deals with disputes about parenting arrangements for children and the division of property that arise when parties to a marriage or de facto relationship separate. Past and continuing family violence has an effect on all these matters, but is particularly relevant to parenting arrangements for children.

15.8 In January 2010, the Australian Institute of Family Studies (AIFS) released its *Evaluation of the 2006 Family Law Reforms*. As part of the evaluation, AIFS conducted a longitudinal study of separated parents. It found that about two-thirds of separated mothers and just over half of separated fathers indicated that their partner had emotionally abused them before or during separation. One in four mothers and around one in six fathers said that their partners had hurt them physically prior to separation, and, of this group,<sup>3</sup> most indicated that their children had seen or heard some of the abuse or violence.<sup>3</sup>

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3 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 26.

15.9 Where no family violence had been reported, post-separation relationships were likely to be friendly or cooperative. However, where parents reported having experienced physical or emotional violence, 25% developed distant relationships with their former partners; and 40% developed highly conflicted or fearful relationships with their former partners.<sup>4</sup> The evaluation suggested that ‘the experience of a past or present abusive dynamic is a very common characteristic of high-conflict family law clients’.<sup>5</sup>

15.10 The evaluation also examined the pathways taken by separating parents to sort out parenting arrangements. The data showed that a matter that involves family violence is more likely to proceed to the court, rather than be sorted out between the parents.<sup>6</sup>

### The effect of family violence on parenting arrangements

15.11 Family violence is a significant factor when determining post-separation parenting arrangements. Dr Tom Altobelli has summarised a number of different ways in which family violence can affect parenting.<sup>7</sup> The factors, drawn from empirical research, include:

- Spousal abuse may not end with separation—in particular, abusive controlling violence may escalate after separation.
- People who use family violence may be deficient or even abusive parents and poor role models for their children. They may also undermine their victims’ parenting role.
- Victims of family violence may find parenting difficult, as a result of abuse, poor self esteem and the stress of separation and court proceedings. Time, protection and support may be required to re-establish their parenting role. A victim’s behaviour under the stress of an abusive relationship or separation should not prejudice parenting decisions.

15.12 As noted in Chapter 5, violence between partners and within families can take a variety of forms. Altobelli emphasises that not all factors will arise in every case of family violence, and that there is therefore a need to differentiate among families experiencing family violence.<sup>8</sup>

15.13 Where there has been family violence, a parent may also have concerns about the safety of his or her children when in contact with the other parent. The AIFS Evaluation found that around one in five parents reported safety concerns associated with ongoing contact between the child and the other parent. Safety concerns were

4 Ibid, 34.

5 Ibid, 34.

6 Ibid, 77–78.

7 T Altobelli, ‘Family Violence and Parenting: Future Directions in Practice’ (2009) 23 *Australian Journal of Family Law* 194. In particular, Altobelli draws on the analysis in P Jaffe and others, ‘Custody Disputes Involving Allegations of Domestic Violence: Toward a Differentiated Approach to Parenting Plans’ (2008) 46 *Family Court Review* 476.

8 Ibid, 200.

strongly associated with a history of abuse—90% of fathers and 95% of mothers with concerns for the safety of their children also reported that they had been either physically hurt or emotionally abused by their partner. The evaluation notes, however, that:

Around one in five mothers and just over one in ten fathers who did not hold safety concerns also indicated that they had been physically hurt prior to separation. For some of these parents, separation may have relieved them of such concerns.<sup>9</sup>

15.14 Other studies have shown that there is an increased risk of family violence in the period following separation. This risk is heightened when parents meet to facilitate children spending time with each parent, for example during handover arrangements.<sup>10</sup>

15.15 It is therefore important that protection orders made under state and territory family violence legislation and family law orders that allow children to spend time and communicate with parents operate together to ensure the safety of all parties.

## **Family courts**

15.16 Two federal courts deal with matters under the *Family Law Act*—the Family Court of Australia (Family Court) and the Federal Magistrates Court of Australia (FMC). The FMC deals with the majority of family law matters.<sup>11</sup>

15.17 The two courts operate from a single registry, where parties may file documents for proceedings in either court. While parties can select which court they wish to use, the protocol for the division of work between the two courts provides that where there are serious allegations of child sexual or physical abuse or ‘serious controlling family violence’, proceedings should be filed in the Family Court, rather than the FMC.<sup>12</sup>

15.18 The Australian Government has introduced legislation to restructure the federal family courts. The restructure would create two divisions in the Family Court. The Appellate and Superior Division, comprising Family Court judges, would hear complex family law matters and appeals. The General Division, comprising Federal Magistrates who currently undertake family law work and accept a new commission, would hear most family law matters.<sup>13</sup>

15.19 In addition to the federal family courts, the Family Court of Western Australia has jurisdiction under the federal *Family Law Act*.<sup>14</sup> It also exercises jurisdiction under Western Australian legislation, and may make care and protection orders under the *Children and Community Services Act 2004* (WA). Unlike the federal family courts, it

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9 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 34.

10 See, eg Women's Legal Service, ‘An Unacceptable Risk: A Report on Child Contact Arrangements Where There Is Violence in the Family’ (2002) 14 *Journal of Judicial Administration* 157; M Kaye, J Stubbs and J Tolmie, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence* (2003).

11 R Chisholm, *Family Courts Violence Review* (2009), 53.

12 Family Court of Australia, *Protocol for the Division of Work between the Family Court of Australia and the Federal Magistrates Court as at 29/01/2010* (2010) <[www.familycourt.gov.au](http://www.familycourt.gov.au)> at 22 February 2010.

13 Access to Justice (Family Court Restructure and Other Measures) Bill 2010 (Cth).

14 ‘Federal family courts’ is used to refer to the Family Court of Australia and the Federal Magistrates Court. ‘Family courts’ also includes the Family Court of Western Australia.

may make care or protection orders in relation to children. The Family Court of Western Australia consists of both judges and magistrates, and some procedures in that court may differ from those in the federal family courts.

### Powers

15.20 The *Family Law Act* sets out the rules and procedures that federal family courts follow when determining family law disputes on separation, including parental responsibility for children and financial matters arising from separation.

#### *Parenting orders*

15.21 A parenting order can deal with any aspect of parental responsibility for a child. Parenting orders may be made in favour of a parent or another person, such as a grandparent or other relative of the child.<sup>15</sup> A parenting order may specify who has parental responsibility for a child, with whom a child lives, the time a child spends with his or her parents or other persons, and other aspects of the child's care, welfare or development.<sup>16</sup>

15.22 The paramount consideration when making a parenting order is the 'best interests of the child'.<sup>17</sup> In determining a child's best interests, the court must consider two 'primary' and 13 'additional' considerations. The primary considerations are:

- (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.<sup>18</sup>

15.23 'Additional considerations' include:

- any views expressed by the child;
- the nature of the relationship between relevant persons and the child;
- the maturity, sex, lifestyle and background of the child and his or her parents;
- the willingness and ability of each of the child's parents to facilitate and encourage a close and continuing relationship between the child and the other parent;
- the practical difficulty and expense of a child spending time or communicating with a parent;
- any family violence involving the child or a member of his or her family;

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15     *Family Law Act 1975* (Cth) s 64C.

16     Ibid s 64B(2).

17     Ibid s 60CA.

18     Ibid s 60CC(2).

- the capacity of the child's parents and any other person (such as a grandparent or other relative) to provide for the needs of the child, including emotional and intellectual needs; and
- if the child is Indigenous, the child's right to enjoy his or her Indigenous culture.<sup>19</sup>

15.24 When making a parenting order, a court must also ensure that the order does not expose a person to an unacceptable risk of family violence and is consistent with any protection order made under state and territory family violence legislation.<sup>20</sup>

15.25 The *Family Law Act* contains a presumption that it is in the best interests of a child for his or her parents to have equal shared parental responsibility for the child.<sup>21</sup> Shared parental responsibility means that decisions about 'major long term issues' must be made jointly by the parents.<sup>22</sup>

15.26 The presumption of equal shared parental responsibility does not apply if the court believes, on reasonable grounds, that a parent has engaged in child abuse or family violence.<sup>23</sup> The presumption may be rebutted by evidence that it would not be in the best interests of the child for the parents to have equal shared parental responsibility.<sup>24</sup>

15.27 Where the presumption of equal shared parental responsibility applies, the court must consider whether the child spending equal, or substantial and significant, time with each parent would be reasonably practicable and in the best interests of the child.<sup>25</sup>

15.28 The Family Court has developed *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (Best Practice Principles) to give guidance to judicial officers on how to approach parenting proceedings where there are allegations of family violence or child abuse.<sup>26</sup> However, as noted in some consultations and in the *Family Courts Violence Review* undertaken by Professor Richard Chisholm, the Best Practice Principles are not regularly applied by all judicial officers.<sup>27</sup>

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19 Ibid s 60CC(3).

20 Ibid s 60CG.

21 Ibid s 61DA(1). As noted in Ch 1 and discussed below, this provision has been the subject of criticism.

22 Ibid s 65DAC.

23 Ibid s 61DA(2).

24 Ibid s 61DA(4).

25 Ibid s 65DAA.

26 Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (2009).

27 R Chisholm, *Family Courts Violence Review* (2009). The Chisholm Review recommended that the family law courts review the extent to which judicial officers in the Family Court of Australia and the Federal Magistrates Court use and benefit from the Best Practice Principles and consider any measures that might lead to the Principles becoming more influential: Rec 4.8.

### **Relocation proceedings**

15.29 Relocation disputes are a type of parenting dispute that may arise when one parent with whom a child lives wants to move to another location, which may limit the other parent's opportunity to spend time with the child. Relocation disputes are determined in accordance with the provisions in the *Family Law Act* for assessing the best interests of the child. Relocation may be of particular significance in cases involving family violence as the victim may wish to relocate in order to escape from the violence.

### **Recovery proceedings**

15.30 The removal of a child to a location within Australia may give rise to recovery proceedings. Pursuant to s 67U of the *Family Law Act*, federal family courts are empowered to make orders requiring the return of a child, typically to a parent. Recovery orders authorise or direct a person—generally the Australian Federal Police—to find, recover and deliver the child. In deciding whether to make a recovery order, federal family courts must have regard to the best interests of the child as the paramount consideration.

15.31 The abduction or removal of a child to a location overseas may lead to proceedings under the *Convention on the Civil Aspects of International Child Abduction* (Hague Convention) as implemented by the *Family Law (Child Abduction Convention) Regulations 1986* (Cth).<sup>28</sup> The Hague Convention is a multilateral treaty which provides a procedure for the prompt return of children who have been removed from their country of habitual residence.

### **Property proceedings**

15.32 Part VIII of the *Family Law Act* deals with disputes about property and spousal maintenance, providing a mechanism for parties to alter property rights that would otherwise apply under common law and equity. Under s 78 of the *Family Law Act*, a federal family court may make a declaration of the title or rights that each party to a marriage has with respect to property. Section 79 allows the court to alter property rights to effect a just distribution between the parties. In practice, most parties seek orders under s 79 because it confers a wider discretion on the court.<sup>29</sup> The case of *In the Marriage of Kennon* held that family violence, in some limited circumstances, may be a relevant factor in determining property disputes.<sup>30</sup>

### **Procedures**

15.33 The *Family Law Rules 2004* (Cth) set out the procedures that apply in the Family Court. Proceedings in the FMC are governed by the *Federal Magistrates Court Rules 2001* (Cth), which adopt some of the *Family Law Rules*.<sup>31</sup> The FMC also has discretion to apply the *Family Law Rules* to fill any gap that might be left in the

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28 Relevant aspects of the Hague Convention are set out in Ch 2.

29 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [12.28].

30 *In the Marriage of Kennon* (1997) 139 FLR 118.

31 *Federal Magistrates Court Rules 2001* (Cth) sch 3.

*Federal Magistrates Court Rules.*<sup>32</sup> Consequently, the court rules and procedures in each court differ in some respects.

15.34 Additional procedural requirements are imposed on parties seeking parenting orders, as opposed to other family law orders. The following section outlines some key procedural events.<sup>33</sup>

### ***Initiating application***

15.35 A person commences proceedings in a family court by filing an ‘Initiating Application (Family Law)’ form. The form is the same for the Family Court, the FMC and the Family Court of Western Australia. In the form, the applicant provides details about the parties and any children, and sets out the orders sought. The form also includes a place to provide information about ‘any existing orders, agreements, parenting plans or undertakings to this or any other court’ about ‘family law, child support, family violence or child welfare issues’ concerning any of the parties or children.<sup>34</sup>

15.36 After an initiating application is filed, the other party (the respondent) files a ‘Response to an Initiating Application (Family Law)’ form. In this form, the respondent sets out any disagreement with the facts or information contained in the initiating application, and the alternative orders sought.

### ***Compulsory family dispute resolution***

15.37 Both the Family Court and the FMC require parties seeking parenting orders to participate in family dispute resolution (FDR) before commencing court proceedings. In FDR, an independent FDR practitioner assists the parties to resolve parenting disputes, through mediation, conciliation or other means. Parties who participate in FDR obtain a s 60I certificate, which must be attached to the initiating application.<sup>35</sup> Information disclosed in FDR is admissible in court proceedings only in very limited circumstances.<sup>36</sup>

15.38 There are five different types of s 60I certificate, two of which have particular relevance to family violence. A certificate under s 60I(8)(aa) is issued where the FDR practitioner considers that FDR would not be appropriate, bearing in mind the matters set out in the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*. These matters include violence, the safety of the parties, inequalities of bargaining power and the risk of child abuse.<sup>37</sup> Because it may not always be apparent that there are risk factors until FDR is under way, s 60I(8)(d) provides for a certificate to be

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32 Ibid r 1.05(2).

33 A detailed overview of the practices and procedures of the Family Court and FMC in parenting cases raising issues of family violence appears in R Chisholm, *Family Courts Violence Review* (2009), apps 3, 4.

34 Family Court of Australia, *Initiating Application (Family Law)* <www.familycourt.gov.au/> at 9 February 2010, 6.

35 *Family Law Act 1975* (Cth) s 60I(7). FDR is discussed in Part F.

36 Admissibility of information disclosed in FDR is discussed in Ch 22.

37 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25.

issued where a person begins FDR but the practitioner considers that it is inappropriate to continue.

15.39 It is possible for parties to bypass FDR by arguing one of the exceptions to obtaining a s 60I certificate, including where there are reasonable grounds to believe there has been, or there is a risk of, child abuse or family violence.<sup>38</sup> Parties that rely on this exception must satisfy the court that they have received information from a counsellor or FDR practitioner about services and options available in cases of abuse and violence.<sup>39</sup> In both courts, a registrar will usually determine if the requirements for an exception have been met.

#### ***Notice of Child Abuse or Family Violence (Form 4)***

15.40 A party who alleges that a child has been abused or is at risk of abuse must file and serve a Notice of Child Abuse or Family Violence (Form 4).<sup>40</sup> The *Family Law Rules* also require that a Form 4 be filed if there are allegations that there has been, or there is a risk of, family violence involving a child, or a member of the child's family.<sup>41</sup> In the form, parties can provide details about the family violence or child abuse, or the risk of such violence or abuse.

15.41 Under the *Family Law Act*, once a Form 4 is filed, the court must consider making orders to enable the parties to obtain appropriate evidence, and to protect the child or any party to the proceedings.<sup>42</sup>

#### ***Affidavits and other documents***

15.42 An affidavit setting out the facts of the case can form part of the evidence before the court. In the Family Court, parties are only to file affidavits if they seek interim or procedural orders.<sup>43</sup> A different rule applies in the FMC, where the initiating application and response must be accompanied by affidavits.<sup>44</sup>

15.43 Parties to parenting proceedings in either court are required to file copies of any protection orders made under state or territory family violence legislation that affect the child or a member of the child's family.<sup>45</sup> This is usually done by attaching a copy of any orders to the initiating application.

#### ***Procedural hearings***

15.44 In the Family Court, the first hearing is usually before a registrar and deals with procedural matters. In parenting proceedings, the registrar can refer the parties to the Child Responsive Program.<sup>46</sup> The program involves meetings between the parties and a

38      *Family Law Act 1975* (Cth) s 60I(9)(b).

39      Ibid s 60J.

40      Ibid s 67Z.

41      *Family Law Rules 2004* (Cth) r 2.04B.

42      *Family Law Act 1975* (Cth) s 60K(2).

43      *Family Law Rules 2004* (Cth) r 5.02.

44      *Federal Magistrates Court Rules 2001* (Cth) r 4.05.

45      *Family Law Act 1975* (Cth) s 60CF; *Family Law Rules 2004* (Cth) r 2.05, which also applies in the FMC: *Federal Magistrates Court Rules 2001* (Cth) sch 3.

46      *Family Law Rules 2004* (Cth) r 12.03(5).

family consultant assigned to the case. The family consultant may also meet with any children, if appropriate. The objective of the program is to encourage parents to focus on the needs of their children when determining parenting arrangements, and to reach agreement about the parenting arrangements that support the best outcomes for the children.<sup>47</sup>

15.45 The family consultant also screens for family violence. Where there are concerns about family violence, the family consultant may take protective action, including notifying relevant child protection authorities. The family consultant provides the parties, their legal representatives and the court with a written report of the main issues affecting the family.<sup>48</sup> The Child Responsive Program differs from FDR in that the information gathered in meetings in the program is admissible in court.

15.46 If settlement is not reached, the registrar may conduct further procedural hearings to prepare the matter for hearing before a judicial officer. In addition to case management directions, at least 28 days before the final hearing, parties to parenting proceedings must complete a parenting questionnaire, which includes questions about family violence and child abuse, alcohol and drug use, and the details of the parties' current living and parenting arrangements. This information can be admitted as evidence before the court.<sup>49</sup>

15.47 In the FMC, the first hearing is usually before the Federal Magistrate assigned to the case. The Federal Magistrate can make a variety of orders about the conduct of the proceedings, including referring the parties to other forms of dispute resolution<sup>50</sup> or a conciliation conference.<sup>51</sup> While there is no Child Responsive Program in the FMC, the court can order parties to meet with a court-appointed family consultant at a Child Dispute Conference.

15.48 An independent children's lawyer may be appointed to represent the best interests of a child in the proceedings on the application of any of the parties or an organisation concerned with the child's welfare, or on the initiative of the court.<sup>52</sup>

### ***Trial***

15.49 Both the Family Court and the FMC adopt a 'less adversarial' approach when conducting child-related proceedings.<sup>53</sup> This means that the proceedings are conducted with as little formality as possible, and the judicial officer actively directs the conduct of the proceedings.<sup>54</sup> In addition, at any point in the trial, either court may refer parties to FDR or counselling.

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47 R Chisholm, *Family Courts Violence Review* (2009), 224.

48 Ibid, 224–226.

49 Ibid, 229.

50 *Federal Magistrates Court Rules 2001* (Cth) r 10.01.

51 *Federal Magistrates Act 1999* (Cth) s 26. Conciliation conferences are more likely to be part of financial proceedings rather than parenting proceedings: see R Chisholm, *Family Courts Violence Review* (2009), 262.

52 *Family Law Act 1975* (Cth) s 68L.

53 Ibid s 69ZN.

54 Ibid s 69ZN.

15.50 Either court may order that a court-appointed family consultant prepare a family report if the care, welfare or development of a child is relevant to the proceedings.<sup>55</sup> The court may also appoint an expert witness to prepare a report on the family.<sup>56</sup> In determining whether to order a family report, the FMC may take into account allegations of family violence or child abuse.<sup>57</sup> In the Family Court, the Best Practice Principles suggest a number of matters that the court may direct the family report writer or expert witness to address in cases where family violence or child abuse is alleged, including:

- the impact of the family violence or abuse;
- the harm, or risk of harm, to the children;
- any benefits if the child spends time with the parent against whom the allegations are made; and/or
- whether the safety of the child and the parent alleging the family violence or abuse can be secured if there is contact with the person against whom allegations have been made.<sup>58</sup>

### ***Interim hearings***

15.51 Both the Family Court and the FMC can make orders on an interim basis pending final orders. In some circumstances, interim orders can be made without notice to the other parties to the proceedings, including where there are family violence and child abuse concerns.

### ***Consent orders***

15.52 Consent orders are orders agreed to by the parties about parenting arrangements or other issues in dispute. The orders must be put before the court, which will consider making formal orders that bind the parties. Parties may apply for consent orders at any stage of proceedings in the Family Court and the FMC.

## **State and territory courts exercising jurisdiction under family violence legislation**

### **Powers**

15.53 While the role of the family courts is to resolve disputes that arise between separating spouses or de facto couples, the focus of state and territory courts exercising jurisdiction under family violence legislation is the prevention of family violence and the protection of persons who experience or who are at risk of family violence.<sup>59</sup>

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55 Ibid s 62G.

56 Ibid s 69ZX(1)(d).

57 *Federal Magistrates Court Rules 2001* (Cth) r 23.01A(2).

58 Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (2009), 5–6.

59 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 9(1); *Family Violence Protection Act 2008* (Vic) s 1; *Domestic and Family Violence Protection Act 1989* (Qld) s 3A(1); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 5; *Family Violence Act 2004* (Tas) s 3; *Domestic Violence and*

15.54 The primary way in which state and territory courts achieve this objective is by making protection orders. The purpose of family violence protection orders is to protect people from future family violence. This is usually done by prohibiting a person who has used, or threatened to use, family violence from engaging in certain conduct. Family violence legislation generally allows courts to impose any restriction on a person who has used or threatened to use family violence that it thinks necessary or desirable for the protection of the person at risk.<sup>60</sup> For example, a protection order may prohibit a person from: behaving in an intimidating, offensive or abusive manner towards the person protected; communicating with the protected person; or approaching or entering particular premises where the protected person lives or works.<sup>61</sup>

15.55 Family violence legislation in each state and territory confers power to make protection orders on courts of summary jurisdiction in the relevant jurisdiction—that is, local or magistrates courts (collectively referred to in this chapter as ‘magistrates courts’).<sup>62</sup> Courts of summary jurisdiction also have limited jurisdiction under the *Family Law Act*, discussed in more detail in Chapter 16.

15.56 State and territory magistrates courts also hear minor offences, conduct preliminary hearings for serious offences and deal with civil proceedings for amounts under a certain monetary threshold. Magistrates may also sit on specialist children’s courts which deal with child protection matters and juvenile offenders. In some jurisdictions, children’s courts can also deal with protection order matters—for example, where a child seeks a protection order or a protection order is sought against a child.<sup>63</sup>

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<sup>60</sup> Protection Orders Act 2008 (ACT) s 6; Domestic and Family Violence Act 2007 (NT) s 3(1). See further, Ch 3.

<sup>61</sup> Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 35(1); Family Violence Protection Act 2008 (Vic) s 81(1); Domestic and Family Violence Protection Act 1989 (Qld) s 25(b); Restraining Orders Act 1997 (WA) s 13(1); Intervention Orders (Prevention of Abuse) Act 2009 (SA) s 5; Family Violence Act 2004 (Tas) s 16(2); Domestic Violence and Protection Orders Act 2008 (ACT) s 48(1); Domestic and Family Violence Act 2007 (NT) s 21(1)(a).

<sup>62</sup> See, eg, Crimes (Domestic and Personal Violence) Act 2007 (NSW) ss 35–36; Family Violence Protection Act 2008 (Vic) s 81(2); Domestic and Family Violence Protection Act 1989 (Qld) ss 22, 25(3); Restraining Orders Act 1997 (WA) s 13(2); Intervention Orders (Prevention of Abuse) Act 2009 (SA) s 12; Family Violence Act 2004 (Tas) s 16(3); Domestic Violence and Protection Orders Act 2008 (ACT) s 48(2); Domestic and Family Violence Act 2007 (NT) ss 22, 23. See Ch 11 for a discussion on the kinds of conditions that may be included in protection orders.

<sup>63</sup> Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 91; Family Violence Protection Act 2008 (Vic) s 4; Domestic and Family Violence Protection Act 1989 (Qld) s 38; Restraining Orders Act 1997 (WA) s 25(3); Intervention Orders (Prevention of Abuse) Act 2009 (SA) s 3; Family Violence Act 2004 (Tas) s 5(1); Domestic Violence and Protection Orders Act 2008 (ACT) s 46; Domestic and Family Violence Act 2007 (NT) s 4.

<sup>64</sup> See, eg, Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 91; Family Violence Protection Act 2008 (Vic) ss 146–147; Children and Young People Act 2008 (ACT) s 459; Restraining Orders Act 1997 (WA) s 25(3)(a); Family Violence Act 2004 (Tas) s 31(8), (9).

15.57 Some kinds of protection orders may be made by authorities other than judicial officers. In some jurisdictions, registrars of the court may make interim protection orders.<sup>64</sup> In addition, police officers in some states and territories can make temporary protection orders for the immediate protection of a victim of family violence.<sup>65</sup> The following outline focuses on the procedures involved where a court makes a protection order. The processes associated with police-issued protection orders are discussed in Chapter 9.

## Procedures

15.58 The court procedures involved in making a protection order vary across the states and territories. There may also be some variation between courts in the same state or territory, depending on where the court is located—for example, whether it is in an urban, regional or remote area—and how the court operates—for example, whether the court has a specialist family violence list. The following section provides a general outline of the court procedures common to most jurisdictions.

### *Applying for a protection order*

15.59 The first step for a person seeking a protection order is to make an application to the court. Generally, an application for a protection order may be made by:

- the person seeking protection;
- a police officer; or
- another person acting for the person for whose protection the order would be made, such as a child's parent or guardian.<sup>66</sup>

15.60 A person seeking a protection order under state or territory family violence legislation (the applicant) applies for an order by completing an application form.<sup>67</sup> In the application form, the applicant sets out the reasons why he or she seeks a protection

64 For example, in NSW a registrar may make interim orders by consent: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 23.

65 *Family Violence Protection Act 2008* (Vic) s 24; *Restraining Orders Act 1997* (WA) s 30A; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 18; *Family Violence Act 2004* (Tas) s 14; *Domestic and Family Violence Act 2007* (NT) s 41. Police powers to issue protection orders are discussed in Ch 9.

66 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 48(2); *Family Violence Protection Act 2008* (Vic) s 45; *Domestic and Family Violence Protection Act 1989* (Qld) s 14; *Restraining Orders Act 1997* (WA) s 25; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 20; *Family Violence Act 2004* (Tas) s 15(2); *Domestic Violence and Protection Orders Act 2008* (ACT) s 18; *Domestic and Family Violence Act 2007* (NT) s 28.

67 New South Wales, *Application—Apprehended Domestic Violence Order*; Magistrates' Court of Victoria, *Information for Application for an Intervention Order* (2009) <[www.magistratescourt.vic.gov.au](http://www.magistratescourt.vic.gov.au)> at 2 February 2010; Magistrates Court of Queensland, *Protection Order Application* <[www.communityservices.qld.gov.au/violenceprevention/legislation/dom-violence-orders.html](http://www.communityservices.qld.gov.au/violenceprevention/legislation/dom-violence-orders.html)> at 9 February 2010; Magistrates Court of Western Australia, *Violence Restraining Order Application* <[www.magistratescourt.wa.gov.au/content/restraining.aspx](http://www.magistratescourt.wa.gov.au/content/restraining.aspx)> at 9 April 2010; Magistrates Court of Tasmania, *Application for a Family Violence Order* <[www.magistratescourt.tas.gov.au/divisions/family\\_violence/forms](http://www.magistratescourt.tas.gov.au/divisions/family_violence/forms)> at 29 March 2010; Magistrates Court of the Australian Capital Territory, *Application for a Domestic Violence Order* (2009) <[www.courts.act.gov.au/magistrates](http://www.courts.act.gov.au/magistrates)> at 9 February 2010; Northern Territory Magistrates Courts, *Application for Domestic Violence Order* <[www.nt.gov.au/justice/ntmc/forms\\_fees.shtml](http://www.nt.gov.au/justice/ntmc/forms_fees.shtml)> at 29 March 2010.

order, recent incidents of family violence, the history of the relationship and the particular orders sought.

15.61 The application process differs between jurisdictions. In Victoria, for example, a person seeking a protection order fills out an information form, and the Court Registry uses this information to lodge a formal application for an order on the person's behalf.<sup>68</sup> In other jurisdictions, it is up to the applicant or his or her legal representative to complete and file the application form.

15.62 Family violence legislation in each state and territory allows police officers to apply for protection orders on behalf of victims of family violence.<sup>69</sup> The prevalence of applications by police on behalf of victims varies across jurisdictions. For example, in Victoria, the majority of applications for protection orders are now made by the police.<sup>70</sup>

### ***Interim orders***

15.63 Interim protection orders are temporary orders made pending another court hearing, such as for final protection orders, or criminal proceedings. Often, an applicant will ask the court for interim orders so that the person has protection immediately after the first court hearing.

15.64 In South Australia, an application for a protection order is presumed to be an application for an interim order. The court conducts a preliminary hearing without notice to the person against whom the protection order is sought (the respondent). At this hearing, the court may make an interim protection order or otherwise deal with the matter.<sup>71</sup> In other jurisdictions, if interim orders are sought, the application will be listed before a magistrate as soon as possible after the application is filed, usually on the same day.

15.65 In all jurisdictions, a hearing for an interim protection order can occur in the absence of the respondent and without notifying the respondent.<sup>72</sup> In the hearing, the court will consider the application and any written or oral evidence provided by the applicant and decide whether or not to make an interim protection order.

15.66 All jurisdictions also make provision for protection orders to be made urgently in the absence of the respondent where the circumstances require it. In some

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68 R Alexander, 'Family Violence' in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.601]–[2.8.602].

69 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 49; *Family Violence Protection Act 2008* (Vic) s 45(a); *Domestic and Family Violence Protection Act 1989* (Qld) s 14(1), pt 6; *Restraining Orders Act 1997* (WA) s 25(1); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 18; *Family Violence Act 2004* (Tas) s 15(2)(a); *Domestic Violence and Protection Orders Act 2008* (ACT) s 18(2); *Domestic and Family Violence Act 2007* (NT) s 28(1)(c).

70 Victims Support Agency, *Measuring Family Violence in Victoria* (2009), 38.

71 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 21.

72 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 22(3); *Family Violence Protection Act 2008* (Vic) s 54; *Domestic and Family Violence Protection Act 1989* (Qld) s 39D; *Restraining Orders Act 1997* (WA) s 27; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 21; *Family Violence Act 2004* (Tas) s 23(4); *Domestic Violence and Protection Orders Act 2008* (ACT) s 33; *Domestic and Family Violence Act 2007* (NT) s 35(2).

jurisdictions, courts or other authorities may make urgent orders after hours by telephone, fax or email.<sup>73</sup> Generally, only police may apply for such orders.<sup>74</sup>

15.67 Interim orders are usually of short duration, pending a court hearing at which a court can hear from the respondent and make a final order.

### **Notifying the respondent**

15.68 The respondent needs to be notified of the proceedings for the protection order. In most jurisdictions a court clerk or registrar will notify the respondent of the application and the time and place for the court hearing.<sup>75</sup>

### **Court hearings**

15.69 When the respondent is notified of the application or the interim order, he or she will also be told when both the applicant and respondent will need to appear at a preliminary court hearing or ‘mention’. The main purpose of the mention is to determine whether the respondent will oppose or agree to the application for the protection order.

15.70 Because many magistrates courts deal with a high volume of applications for protection orders, mentions may be quite short. Dr Jane Wangmann, in her study of protection order proceedings in NSW Magistrates Courts, estimated that most mentions were dealt with in less than three minutes.<sup>76</sup> This however, is not necessarily reflective of practices across Australia.

15.71 There can be several different outcomes of a mention. A large number of protection orders are made by consent, when the applicant and respondent agree on the content of the order, which is then made by the court.<sup>77</sup> In such cases, the court is not required to make any findings as to whether the grounds for making the order are

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73     *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 26; *Family Violence Protection Act 2008* (Vic) s 44; *Domestic and Family Violence Protection Act 1989* (Qld) s 54; *Restraining Orders Act 1997* (WA) s 19; *Domestic Violence and Protection Orders Act 2008* (ACT) s 70.

74     *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 25(1); *Family Violence Protection Act 2008* (Vic) s 44; *Domestic and Family Violence Protection Act 1989* (Qld) s 54; *Restraining Orders Act 1997* (WA) s 18; *Domestic Violence and Protection Orders Act 2008* (ACT) s 68.

75     See, eg, *Family Violence Protection Act 2008* (Vic) s 48; *Domestic and Family Violence Protection Act 1989* (Qld) s 47; *Domestic Violence and Protection Orders Act 2008* (ACT) s 63; *Domestic and Family Violence Act 2007* (NT) s 31.

76     J Wangmann, “‘She Said ...’ ‘He said ...’: Cross Applications in NSW Apprehended Domestic Violence Order Proceedings”, *Thesis*, University of Sydney, 2009, 104. Wangmann notes that Hunter, in her research on protection order proceedings in the Victorian Magistrates’ Court, also found that most uncontested matters were considered within three minutes.

77     Generally, only a court may make a final protection order by consent. An exception is s 38 of the *Domestic and Family Violence Act 2007* (NT), which allows a court or clerk to make a final order.

satisfied.<sup>78</sup> The court may also make an order by ‘consent without admissions’, where the respondent does not admit or agree to the allegations made in the application.<sup>79</sup>

15.72 If the applicant and respondent do not agree about the orders, the court will set a date for a contested hearing. The court may make an interim order for the person’s protection until the next court date, or continue an existing interim order. At the contested hearing, the court makes a decision whether or not to make a protection order based on evidence provided by the applicant and respondent, such as oral testimony from the parties and witnesses, police reports, medical reports, telephone records and photographs. Because protection order proceedings are civil proceedings, the magistrate will need to be satisfied of the facts ‘on the balance of probabilities’, not the higher criminal standard of ‘beyond reasonable doubt’.

15.73 If the respondent has been served or notified of the orders and proceedings but does not attend the mention or final hearing, the court may decide to hear the evidence and, if appropriate, make a protection order in his or her absence.<sup>80</sup>

15.74 In Western Australia and the ACT, a different procedure applies. In those jurisdictions, the respondent must return a signed copy of the interim order to the court, indicating whether he or she objects to the order.<sup>81</sup> If the respondent does not object, or fails to return the order, the interim order becomes a final order.<sup>82</sup> If the respondent does object, the registrar of the court will set a date for a contested hearing.<sup>83</sup>

### ***Final orders***

15.75 By making a final order, the court will replace any interim orders. Final orders must also be served on the respondent.<sup>84</sup> The order takes effect when it is made—if the respondent is present—or when the order is served on the respondent—if the respondent was not present at the hearing.<sup>85</sup> It is essential that the respondent knows

78     *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 78(1); *Family Violence Protection Act 2008* (Vic) s 78; *Restraining Orders Act 1997* (WA) s 43; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 23; *Domestic Violence and Protection Orders Act 2008* (ACT) s 43(2)(b); *Domestic and Family Violence Act 2007* (NT) s 38.

79     *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 78(2); *Family Violence Protection Act 2008* (Vic) s 78; *Restraining Orders Act 1997* (WA) s 43; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 23(3); *Family Violence Act 2004* (Tas) s 22(2); *Domestic Violence and Protection Orders Act 2008* (ACT) s 43(2)(c); *Domestic and Family Violence Act 2007* (NT) s 38.

80     *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 57; *Family Violence Protection Act 2008* (Vic) s 61(2)(b); *Domestic and Family Violence Protection Act 1989* (Qld) s 49; *Restraining Orders Act 1997* (WA) s 42(2); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 23(2); *Family Violence Act 2004* (Tas) s 31(7); *Domestic and Family Violence Act 2007* (NT) s 32.

81     *Restraining Orders Act 1997* (WA) s 31; *Domestic Violence and Protection Orders Act 2008* (ACT) s 36.

82     *Restraining Orders Act 1997* (WA) s 32; *Domestic Violence and Protection Orders Act 2008* (ACT) s 36.

83     *Restraining Orders Act 1997* (WA) s 33; *Domestic Violence and Protection Orders Act 2008* (ACT) s 36.

84     *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 77; *Family Violence Protection Act 2008* (Vic) s 201; *Domestic and Family Violence Protection Act 1989* (Qld) s 58; *Restraining Orders Act 1997* (WA) s 44; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 23(5); *Family Violence Act 2004* (Tas) s 25(1)(b); *Domestic Violence and Protection Orders Act 2008* (ACT) s 64; *Domestic and Family Violence Act 2007* (NT) ss 36, 40.

85     See, eg, *Domestic and Family Violence Protection Act 1989* (Qld) s 34; *Restraining Orders Act 1997* (WA) s 16; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 23(4), (5); *Family Violence Act 2004* (Tas) s 25.

that an order has been made because breach of a protection order by the respondent is a criminal offence in all jurisdictions.<sup>86</sup> Final orders may be in force for a period set out in the order, for a specified default period, for a specified maximum period or until the order is revoked.<sup>87</sup>

#### **Variation and revocation**

15.76 State and territory family violence legislation permits a court to vary or revoke a protection order.<sup>88</sup> Procedures to vary or revoke protection orders differ across jurisdictions. Legislation in some jurisdictions requires the respondent to seek leave of the court before making an application to vary or revoke a protection order, to ensure that applications to vary or revoke are not made for the purposes of harassing the victim of family violence.<sup>89</sup>

#### **Key interaction issues**

15.77 Interaction issues will not arise in all cases involving family violence. Family violence is not an issue in all cases before federal family courts. Similarly, not all people who seek family violence protection orders are involved in proceedings in the family courts. This may be because separation and parenting matters are not an issue in every case, or may be resolved without the involvement of a family court. It may also be because some people have difficulty accessing family courts—for example because the costs of legal proceedings or geographic remoteness make access to courts impractical. In particular, several stakeholders noted that statistics show that the number of Indigenous people accessing family courts is low.

15.78 However, for those people that do need to seek orders from a state or territory court to ensure their personal protection and also resolve family law matters, it is important that the legal system supports and facilitates this as seamlessly and effectively as possible. It is also important to ensure that recommendations for reform to address the problems caused by the interaction between state and territory family violence legislation and the *Family Law Act* do not interfere unduly with the effective operation of the protection order system in cases where interaction issues do not arise.

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86     *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14; *Family Violence Protection Act 2008* (Vic) s 123; *Domestic and Family Violence Protection Act 1989* (Qld) s 80; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 31; *Restraining Orders Act 1997* (WA) s 61; *Family Violence Act 2004* (Tas) s 35; *Domestic Violence and Protection Orders Act 2008* (ACT) s 90; *Domestic and Family Violence Act 2007* (NT) s 120.

87     See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 79; *Family Violence Protection Act 2008* (Vic) ss 97, 99; *Domestic and Family Violence Protection Act 1989* (Qld) s 34A; *Restraining Orders Act 1997* (WA) s 16(5); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 11; *Family Violence Act 2004* (Tas) s 19; *Domestic Violence and Protection Orders Act 2008* (ACT) s 55; *Domestic and Family Violence Act 2007* (NT) s 27.

88     *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 72; *Family Violence Protection Act 2008* (Vic) s 100; *Domestic and Family Violence Protection Act 1989* (Qld) ss 35–36; *Restraining Orders Act 1997* (WA) s 45; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 26; *Family Violence Act 2004* (Tas) s 20; *Domestic Violence and Protection Orders Act 2008* (ACT) ss 58, 62; *Domestic and Family Violence Act 2007* (NT) s 51.

89     *Family Violence Protection Act 2008* (Vic) s 109; *Restraining Orders Act 1997* (WA) s 46; *Family Violence Act 2004* (Tas) s 20(2); *Domestic and Family Violence Act 2007* (NT) s 48.

15.79 Submissions and consultations in this Inquiry highlighted how the interaction between protection orders made under state and territory family violence legislation and parenting orders made under the *Family Law Act* can lead to a range of ‘gaps’ in the protection of victims of family violence.

### **Inconsistent orders**

15.80 Protection orders and parenting orders may contain inconsistent conditions. Sometimes orders will be directly inconsistent. For example, a protection order may prohibit a person from coming within a specified distance of the other parent’s home, while a parenting order allows the parent to collect and return the children at the home. At other times, orders will be inconsistent in practice—while they are not directly contradictory, it is difficult or impossible to comply fully with both. For example, a parenting order may allow a parent to spend time with a child, while a protection order prohibits that parent from communicating with the person with whom the child lives, making it difficult to comply with the parenting order.<sup>90</sup>

15.81 The *Family Law Act* provides that a protection order made under state or territory family violence legislation that is inconsistent with a *Family Law Act* order which provides for, requires or authorises a person to spend time with a child, is invalid to the extent of the inconsistency.<sup>91</sup> This means that conditions in a parenting order made under the *Family Law Act* will override any inconsistent requirements in a protection order, which, in itself can lead to a gap in protection.

15.82 A number of submissions to this Inquiry noted that the fact that a parenting order overrides a protection order can lead to gaps in the protection of victims of family violence, particularly when the terms of the parenting order do not include arrangements for the safety of all parties.<sup>92</sup> Dr Lucy Healey, a Research Fellow in a family violence reform research team, led by Professor Cathy Humphreys at the University of Melbourne, included the following example in her submission:

One woman reported that a Family Court judge made comments such as; “I don’t know why you’re here”, “Are you trying to stop the father seeing the children?” and “I don’t see why you can’t just change over at McDonald’s like other couples”. Her ex-partner had stalked her, tailgated her and tried to run her off the road when driving the children to meet their father but these did not appear to be seriously considered in court. (This woman had left her husband after a 13 year marriage when he threatened to kill their children and himself. She had a disability that was not readily obvious and both of her children were autistic.) In her view, the fact that Family Court Orders over-rode Intervention Orders with exclusion conditions made the latter a ‘waste of time’.<sup>93</sup>

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90 See Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [6.2.2].

91 *Family Law Act 1975* (Cth) s 68Q(1).

92 See, eg, Michelle O, *Submission FV 153*, 24 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; L Healey, *Submission FV 64*, 1 June 2010.

93 L Healey, *Submission FV 64*, 1 June 2010.

## Culture and practice of state and territory courts

### *Standard exceptions for contact*

15.83 In practice, inconsistency is often avoided by state and territory courts making exceptions for contact or communication authorised or required by a family law order from the conduct prohibited in the protection order.<sup>94</sup> Contact authorised by ‘order of any court’ is a standard exception to prohibitions on communication or contact in a protection order.

15.84 In effect, this means that responsibility for deciding how contact should take place, when there are children involved, is left to a decision by a federal family court or agreement between the parties. Even though state and territory magistrates courts have limited jurisdiction under the *Family Law Act*, as discussed in Chapter 16 the Commissions have heard in this Inquiry that this jurisdiction is rarely exercised by courts making protection orders under family violence legislation. A reluctance to exercise family law jurisdiction, and a preference to leave such matters for federal family courts, has several consequences.

### *Some magistrates are reluctant to exercise family law jurisdiction*

15.85 Some stakeholders have reported difficulties seeking a protection order from a state or territory court when proceedings have been commenced in the family court. For example, in their study on family violence and parenting arrangements, Miranda Kaye and colleagues reported the experience of a study participant who applied for a protection order for herself and her children:

The Local Court decided not to deal with the matter because [the victim’s] ex-partner had started proceedings in the Family Court. The magistrate commented that the ‘Family Court was looking into it now’ and that her interim Family Court orders for supervised contact ‘covered the situation’. ... The magistrate went on to comment that, in any event, he ‘couldn’t overrule the Family Court’.<sup>95</sup>

15.86 There are also concerns that some magistrates are reluctant to deal with family law matters even where formal family law proceedings have not been commenced. For example, a confidential submission noted that:

When in the process of considering domestic violence orders, state based courts will frequently ‘shy away’ from making any decisions that are relevant, or might impact or be construed to be, jurisdiction of the family court...

We often hear magistrates at [family violence] courts say ‘you have to take that issue to that court, it’s not this court’s business or an issue for today’. Courts don’t seem willing to take on the work that another court has done, or needs to do. In these cases, when the issue is one of child or adult safety at contact or handover, the overriding

<sup>94</sup> Family Law Council, *Review of Division 11—Family Violence* (2004), 7.

<sup>95</sup> M Kaye, J Stubbs and J Tolmie, ‘Domestic Violence and Child Contact Arrangements’ (2003) 17 *Australian Journal of Family Law* 93, 98. See also Kearney McKenzie & Associates, *Review of Division 11* (1998), 15. Similar practices were reported by some participants in the ALRC Family Violence Online Forum.

message is that the violence is not as important as the accuracy of the family court orders and/or child contact arrangements.<sup>96</sup>

15.87 This is not, however, true of all magistrates courts—education and training and specialised practices in some family violence courts have increased the willingness and capacity of magistrates courts to deal with family law issues where relevant to the protection of a victim of family violence.

### Culture and practice of federal family courts

15.88 The *Family Law Amendment (Shared Parental Responsibility) Act 2006* (Cth) introduced the presumption of equal shared parental responsibility into the *Family Law Act* and the requirement that courts consider whether a child spending equal time with both parents is reasonably practical and in the best interests of the child. In addition, the ‘best interests of the child’ test in s 60CC of the *Family Law Act* was amended to make the benefit to the child of having a meaningful relationship with both parents and protection from physical and psychological harm the primary considerations when deciding the best interests of the child.

15.89 The effect of these amendments on victims of family violence has been strongly criticised—both in submissions to this Inquiry and in other reports, including those set out in Chapter 1. In particular, there is a concern that, where there are issues of family violence, the child’s interest in having contact with both parents has come to outweigh the protection of victims of family violence.<sup>97</sup>

15.90 For example, Women’s Legal Service Victoria provided a case study in which a father, ‘Peter’, who had been extremely violent towards his partner ‘Kirsty’ in front of their child:

In this matter, the Independent Children’s Lawyer [ICL] was of the opinion that, despite Peter’s extraordinarily violent behaviour, [the child] should have contact, albeit limited, with Peter. The final orders were made based on the ICL’s Minutes of Proposed Orders. It reinforces a view that contact, albeit with a frighteningly violent parent, is preferable to no contact for the sake of protection.

This runs contrary to [the approach under] the Victorian *Family Violence Protection Act 2008* which mandates a Magistrate to order ‘no contact’ if contact ‘may’ jeopardise the child’s or potentially the parent’s safety.

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<sup>96</sup> Confidential, *Submission FV 190*, 25 June 2010.

<sup>97</sup> R Kaspiew, ‘Violence in Contested Children’s Cases: An Empirical Exploration’ (2005) 19 *Australian Journal of Family Law* 112. Submissions that expressed this view include: Confidential, *Submission FV 190*, 25 June 2010, Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; NSW Women’s Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; Murray Mallee Community Legal Service, *Submission FV 167*, 25 June 2010; Perinatal Mental Health Service at St George Hospital, *Submission FV 165*, 25 June 2010; Confidential, *Submission FV 156*, 24 June 2010; Women’s House Shelta, *Submission FV 139*, 23 June 2010; Victims of Crime Assistance League Inc NSW, *Submission FV 133*, 21 June 2010; S Waddell, *Submission FV 127*, 21 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010; J Drake, *Submission FV 66*, 1 June 2010; Migrant Women’s Emergency Support Service trading as Immigrant Women’s Support Service, *Submission FV 61*, 1 June 2010; P Easteal, *Submission FV 40*, 14 May 2010.

The inconsistency in approach between the Magistrates Court and the Family Court led to different orders and approaches to the extensive family violence Kirsty and [her child] had experienced.<sup>98</sup>

15.91 Women's Legal Service Victoria submitted that:

This case study demonstrates that the lack of integration between the Family and Magistrates Courts means that vulnerable parties are not adequately protected from violence and abuse. It also shows the very high test for violence a victim has to satisfy before a no contact order can be made by the Family Court. This is probably as a result of the tension in the current *Family Law Act* between protection from abuse and the need for children to have a meaningful relationship with both parents.<sup>99</sup>

15.92 Other submissions were critical that insufficient weight is being given in family law proceedings to findings of family violence. For example, the Murray Mallee Community Legal Service noted that while

the *Family Law Act* places a responsibility on the federal family courts to ensure people's safety from family violence ... it appears that in practice the *Family Law Act* does not take family violence against women and children seriously. Those of our family law clients who experience family violence do not find that the *Family Law Act* protects them or their children. For example, in several clients' cases parenting orders have been made providing that children spend substantial amounts of unsupervised time with the other parent, despite the Family Court acknowledging that that parent was violent and abusive.<sup>100</sup>

### Unclear pathways

15.93 Several submissions to this Inquiry characterised victims' experiences of negotiating the various legal systems as a form of further abuse and victimisation,<sup>101</sup> in which victims are often required to retell their story to different courts, lawyers and counsellors working across different jurisdictions. In addition, victims who feel that they have successfully obtained protection from family violence by obtaining a protection order find that the protection order can be overruled by a family court order.

15.94 The Magistrates' Court and Children's Court Victoria noted the impact on victims caused by the silos that currently exist between the protection order and family law jurisdictions:

Currently the pathways to resolution of parenting arrangements following intervention order proceedings can be unclear and ad hoc. Despite family violence being a cross jurisdictional issue, the state/territory family violence jurisdictions and the federal family law jurisdictions often operate in silos. This results in duplication as parties attend multiple court dates in different courts, get advice from different lawyers (family violence duty lawyers and then family lawyers) and re-litigate the same issues in different forums. This system is not effective or efficient and it does not maximise

<sup>98</sup> Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

<sup>99</sup> Ibid.

<sup>100</sup> Murray Mallee Community Legal Service, *Submission FV 167*, 25 June 2010. See also NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010.

<sup>101</sup> NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; C Stoney, *Submission FV 134*, 22 June 2010; K Hall, *Submission FV 113*, 8 June 2010; Confidential, *Submission FV 86*, 2 June 2010.

safety. Such a system creates opportunities for the process itself to become a tool of further abuse. It creates the potential for inconsistent orders. There is a concern that family violence can get minimised along the way.<sup>102</sup>

15.95 State and territory magistrates courts are often the first point of contact with the legal system for separating families affected by family violence. In many cases, protection order proceedings are commenced to secure the immediate protection of a victim of family violence, while family law matters take longer to resolve. However, unresolved parenting issues, which can heighten the risk of family violence, may be present at this first point of contact.

15.96 In light of this, the Victorian Magistrates' Court and Children's Court submitted that it is 'crucial that a clear pathway is provided to deal with cross-jurisdictional issues of family violence and parenting orders'.<sup>103</sup>

## Corresponding jurisdictions

15.97 In Chapter 3, the Commissions set out a framework for reform of the jurisdictions of courts that deal with issues of family violence. In that chapter, the Commissions consider that the effective protection of people affected by family violence is compromised by gaps arising as a result of the interaction between four legal systems: state and territory family violence legislation; criminal law; child protection laws; and federal family law. For the reasons discussed in Chapter 3, the Commissions do not favour a recommendation that one court should be established with jurisdiction to deal with all legal issues resulting from family violence. Rather, the Commissions consider that the most effective way to integrate these systems is to develop corresponding jurisdictions, where the jurisdictions of courts dealing with family violence overlap to an appropriate degree.

15.98 Using this framework, Chapters 16 and 17 consider how the jurisdiction of state and territory magistrates courts under family violence legislation and the jurisdiction of federal family courts to make orders with respect to parenting can correspond. Chapter 16 considers reforms to the jurisdiction of state and territory courts to deal with family law matters, while Chapter 17 considers reforms to the jurisdiction of federal family courts to make protective orders for victims of family violence.

15.99 In addition, these chapters consider the operation of laws governing how federal family courts and state and territory courts deal with inconsistencies between orders. The emphasis throughout is the need to ensure that the interaction between the two legal systems does not expose victims of family violence to the risk of further harm.

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102 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.  
103 Ibid.

# **16. Family Law Interactions: Jurisdiction and Practice of State and Territory Courts**

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## **Contents**

Introduction	695
Current jurisdiction of state and territory magistrates courts	696
Section 68R of the <i>Family Law Act</i>	698
Current use of s 68R	699
Fostering the use of s 68R	703
Enabling state and territory courts to make parenting orders	708
Relevant considerations when making or varying a parenting order	712
Duration of parenting orders amended in protection order proceedings	719
Obligations on state and territory courts making protection orders	725
Relevant considerations when making a protection order	725
Exceptions for court-ordered contact with a child	729
Improving practice	734
Specialised practice	735
Training and education	735
Personal property directions in protection orders	738
Overview	738
Types of property subject to personal property directions	740
Interaction with federal family court proceedings	741
Strategies to prevent inconsistencies between orders	750
Impact on future federal family court proceedings	753

## **Introduction**

16.1 This chapter examines the way in which state and territory courts exercise jurisdiction under family violence legislation and the *Family Law Act 1975* (Cth). In doing so, the chapter focuses on three issues arising from the interaction of family violence legislation and the *Family Law Act* identified in Chapter 9:

- inconsistencies between family law orders and protection orders;
- a culture in state and territory magistrates courts of deferring to family courts rather than exercising jurisdiction under the *Family Law Act*; and
- difficulties in negotiating the pathways between the state and territory family violence regimes and federal family law, leading to duplication and inconsistencies.

16.2 In Chapter 3, the Commissions set out a framework for the reform of the jurisdiction of courts that deal with issues of family violence. This framework is informed by the principle that victims of family violence should, as far as possible, be able to have as many of the legal issues relating to the violence resolved by the same court. As discussed in Chapter 3, the Commissions consider that an effective way to do this is to enhance the ability of the courts that currently deal with family violence matters to address matters outside their core jurisdiction.

16.3 Often, the first point of contact that victims of family violence have with the legal system is at a state or territory magistrates court, when the victim, or a police officer acting on the victim's behalf, seeks a protection order. This chapter focuses on how to enhance the way that state and territory courts exercise jurisdiction under family violence legislation so that they may also deal with related family law matters more effectively.

16.4 This chapter begins by setting out the jurisdiction under the *Family Law Act* that is currently conferred on state and territory courts. The chapter then examines the provisions of the *Family Law Act* that allow a state or territory court, when making a protection order, also to revive, vary, suspend or discharge a parenting order. The chapter goes on to discuss the matters courts should take into account when making a protection order in circumstances where *Family Law Act* orders exist or are pending. Finally, the chapter examines the provisions for the recovery of personal property in state and territory family violence legislation, in the context of protection order proceedings.

16.5 The Commissions acknowledge that amending legislation to expand the jurisdiction of courts is not, in itself, sufficient to address the interaction issues identified above. The chapter therefore includes a discussion of how specialised practice and training, education and resources for people involved in protection order proceedings are necessary to improve the way that courts consider and address issues of family violence.

## **Current jurisdiction of state and territory magistrates courts**

16.6 Part VII of the *Family Law Act* relates to children, and includes provisions relating to parental responsibility, parenting plans, parenting orders and child maintenance orders. Jurisdiction under pt VII is vested in the courts of summary jurisdiction in each state and territory.<sup>1</sup>

16.7 Proceedings for a parenting order can be instituted in a state or territory court of summary jurisdiction. However, s 69N of the *Family Law Act* places some limitations on the circumstances in which state and territory courts can hear and determine parenting proceedings. If a party seeks orders different from those sought in the application, the state or territory court must seek the consent of all parties to the

1 *Family Law Act 1975* (Cth) s 69J. The Local Court of New South Wales and the Magistrates Courts of Victoria, Queensland, Western Australia, South Australia, Tasmania, the Australian Capital Territory and the Northern Territory are all courts of summary jurisdiction. For ease of reference, these courts are referred to as 'magistrates courts' in this chapter.

determination of the application by the court. If the parties do not consent, the state or territory court must transfer the proceedings to a federal family court.<sup>2</sup>

16.8 The effect of s 69N is that a state or territory court may only make parenting orders where both parties agree on the content of the order, or where both parties agree that the court hear and determine the matter.<sup>3</sup>

16.9 The state or territory court may also make any orders it considers necessary pending the federal family court dealing with the matter.<sup>4</sup> For example, a state or territory court may make interim orders, such as an ex parte order for the recovery of a child, or order that parties attend a family conference or counselling.<sup>5</sup>

16.10 In addition to this jurisdiction, the *Family Law Act* allows state and territory courts, when making or varying a protection order under state or territory family violence legislation, to vary a parenting order. Section 68R of the *Family Law Act* permits a state or territory court with jurisdiction under pt VII to ‘revive, vary, discharge or suspend’:

- a parenting or recovery order;
- an injunction granted under ss 68B or 114 of the *Family Law Act* ;
- an undertaking given to a court exercising jurisdiction under the *Family Law Act*;
- a registered parenting plan; or
- a recognisance entered into under an order under the *Family Law Act*.

16.11 This chapter focuses on the use of s 68R to amend a parenting order, on the basis that it is the most common point of interaction. However, the principles developed in this chapter could also be applied to other *Family Law Act* orders.

16.12 A state or territory court may only revive, vary, discharge or suspend a parenting order to the extent that it relates to a person spending time with a child.<sup>6</sup> In addition, the court may only exercise its power under s 68R when it has material that was not before the court that made the original parenting order.<sup>7</sup>

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2 Ibid s 69N.

3 This restriction does not apply to proceedings for child maintenance orders, or to proceedings commenced in the Magistrates Court of Western Australia: Ibid s 69N(1)(a).

4 Ibid s 69N(2).

5 While not directly relevant to this Inquiry, the *Family Law Act* permits state and territory courts of summary jurisdiction to hear proceedings for ‘matrimonial causes’ other than proceedings for divorce or decree of nullity or a declaration as to the validity of a marriage, divorce or annulment: s 39(6)(a). State and territory courts can also hear defended proceedings in relation to property with a total value of up to \$20,000 without restriction, and with a higher value with the consent of all parties: s 46. If the parties do not consent to the state or territory court hearing the matter, the proceedings must be transferred to a federal family court: s 46(1)(a).

6 *Family Law Act 1975* (Cth) s 68R(1).

7 Ibid s 68R(3).

16.13 The effect of a decision to amend a parenting order differs depending on whether it is amended during proceedings for an interim protection order or for a final protection order. Magistrates courts are not permitted to discharge a parenting order during proceedings for an interim protection order.<sup>8</sup> In addition, if a magistrates court revives, varies or suspends a family law order during proceedings for an interim protection order, the variation only has effect for 21 days.<sup>9</sup>

16.14 The jurisdiction of courts of summary jurisdiction in Western Australia to amend a parenting order differs depending on whether the order was made under the *Family Law Act* or the *Family Court Act 1997* (WA). Arrangements in Western Australia have led to some uncertainty about the jurisdiction of Western Australian courts of summary jurisdiction under the *Family Law Act*.<sup>10</sup>

16.15 The power to revive, vary, discharge or suspend a parenting order under s 68R differs from the jurisdiction conferred by s 69N of the *Family Law Act* in that s 68R may be exercised by a magistrate on his or her own initiative. Section 68R does not require that the parties prepare and lodge a formal application for parenting orders with the court<sup>11</sup> or have attended family counselling.<sup>12</sup>

### **Section 68R of the *Family Law Act***

16.16 Section 68R is in pt VII div 11 of the *Family Law Act*, which deals with inconsistency between protection orders made under state and territory family violence legislation and *Family Law Act* orders that provide, require or authorise a person to spend time with a child.<sup>13</sup> The purpose of this division is:

- to resolve inconsistencies between orders;
- to ensure that such orders do not expose people to family violence; and
- to achieve the objects and principles in s 60B of the *Family Law Act*, which relate to meeting the child's best interests.<sup>14</sup>

16.17 Section 68R addresses the situation where a victim of family violence seeks a protection order after a parenting order has been made and is seeking conditions in that protection order that would be inconsistent with the existing parenting order. Because conditions in a parenting order made under the *Family Law Act* will override any inconsistent conditions in a protection order,<sup>15</sup> a protection order that is inconsistent

8 Ibid s 68R(4).

9 Ibid s 68T(1).

10 See, D Monaghan, 'Restraining Orders v Existing Parenting Orders' (Paper presented at Western Australian Magistrates Conference, Perth, November 2008).

11 *Family Law Act 1975* (Cth) s 68R(2).

12 Ibid s 68S(1)(b).

13 Ibid s 4 defines an order made under state or territory family violence legislation as 'an order (including an interim order) made under a prescribed law of a State or Territory to protect a person from family violence'. Laws prescribed under the *Family Law Regulations 1984* (Cth) reg 12BB and sch 8 correspond to those state and territory laws defined as 'family violence laws' for the purpose of this Inquiry.

14 Ibid s 68N.

15 Ibid s 68Q(1).

with a parenting order may not provide effective protection for a victim of family violence, as the inconsistent conditions in the protection order are not binding and cannot be enforced. Section 68R provides a mechanism for state and territory courts to amend the parenting order to remove the inconsistency and ensure that the person is protected from violence.

16.18 Section 68R, and other provisions of div 11, were the subject of two previous reviews—one by Kearney McKenzie and Associates in 1998 (the Kearney McKenzie Report) and another by the Family Law Council in 2004 (the 2004 Family Law Council advice). The Kearney McKenzie Report commented on the importance of s 68R:

In the circumstances where [s 68R] is likely to be used, where contact or contact handover is an occasion of violence by one parent against another, it can be used to provide a circuit breaker in the violence. It gives the victim a breathing space from the violence. It does not have to be used to deny contact altogether; in appropriate cases, the variation might be new pick up and delivery arrangements.<sup>16</sup>

### **Current use of s 68R**

16.19 Previous reports and articles have commented on how rarely state and territory courts exercise their power to vary or suspend a parenting order under the *Family Law Act* to complement a protection order made in family violence proceedings.<sup>17</sup> In this Inquiry, the Commissions sought views on whether state and territory courts, and legal practitioners working in these courts, remain hesitant to consider, or raise matters relevant to s 68R and, if so, the factors that contribute to the provision's underuse.<sup>18</sup>

#### ***Submissions and consultations***

16.20 Many stakeholders considered that s 68R was an important provision and should be used more frequently to ensure that inconsistent orders do not place victims of family violence at risk of further violence during contact authorised by a parenting order.<sup>19</sup> For example, the Australian Domestic and Family Violence Clearinghouse submitted that s 68R

provides enormous and underutilized potential for addressing many of the difficulties arising from the overlap of family violence laws and family laws, including access to

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16 Kearney McKenzie & Associates, *Review of Division 11* (1998), [4.10].

17 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [6.2.40]–[6.2.42]; Kearney McKenzie & Associates, *Review of Division 11* (1998), [3.12]–[3.21]; M Kaye, ‘Section 68T Family Law Act 1975: Magistrates’ Powers to Alter Family Court Contact Orders when Making or Varying ADVOs’ (2003) 15(1) *Judicial Officers’ Bulletin* 3, 4.

18 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Questions 8–6, 8–8.

19 Women’s Legal Service Brisbane, *Submission FV 223*, 2 July 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

evidence, inconsistent orders, exposure of children to danger/harm and its centrality to assessment of their ‘best interests’ [and] definitions of violence.<sup>20</sup>

16.21 Submissions and consultations indicated that, while practice varies across jurisdictions, many state and territory magistrates courts remain reluctant to use s 68R of the *Family Law Act*. Stakeholders suggested several reasons for this.

16.22 The Local Court of New South Wales submitted that s 68R addresses a relatively uncommon situation, as it is rare for parties seeking a protection order also to be involved in prior or concurrent family law proceedings.<sup>21</sup> Generally, an application for a protection order is made first, and family law proceedings may follow later.

16.23 In those matters where an application to make or vary a protection order is made when there is a parenting order in place, a number of stakeholders suggested that some magistrates and lawyers consider that parenting orders are a matter for a federal family court.<sup>22</sup> As Women’s Legal Services Australia noted, ‘parenting orders are commonly treated as a fixed backdrop rather than something that could be changed to ensure the safety of the protected person’.<sup>23</sup>

16.24 The Local Court of New South Wales and the Magistrates’ Court and the Children’s Court of Victoria suggested that a reason for the underuse of s 68R is that some magistrates may assume that they do not have the power to vary an order of a court of superior jurisdiction.<sup>24</sup> The Law Society of NSW noted that, in NSW, magistrates and court staff do not specialise in family law, do not have access to services such as child dispute services or independent children’s lawyers and may not have the ‘time or resources’ to determine parenting matters.<sup>25</sup> Women’s Legal Centre ACT agreed with this view, and considered that a parenting order which exposed a person to a risk of family violence should go back to a federal family court for consideration.<sup>26</sup>

16.25 Other stakeholders expressed concerns about the practicality and fairness of using s 68R to amend a parenting order at the same time as making a protection order. Some submissions noted that magistrates may require more information or evidence (such as a copy of the parenting orders or a written application) and that notice should be given to the other party, and this may not be possible if a variation of a parenting order is sought ‘on the run’ in a busy court list.<sup>27</sup>

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20 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

21 Local Court of NSW, *Submission FV 101*, 4 June 2010.

22 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

23 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

24 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010.

25 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

26 Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

27 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010, Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010.

16.26 Some submissions described situations in which applicants seeking a condition in a protection order in relation to children were required by the judicial officer to negotiate family law matters during an adjournment of the protection order proceedings. In addition, some stakeholders noted that courts have directed a police prosecutor to assist the applicant to negotiate parenting orders, which, in their view, was inappropriate.<sup>28</sup> A number of legal service providers expressed the view that it may not be appropriate to ask people to negotiate parenting issues at the same time that they seek a protection order.<sup>29</sup> In such cases there is often limited opportunity for parties to seek legal advice about family law matters on the same day that they apply for a protection order.<sup>30</sup> Access to legal advice is complicated by the fact that some parties may have legal assistance to apply for a protection order, but may not have sought, or qualified for, legal aid in relation to a family law matter.<sup>31</sup> Further, requiring parties to consider parenting matters on the day can put additional pressure on victims of family violence who are in court to seek protection from violence.

16.27 Some stakeholders noted that some applicants who seek to vary a parenting order fear that, by doing so, they will be perceived as ‘unfriendly parents’ or as misusing the legal system to frustrate children spending time with the other parent.<sup>32</sup>

16.28 The Law Society of NSW expressed concerns about the possibility that a party who is dissatisfied with the outcome of federal family law proceedings will seek to use s 68R to revisit those orders.<sup>33</sup>

16.29 Finally, many stakeholders agreed that a lack of experience and knowledge about s 68R and general family law on the part of magistrates courts, legal practitioners involved in protection order proceedings and police prosecutors contributed to the underuse of s 68R.<sup>34</sup>

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28 Confidential, *Submission FV 235*, 16 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

29 Confidential, *Submission FV 235*, 16 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

30 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010, Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

31 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Confidential, *Submission FV 190*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

32 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 88*, 2 June 2010.

33 Law Society of New South Wales, *Submission FV 205*, 30 June 2010. See also J Stubbs, *Submission FV 186*, 25 June 2010.

34 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission*

### ***Commissions' views***

16.30 The reasons for the underuse of s 68R of the *Family Law Act* identified by stakeholders in this Inquiry reflect the reasons suggested in previous reports.<sup>35</sup> In summary, the provision is rarely used to revive, vary, discharge or suspend a parenting order because:

- judicial officers, lawyers, police and others involved in protection order proceedings may not be sufficiently aware of the existence, or understand the nature, of s 68R;
- some judicial officers, lawyers and police appear to consider that issues in relation to parenting orders should be a matter for federal family courts;
- judicial officers may not have the information or evidence necessary to amend a parenting order; and
- parties to proceedings may not have access to appropriate legal advice and other support before seeking to amend a parenting order.

16.31 The Commissions are of the view that increasing and improving the use of s 68R in state and territory magistrates courts is necessary to fill a gap in the protection of victims of family violence caused by the interaction between family law and state and territory family violence legislation. In particular, s 68R is necessary to protect victims of family violence where violence arises or escalates after parenting orders have been made—for example, during handover arrangements. In such cases, if s 68R is not used to amend the parenting order, a victim of violence may need to go to a federal family court to seek an amendment to the parenting order as well as a state or territory magistrates court to seek a protection order. In this way, state and territory family violence legislation and the *Family Law Act* are designed to be complementary, but do not appear to be operating in this way in practice.

16.32 Fostering the use of s 68R, improving understanding about the intersections between state and territory family violence legislation and the *Family Law Act*, and, as discussed below, allowing magistrates courts to make parenting orders when making or varying a protection order until further order, will allow one court to deal with a range of personal protection and family law matters that may arise when a victim of family violence seeks a protection order.<sup>36</sup>

16.33 The Commissions note the concerns expressed by some stakeholders about whether state and territory magistrates courts are the appropriate forum for the consideration and amendment of family law orders. In order to close the gaps in

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<sup>35</sup> *FV 212*, 28 June 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

<sup>36</sup> Family Law Council, *Review of Division 11—Family Violence* (2004), [15]; Kearney McKenzie & Associates, *Review of Division 11* (1998), [3.14]–[3.21].

<sup>36</sup> A related issue is the practice of making protection orders with standard exceptions, deferring to parenting orders. This is considered further below.

protection and make court process as seamless as possible from the point of view of victims of family violence, the Commissions consider that fostering the exercise of family law jurisdiction by state and territory magistrates courts needs to be accompanied by a specialised family violence practice that transcends the current silos between protection orders and family law matters. Specialisation is discussed further below and in Chapter 32.

### **Fostering the use of s 68R**

16.34 In the Consultation Paper, the Commissions proposed three measures to foster the use of s 68R by state and territory magistrates courts:

- amending state and territory family violence legislation to refer expressly to s 68R,<sup>37</sup>
- including a question about parenting orders in application forms for protection orders under state and territory family violence legislation,<sup>38</sup> and
- training and education of judicial officers.<sup>39</sup>

16.35 Because training and education is integral to many of the recommendations made in this chapter, it is discussed separately later in this chapter.

#### ***Express reference to s 68R in state and territory legislation***

16.36 Family violence legislation in Victoria and South Australia expressly refers to the court's ability to revive, vary, discharge or suspend a parenting order when making or varying a protection order. Section 16(1) of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) states:

An intervention order is invalid to the extent of any inconsistency with a *Family Law Act* order of a kind referred to in section 68R of the *Family Law Act 1975* of the Commonwealth (but the Court may resolve the inconsistency by exercising its power to revive, vary, discharge or suspend the *Family Law Act* order under that section).

16.37 Section 90 of the *Family Violence Protection Act 2008* (Vic) goes further, and requires, where a protection order will be inconsistent with an existing *Family Law Act* order:

The court must, to the extent of its powers under section 68R of the *Family Law Act*, revive, vary, discharge or suspend the *Family Law Act* order to the extent that it is inconsistent with the family violence intervention order.

16.38 In the Consultation Paper, the Commissions proposed that family violence legislation in each state and territory should refer to the powers under s 68R of the *Family Law Act* to revive, vary, discharge or suspend a parenting order to give effect to a family violence protection order. The Commissions expressed a preliminary view that the approach adopted in the South Australian legislation—which refers to the

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<sup>37</sup> Consultation Paper, Proposal 8–8.

<sup>38</sup> Ibid, Proposal 8–9.

<sup>39</sup> Ibid, Proposal 8–13.

powers under s 68R of the *Family Law Act*—would be sufficient to increase the visibility and awareness of s 68R. However, the Commissions also asked whether courts should be *required* to use s 68R to revive, vary, discharge or suspend an inconsistent *Family Law Act* order, as is the case in Victoria.<sup>40</sup>

### ***Submissions and consultations***

16.39 Most submissions received in response to this proposal agreed that state and territory family violence legislation should expressly refer to s 68R. However, views differed about the form such a provision should take.

16.40 Most stakeholders preferred the Victorian model.<sup>41</sup> Some did so on the basis that the requirement to act would be more effective in raising awareness and facilitating the use of s 68R.<sup>42</sup> For example, Women's Legal Services NSW preferred this option

as it places a stronger obligation on the courts, requiring them to exercise their powers, than the wording of section 68R in which courts 'may' amend existing orders. In circumstances where a protection order has been made creating a conflict with an existing parenting order, it is essential that magistrates turn their minds to whether or not there needs to be a change to the parenting orders.<sup>43</sup>

16.41 Other stakeholders submitted that state and territory legislation should refer to the powers under s 68R of the *Family Law Act*, but not mandate its use.<sup>44</sup> For example, the Queensland Law Society submitted that a magistrate ought to be required to

40 Ibid, Proposal 8–8.

41 Women's Legal Service Brisbane, *Submission FV 223*, 2 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 190*, 25 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Murray Mallee Community Legal Service, *Submission FV 167*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; P Easteal, *Submission FV 40*, 14 May 2010.

42 See, eg, National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 190*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

43 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

44 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

consider whether s 68R of the *Family Law Act* applies as part of a ‘checklist’ before making a protection order.<sup>45</sup> Other submissions expressed concerns about requiring a magistrates court to exercise its powers under s 68R whenever there is an inconsistency. In particular, the Chief Justice of the Family Court and the Chief Federal Magistrate commented that:

A court making a family violence order may not have sufficient information to be confident about dealing with the parenting order and the matter should therefore remain discretionary.<sup>46</sup>

16.42 The Law Society of NSW submitted that, in its view, requiring state courts to use s 68R would be inappropriate in cases where the protection order proceedings are brought because one party is dissatisfied with the family law orders. It preferred an approach where the use of s 68R was left to the discretion of the judicial officer based on the circumstances of each case:

State Courts may not have the time or resources to determine issues regarding the variation or suspension of parenting orders, particularly in cases where the Federal Family Law Courts have made a determination, following hearing of evidence in the matter which may include a Family Report and where the Federal Family Law Courts may have had the benefit of an Independent Children’s Lawyer who was appointed to the case to represent the interests of the children separately.<sup>47</sup>

### ***Commissions’ views***

16.43 The Commissions are of the view that an express reference to the powers under s 68R in the family violence legislation in each state and territory will increase awareness of the provision among judicial officers, police prosecutors and legal practitioners involved in protection order proceedings.

16.44 The Commissions recommend that state and territory family violence legislation should require a judicial officer to consider whether s 68R should be used to ensure that an existing parenting order that is inconsistent with new conditions in a protection order does not compromise the protection of a victim of family violence. The requirement to consider the use of s 68R will mean that a judicial officer retains the discretion to resolve inconsistencies in a way that is appropriate in each case.

16.45 While the Commissions note the concerns of some stakeholders about the potential misuse of s 68R by a party dissatisfied with the outcome of family law proceedings, there is little evidence to support that this is in fact the case. The Commissions consider that s 68R and state and territory family violence legislation contain sufficient safeguards to allow courts to deal with unmeritorious applications. A judicial officer making or varying a protection order under state or territory family violence legislation must be satisfied on the evidence that the order is necessary or desirable to protect the person from family violence. Further, s 68R requires that a

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45 Queensland Law Society, *Submission FV 178*, 25 June 2010.

46 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010. See also Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

47 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

judicial officer may only revive, vary, discharge or suspend a parenting order if the court has before it material that was not before the court that made the original order.<sup>48</sup>

**Recommendation 16–1** Family violence legislation in each state and territory should require judicial officers making or varying a protection order to consider, under s 68R of the *Family Law Act 1975* (Cth), reviving, varying, discharging or suspending an inconsistent parenting order.

### *Application forms*

16.46 Another practical way to increase the awareness and use of s 68R of the *Family Law Act* is to include a question regarding current parenting orders in application forms for protection orders in each state and territory. For example, the *Information for Application for an Intervention Order* form, used in Victoria, asks applicants to check a box if they would like a *Family Law Act* order to be revived, varied or suspended.<sup>49</sup>

16.47 In the Consultation Paper, the Commissions proposed that application forms for protection orders under state and territory family violence legislation should include a clear option for an applicant to request the court to revive, vary, discharge or suspend a parenting order.<sup>50</sup>

### *Submissions and consultations*

16.48 The majority of stakeholders who responded to this proposal supported it.<sup>51</sup> Women's Legal Services NSW commented that:

48 *Family Law Act 1975* (Cth) s 68R(3).

49 Magistrates' Court of Victoria, *Information for Application for an Intervention Order* (2009) <[www.magistratescourt.vic.gov.au](http://www.magistratescourt.vic.gov.au)> at 2 February 2010, 10.

50 Consultation Paper, Proposal 8–9.

51 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; WESNET—The Women's Services Network, *Submission FV 217*, 30 June 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; Confidential, *Submission FV 130*, 21 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; A Harland, *Submission FV 80*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; P Easteal, *Submission FV 40*, 14 May 2010.

this would be a simple amendment that could provide protection order applicants with a clear opportunity to raise the necessity of change to a current parenting order, which they would otherwise have thought was not possible.<sup>52</sup>

16.49 The Australian Domestic and Family Violence Clearinghouse submitted that clear options on forms would facilitate awareness amongst police, lawyers and judicial officers as well as clients.<sup>53</sup> The Queensland Commission for Children submitted that this would be a ‘helpful prompt for parties and the court in protection order matters to consider the safety implications for existing parenting orders’.<sup>54</sup>

16.50 The Magistrates’ Court Victoria agreed with the proposal, but noted that, in its experience in Victoria, the option on the form does not appear to be used regularly. The Court suggested that this may be because applicants do not understand what it means in the absence of legal advice.<sup>55</sup> In this regard, the Aboriginal Family Violence Prevention and Legal Service Victoria supported the proposal, but submitted that the form could also include a brief explanation to assist applicants.<sup>56</sup>

16.51 Women’s Legal Service NSW drew attention to the fact that many protection order proceedings are initiated by police. It recommended that police be directed to obtain information from the protected person about whether to seek a variation to a current parenting order.<sup>57</sup>

16.52 Two submissions did not support this proposal. The Law Society of NSW considered that including such an option on an application form was not appropriate, as a variation could be sought when the matter was before the court. The Women’s Legal Centre ACT submitted that, in the ACT, it would be more appropriate for an inconsistent parenting order to be referred to a federal family court.<sup>58</sup>

#### ***Commissions’ views***

16.53 In Chapter 30, the Commissions recommend that application forms for protection orders in all states and territories should clearly seek information about existing parenting orders or pending proceedings for such orders.<sup>59</sup> Further, the Commissions also recommend that state and territory courts dealing with family violence matters and child protection matters should have access to the Commonwealth Courts Portal used by federal family courts to ensure that they have reliable and timely access to information about existing parenting orders and pending proceedings for such orders.<sup>60</sup>

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52 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

53 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010. See also, Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 81*, 2 June 2010.

54 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

55 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

56 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

57 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

58 Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

59 Rec 30–7.

60 Rec 30–8.

16.54 In addition, the Commissions consider that application forms for protection orders under state and territory family violence legislation should include an option for applicants to request the court to revive, vary, discharge or suspend a parenting order. Later in this chapter, the Commissions recommend that state and territory courts, when making or varying a family violence protection order, should be able to make a parenting order. This option should also be noted in the application forms. Expressly including this option in application forms would go some way to increasing awareness and use of s 68R by bringing the issue to the attention of the court, lawyers and parties.

16.55 The Commissions note the comments from the Victorian Magistrates Court that this option in the application form in Victoria is not often used, and also the concerns discussed in Chapter 30 about over-reliance on self-disclosure by applicants for protection orders. Application forms for protection orders are often completed urgently and at a time of great stress. Applicants may also not have the benefit of legal advice or assistance. As such, applicants may not understand why parenting orders are relevant to their application for a protection order, or may be confused about whether a parenting order needs to be amended in addition to seeking a protection order. State and territory courts could also develop plain language information pamphlets or other resources to support awareness and use of this option.

16.56 In Chapter 30, the Commissions recommend placing an obligation on judicial officers making protection orders to inquire about the existence of other orders, including family law orders. In these circumstances, while applicants, including police, should be encouraged to consider whether a s 68R variation is necessary, the obligation should be on the court to inquire about the terms of any parenting order. This is consistent with s 68R(2), which permits the court to amend a parenting order either by application or on a court's own motion.

**Recommendation 16–2** Application forms for protection orders under state and territory family violence legislation should include an option for an applicant to request the court to revive, vary, discharge or suspend a parenting order.

### **Enabling state and territory courts to make parenting orders**

16.57 Before 2006, s 68R of the *Family Law Act* permitted state and territory courts, when making or varying a protection order, to make a parenting order, in addition to their ability to revive, vary, suspend or discharge a parenting order. This aspect of s 68R was repealed by the *Family Law Amendment (Shared Parenting) Act 2006* (Cth).

16.58 The removal of the power to make parenting orders when making or varying a protection order was recommended in the 1998 Kearney McKenzie Report and the 2004 Family Law Council advice.<sup>61</sup> The Kearney McKenzie Report argued that the

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61 Family Law Council, *Review of Division 11—Family Violence* (2004), Rec 4; Kearney McKenzie & Associates, *Review of Division 11* (1998), [4.9].

focus of s 68R should be limited to resolving inconsistencies between protection orders and existing parenting orders:

If there is no contact order there is no inconsistency and there is no need to do anything. Depending on its terms, a family violence order may have the effect of denying contact for a time. If so, the violent parent can apply to the Family Court. It should not be possible for either party to use family violence proceedings to get a contact order.<sup>62</sup>

16.59 In addition, the Kearney McKenzie Report considered that state and territory magistrates courts, at that time, did not have the time or resources to make parenting orders:

In family violence proceedings the focus should be on protecting the woman and her children ... The focus of s [68R] should be on resolving inconsistencies between family violence orders and existing [family law] orders. In cases where there is family violence making an appropriate contact order is always going to be difficult and magistrates have neither the time or resources to do so.<sup>63</sup>

16.60 The Family Law Council agreed with these arguments and also recommended that there should be no power for a state or territory court to make a parenting order as part of protection order proceedings.<sup>64</sup>

16.61 The Consultation Paper noted that some stakeholders expressed the view that the power to make parenting orders during protection order proceedings should be reinstated, on the basis that it enables state and territory courts to deal comprehensively with protection order proceedings involving children. The Commissions asked whether s 68R of the *Family Law Act* should be amended to allow state and territory courts to make parenting orders, in addition to their ability to revive, vary, discharge or suspend such orders.<sup>65</sup>

### ***Submissions and consultations***

16.62 There was some support for reinstating the power for state and territory magistrates courts to make parenting orders during protection order proceedings.<sup>66</sup> Some stakeholders considered that this would allow victims of family violence who have children to resolve their family violence protection orders and parenting

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62 Kearney McKenzie & Associates, *Review of Division 11* (1998), 23–24. This report was written prior to amendments to the *Family Law Act* which removed the terminology of ‘contact’.

63 Ibid, 24.

64 Family Law Council, *Review of Division 11—Family Violence* (2004), [40], Rec 4.

65 Consultation Paper, Question 8–10.

66 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 82*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; P Easteal, *Submission FV 40*, 14 May 2010.

arrangements in one court.<sup>67</sup> National Legal Aid expressed the view that while it is preferable for a specialist family court to make parenting orders,

state and territory courts should have the power to make parenting orders in those circumstances in which they can revive, vary, discharge or suspend such orders, where there are situations of urgency and so the matters of people living in regional and remote areas can be readily addressed. The power should be in relation to interim orders only. These powers should be supported by specialist training in family law for state and territory judicial officers. This specialist training is essential. The situation should be monitored and appropriate resourcing allocated.<sup>68</sup>

16.63 The Magistrates' Court Victoria noted that, prior to the amendments in 2006, it was more common for magistrates to make a new parenting order, than to discharge, vary or suspend an existing parenting order, because applications for protection orders are often made *before* family law proceedings are commenced.<sup>69</sup>

16.64 Women's Legal Services NSW submitted that the current operation of s 68R leads to inconsistency in the options available to parties, depending on whether or not they have a parenting order in place:

We note that the provisions in section 68R are expressed widely enough that the local courts can entirely discharge the existing orders replacing them with wholly new orders if considered necessary. This means that there is a clear inconsistency between people with current parenting orders who could have new orders made by the local court during the course of proceedings for protection orders, while people without existing orders must use the family law courts (unless both parties consent).<sup>70</sup>

16.65 Some stakeholders who supported an amendment to allow magistrates courts to make parenting orders in protection order proceedings noted that magistrates would require appropriate training in making parenting orders as well as additional funding and resources.<sup>71</sup>

16.66 A number of stakeholders opposed extending s 68R to allow state and territory magistrates courts to make parenting orders. Some agreed with the recommendations of the Kearney Mackenzie Report and the 2004 Family Law Council advice and submitted that magistrates courts were not the appropriate forum for making parenting orders.<sup>72</sup> Others considered that some magistrates courts do not have the time, resources or expertise to make parenting orders.<sup>73</sup> The Department of Premier and

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67 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

68 National Legal Aid, *Submission FV 232*, 15 July 2010.

69 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

70 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

71 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

72 Family Law Council, *Review of Division 11—Family Violence* (2004); Kearney McKenzie & Associates, *Review of Division 11* (1998).

73 See, eg, Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres

Cabinet (Tas) submitted that this meant that a re-introduced power for state courts to make parenting orders is unlikely to be used in Tasmania.<sup>74</sup>

#### ***Commissions' views***

16.67 As state and territory magistrates courts are often the first point of contact with the legal system for separating families who have experienced family violence, the Commissions consider that it is important that state and territory magistrates courts can deal with as many issues relating to the protection of victims of family violence as possible.

16.68 In Chapter 3, the Commissions set out a framework for reform of the jurisdiction of courts that deal with issues of family violence. The Commissions consider that, while the prospect of a single specialist court to deal with all legal matters relating to family violence is not practicable, an effective way to achieve the benefits of 'one court' is to develop corresponding jurisdictions, in which the jurisdictions of courts dealing with family violence correspond to an appropriate degree.

16.69 The Commissions consider that state and territory courts, when making or varying a protection order, should also be able to make parenting orders 'until further order'—a reinstatement of the jurisdiction under the *Family Law Act* that was removed from state and territory courts in 2006. Making an interim parenting order at this time may take the heat out of the situation by regulating how separating parents spend time and communicate with their children. For example, while a protection order may include conditions to protect a person from violence or harassment, a parenting order may prescribe handover arrangements to minimise contact between the parents.

16.70 The Commissions recommend that a parenting order made in these circumstances should last 'until further order'. This means that a party who disagrees with the order may seek amendments from a federal family court, or from a state or territory court with jurisdiction under the *Family Law Act* by using s 69N. Once this kind of application is made, the provisions of the *Family Law Act* that require parties to attend counselling would take effect. In appropriate cases, a judicial officer making a parenting order during protection order proceedings could also make orders to facilitate transfer to a family court, for example by making orders about family counselling or appointing an independent children's lawyer.

16.71 One reason for the recommendations in the Kearney McKenzie Report and the 2004 Family Law Council advice to repeal the power of state and territory courts to make parenting orders was the view that magistrates courts, at the time of those reports, had limited time and resources to perform this role. The Commissions acknowledge the force of the practical concerns reflected in submissions to this Inquiry. The recommendations made in this Report are put forward as part of a package, and the goal of ensuring that legal systems that deal with issues of family violence are as accessible and seamless as possible, requires changes to the jurisdiction as well as the practices of state and territory courts to be implemented together. In

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Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

74 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

particular, the Commissions consider that developing and extending specialised practices in family violence in state and territory courts is an important way to foster the expertise and focus the resources of courts, judicial officers and legal practitioners. The importance of specialisation in the exercise of family law jurisdiction by state and territory magistrates courts is discussed below, while the benefits of specialised practice are set out in Chapter 32.

16.72 The Commissions also acknowledge concerns expressed about the need to ensure that parties have access to timely and appropriate legal advice, including about family law, before a state or territory court amends a parenting order. While specialised practices such as a dedicated family violence list, may provide a better opportunity for qualified lawyers to be present when protection orders and parenting orders are dealt with by the court, the broader issue of increasing access to legal aid is outside the terms of reference for this Inquiry.<sup>75</sup>

**Recommendation 16–3** The *Family Law Act 1975* (Cth) should be amended to allow state and territory courts, when making or varying a protection order, to make a parenting order until further order.

### **Relevant considerations when making or varying a parenting order**

#### *Different considerations in different contexts*

16.73 When reviving, varying, discharging or suspending a parenting order using s 68R of the *Family Law Act*, the state or territory court must:

- have regard to the purposes of the division (which are set out above and include resolving inconsistencies between orders, ensuring that orders do not expose people to family violence and achieving the objects and principles in s 60B of the *Family Law Act*, which relate to meeting the child’s best interests);
- consider whether contact with both parents is in the best interests of the child; and
- if varying, discharging or suspending a parenting order that, when made, was inconsistent with a protection order, be satisfied that it is appropriate to do so because a person has been exposed, or is likely to be exposed, to family violence as a result of the operation of that order.<sup>76</sup>

16.74 Section 60CA of the *Family Law Act* requires a court making a parenting order under div 10 of pt VII to have regard to the best interests of the child as the paramount

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75 The Commissions note the announcement by the Australian Government Attorney-General, the Hon Robert McClelland MP, of a National Partnership Agreement on Legal Assistance Services, which included greater access to Commonwealth funding for child protection and family violence matters where there is a related family law matter: R McClelland (Attorney-General), ‘National Partnership Agreement on Legal Assistance Services’ (Press Release, 2 July 2010).

76 *Family Law Act 1975* (Cth) s 68R(5).

consideration.<sup>77</sup> However, when using s 68R to revive, vary, suspend or discharge a parenting order, the *Family Law Act* states that any provisions such as s 60CA that would otherwise make the best interests of the child the paramount consideration do not apply.<sup>78</sup>

16.75 As the Family Law Council, in its 2004 advice, explained,

Division 11 deals with situations in which contact orders are being considered in circumstances in which family violence orders are in existence or are about to be made. Section [68S] makes it clear that, in such situations, while the court must have regard to the best interests of a child, such interests are *not the paramount consideration*. The case for not applying the paramountcy principle in such cases is that a child's best interests must give way to the right of other family members to be protected from violence or the threat of violence.<sup>79</sup>

16.76 As noted by the Family Law Council, this means that there is an inconsistency between parenting orders made using div 10 in which the best interests of the child are the paramount consideration, and parenting orders varied using s 68R, in which the child's best interests are not the paramount consideration. Where a parenting order is made using div 10, s 60CG(1) of the *Family Law Act* requires the court to ensure that a parenting order is consistent with a protection order and does not expose a person to an unacceptable risk of family violence, but only 'to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration'. In order to ensure that a parenting order does not expose a person to a risk of family violence, the court can include any safeguards that it considers necessary for the safety of persons affected by the order.<sup>80</sup>

#### **Lack of clarity**

16.77 In addition to this inconsistency, the provisions of the *Family Law Act* seem unclear about the principles that apply when a state or territory court varies a parenting order using s 68R. In particular, there is uncertainty about whether the protection of family members from family violence should take priority over a child's interest in spending time with both parents.

16.78 In 2004, the Family Law Council recommended that the *Family Law Act* should clarify the considerations relevant to a decision to vary a parenting order according to s 68R so that:

In exercising its powers under this section, a court must have regard to the need to protect all family members from family violence and the threat of family violence and, subject to that, to the child's right to contact with both parents, provided such contact is not contrary to the best interests of the child.<sup>81</sup>

16.79 This recommendation has not been implemented.

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<sup>77</sup> Ibid s 60CA.

<sup>78</sup> Ibid s 68S(1).

<sup>79</sup> Family Law Council, *Review of Division 11—Family Violence* (2004), [29] (emphasis in original). The sections cited in this quotation have been amended to reflect the current section numbering of the *Family Law Act*.

<sup>80</sup> *Family Law Act 1975* (Cth) s 60CG(2).

<sup>81</sup> Family Law Council, *Review of Division 11—Family Violence* (2004) [29].

***The broader issue: how to determine what is in a child's best interests?***

16.80 The issue of which considerations are relevant when deciding what parenting orders to make, and the weight to be given to each consideration, has been the subject of several other reviews and reports.

16.81 Miranda Kaye and colleagues suggested that the *Family Law Act* could be amended to include a presumption that, once the court has made a finding of violence, it should not make an order giving residence or unsupervised contact to a party who has used violence against a child or other family member unless it is satisfied that the child will be safe.<sup>82</sup> This is the approach taken in New Zealand.<sup>83</sup>

16.82 The Family Courts Violence Review, undertaken by Professor Richard Chisholm (the Chisholm Review),<sup>84</sup> considered the legislative provisions that govern how a family court determines what parenting arrangements are in a child's best interests. The Review considered that the current test for determining the best interests of a child was problematic.

16.83 First, the Chisholm Review considered that the stipulation of two inherently juxtaposed primary considerations, in which parental involvement is balanced with protection from violence and abuse is 'not an ideal guide to children's best interests'.<sup>85</sup> While violence and abuse are serious matters, they are not the only issues that need to be considered in parenting cases.

16.84 Secondly, the Chisholm Review outlined the problems with any legislative approach to the best interests of the child that singles out a particular outcome for special mention—such as each parent spending equal time with the child, or no contact with the child in cases of violence. Instead, the Review emphasised that the court should consider the arrangements which would be best for the child in each case, rather than starting with an assumption that a particular outcome is likely to be best in a particular category of case.<sup>86</sup>

16.85 The Chisholm Review recommended that the *Family Law Act* should list the factors that a court must take into account when considering what parenting orders to make. The factors recommended in the review do not expressly include family violence. Rather, they would require a court to consider a child's 'safety, welfare and wellbeing', which would encompass family violence as well as other matters that might threaten a child's safety, welfare or wellbeing, such as a parent's mental illness or history of substance abuse.

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82 M Kaye, J Stubbs and J Tolmie, 'Domestic Violence and Child Contact Arrangements' (2003) 17 *Australian Journal of Family Law* 93, 132.

83 *Care of Children Act 2004* (NZ) s 60.

84 Chapter 1 sets out the background to the Chisholm Review.

85 R Chisholm, *Family Courts Violence Review* (2009), 127.

86 Ibid, 131–132.

### **Submissions and consultations**

16.86 In the Consultation Paper, the Commissions noted the recommendation in the 2004 Family Law Council advice and asked whether the *Family Law Act* should be amended to direct state and territory courts varying parenting orders to give priority to the protection of family members against violence and the threat of family violence over a child's interest in having contact with both parents.<sup>87</sup>

16.87 Many submissions supported this proposal on the basis that it would clarify that the protection of family members from the threat of violence has priority over the interests of the child in spending time with both parents.<sup>88</sup>

16.88 A number of stakeholders also considered that this priority should apply to all parenting orders, not just those made under s 68R.<sup>89</sup> A confidential submission commented that the *Family Law Act* needs to

prioritise the safety of people, particularly children, over relationships with the violent parent. Where a relationship is sought, and research suggests that it is sensible to create these relationships with both parents, such relationships should only be encouraged where it can be guaranteed that the child will be safe and protected. The court should not make orders based on the concept of a right to know a parent, prioritized over the right to be safe.<sup>90</sup>

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87 Consultation Paper, Question 8–9.

88 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; T Searle, *Submission FV 108*, 2 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; P Easteal, *Submission FV 40*, 14 May 2010.

89 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

90 Confidential, *Submission FV 190*, 25 June 2010.

16.89 A number of stakeholders commented that the issue about relevant considerations when varying a parenting order under s 68R is just one aspect of a larger issue about the relationship between the two ‘primary considerations’ for determining a child’s best interests, that is:

- the benefit to the child of having a meaningful relationship with both parents; and
- the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.<sup>91</sup>

16.90 The Australian Domestic and Family Violence Clearinghouse noted that:

Conflict between these two considerations in determining ‘best interests’ is at the heart of most difficulties that arise in relation to the application of the *Family Law Act* to situations of domestic violence. Notwithstanding the recent investigations of this issue by Professor Chisholm and the Family Law Council, it is the view of the Clearinghouse that a false dichotomy has arisen. The Clearinghouse would argue that there is strong evidence documenting the harms which children exposed to violence endure. This suggests that contact with a perpetrator of violence can never be in their ‘best interests’, and in particular, that shared time of any sort in a relationship where abuse and control characterise the dynamics of one party to another is not possible without the exposure of children to the additional harm of ongoing stress and damage.<sup>92</sup>

16.91 Similarly, in a joint submission, Domestic Violence Victoria and others drew attention to the primary considerations for determining a child’s best interests and expressed concern that:

the Act, in its enthusiasm for shared parenting, often leads to contact orders which are inconsistent with expert knowledge about child development, and where family violence is present, put children’s rights to safety second. In effect, the Act now emphasizes the first principle of meaningful involvement at the expense of children’s and women’s right to safety. The framing of these criteria takes the focus away from the best interests of the child, and places the emphasis on parental rights.<sup>93</sup>

16.92 Women’s Legal Service NSW submitted that in parenting proceedings involving family violence there is a direct conflict between the question of division of time and the risk of harm, and expressed serious concerns that, in its experience, current court practice is to resolve the conflict in favour of prioritising time over considerations relating to risk of harm.<sup>94</sup>

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91      *Family Law Act 1975* (Cth) s 60CC(2).

92      Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010. See also Murray Mallee Community Legal Service, *Submission FV 167*, 25 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010.

93      Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010. See also, Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Migrant Women’s Emergency Support Service trading as Immigrant Women’s Support Service, *Submission FV 61*, 1 June 2010.

94      Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

16.93 Other submissions expressed the view that the *Family Law Act* should not be amended to direct state and territory courts varying parenting orders to give priority to the protection of family members from violence over a child's interest in having contact with both parents. The Queensland Law Society and Law Council of Australia suggested that this consideration was more appropriate when making protection orders, not parenting orders.<sup>95</sup>

16.94 In their submission, the Chief Justice of the Family Court and the Chief Federal Magistrate considered that the best interests of the child should be the paramount consideration when making parenting orders. They submitted that the proposed amendment would 'result in a bifurcated process with violence issues being separated out from every other issue otherwise required to be considered in determining the best interests of the child' and emphasised the importance of providing a nuanced response to all of the relevant issues and factors in a child's life. The Commissioner for Children Tasmania agreed that courts making parenting orders should consider a range of interests and options.<sup>96</sup>

16.95 National Legal Aid submitted that a legislative amendment of this kind was unnecessary as 'appropriate education [and] training to people working in the family law, family violence, and child protection systems should overcome the concern that this proposed amendment is intended to address'.<sup>97</sup>

#### ***Commissions' views***

16.96 The *Family Law Act* provides that, when deciding whether to make a particular parenting order, a court must regard the best interests of the child as the paramount consideration.<sup>98</sup> However, the *Family Law Act* specifies two different tests for making or varying a parenting order where there is a risk of family violence. When a state or territory court uses s 68R to vary a parenting order, the best interests of the child are not the paramount consideration—rather, the safety of the person and any children from family violence is paramount. When a federal family court makes or varies a parenting order using div 10 of the *Family Law Act*, the court must ensure that an order does not expose a person to an unacceptable risk of family violence, but only to the extent that it is possible to do so consistently with the child's best interests being the paramount consideration.

16.97 The Commissions are of the view that the considerations relevant to making or varying a parenting order should be the same, regardless of whether the parenting order is made or varied using the provisions of s 68R of the *Family Law Act* or the provisions in div 10 of the *Family Law Act*. Identical factual circumstances—in which parenting orders place a person at risk of family violence—should not lead potentially to different outcomes depending on the forum used to make or amend the parenting orders to resolve that issue. Having consistent tests would also allay the concern,

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95 Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

96 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

97 National Legal Aid, *Submission FV 232*, 15 July 2010.

98 *Family Law Act* 1975 (Cth) s 60CA.

expressed in some submissions, that parties who are dissatisfied with parenting orders made by a federal family court, can use s 68R to seek a different outcome.

16.98 Where the person at risk of family violence is a child, the parenting orders should properly take the child's best interests as the paramount consideration. The court making a parenting order must consider, as a primary consideration, the need to protect the child from physical or psychological harm and from being subjected to, or exposed to, abuse, neglect or family violence.<sup>99</sup> Depending on the risk of family violence, a court may order 'no contact'—that the parent who has used family violence is not to spend time or communicate with the child—or order that the parent be supervised while spending time with the child. A court may consider that a 'no contact' order is in a child's best interests where the child has been exposed to family violence directed at other family members.

16.99 However, where a court determines, having regard to all the relevant considerations, that it is in the best interests of the child to spend time or to communicate with a parent who has used, or threatened to use, family violence against a family member other than the child, the paramountcy of the best interests of the child may become problematic. In such cases, the 'paramount' consideration of the best interests of the child can be applied to displace, or outrank, the safety of other family members from family violence. Where a parenting order, made in the best interests of the child, has the potential to expose another person to the risk of family violence, the best interests of the child are arguably met at the expense of the safety of other family members.

16.100 In such cases, a court has a number of options, including making orders that handover occur at a safe place or be supervised.<sup>100</sup> While making orders to ensure another person's safety may also be in the best interests of the child, the Commissions consider that a court should make such orders on the basis of the need to protect the person from family violence and not only where this coincides with the child's bests interests. The safety of other family members from family violence should be a consideration in its own right.

16.101 The Commissions are of the view that parenting orders should not operate to place a person at risk of family violence. To make orders of this kind is to privilege the best interests of the child over a parent's protection from family violence. The Commissions consider that the *Family Law Act* should recognise the interest of all parties to be protected from family violence.

16.102 In taking this approach, the Commissions do not recommend amendments to the mandatory considerations for determining what orders are in the child's best interests. The Commissions share the concerns outlined in the Chisholm Review about

99 Ibid s 60CC(2).

100 The Best Practice Principles developed by the Family Court to provide guidance to decision makers dealing with matters in which family violence is alleged, list a number of other matters that may be considered when ordering that a child spend time with a parent who has used family violence: Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (2009), 11.

the dangers of prescribing in legislation particular outcomes that are presumed to be in the best interests of the child. The Commissions agree with the Chisholm Review that a court making a parenting order should consider the arrangements which would be best for the child, in the context of each particular case.

16.103 When applying s 60CG of the *Family Law Act* the court should ensure that parenting orders do not operate to place a person at risk of family violence and make such amendments to the order as are necessary to ensure that the person is protected from an unacceptable risk of family violence. When considering these amendments, the court should consider what is necessary for the safety of those affected by the order and the best interests of the child should not be the paramount consideration.

16.104 This test should be the same, regardless of whether the parenting order is made using the provisions of div 10 of the *Family Law Act*; revived, varied, suspended or discharged by a state or territory court under s 68R; or made during proceedings to make or vary a protection order under state or territory family violence legislation in circumstances set out in Recommendation 16–3.

**Recommendation 16–4** Section 60CG of the *Family Law Act 1975* (Cth)—which requires a court to ensure that a parenting order does not expose a person to an unacceptable risk of family violence and permits the court to include in the order any safeguards that it considers necessary for the safety of a person affected by the order—should be amended to provide that the court should give primary consideration to the protection of that person over the other factors that are relevant to determining the best interests of the child.

### Duration of parenting orders amended in protection order proceedings

16.105 Section 68R operates differently depending on whether a parenting order is amended by a state or territory court during proceedings for an interim protection order or for a final protection order. When a parenting order is revived, varied or suspended under s 68R in proceedings to make or vary an *interim* protection order, s 68T provides that the parenting order only has effect for the period of the interim protection order or 21 days from the date of the order, whichever is earlier.<sup>101</sup> No appeal lies in relation to the revival, variation or suspension of a parenting order in proceedings for interim protection orders.<sup>102</sup> In contrast, the *Family Law Act* does not place a time limit on parenting orders revived, varied, discharged or suspended in proceedings to make or vary a *final* protection order.

16.106 In all states and territories, a hearing for an interim protection order often occurs in the absence of the respondent and without notifying the respondent.<sup>103</sup> In

101 *Family Law Act 1975* (Cth) s 68T(1).

102 Ibid s 68T(2).

103 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 22(3); *Family Violence Protection Act 2008* (Vic) s 54; *Domestic and Family Violence Protection Act 1989* (Qld) s 39D; *Restraining Orders Act 1997* (WA) s 27; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 21; *Family Violence Act 2004*

such cases, each party will have the opportunity to be heard before the court makes a final protection order. The purpose of s 68T, outlined in the Explanatory Memorandum to the Family Law Amendment (Shared Parenting) Bill 2005, is to provide immediate protection for a victim of family violence, but also to ensure that ‘any changes to family law orders are dealt with in a short period and with due process’.<sup>104</sup> The Explanatory Memorandum stated that the 21 day period would provide parties with an opportunity to make an application to amend the family law orders.

16.107 Previous reviews have identified that the 21 day period to seek orders from a court exercising family law jurisdiction is not practical and does not take account of the workload of federal family courts and delays in listing parenting matters for hearing.<sup>105</sup>

16.108 The Kearney McKenzie Report considered that a magistrate should have power to make the variation for a period that is long enough to enable the parties to go to a federal family court, and recommended the legislation specify a period of 90 days. The Report acknowledged that this was a long time to bind a person to an order that could not be appealed.<sup>106</sup> The Family Law Council did not agree with this recommendation, on the basis that 90 days was too long a period to bind a person to orders which could not be appealed, and which could potentially prevent a parent from spending time with his or her child.<sup>107</sup>

16.109 In the Consultation Paper, the Commissions asked whether there were practical difficulties associated with obtaining new orders from a court exercising family law jurisdiction within 21 days, and if so, what would be an appropriate time in which such orders could be obtained.<sup>108</sup>

16.110 The Consultation Paper also noted a comment by the Family Law Council that it would be unlikely that a court would judge a person to be in breach of a parenting order because the parent withheld contact beyond the 21 day period while an application to vary or discharge was awaiting hearing.<sup>109</sup> The Commissions asked whether this policy should be reflected in the legislation by amending the *Family Law Act* to include a defence to a breach of a parenting order in such circumstances.<sup>110</sup>

### ***Submissions and consultations***

16.111 Nearly all stakeholders who responded to these questions agreed that 21 days was an insufficient time to obtain new orders from a federal family court. A number of

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(Tas) s 23(4); *Domestic Violence and Protection Orders Act 2008* (ACT) s 33; *Domestic and Family Violence Act 2007* (NT) s 35(2).

104 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), [60].

105 Family Law Council, *Review of Division 11—Family Violence* (2004), [44]; Kearney McKenzie & Associates, *Review of Division 11* (1998), [4.10].

106 Kearney McKenzie & Associates, *Review of Division 11* (1998), [4.10].

107 Family Law Council, *Review of Division 11—Family Violence* (2004), [41]–[44].

108 Consultation Paper, Question 8–11.

109 Family Law Council, *Review of Division 11—Family Violence* (2004), [45].

110 Consultation Paper, Question 8–12.

reasons were given, including the time needed to arrange legal aid or other legal advice and the time required to organise evidence and make and serve an application.<sup>111</sup>

16.112 A number of submissions noted that the time between making an application and the date for a court hearing in the Family Court or Federal Magistrates Court varied depending on the registry and the availability of a judicial officer.<sup>112</sup> For this reason, stakeholders did not agree on what would be a realistic timeframe to obtain new orders from a federal family court. Some stakeholders considered that the 90 day period recommended in the Kearney McKenzie Report would be realistic.<sup>113</sup> Others suggested that 40 or 45 days may be appropriate.<sup>114</sup> NSW Legal Aid suggested that 16 weeks (120 days) reflected the reality of court availability.<sup>115</sup>

16.113 One effect of this disjunction between the terms of s 68T and the realities of legal practice is the potential to expose a victim of family violence to a threat of further violence. The joint submission from Domestic Violence Victoria and others noted that:

Delays in the family court system beyond the control of the client should not in any circumstances lead to further victimisation of that client, and importantly, should never allow a child to be placed in danger because of that delay.<sup>116</sup>

16.114 Some stakeholders identified the 21 day limit on the operation of parenting orders varied or suspended during proceedings for interim protection orders as one factor contributing to reluctance to use s 68R.<sup>117</sup>

16.115 Stakeholders expressed differing views on how best to resolve this issue. Some stakeholders agreed with the Kearney McKenzie Report that the period of time in s 68T should be extended to 90 days.<sup>118</sup> Others submitted that, rather than extend the time period, courts exercising family law jurisdiction should be adequately resourced

111 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010.

112 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

113 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010.

114 Law Council of Australia, *Submission FV 180*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

115 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

116 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010. See also, K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 96*, 2 June 2010.

117 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

118 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

to consider the matter within the 21 days currently stipulated.<sup>119</sup> For example, Women's Legal Service NSW submitted that:

the current timeframe is an appropriate limit on how long a matter involving domestic violence should wait before receiving a first court date, and submit that the family courts should be sufficiently resourced to allow the timeframe to be met.<sup>120</sup>

16.116 Other stakeholders supported the idea that there should be a defence to a breach of a parenting order where a parent withholds contact beyond 21 days due to family violence concerns while a variation or suspension of a parenting order made by a state or territory court is awaiting hearing in a federal family court.<sup>121</sup>

16.117 However, a number of stakeholders drew attention to s 70NAE(5) of the *Family Law Act*, which provides that a person has a reasonable excuse for contravening a parenting order if they believed, on reasonable grounds, that not allowing the child to spend time with the other parent was necessary to protect the health or safety of a person.<sup>122</sup>

16.118 The Chief Justice of the Family Court and the Chief Federal Magistrate submitted that this defence works well because it can be adapted to different circumstances:

If a more specific defence was introduced, a situation might arise in which, for various reasons, a long delay occurs between the making of the protection order and the hearing of an application for variation of a parenting order. The specific defence would mean there would be no consequences for failing to make the child available, regardless of whether or not it was reasonably necessary to protect the health or safety of a person. If the withholding was genuinely necessary to protect the health or safety of a person there will be no breach found.<sup>123</sup>

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119 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; A Lamb, *Submission FV 121*, 16 June 2010.

120 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

121 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; P Easteal, *Submission FV 40*, 14 May 2010.

122 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

123 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

16.119 Some stakeholders considered that this defence was adequate and should be retained without amendment.<sup>124</sup> The Department of Premier and Cabinet (Tas) noted that, in practice, the 21 day limit is rarely a problem, perhaps because ‘it is recognised that it is reasonable for a person to fail to comply with orders if to comply with them would be putting the person at risk’.<sup>125</sup> Others thought that there may be merit in particularising the situation arising under s 68T as part of the defence.<sup>126</sup> The Magistrates’ Court Victoria expressed concerns about ‘a legislative approach that sanctions a breach of a court’s own order’.<sup>127</sup>

16.120 Finally, the Magistrates’ Court Victoria identified a further limitation to the effectiveness of s 68T of the *Family Law Act*:

In Victoria, interim orders are made until further order of the court. This means that a section 68R order is made once at the interim stage and cannot be made again because there is no mechanism for remaking it.<sup>128</sup>

16.121 While there is no barrier to a magistrates court extending the period for a further 21 days when making another interim protection order (providing the other conditions of s 68R are met), if a magistrates court makes an interim order ‘until further order’ it does not need to periodically make new interim orders.

#### ***Commissions’ views***

16.122 In the Commissions’ view, the policy objective of s 68T is to ensure that parenting orders revived, varied or suspended in proceedings when an interim protection order is made, have effect for a short period of time so that parties have an opportunity to apply to amend the orders, provide further evidence and be heard before a final parenting order is made. However, the Commissions consider that s 68T, by setting an arbitrary and impracticable time limit on the duration of the parenting orders, does not facilitate this policy objective and is at odds with the policy objectives underpinning the Commissions’ recommendations in this Report.<sup>129</sup> Rather than ensuring that parties have an opportunity to be heard, the 21 day time limit means that the amended parenting order expires before the matter is listed before a court.

16.123 Further, the 21 day time limit on parenting orders varied during proceedings for an interim protection order has the potential to expose a victim of family violence to the risk of further violence as the time limit expires and the parenting order reverts to the conditions that placed the victim at risk 21 days earlier. The provision also means that victims of violence are required to engage with two different courts in order to obtain effective protection from family violence.

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124 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

125 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

126 Confidential, *Submission FV 183*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

127 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

128 Ibid.

129 See Ch 1.

16.124 Earlier in this chapter, the Commissions recommend that the *Family Law Act* should be amended to allow state and territory courts, when making or varying a family violence protection order, to also make a parenting order. The Commissions recommend that parenting orders made in these circumstances would operate ‘until further order’.

16.125 In relation to s 68T, the Commissions also consider that parenting orders revived, varied or suspended during proceedings for an interim protection order should have effect until a date specified by the court, until the interim protection order expires or ‘until further order’. This means that the judicial officer can manage the case by setting timeframes on both interim protection orders and parenting orders, by notifying the respondent of the order and relisting matters so that parties have an opportunity to obtain legal advice. If necessary, the respondent can challenge the terms of the new parenting order at the next or later hearing of the protection order proceeding.

16.126 Alternatively, the respondent may choose to challenge the new parenting order in a federal family court or make a family law application in the state or territory magistrates court. If the parenting order has been made until further order, the order will operate until the federal family court amends or makes a new parenting order to take account of the changed circumstances. In addition to improved information sharing between state and territory courts and federal family courts, to avoid duplication and inconsistency, the Commissions consider that it would be beneficial if matters in which a parenting order has been made, revived, varied or suspended during proceedings for an interim protection order are given priority in federal family courts. In such cases, family violence is clearly an issue in the proceedings and should be resolved urgently.

16.127 The Commissions consider that, if s 68T is amended to allow parenting orders amended in proceedings for an interim protection order to operate until further order, there is no need for a defence to a breach of a parenting order where a parent withholds contact beyond the 21 day period while an application to vary or discharge is awaiting hearing. The Commissions are of the view that legislation should not sanction a breach of a court’s order—rather the order should be made in such terms that it is possible to comply with. Section 70NAE(5) of the *Family Law Act*, which provides that a person has a reasonable excuse for contravening a parenting order if they believed, on reasonable grounds that not allowing the child to spend time with the other parent was necessary to protect the health or safety of a person, is a sufficient safeguard.

**Recommendation 16–5** Section 68T of the *Family Law Act 1975* (Cth) should be amended to provide that, where a state or territory court, in proceedings to make an interim protection order under state or territory family violence legislation, revives, varies or suspends a parenting order under s 68R, or makes a parenting order in the circumstances set out in Rec 16–3, that parenting order has effect until:

- (a) the date specified in the order;
- (b) the interim protection order expires; or
- (c) further order of the court.

## Obligations on state and territory courts making protection orders

16.128 The previous section of this chapter focused on the ability of state and territory magistrates courts to make or amend parenting orders. This section examines the obligations on magistrates when making protection orders, and the extent to which they must take account of current or pending family law orders.

### Relevant considerations when making a protection order

16.129 The family violence legislation in all jurisdictions requires courts to consider relevant parenting orders or arrangements when making or varying final or interim protection orders.<sup>130</sup> Some family violence legislation requires the court to consider whether contact between the person protected by the order, or the person against whom an order is made, and a child, is relevant to the making or variation of the order.<sup>131</sup> Other provisions require a court to consider any relevant family law order.<sup>132</sup>

16.130 The Kearney McKenzie Report noted some concerns that such provisions, by requiring a magistrate to consider a parenting order, may lead a court to use the existence of a parenting order to justify not making a protection order. The report stated that:

130 See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 42(3); *Domestic and Family Violence Protection Act 1989* (Qld) s 46C; *Restraining Orders Act 1997* (WA) s 12(1)(f); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(2); *Family Violence Act 2004* (Tas) s 18(1); *Domestic Violence and Protection Orders Act 2008* (ACT) ss 31(1), 47(1)(f), 71(1); *Domestic and Family Violence Act 2007* (NT) s 19(2)(a).

131 See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 42(3)(a); *Domestic and Family Violence Protection Act 1989* (Qld) s 46C(1); *Family Violence Act 2004* (Tas) s 18(1)(b); *Domestic Violence and Protection Orders Act 2008* (ACT) ss 31(1), 47(1)(f), 71(1).

132 See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 42(3)(b); *Domestic and Family Violence Protection Act 1989* (Qld) s 46C(2); *Restraining Orders Act 1997* (WA) s 12(1)(f); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(2); *Family Violence Act 2004* (Tas) s 18(1)(c); *Domestic and Family Violence Act 2007* (NT) s 19(2)(a).

it is important to remember that State and Territory family violence proceedings are not about ensuring children have contact with both parents; they are about protecting women and children who are at risk of violence at the hands of the respondent.<sup>133</sup>

16.131 The Victorian legislation takes a more prescriptive approach than the legislation in other jurisdictions. The *Family Violence Protection Act 2008* (Vic) requires the court to decide whether or not it will jeopardise the safety of the child or the protected person for the child to spend time or communicate with the respondent to the protection order.<sup>134</sup> If there is no family law order in place, and the court decides there is no risk to safety, then the court must include conditions in the protection order that arrangements for the child to live with, spend time or communicate with the respondent are to be negotiated and put in writing.<sup>135</sup> If there is a risk to the safety of the child or the protected person the court must include a condition in the protection order prohibiting the respondent from living with, spending time or communicating with the child.<sup>136</sup>

16.132 As noted above, the Victorian legislation also requires the court to exercise its powers under s 68R of the *Family Law Act* to revive, vary, discharge or suspend inconsistent parenting orders.<sup>137</sup> The Commissions note that the majority of protection order proceedings are heard by a magistrates court when there are no family law orders in place, so the circumstances in which a magistrates court would be asked to vary a current parenting order are not common.

16.133 In the Consultation Paper, the Commissions expressed the view that, while state and territory judicial officers should be aware of, and consider, any parenting orders in order to ensure the orders are consistent, judicial officers should not feel obliged to defer to pre-existing parenting orders where they have the potential to jeopardise the safety of victims of family violence. Where necessary, judicial officers should consider exercising powers under s 68R of the *Family Law Act* to make, revive, vary, discharge or suspend an inconsistent parenting order.

16.134 In the Consultation Paper, the Commissions expressed the view that there should be a clear policy that state and territory courts hearing protection order proceedings should not significantly lower the standard of protection afforded by a protection order for the purpose of facilitating consistency with a current parenting order. The Commissions asked whether this should be put in legislation or as guidance in relevant court bench books.<sup>138</sup>

### ***Submissions and consultations***

16.135 All stakeholders who commented on this proposal agreed that state and territory courts hearing protection order proceedings should not significantly lower the

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133 Kearney McKenzie & Associates, *Review of Division 11* (1998), [2.15].

134 *Family Violence Protection Act 2008* (Vic) s 91.

135 Ibid s 92.

136 Ibid s 93.

137 Ibid s 90.

138 Consultation Paper, Proposal 8–7.

standard of protection afforded by a protection order for the purpose of facilitating consistency with a current parenting order.<sup>139</sup>

16.136 Some stakeholders submitted that a legislative provision of this kind is necessary to ensure that state and territory courts make the orders that are necessary and appropriate for the protection of victims of family violence.<sup>140</sup> For example, the Queensland Commissioner for Children submitted that:

protection order proceedings need to maintain a protective focus to prevent confusion. Clarity of legislative focus is important to prevent state or territory courts feeling pressured to lower the standard of protection required in an attempt to achieve consistency with a parenting order or to avoid having to vary it.<sup>141</sup>

16.137 The Law Council of Australia agreed conditionally with the proposal, noting that the court should allow an applicant to request that the protection order does not affect certain matters relating to parenting. In addition, the Law Council submitted that ‘state and territory courts should also be entitled to infer that courts issuing parenting orders have adequately dealt with issues of family violence when making those orders’.<sup>142</sup>

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139 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; Confidential, *Submission FV 130*, 21 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; P Easteal, *Submission FV 40*, 14 May 2010.

140 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010, Legal Aid NSW, *Submission FV 219*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010, National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

141 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

142 Law Council of Australia, *Submission FV 180*, 25 June 2010.

16.138 Some stakeholders considered that this principle should be included in legislation,<sup>143</sup> because a legislative provision is a stronger requirement than guidance in bench books,<sup>144</sup> while other stakeholders preferred that the principle be included as guidance in court bench books.<sup>145</sup> A number of stakeholders submitted that it would be beneficial if the principle was included both in legislation and as guidance in bench books.<sup>146</sup> Women's Legal Services NSW supported both approaches and submitted that while guidance alone was unlikely to be sufficient, guidance would be quicker and easier to implement.<sup>147</sup> Some stakeholders considered that training and support for judicial officers and legal practitioners was also important in changing the culture in state and territory courts.<sup>148</sup>

16.139 A number of submissions noted that, in order for a provision of this kind to be effective, it is also necessary to improve the exercise of the power under s 68R by state and territory courts to amend parenting orders.<sup>149</sup>

#### *Commissions' views*

16.140 In the Commissions' view, magistrates courts should consider existing parenting orders to identify any inconsistencies between them and protection orders they propose to make. However, the consideration of parenting order conditions should not cause a state or territory court to lower the standard of protection afforded by the protection order for the purpose of facilitating consistency with the parenting order. Instead, courts faced with making a protection order that is inconsistent with a parenting order should consider whether to make, revive, vary, discharge or suspend the parenting order in accordance with s 68R of the *Family Law Act*, amended as recommended in this chapter.

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143 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

144 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; P Easteal, *Submission FV 40*, 14 May 2010.

145 J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

146 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

147 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

148 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Confidential, *Submission FV 183*, 25 June 2010; Murray Mallee Community Legal Service, *Submission FV 167*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

149 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

16.141 Accordingly, the Commissions recommend that state and territory family violence legislation should provide that courts should not significantly diminish the standard of protection afforded by a protection order for the purpose of facilitating consistency with a parenting order.

16.142 The Commissions acknowledge that, while the practices of state and territory magistrates courts vary, there is a widespread view in the community that some state and territory courts exercising jurisdiction under family violence legislation regularly defer to family law orders. Later in this chapter, the Commissions discuss the importance of providing training and education to judicial officers and the development of materials for inclusion in a bench book to assist judicial officers dealing with matters that raise issues of family violence. As recommended below, bench books should include guidance about the relevant considerations and options available when making protection orders that are inconsistent with current family law orders.

**Recommendation 16–6** State and territory family violence legislation should provide that courts not significantly diminish the standard of protection afforded by a protection order for the purpose of facilitating consistency with a parenting order.

### Exceptions for court-ordered contact with a child

16.143 Some protection orders prohibit a person from communicating with the person protected by the order or approaching or entering particular premises where the person protected lives or works. Protection orders of this kind often include an exception for contact required or authorised by an order made under the *Family Law Act*. Sometimes, protection orders are made with an exception for ‘child contact’, which encompasses contact with a child where there are no formal arrangements for how contact is to occur between a violent parent and a child. Including an exception of this kind has the potential to compromise the safety of victims of family violence and children, because a person who has used violence may contact and harass the victim on the pretext of spending time with the child.<sup>150</sup>

16.144 Including an exception for court-ordered contact has the potential to compromise the safety of victims of family violence and their children, particularly when family violence has arisen after family law orders have been made, or when the family court has made interim orders and not yet fully considered allegations of family violence.

16.145 In addition, by including an exception for court-ordered contact in a protection order, formal inconsistency between a protection order and a family law order will never arise. In these circumstances, the provisions that require a federal

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150 See Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [9.80]–[9.98].

family court to specify and address the inconsistency do not apply.<sup>151</sup> The Kearney McKenzie Report noted that:

if the Family Court is satisfied that whatever order it makes is not going to be inconsistent with the family violence order and does not consider the violence issue, the outcome may well be that woman and children are left unprotected. This is particularly so at the interim stage because the Court does not have a lot of information. It is not enough merely to eliminate inconsistency; contact orders must not expose people to violence.<sup>152</sup>

16.146 One way to minimise the potential for exceptions in protection orders to lead to a gap in the protection of victims of family violence is for courts exercising family law jurisdiction to consider the issue of family violence, not just issues of inconsistency, as required by the *Family Law Act*.<sup>153</sup> This issue is discussed in Chapter 17.

16.147 However, there is also a concern that state and territory courts exercising jurisdiction under family violence legislation automatically include an exception for court-ordered contact whenever there are family law orders relating to children, or where such orders are pending. In the Consultation Paper, the Commissions discussed some reforms to encourage courts to apply an exception for court-ordered contact only where appropriate.

16.148 One option is to ensure that application forms include an option for applicants to indicate their preference that there should be no exception in the protection order for contact required or authorised by a parenting order.<sup>154</sup>

16.149 All application forms for protection orders include an option for applicants to indicate that they seek the protection order to prohibit a person from contacting them. In most jurisdictions, the application forms allow the applicant to select an exception to this prohibition. For example, the Tasmanian application form allows the applicant to select from a range of conditions that the person ‘not approach [the applicant] directly or indirectly including by telephone, email, facsimile or letter’. Applicants can then choose whether to seek an exception ‘for the purpose of contact with the children named above as agreed or as ordered by a court of competent jurisdiction’.<sup>155</sup> Most other jurisdictions take a similar approach.

16.150 In Victoria, the Information for an Application for an Intervention Order form takes a different approach, and asks whether the applicant does or does not

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<sup>151</sup> The *Family Law Act* imposes certain requirements on courts when making a parenting order that is inconsistent with a protection order. These requirements are discussed in Ch 17.

<sup>152</sup> Kearney McKenzie & Associates, *Review of Division 11* (1998), [3.10].

<sup>153</sup> Family Law Council, *Review of Division 11—Family Violence* (2004), [37]–[38]; Kearney McKenzie & Associates, *Review of Division 11* (1998), [4.14].

<sup>154</sup> Consultation Paper, Proposal 8–12.

<sup>155</sup> Magistrates Court of Tasmania, *Application for a Family Violence Order* <[www.magistratescourt.tas.gov.au/divisions/family\\_violence/forms](http://www.magistratescourt.tas.gov.au/divisions/family_violence/forms)> at 29 March 2010.

believe that the applicant's own safety, or that of the children will be jeopardised by the children living with, spending time with or communicating with the respondent.<sup>156</sup>

16.151 In contrast, in the Northern Territory, application forms only allow an applicant to select a prohibition on contact that includes, as a matter of course, exceptions for contact in accordance with a parenting plan or family law order.<sup>157</sup>

16.152 The second option considered in the Consultation Paper was to remove contact required or authorised by a parenting order from the standard exceptions to prohibited conduct under state and territory protection orders.<sup>158</sup>

### **Submissions and consultations**

16.153 Many submissions supported the proposal that application forms should allow applicants to indicate whether they wish to seek an exception to permit contact required or authorised by another court.<sup>159</sup> For example, the Queensland Commissioner for Children considered that this would be a 'helpful prompt for parties and the court in protection order matters to consider the safety implications for existing parenting orders'.<sup>160</sup>

16.154 Similarly, a confidential submission noted that:

It is important that those applying for protection orders are made aware and have the option of expressing their preference that there be no such exception as currently victims of violence are often unaware of the consequences of such an exception or feel compelled to agree to such an exception. Courts should always examine the potential risks associated with making exemptions within protection orders.<sup>161</sup>

16.155 However a number of stakeholders cautioned that a court should not overly rely on what is expressed in application forms. One stakeholder noted that too many options on application forms may be confusing for some parties,<sup>162</sup> while others stated

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156 Magistrates' Court of Victoria, *Information for Application for an Intervention Order* (2009) <[www.magistratescourt.vic.gov.au](http://www.magistratescourt.vic.gov.au)> at 2 February 2010.

157 Northern Territory Magistrates Courts, *Application for Domestic Violence Order* <[www.nt.gov.au/justice/ntmc/forms\\_fees.shtml](http://www.nt.gov.au/justice/ntmc/forms_fees.shtml)> at 29 March 2010.

158 Consultation Paper, Question 8–13.

159 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 89*, 3 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

160 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

161 Confidential, *Submission FV 184*, 25 June 2010.

162 Confidential, *Submission FV 183*, 25 June 2010.

that it is important for applicants to state why they wish to seek an exception for court ordered contact so the court can make an informed decision.<sup>163</sup>

16.156 A number of stakeholders emphasised that it is primarily the role of the court to consider the risks of making an exception in a protection order in each particular case.<sup>164</sup> Professor Julie Stubbs cautioned that, while allowing applicants to indicate a preference for an exception for contact may be useful, ‘one unintended consequence may be that where no application is made that judicial officers do not consider this issue adequately or at all’.<sup>165</sup>

16.157 Stubbs also drew attention to the need for any conditions about contact to be clearly set out in the order:

The preferred option is one in which the timing and conditions of any contact that is permitted needs to be specified clearly otherwise police indicate that they cannot determine when a breach occurs. In cases where contact is unsafe, the order should specify that clearly, together with any requirements that contact must occur through a third party or at a supervised contact centre, or that there should be no contact.<sup>166</sup>

16.158 Some stakeholders considered that contact required or authorised by a parenting order should be removed from the standard exceptions to prohibited contact under state and territory protection orders.<sup>167</sup> For example, a confidential submission stated that the presumption, that an exception for court-ordered contact is always appropriate,

has become entrenched with the danger that situations where it is not appropriate will be missed. Where the violence is such that contact between children and a violent parent would place the parent or children at risk, inclusion of the exception clause actually indicates the opposite—ie that it is envisaged and appropriate that such orders be made. Whether orders are appropriate at a given point in time will be up to the Family Courts if and when an application by the violent parent is made.<sup>168</sup>

16.159 Other stakeholders opposed removing court-ordered contact from the standard exceptions in a protection order. In particular, a number of stakeholders expressed the view that it was important for the court to consider whether an order

<sup>163</sup> National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

<sup>164</sup> National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

<sup>165</sup> J Stubbs, *Submission FV 186*, 25 June 2010.

<sup>166</sup> Ibid.

<sup>167</sup> Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; P Easteal, *Submission FV 40*, 14 May 2010.

<sup>168</sup> Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

prohibiting all contact, or contact with certain exceptions, was appropriate in each particular case.<sup>169</sup>

16.160 Legal Aid NSW submitted that each case needs to be considered in its particular circumstances and that:

in many cases, the condition provides necessary boundaries and protection for victims whilst facilitating the children having a relationship with the defendant in situations where the victim does not have concerns about the safety of the children spending time with the defendant. This is especially the case if the two sets of orders are made with the other set of orders in mind.<sup>170</sup>

16.161 Legal Aid NSW noted that, in its experience, an exception for contact as authorised by a parenting order would not be included where there have been serious assaults. It noted that in other cases, such as where there is verbal abuse at changeover, the harm caused by such conduct could be addressed by using another mechanism, such as changeover via a third person or at a contact centre.<sup>171</sup>

16.162 Women's Legal Centre ACT also submitted that the matter should be considered on the facts of the case and commented that it

is aware of clients who do need to have arrangements for the children in place. Having the exception worded as it is mandates some formal action around arrangements for the children which can provide certainty to both parties whilst still taking into account safety of the victim.

Arguably the prospect of having no arrangements for the children heightens tension and increases the safety risk for women. Simply removing this exception does not address the problem. The issue is having the appropriate parenting orders that properly reflect all safety concerns of women and children.<sup>172</sup>

16.163 Similarly, Wurringa Baiya Aboriginal Women's Legal Centre noted that:

We speak to some Aboriginal women who say that they want the father/defendant to maintain a relationship with, and have contact with, the children of the relationship. However, these women tell us that they want this to be done in a safe and controlled way.<sup>173</sup>

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169 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Commissioner for Children (Tas), *Submission FV 62*, 1 June 2010.

170 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

171 Ibid. See also Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Confidential, *Submission FV 164*, 25 June 2010.

172 Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

173 Wurringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010. See also Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Confidential, *Submission FV 81*, 2 June 2010.

***Commissions' views***

16.164 The Commissions note the concerns expressed by stakeholders that an exception for contact authorised or required by a family law order is often automatically included in protection orders where children are involved.

16.165 The Commissions are of the view that the exception for court-ordered contact should be retained as an exception that can be included in protection orders but should not be automatically included in all cases. The concern is not that such an exception exists, but that the exception is included without due consideration of the evidence and the safety of all parties. As noted above, state and territory courts exercising jurisdiction under family violence legislation should make orders necessary for the safety of victims of family violence. This includes, where appropriate, making orders that a parent not have contact with a child. In such cases, a state or territory court may also amend a current parenting order using s 68R of the *Family Law Act*, or make an interim parenting order as recommended in Recommendation 16–3.

16.166 The Commissions consider that application forms that ask the applicant whether he or she wishes the court to make an exception for court-ordered contact with a child in the protection order would encourage the applicant, and the court, to consider the implications of making such an exception or ordering no contact, as the case may be. The Commissions note that the application forms in a number of jurisdictions already ask the applicant if they would like to opt-in to an exception for court-ordered contact in the protection order.

16.167 The Commissions emphasise that amending application forms will not, in itself, change the practices of people involved in family violence proceedings in state and territory magistrates courts. In particular, the Commissions acknowledge that applicants for protection orders may not have received legal advice, are often stressed and may not be able to consider the parenting issues carefully at the time of making an order. Magistrates, court staff and practitioners need to be provided with education, training and resources to consider family violence and family law issues in a way that ensures families are safe from violence. Ways to improve this practice are discussed in the following section of this chapter.

**Recommendation 16–7** Application forms for protection orders under state and territory family violence legislation should include an option for applicants to indicate their preference that there should be no exception in the protection order for contact required or authorised by a parenting order made under the *Family Law Act 1975* (Cth).

**Improving practice**

16.168 State and territory magistrates courts, as the first point of contact that most victims of family violence have with the legal system, are in a position to deal with the range of legal issues faced by victims of family violence in an integrated and responsive way. The recommendations made in this chapter are directed towards

ensuring that state and territory magistrates courts exercising jurisdiction under family violence legislation can also address related family law issues that arise in such proceedings. While the Commissions recommend that the jurisdiction of state and territory courts should be extended so that magistrates may make interim parenting orders in certain circumstances, the majority of the recommendations focus on ways to encourage and facilitate magistrates courts exercising the family law jurisdiction that they already have.

16.169 The Commissions acknowledge that family law is not currently a large practice in many state and territory magistrates courts. As such, the judicial officers, legal practitioners, police prosecutors and others involved in family violence proceedings will require regular training, resources and other support in order to exercise family law jurisdiction in a way that ensures the protection of victims of family violence.

16.170 The Commissions also acknowledge that the capacity of state and territory courts to exercise federal jurisdiction is, to a large degree, governed by funding arrangements. As such, the federal government must play an important role in funding and supporting the exercise of federal family law jurisdiction by state and territory courts. The Commissions consider that while this will have resource implications, it will lead to savings in the long term because people can resolve more of their legal issues in the one court, reducing duplication and further litigation.

### **Specialised practice**

16.171 By expanding the jurisdiction of state and territory magistrates courts to make family law orders in certain circumstances and fostering the use of current family law jurisdiction, the Commissions envisage that state and territory courts will develop or expand specialised practice in family violence. Specialised practice in state and territory magistrates courts will be particularly beneficial to victims of violence, as they are often the first point of contact that separating families with issues of family violence have with the legal system.

16.172 Chapter 32 discusses a number of benefits of specialised courts, or specialised lists within courts including greater understanding and sensitivity about the context of family violence, improved victim support and the development of best practice to address the needs of all participants in the system. In addition, specialised lists can also build cohorts of legal practitioners with specialisation in family violence—rather than a siloed approach in which lawyers specialise in criminal law or family law.

### **Training and education**

16.173 It is clear from submissions and consultations that one of the greatest barriers to state and territory magistrates courts exercising their current jurisdiction under the *Family Law Act* is a lack of knowledge and experience in family law on the part of judicial officers, legal representatives, police prosecutors and others involved in protection order proceedings.

16.174 The importance of training and education has been emphasised in a number of inquiries.<sup>174</sup> In particular, the National Council to Reduce Violence against Women and their Children (National Council) recommended the development of a national education and professional development framework for all people involved in the legal systems that deal with family violence.<sup>175</sup>

16.175 As part of training for judicial officers, the National Council recommended the development of a model bench book that would provide information on the social context and case law relating to family violence and sexual assault.<sup>176</sup>

16.176 In the specific context of the exercise of family law jurisdiction by state and territory courts, the Commissions proposed that the Australian Government—in conjunction with state and territory governments, the National Judicial College of Australia, the Judicial Commission of NSW and the Judicial College of Victoria—should provide ongoing training and development for judicial officers in state and territory courts who hear proceedings for protection orders on the exercise of their powers under the *Family Law Act*.<sup>177</sup>

#### ***Submissions and consultations***

16.177 Stakeholders generally supported the need for training and education for judicial officers on the exercise of their family law jurisdiction.<sup>178</sup> However, some submissions noted that other participants in the legal systems dealing with family violence would also benefit from training. In particular, ensuring that legal practitioners involved in protection order proceedings and police prosecutors had

174 R Chisholm, *Family Courts Violence Review* (2009), Recs 4.3, 4.6, 4.8; Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Recs 6.1–6.7.

175 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), Rec 4.4.1. Further detail on the recommendations made by the National Council in relation to training and education are discussed in Ch 31.

176 Ibid, Rec 4.4.2. This is also discussed in Ch 31.

177 Consultation Paper, Proposal 8–13.

178 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 125*, 20 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

knowledge of family law would mean that they are better able to assist the court in the exercise of its family law jurisdiction.<sup>179</sup>

16.178 In addition to training about relevant family law provisions, some stakeholders submitted that judicial officers and other participants in protection order proceedings should be supported with education about the nature and effect of family violence. For example, Legal Aid NSW and the Women's Domestic Violence Court Advocacy Service Network submitted that:

judicial officers need to undertake significant domestic violence training to ensure that they understand the complex nature of this violence. This will also ensure consistency across the various jurisdictions and courts. To enable judicial officers to make educated and informed decisions they need to understand the dynamics of domestic violence and the impact of this violence on victims and their children.<sup>180</sup>

16.179 The Magistrates' Court Victoria did not consider that the government should provide training and education for judicial officers, and submitted that judicial education should be provided by the courts themselves or educational authorities set up for that purpose.<sup>181</sup> The Court noted that these colleges provide judicial education on a broad range of jurisdictions and areas of law, and submitted that judicial education in family violence and family law should be supported with 'national standardised education packages based on sophisticated data and up to date research'.<sup>182</sup>

16.180 The Magistrates' Court Victoria and the joint submission from Domestic Violence Victoria and others commented that, in addition to training, judicial officers would benefit from access to a common bench book that included resources and research about the social context of family violence to support effective decision making.<sup>183</sup>

#### ***Commissions' views***

16.181 Training and education of all people involved in family violence matters is essential to efforts to promote the use of the state and territory courts' family law jurisdiction to improve the safety of victims of family violence.

16.182 The Commissions consider that regular training about the operation of s 68R and any new provisions of the *Family Law Act* that confer powers on state and territory courts would be particularly useful for judicial officers, legal practitioners and police prosecutors. Such training should also cover the considerations relevant when making protection orders and making or amending a parenting order. Training of this kind would raise awareness of the provisions and build confidence in legal practitioners and

179 See, eg, Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

180 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

181 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

182 Ibid.

183 Ibid; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

judicial officers to use these provisions to seek and make amendments to parenting orders in appropriate circumstances.

16.183 The Commissions also consider that judicial officers, court staff, legal practitioners, police and other professionals involved in family violence proceedings should also receive education about the prevalence, nature and effects of family violence. In particular, education programs should focus on the impact of family violence on children and the risk of family violence during contact and handover arrangements, as well as practical safeguards that can be used to ensure that these arrangements do not expose parents and children to family violence.

16.184 Bench books to assist judicial officers are an important part of training and education for judicial officers. Elsewhere in this Report, the Commissions have endorsed the recommendation of the National Council that a model bench book should be produced which would provide information on the social context and case law relating to family violence and sexual assault.<sup>184</sup> Information in bench books could also include guidance for state and territory judicial officers on exercising jurisdiction under the *Family Law Act* to ensure that parenting orders and protection orders are consistent and do not compromise the protection of victims of family violence.<sup>185</sup>

**Recommendation 16–8** Australian courts and judicial education bodies should provide education and training, and prepare material in bench books, to assist judicial officers in state and territory courts better to understand and exercise their jurisdiction under the *Family Law Act 1975* (Cth). This material should include guidance on resolving inconsistencies between orders under the *Family Law Act* and protection orders to ensure the safety of victims of family violence.

**Recommendation 16–9** Australian, state and territory governments should collaborate to provide training to practitioners involved in protection order proceedings on state and territory courts' jurisdiction under the *Family Law Act 1975* (Cth).

## Personal property directions in protection orders

### Overview

16.185 Most state and territory family violence legislation provides for the recovery of personal property. This is usually achieved by giving a court the discretion to include specific conditions in the protection order to deal with property recovery. Similarly, NSW family violence legislation provides that a court may make an ancillary property order when issuing a protection order.<sup>186</sup> For the purpose of the

<sup>184</sup> Recommendation 31–2.

<sup>185</sup> See Ch 31.

<sup>186</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 37.

following discussion, conditions or orders made to enable a person to recover property in protection order proceedings will be referred to as ‘personal property directions’.

16.186 Personal property directions may be of particular relevance where courts make exclusion orders. As discussed in Chapter 11, exclusion orders are protection orders which include a condition prohibiting a person from entering or approaching the protected person’s residence. State and territory family violence legislation in all jurisdictions except the ACT expressly specifies that exclusion orders may cover a property in which the person against whom the order was made has a legal or equitable interest.

16.187 Most family violence laws provide for a court to make personal property directions permitting an excluded person to gain access to the premises for the purpose of taking personal possessions, often setting out the manner in which property may be recovered or providing for it to occur in the company of police. In Queensland, for example, a court that imposes an exclusion order must consider including another condition allowing the excluded person to recover ‘stated property’.<sup>187</sup> In the Northern Territory a right of recovery automatically applies where a court makes an exclusion order in respect of property on which the personal property of an excluded person is located.<sup>188</sup>

16.188 In NSW and Western Australia, courts may make personal property directions when issuing protection orders that do not include exclusion conditions to enable persons who have used family violence to recover personal property. For example, NSW family violence legislation permits a court that has issued a protection order to make personal property directions to enable a person who has used family violence to remove personal property that has been left at premises occupied by the victim.<sup>189</sup>

16.189 Most state and territory family violence legislation provides for a court making a protection order to make personal property directions enabling victims to recover property—irrespective of whether the protection orders contain exclusion conditions.<sup>190</sup> For example, s 12 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) provides that a protection order may require a person who has used family violence to ‘return specified personal property to a protected person’, or to ‘allow a protected person to recover or have access to or make use of specified personal property’.

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187 *Domestic and Family Violence Protection Act 1989* (Qld) s 25A(3). See also *Family Violence Protection Act 2008* (Vic) s 86.

188 *Domestic and Family Violence Act 2007* (NT) s 85.

189 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 37. Similarly see *Restraining Orders Act 1997* (WA) s 13(5).

190 The *Domestic and Family Violence Act 2007* (NT) contains a section dealing with retrieval of an excluded person’s property only. However, return of personal property to a victim or a person who has used family violence is provided as an example of an order that can be made where it is just or desirable. *Domestic and Family Violence Act 2007* (NT) ss 21(1)(c), 85. The *Domestic Violence and Protection Orders Act 2008* (ACT) provides for the making of personal property directions for the benefit of victims in the context of exclusion orders, but is silent on this issue in relation to protection orders generally. *Domestic Violence and Protection Orders Act 2008* (ACT) s 48(3).

16.190 The *Family Violence Act 2004* (Tas) does not expressly cover the recovery of property by either a victim or an excluded person. However, the *Justices Act 1959* (Tas) provides for a court to make a personal property direction so that a victim or a person restrained by the order may recover their property.<sup>191</sup>

16.191 In South Australia and the ACT, legislative provisions address the retrieval of property by a victim of violence, not the recovery of property by an excluded person. However, the Australian Government Solicitor has noted that:

if the legislation in a particular jurisdiction does not deal expressly with retrieval of personal property, this does not mean that a court would be unable to attach appropriate conditions to an exclusion order—for example, stipulating that a person is excluded from premises but may return at a certain time to collect specified items.<sup>192</sup>

16.192 Generally, as state and territory family violence legislation makes clear that judicial officers issuing protection orders are not limited to imposing the standard conditions, judicial officers may make personal property directions not specified by legislation when issuing a protection order—although the Commissions are not aware of whether this occurs in practice.<sup>193</sup>

### **Types of property subject to personal property directions**

16.193 Family violence laws in Western Australia and the Northern Territory provide additional details about the type of property which may be taken. A person may recover ‘prescribed property’ pursuant to an order made under the *Restraining Orders Act 1997* (WA) including: property used to earn income; personal property of a child of the person; property that is wholly or partly the property of the excluded person that is used by or for his or her child; and property that the victim has agreed that the person can take.<sup>194</sup> Under the *Domestic and Family Violence Act 2007* (NT), an excluded person may retrieve personal property including ‘clothes, tools of trade, personal documents and other items of personal effect’.<sup>195</sup>

16.194 In some states and territories, family violence laws provide for conditions which may be imposed specifying property that *cannot* be taken—or must be returned—by an excluded person, or a person who has used family violence. In Victoria, a court may prevent an excluded person from taking ‘the furniture or appliances in the residence that enable the normal running of the home’.<sup>196</sup> In making a protection order—not necessarily an exclusion order—a Victorian court may direct a person who has used family violence to return not only personal property of the victim and his or her family members, but also personal property belonging to both parties, where that will enable the everyday life of the victim ‘to continue with as little disruption as practicable in the circumstances’.<sup>197</sup> The Explanatory Memorandum

191     *Justices Act 1959* (Tas) s 106B(5A).

192     Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.2.14].

193     Protection order conditions are discussed in Ch 11.

194     *Restraining Orders Regulations 1997* (WA) reg 13.

195     *Domestic and Family Violence Act 2007* (NT) s 85(5).

196     *Family Violence Protection Act 2008* (Vic) s 86(b)(i).

197     Ibid s 86(a).

indicated that this provision may apply to ‘basic personal property such as clothes, cooking equipment, a car’.<sup>198</sup>

16.195 In several jurisdictions, protection orders may impose conditions relating to personal property which is reasonably needed by a victim of family violence. In Western Australia, a court may restrain a person who has used family violence from preventing the victim obtaining and using property reasonably needed by the victim, even if the person who has used family violence is the owner, or has the right to possess the property.<sup>199</sup> Similarly, ACT legislation provides that an excluded person may be prohibited from taking possession of, or be required to give a victim, personal property that is ‘reasonably needed’ by the victim or a child of the victim.<sup>200</sup> South Australian family violence legislation also contains such a provision in relation to property reasonably needed by the victim.<sup>201</sup>

### **Interaction with federal family court proceedings**

16.196 Personal property directions can interact with property proceedings pursuant to the *Family Law Act*<sup>202</sup> where they:

- influence future property proceedings under pt VIII of the *Family Law Act*—for example, where a party gains possession of property pursuant to a personal property direction and no longer needs or wants to contest ownership in the family courts;
- are directly inconsistent with existing property orders made under the *Family Law Act*; and
- are used as an indication of possessory or ownership rights by a federal family court and thereby have an impact on the outcome of future property proceedings under the *Family Law Act*.

16.197 Depending on the property that a person who used family violence or a victim obtains through a personal property direction, he or she may not have the need or desire to commence property proceedings in the federal family courts. The likelihood of this occurrence will depend to some extent on the type of property to which access is gained and the ownership or possessory rights. The scope for this to occur will depend on the breadth of personal property directions which may be issued by a state or territory court in exercising jurisdiction under family violence legislation.

16.198 In its report, *Apprehended Violence Orders*, the NSWLRC recommended that a court could decline to make a personal property direction if it was satisfied that title to the property is genuinely in dispute; or other more appropriate means are

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198 Explanatory Memorandum, Family Violence Protection Bill 2008 (Vic).

199 *Restraining Orders Act 1997* (WA) s 13(2)(e).

200 *Domestic Violence and Protection Orders Act 2008* (ACT) s 48(3).

201 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 12(g). This provision applies where a protection order is made generally—not only where an order contains an exclusion condition.

202 Provisions in family violence legislation may also interact with residential tenancy laws. The interaction between such laws is outside the Terms of Reference for this Inquiry.

available for the issue to be addressed. This could include, for example, ongoing property proceedings in a federal family court.<sup>203</sup> No provision to this effect is included in the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

### ***Submissions and consultations***

#### ***Interaction with federal family court proceedings***

16.199 In the Consultation Paper, the Commissions asked how often persons who have been the subject of exclusion conditions in protection orders or victims of family violence take possession of property which they do not own or have a right to possess, or deny the other person access to property. The Commissions also asked what impact this has on property proceedings or orders relating to property under the *Family Law Act*.<sup>204</sup>

16.200 The Magistrates' Court and the Children's Court of Victoria stated 'some magistrates have commented they hear about this situation in evidence in contested family violence matters'.<sup>205</sup> However the Law Council of Australia stated that in the experience of members of their Family Law Section, 'the improper removal or retention of personal property by a person against whom a personal protection order is made is not a significant problem'.<sup>206</sup>

16.201 A number of stakeholders submitted that the more common problem is the difficulties faced by victims in retrieving their personal property after they have left their home.<sup>207</sup> For example, two women's legal services commented that victims who have been forced to flee their homes 'tell us that they are regularly denied access to or possession of their property'.<sup>208</sup> Stakeholders commented that when victims leave home, they may only take with them limited personal property.<sup>209</sup> The Department of Premier and Cabinet (Tas) stated that this is particularly the case 'for victims who flee first, especially in secret, prior to seeking assistance'.<sup>210</sup>

16.202 Victims may have difficulty retrieving 'identification cards, bank cards, passports', as well as personal belongings such as clothes and children's items.<sup>211</sup> A

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203 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report 103 (2003), [7.92]–[7.93].

204 Consultation Paper, Question 9–6.

205 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

206 Law Council of Australia, *Submission FV 180*, 25 June 2010.

207 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010. See also Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010.

208 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

209 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010. See also Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

210 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

211 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010.

number of stakeholders commented that persons who use family violence may destroy or dispose of property, or threaten to do so.<sup>212</sup> In particular, items of sentimental value and clothing may be destroyed.<sup>213</sup> The Department of Premier and Cabinet (Tas) stated that this has

a huge impact—in the case of the clothes, the financial impact is enormous because of the cost of replacing new-for-old. This applies also to having to re-furnish and re-equip a house from scratch—it simply does cost much more money to get everything again than the ‘valuation’ of the items.<sup>214</sup>

16.203 Several stakeholders submitted that victims are cautious not to provoke the person who has used family violence in relation to this issue.<sup>215</sup> For example, Women’s Legal Services Australia and Women’s Legal Services NSW commented that:

our clients often state that it is not worth the hassle and opt to ‘keep the peace’ rather than find a way to get the property back.<sup>216</sup>

16.204 Women’s Legal Services NSW also stated that once victims leave the home for a safe place away from the person who has used violence, they may no longer be eligible for a protection order where they are not at risk of further violence. Consequently, these victims are unable to obtain personal property directions from state and territory courts.<sup>217</sup>

16.205 The Queensland Government commented on the consequences of an exclusion order on the person who has used family violence. It stated that feedback received in their consultations for the 2010 review of the Queensland family violence legislation noted that it can be difficult for an excluded person to recover property, particularly where property proceedings are on foot or pending in federal family courts. It stated that ‘a lack of clarity on the entitlement of the parties to remove or retain property can be a source of further conflict’.<sup>218</sup>

16.206 Another stakeholder expressed concern about excluded persons being deprived of their personal property:

where a family violence order is issued without property settlement and the defendant is removed then the defendant suffers serious financial loss.<sup>219</sup>

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212 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

213 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010.

214 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

215 Ibid; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

216 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

217 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

218 Queensland Government, *Submission FV 229*, 14 July 2010.

219 A Lamb, *Submission FV 121*, 16 June 2010.

16.207 In relation to the question about the impact that denying a person possession or access to their personal property may have on federal family court proceedings, Women's Legal Services Australia stated that

the inability to gain access to personal belongings can have some practical impact on the ability of family violence victims to achieve a just settlement under the *Family Law Act 1975* (Cth) because they are unable to obtain access to important documents that will assist them in negotiating a fairer property settlement.<sup>220</sup>

16.208 One stakeholder considered that a victim in these circumstances should be able to resolve their legal matters in the same court, arguing:

a victim of abuse should NOT be forced to lose all or nearly all of their assets through legal fees just to try and gain what was rightfully theirs in the first place.<sup>221</sup>

16.209 Some stakeholders also expressed concern that federal family courts are inaccessible to victims of family violence with property matters, particularly when the pool of assets is small, and in some cases 'may even be just about transferring responsibility for a debt'.<sup>222</sup> Women's Legal Services Australia and Women's Legal Services NSW commented that legal aid is generally unavailable for these matters, and lawyers' costs are 'prohibitive and disproportionate'.<sup>223</sup> National Legal Aid and Legal Aid NSW commented that this issue particularly affects their clients from culturally and linguistically diverse backgrounds, who may be unable to represent themselves in property proceedings in federal family courts.<sup>224</sup>

16.210 Several stakeholders provided case studies which illustrated the lack of practical avenues available for victims to obtain personal property,<sup>225</sup> such as the following from National Legal Aid:

The parties were from Iraq. Following family violence the mother and children went to a refuge. When the mother returned to the former matrimonial home (rented accommodation) the father had removed nearly all of their property including the children's bedding, clothes and toys. The mother had no practical legal remedy.<sup>226</sup>

#### ***Types of property subject to personal property directions***

16.211 In the Consultation Paper, the Commissions proposed reform to personal property directions to limit their potential effect on proceedings in federal family courts. To this end, the Commissions considered that the types of property subject to personal property directions should be limited. The Commissions proposed that provisions in state and territory legislation dealing with exclusion orders should

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220 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010.

221 Confidential, *Submission FV 96*, 2 June 2010.

222 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010. See also National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010.

223 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

224 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010.

225 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

226 National Legal Aid, *Submission FV 232*, 15 July 2010.

- (a) limit the types of property which a court may order an excluded person to recover to clothes, tools of trade, personal documents and other personal effects, and any other items specified by the court; and
- (b) provide that in order to recover property should not include items
  - (i) which are reasonably needed by a victim or a child of the victim; or
  - (ii) in which the title is genuinely in dispute; and
- (c) provide that an order to recover property should not be made where other more appropriate means are available for the issue to be addressed in a timely manner.<sup>227</sup>

16.212 The Commissions asked if there are other types of property which should, or should not, be subject to recovery by an excluded person—for example, if an excluded person should be able to recover property of his or her child.<sup>228</sup>

16.213 Most stakeholders who commented agreed with the proposal.<sup>229</sup> One community organisation stated that, anecdotally, more property is taken than specified in the proposal, and ‘once gone it can be very difficult to recover’.<sup>230</sup> Several stakeholders confirmed that their support—presumably with respect to the limitations proposed—related specifically to circumstances where the person who has used family violence seeks to recover property.<sup>231</sup> Women’s Legal Services Queensland—while agreeing with the proposal—commented that there may not be other means to retrieve belongings.<sup>232</sup>

16.214 The Queensland Law Society provided an alternative view. It submitted that in Queensland, the type of property that may be recovered is necessarily limited by the role of police in personal property directions. It stated that as police are typically very busy,

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227 Consultation Paper, Proposal 9–6.

228 Ibid, Question 9–7.

229 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

230 Confidential, *Submission FV 171*, 25 June 2010.

231 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

232 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

the items are only of the kind and nature identified in the Commissions' proposal. Police do not have the time to ensure that bulky furniture is removed. Similarly, police are insistent that items are available for a child (or retained for the child). Similarly police certainly do not allow for the removal of items where the title is in dispute.<sup>233</sup>

16.215 The Queensland Law Society argued that personal property directions should be left to judicial discretion, and submitted that:

magistrates do not make orders for the recovery of property if there are other more available and appropriate means for the issue to be addressed in a timely manner.<sup>234</sup>

16.216 Women's Legal Services Australia and Women's Legal Services NSW also argued that courts should retain discretion as to the types of property which may be subject to personal property directions. They considered it may be useful for items such as furniture to be subject to personal property directions, if this could finalise property matters between the parties.<sup>235</sup>

16.217 Several stakeholders supported the provisions in the Victorian family violence legislation.<sup>236</sup> The types of property which may be included or excluded in personal property directions in Victoria are discussed above. The Magistrates' Court and Children's Court of Victoria stated that these provisions in relation to exclusion orders work well.<sup>237</sup> The Aboriginal Family Violence Prevention Legal Service Victoria commented:

The Victorian legislation specifies what the defendant can't remove and what must be returned rather than what the defendant can remove which leaves greater discretion to the Court.<sup>238</sup>

16.218 In relation to the question of whether other property should be included or prohibited from recovery by an excluded person, stakeholders' responses focused on the property of the child. One legal centre submitted that the excluded person should not be able to recover children's property when the children were living with the victim.<sup>239</sup> Several stakeholders considered that a child's personal property should be with the person who has care of the child.<sup>240</sup> For example, the Law Council of Australia considered that including property of the child in personal property directions for the benefit of an excluded person 'would have merit in circumstances where the

233 Queensland Law Society, *Submission FV 178*, 25 June 2010. Women's Legal Service Qld also commented that Queensland police only permit recovery of property which is not in dispute, when officers accompany a person to collect items—although this may vary with different officers. Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

234 Queensland Law Society, *Submission FV 178*, 25 June 2010.

235 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010 ;Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

236 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Confidential, *Submission FV 184*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

237 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

238 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

239 Confidential, *Submission FV 183*, 25 June 2010.

240 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010;Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

excluded person has the primary care of that child and the property is necessary for the day to day care of that child'.<sup>241</sup>

16.219 Legal Aid NSW specified that such recoverable property of the child should include property necessary for a child's education—such as a computer. It considered that—arguably—a car may also be an example:

A protected person with children may require a motor vehicle to transport children and it may be one of the only assets available.<sup>242</sup>

16.220 National Legal Aid and the Women's Domestic Violence Court Advocacy Service Network submitted that an excluded person should not be able to obtain orders to recover pets, where the child is not in their care.<sup>243</sup> Wirringa Baiya Aboriginal Women's Legal Service Inc submitted that—apart from children's property and the property specified in the proposal—protection order proceedings 'are not the appropriate forum' to deal with property disputes.<sup>244</sup>

16.221 Women's Legal Services NSW did not express support for such a restriction on property recoverable by an excluded person—reiterating that this is 'is not a major problem reported by our clients'.<sup>245</sup>

### ***Commissions' views***

#### ***Personal property disputes***

16.222 In the Consultation Paper, the Commissions expressed preliminary concerns regarding the operation of personal property directions. In particular, the Commissions were concerned that parties, particularly excluded persons, may take advantage of personal property directions to gain possession of property which they do not own, or wrongfully deny the other party access to property—and that this may have an impact on federal family court proceedings. However, stakeholder responses indicate that, in practice, these are not significant problems.

16.223 A related issue which attracted far more stakeholder concern and comment is the absence of practical legal remedies for victims of family violence in resolving disputes regarding personal property. Federal family courts are inaccessible to many persons due to the expense of lawyers, lack of availability of legal aid, and the difficulties of self-representation. Further, initiating proceedings in a federal family court may be a disproportionate measure in the context of a small pool of assets, which may not amount to more than 'personal property'. For many victims of family violence, personal property directions are the only practical means available of resolving such property disputes.

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241 Law Council of Australia, *Submission FV 180*, 25 June 2010.

242 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

243 National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

244 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

245 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

16.224 Personal property disputes can escalate tensions between parties following family violence and relationship breakdown—potentially putting victims at further risk. Proceedings provide an accessible and safe forum for victims of family violence to resolve personal property disputes. By addressing ongoing conflict and providing safe procedures around the recovery of personal property, personal property directions may operate to improve the safety of victims of family violence—the key objective of this Inquiry.

***Limitations on property subject to personal property directions***

16.225 For the above reasons, the Commissions consider that restricting the scope of personal property directions may be counterproductive in those cases where parties are unable or unwilling to pursue property matters in federal family courts. The Commissions therefore do not make a recommendation limiting the types of personal property that may be subject to personal property directions to the items proposed, namely: clothes, tools of trade, personal documents and other personal effects. The Commissions note that in some jurisdictions—such as Victoria—the types of property which may be deemed ‘personal property’ is significantly broader, and includes furniture, household appliances and even cars.

16.226 The Commissions also proposed to limit recoverable property to ‘items specified by the court’. This is not a limitation on the *scope* of the property which may be subject to personal property directions—rather, it ensures that a person with a personal property direction may only recover specific items. The Commissions consider that clear and specific personal property directions prevent uncertainty, minimising the potential for conflict between parties and further intimidation of the victim. The Commissions therefore consider that personal property directions made by state and territory courts should be as specific as possible regarding the property that may be recovered.

16.227 Family violence legislation already empowers state and territory courts to make personal property directions in specific terms. The Commissions do not consider it necessary to include in family violence legislation provisions limiting property recoverable under a personal property direction to items specified by the court. It is sufficient and appropriate to encourage the making of specific property directions through training and education of judicial officers. Training relating to personal property directions is discussed below.

***Property reasonably needed by the victim and property for which title is in dispute***

16.228 The Commissions consider that in many cases, it will be appropriate for a state or territory court to make personal property directions to ensure that a victim has possession of items they reasonably need—including items belonging to a child of the victim. However, as stakeholders have indicated, it is the lack of means to resolve property disputes that causes practical problems for victims of violence—rather than the content of personal property directions where they are issued. Generally, the Commissions do not have strong views as to whether family violence legislation should specify that certain types of property should, or should not, be subject to recovery by an excluded person under a personal property direction.

16.229 The Commissions are of the view that items of property for which title is genuinely in dispute should not be excluded from the scope of personal property directions. As discussed above, the Commissions consider that providing a forum for victims of family violence to resolve disputes about personal property—including disputes about property title—improves the safety of victims, thus facilitating the protective objectives of family violence legislation.

16.230 For the above reasons, the Commissions have decided not to recommend that family violence legislation should include provisions providing that personal property directions should exclude items reasonably needed by a victim or a child of the victim, or items in which title is genuinely in dispute.

***Personal property directions should not take the place of Family Law Act orders***

16.231 Where parties have access to federal family courts, property disputes should be resolved in accordance with the dedicated and comprehensive processes pursuant to pt VIII of the *Family Law Act*, and the specialist expertise of family court judicial officers. The Commissions consider that personal property directions should not generally be made where other more appropriate means are available for the issue to be addressed in a timely manner. Rather, personal property directions should be available to the extent necessary to address the gap in protection for victims of violence who do not have access—or ready access—to other forums.

16.232 Again, the Commissions do not consider it necessary to reflect this principle in family violence legislation. The Commissions note the comments of the Queensland Law Society that courts are unlikely to make personal property directions in circumstances where more appropriate forums are available to parties. Further, this issue may be adequately dealt with in judicial education and training. An important benefit of this approach is that it allows room for judicial discretion. For example, in a case where federal family court proceedings are pending, a judicial officer applying family violence legislation may still consider it necessary to make a personal property direction to facilitate a prompt and safe recovery of personal items such as identification and bank cards. State and territory magistrates applying family violence legislation have experience in responding to the immediate safety concerns that underpin their family violence jurisdiction.

16.233 To ensure that state and territory courts only make personal property directions where appropriate, courts must have knowledge of orders made in other forums, as well as current and pending proceedings. Strategies to provide state and territory courts with this information are discussed below.

***Training***

16.234 Training of judicial officers and other professionals in relation to improving practice is discussed earlier in this Chapter. The Commissions consider that training should address the making of personal property directions to give effect to the protective objectives of family violence legislation. Training may address the role of personal property directions in resolving ongoing conflict between parties, ensuring property recovery occurs safely—with the involvement of police where necessary, and

minimising opportunities for further abuse of the victim through destruction or disposal of personal property.<sup>246</sup>

### **Strategies to prevent inconsistencies between orders**

16.235 Personal property directions under state and territory family violence legislation may be inconsistent with ownership or possessory rights declared under *Family Law Act* property proceedings. In accordance with s 109 of the *Australian Constitution*, when a law of a state is inconsistent with a law of the Commonwealth which is intended to cover the field, the latter shall prevail to the extent of the inconsistency.

16.236 South Australian family violence legislation contains provisions to minimise the occurrence of inconsistencies between federal family court orders and personal property directions. The *Intervention Orders (Prevention of Abuse) Act 2009* (SA) expressly requires courts issuing personal property directions to take into account any agreement or order for the division of property under the *Family Law Act* of which it has been informed.<sup>247</sup>

16.237 Under s 20 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA), an applicant for a protection order must inform the court of any agreement or order for the division of property under the *Family Law Act*, or any pending application for such an order.<sup>248</sup> However, there is no specific question in relation to property orders on the application form for a protection order in the Magistrates Court of South Australia.<sup>249</sup>

16.238 No other state or territory family violence legislation expressly requires an applicant for a protection order to inform the court about any property order under pt VIII of the *Family Law Act*, or pending proceedings for such an order, nor do any application forms expressly seek this information.

### **Submissions and consultations**

16.239 In the Consultation Paper, the Commissions set out two proposals to assist state and territory courts making protection orders to obtain information about, and consider, property orders made under the *Family Law Act*—thus avoiding inconsistencies between orders. These proposals were as follows:

- state and territory family violence legislation should require applicants for protection orders to inform the courts about and courts to consider, any

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246 Damage to property as a form of family violence is discussed at Ch 5.

247 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 10(2)(c). This section also requires courts to take into account agreement or orders for the division of property under the *Domestic Partners Property Act 1996* (SA).

248 Section 20 of the *Intervention Orders (Prevention of Abuse) Act 2009* (SA) also requires applicants to inform the court of any agreement or orders for the division of property under the *Domestic Partners Property Act 1996* (SA).

249 Magistrates Court of South Australia, *Complaint for a Domestic Violence Restraining Order* <[www.courts.sa.gov.au/lawyers/index.html](http://www.courts.sa.gov.au/lawyers/index.html)> at 9 February 2010.

agreement or order for the division of property under the *Family Law Act*, or any pending application for such an order;<sup>250</sup> and

- application forms for protection orders in family violence proceedings should clearly seek information about any agreement or order for the division of property under the *Family Law Act* or any pending application for such an order.<sup>251</sup>

16.240 Stakeholders who commented on these proposals overwhelmingly expressed their support.<sup>252</sup> For example, the Queensland Law Society stated that:

there should be as much openness as possible for those who come to court seeking orders and in the court being aware of such orders so as to minimise conflict between protection orders and property settlement orders under the *Family Law Act*.<sup>253</sup>

16.241 Women's Legal Service Queensland submitted that the kinds of disclosure required by state and territory legislation of applicants, and prompted on forms, should be limited to relevant property, specifically, 'personal items and chattels rather than the whole property settlement, unless that is relevant'.<sup>254</sup> Similarly, National Legal Aid and Legal Aid NSW supported the proposed legislative requirement of applicants only where an agreement or order for division of property is relevant to the protection order.<sup>255</sup>

16.242 Several women's legal services, while supporting the proposals, expressed some concerns about their operation. Wirringa Baiya Aboriginal Women's Legal Service Inc pointed out that 'some applicants may not be aware of the progress of their family law matter'.<sup>256</sup> Women's Legal Services Australia and Women's Legal Services NSW stated that they are

250 Consultation Paper, Proposal 9–7.

251 Ibid, Proposal 9–8.

252 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010 Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

253 Queensland Law Society, *Submission FV 178*, 25 June 2010.

254 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

255 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010.

256 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

concerned that awareness of potential or actual property proceedings under the *Family Law Act* might result in state or territory courts electing to refrain from making ancillary property orders. It is important to ensure that property will still be recovered with police assistance when required.<sup>257</sup>

16.243 With respect to the proposed changes to application forms, Women's Legal Services NSW considered that adding more questions may make the forms 'more long and complex, particularly for many of our clients who are from culturally and linguistically diverse backgrounds'.<sup>258</sup>

16.244 The Magistrates' Court and Children's Court of Victoria did not consider the proposed reforms necessary. It commented that while information sharing is important, 'such information may be of limited assistance to decision making in relation to family violence protection issues'.<sup>259</sup>

#### *Commissions' views*

16.245 Personal property directions made under state and territory family violence legislation may conflict with existing orders of a federal family court made under pt VIII of the *Family Law Act*. This is likely where a court is not informed about the existence of such orders. Inconsistencies between orders may cause uncertainty and increase tensions between parties. Accordingly, there should be strategies in place for courts making protection orders to obtain information about, and consider, property orders made under the *Family Law Act*, and pending proceedings for such orders.

16.246 The Commissions consider that application forms for protection orders should clearly ask about the existence of orders for the division of property under the *Family Law Act*, or pending applications for such orders. However, the Commissions do not recommend imposing a legal obligation on applicants to inform courts about *Family Law Act* property orders and proceedings. The Commissions note the concerns of Wirringa Baiya Aboriginal Women's Legal Centre Inc that some applicants may be unaware of the details of their federal family court matter. Imposing a legal obligation to provide information may disadvantage persons from culturally and linguistically diverse backgrounds, persons with a disability, and unrepresented applicants. The Commissions consider it sufficient—and more effective—to clearly prompt disclosure of *Family Law Act* property orders and proceedings in application forms.

16.247 The Commissions consider that another effective strategy to ensure courts are aware of federal family court orders and proceedings regarding property is to place an obligation on state and territory courts to request this information when making a personal property direction. Additionally, the Commissions recommend elsewhere in this Report that state and territory courts should be given access to the Commonwealth Courts Portal.<sup>260</sup> This will enable state and territory courts issuing personal property

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257 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

258 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

259 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

260 Rec 30–8.

directions to obtain accurate information about property orders under the *Family Law Act*, as well as pending proceedings.

16.248 The above strategies ensure that state and territory courts applying family violence legislation can make informed determinations in relation to personal property directions, thereby avoiding the potential for inconsistency between personal property directions and federal family court orders. Further, these strategies parallel those recommended by the Commissions in relation to the interaction of parenting orders and protection orders in Chapter 30.<sup>261</sup> If both sets of reforms are implemented, this will provide a consistent and effective approach for state and territory courts to obtain information about relevant federal family court proceedings relating to both property and parenting matters when making decisions under family violence legislation aimed to improve safety of victims and their children.

16.249 The Commissions note the concerns of two women's legal services that state and territory courts may decline to issue personal property directions where they are made aware of pending or concurrent property proceedings in federal family courts. As discussed above, the Commissions consider that, while personal property disputes should generally be resolved in federal family courts where this option is available, judicial officers should retain discretion to make personal property directions where necessary to address a gap in protection. The Commissions consider that the issues raised by the women's legal services may be addressed in judicial education and training.

### **Impact on future federal family court proceedings**

16.250 The reforms discussed above create strategies to avoid inconsistencies between personal property directions made under family violence laws and existing *Family Law Act* orders. Sections 87 and 88 of the *Family Violence Protection Act 2008* (Vic) address the potential repercussions of personal property directions on any future *Family Law Act* proceedings—including the effect of inconsistency between orders. Section 87 provides:

- (1) The power ... to include a condition relating to personal property in a family violence intervention order is subject to any order to the contrary made by the Family Court, or another court or a Tribunal with relevant jurisdiction to adjudicate in property disputes.
- (2) To the extent of any inconsistency between a condition relating to personal property in a family violence intervention order and an order made by the Family Court, another relevant court or a relevant Tribunal the order of the Family Court, other relevant court or relevant Tribunal prevails.

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261 Recs 30–6 and 30–7.

16.251 The Explanatory Memorandum advises that the purpose of s 87 is to:

ensure that property disputes can be resolved in the appropriate jurisdiction and any condition imposed by a family violence intervention order applies in the absence of, or prior to, any determination of the property rights of the parties.<sup>262</sup>

16.252 Section 88 of the *Family Violence Protection Act 2008* (Vic) specifies that a condition relating to personal property in a protection order does not affect any rights the protected person or excluded person may have in relation to the ownership of the property. The Explanatory Memorandum notes that this could be an issue, for example, if the court orders that an excluded person's refrigerator is to remain in the residence under an exclusion condition. In accordance with the section, the excluded person will still own the refrigerator and a federal family court will be able to take this into account in a division of property in association with divorce proceedings.<sup>263</sup>

16.253 Similarly, the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) provides that a personal property direction does not confer a right to take property that a person does not own or have a legal right to possess.<sup>264</sup> The *Justices Act 1959* (Tas) provides that a protection order that affects possession of, or access to, premises or property does not affect any legal or equitable interest that any person holds in the premises or property.<sup>265</sup>

#### ***Submissions and consultations***

16.254 In the Consultation Paper, the Commissions made two proposals in relation to the interaction of personal property directions and future federal family court property proceedings:

- state and territory family violence legislation should provide that personal property directions made in protection order proceedings are subject to orders made by a federal family court or another court responsible for determining property disputes,<sup>266</sup> and
- state and territory family violence legislation should provide that personal property directions do not affect ownership rights.<sup>267</sup>

16.255 The Commissions proposed that the *Family Violence Protection Act 2008* (Vic) should be referred to as a model, pursuant to ss 87 and 88 respectively.

16.256 Both proposals received widespread support from those stakeholders who commented.<sup>268</sup> The Magistrates' Court and Children's Court of Victoria considered

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262 Explanatory Memorandum, Family Violence Protection Bill 2008 (Vic).

263 Ibid.

264 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 67(4).

265 *Justices Act 1959* (Tas) s 106B(5B).

266 Consultation Paper, Proposal 9–9.

267 Ibid, Proposal 9–10.

268 The following stakeholders supported both proposals: Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc,

that these provisions work well in Victoria.<sup>269</sup> The Queensland Commission for Children and Young People and Child Guardian—in support of the proposals—stated that ‘protection order proceedings should only deal with property issues to the extent necessary to give effect to the protective objectives of family violence legislation’.<sup>270</sup>

#### **Commissions’ views**

16.257 Issues of ownership may be somewhat uncertain in the context of acquisition of personal property following relationship breakdown. The recommended approach leaves the resolution of such matters open where necessary, while providing immediate solutions regarding access to designated property in response to the safety concerns of victims.

16.258 Personal property directions may have repercussions for subsequent property proceedings in a federal family court. For example, where an order provides for furniture belonging to an excluded person to remain with the victim, there is scope for this to be put forward as a victim’s ‘property’ for the purpose of a declaration under s 78 of the *Family Law Act*. As discussed, where parties have access to federal family courts for the purpose of resolving property disputes, it is not appropriate for protection order proceedings to take the place of the dedicated processes set out in pt VIII of the *Family Law Act*.

16.259 Accordingly, the Commissions recommend a clear legislative statement in the family violence laws of each state and territory that a condition relating to personal property in a protection order does not affect any rights the victim or person who has used violence may have in relation to the ownership of the property. Section 88 of the *Family Violence Protection Act 2008* (Vic) should be referred to as a model in this regard.

16.260 The Commissions further consider that even though the overriding effect of federal family court property orders is a clear consequence of s 109 of the *Australian Constitution*, family violence legislation should articulate the effect of inconsistent

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*Submission FV 212*, 28 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010. The first proposal also attracted support from the following stakeholders: Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. The second proposal also attracted support from the following stakeholders: Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010.

<sup>269</sup> Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

<sup>270</sup> Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

orders. Provisions in family violence legislation which mirror the constitutional principle play an important educative role. Such provisions clarify that personal property directions apply ‘in the absence of, or prior to, any determination of the property rights of the parties’, as stated in the Explanatory Memorandum for the Victorian family violence bill. The Commissions therefore recommend that family violence legislation should include provisions to the effect that a personal property direction in a protection order is subject to any order to the contrary made by a federal family court. Section 87 of the *Family Violence Protection Act 2008* (Vic) provides an instructive model.

**Recommendation 16–10** Application forms for protection orders under state and territory family violence legislation should clearly seek information about property orders under the *Family Law Act 1975* (Cth) or any pending application for such orders.

**Recommendation 16–11** State and family violence legislation should require courts, when considering whether to make personal property directions in protection order proceedings, to inquire about and consider any property orders under the *Family Law Act 1975* (Cth), or pending application for such orders.

**Recommendation 16–12** State and territory family violence legislation should provide that personal property directions made in protection order proceedings are subject to orders made by a federal family court or other court responsible for determining property disputes.

**Recommendation 16–13** State and territory family violence legislation should provide that personal property directions do not affect ownership rights.

# 17. Family Law Interactions: Jurisdiction and Practice of Federal Family Courts

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## Contents

Introduction	757
Consideration of protection orders and family violence	758
The best interests of the child	758
Ensuring orders do not expose a person to a risk of family violence	768
Parenting orders made by consent	774
Parenting orders made in interim proceedings	777
Relocation and recovery orders	779
Property proceedings	791
Injunctions for personal protection	796
Protection orders and injunctive relief	796
Injunctions available under the <i>Family Law Act</i>	796
Use of <i>Family Law Act</i> injunctions in practice	799
Increasing the effectiveness of injunctions for personal protection	802
Interaction between <i>Family Law Act</i> injunctions and protection orders	813
Inconsistencies between <i>Family Law Act</i> injunctions and protection orders	816
Injunctions to relieve a party to a marriage from rendering conjugal rights	822
Hague Convention	824
Principle of prompt return	824
Exceptions	825
Conditions on orders	825

## Introduction

17.1 In Chapter 16, the Commissions examine the way in which state and territory courts, when making protection orders under family violence legislation, consider parenting orders made under the *Family Law Act 1975* (Cth). This chapter focuses on how federal family courts consider and address issues of family violence when making various kinds of orders under the *Family Law Act*.

17.2 The Commissions note that the *Family Courts Violence Review*, undertaken by Professor Richard Chisholm (the Chisholm Review),<sup>1</sup> examined how federal family courts identify and respond to issues of family violence in family law proceedings. As

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<sup>1</sup> R Chisholm, *Family Courts Violence Review* (2009). Chapter 1 sets out the background to the Chisholm Review.

the Terms of Reference for this Inquiry direct the Commissions not to duplicate this work,<sup>2</sup> this chapter limits the discussion of the Chisholm Review to matters concerning the interaction in practice between state and territory family violence laws and the *Family Law Act*.

17.3 The first part of this chapter examines how federal family courts respond to protection orders made under state and territory family violence legislation when determining what is in a child's best interests, and when ensuring that parenting orders, including relocation and recovery orders, do not expose a parent or child to an unacceptable risk of family violence. This section also briefly discusses the consideration of family violence when making orders under the *Family Law Act* for the distribution of property.

17.4 The second part of this chapter considers ways in which federal family courts can make orders for the personal protection of victims of family violence in family law proceedings. The final part of the chapter considers the interaction between protection orders under state and territory family violence legislation and recovery orders under div VII of the *Family Law Act* or the *Convention on the Civil Aspects of International Child Abduction* (Hague Convention),<sup>3</sup> as implemented by the *Family Law (Child Abduction Convention) Regulations 1987* (Cth).

## **Consideration of protection orders and family violence**

17.5 The *Family Law Act* provides that protection orders made under state and territory legislation are relevant to two aspects of decision making about parenting orders:

- when determining what orders are in the child's best interests pursuant to s 60CC; and
- when ensuring that a parenting order is consistent with a protection order and does not expose a person to an unacceptable risk of family violence pursuant to s 60CG.

### **The best interests of the child**

17.6 Section 60CC of the *Family Law Act* sets out 'primary' and 'additional' considerations that a court must have regard to when determining what is in a child's best interests. The two 'primary considerations' are the benefit to the child of having a meaningful relationship with both parents, and the need to protect the child from physical or psychological harm from being subjected or exposed to abuse, neglect or family violence.<sup>4</sup>

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2 See Ch 1.

3 *Convention on the Civil Aspects of International Child Abduction*, [1987] ATS 2, (entered into force generally on 1 December 1983).

4 *Family Law Act 1975* (Cth) s 60CC(2).

17.7 Two of the ‘additional considerations’ also refer to family violence. The court must consider:

- (a) any family violence involving the child or a member of the child’s family;
- (b) any family violence order that applies to the child or a member of the family, if:
  - (i) the order is a final order; or
  - (ii) the making of the order was contested by a person.

17.8 Prior to amendment in 2006, s 68F of the *Family Law Act*—the former equivalent to s 60CC—directed the court to consider any protection order that applied to the child or a member of the child’s family. Section 60CC(3)(k) now specifies the kinds of protection orders a federal family court can consider when determining what is in a child’s best interests. A court can consider any final protection order—including final orders made by consent, with or without admissions, or uncontested—or any order made after a contested hearing, including both final and interim orders. These amendments were intended to ‘ensure that the court does not take account of uncontested or interim family violence orders’ in order to ‘address a perception that violence allegations are taken into account without proven foundation in some family law proceedings’.<sup>5</sup>

#### ***Concerns about the practical effect of s 60CC(3)(k)***

17.9 There are three key practical issues with the operation of s 60CC(3)(k)—first, the weight to be given to protection orders of themselves when determining what is in a child’s best interests; secondly, how the provision affects practices of litigants in protection order proceedings in state and territory courts; and thirdly, how these issues are considered and managed by family lawyers.

17.10 There are different views about the role of protection orders in the assessment of the risk of family violence in determining a child’s best interests in the context of parenting orders. The Chisholm Review described this issue as follows:

By including [protection] orders in this list of matters relevant to the assessment of children’s interests, it might be taken as suggesting that the order itself is a factor that should be taken into account. It then partly retreats from that suggestion by excluding interim and non-contested orders. The rationale is, obviously, that it may be wrong to infer from the making of such orders that there is a risk of violence. But is the implication that the court should infer that there is a risk of violence from the making of final and contested orders?<sup>6</sup>

17.11 Chisholm was concerned about the weight to be given to the orders of themselves in the particular context of parenting orders.

17.12 Some stakeholders expressed the view that courts, when determining the best interests of a child, should give greater weight to the fact that one of the parties has a

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5 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), [67].

6 R Chisholm, *Family Courts Violence Review* (2009), 139.

protection order. For example, Women's Legal Services Australia, in a submission to the Chisholm Review, stated that:

In combination with the affidavit evidence of the nature and extent of the violence, judges should also be encouraged to consider [protection orders] as good evidence of the existence of domestic violence. It is unacceptable that orders granted by a jurisdiction to protect the lives of people who have experienced violence not be taken into account in a jurisdiction that, on the balance of probabilities, is charged with the responsibility to determine what parenting arrangements are in the best interests of children.<sup>7</sup>

17.13 A study by Professor Patrick Parkinson and others (the Parkinson Study), released after the Chisholm Review, on the use of protection orders during post-separation conflict, raised questions about the connection between the fact a person has a protection order and the risk of family violence. The study found that:

[w]hile applicants reported a valid legal basis for applying for family violence orders, orders were also sought for 'collateral purposes' such as determining the occupancy of the home on separation or maintaining boundaries between newly separated parents. In certain cases they were used as well for purposes connected with the family law dispute, on legal advice.<sup>8</sup>

17.14 However, other studies show that victims of family violence only apply for protection orders as a last resort.<sup>9</sup> The risk of family violence increases at the time of separation, and this risk is heightened when parents meet to facilitate children spending time with each parent, for example during handover arrangements.<sup>10</sup> In a 2003 study, Kaye and colleagues found that most women who have experienced family violence still want their children to have some contact with the other parent, but seek arrangements which ensure the safety of both themselves and their children.<sup>11</sup>

17.15 There are concerns that s 60CC(3)(k) of the *Family Law Act* affects the practices of litigants in state and territory courts. In particular, there is a view—noted in the Parkinson Study and in some consultations and submissions to this Inquiry—that some applicants seek protection orders in order to gain a strategic advantage in family law matters;<sup>12</sup> and some respondents consent without admissions to the protection order as

<sup>7</sup> Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers.

<sup>8</sup> P Parkinson, J Cashmore and J Single, *Post-Separation Conflict and The Use of Family Violence Orders* (2009), 1.

<sup>9</sup> See M Flood, *Fact Sheet #2: The Myth of Women's False Accusations of Domestic Violence and Rape and Misuse of Protection Orders* (2010) XY Online <www.xyonline.net/content/fact-sheet-2-myth-women-s-false-accusations-domestic-violence-and-misuse-protection-orders> at 17 August 2010 citing A Melville and R Hunter, "'As Everybody Knows': Countering Myths of Gender Bias in Family Law" (2001) 10 *Griffith Law Review* 124.

<sup>10</sup> See, eg Women's Legal Service, 'An Unacceptable Risk: A Report on Child Contact Arrangements Where There Is Violence in the Family' (2002) 14 *Journal of Judicial Administration* 157; M Kaye, J Stubbs and J Tolmie, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence* (2003).

<sup>11</sup> M Kaye, J Stubbs and J Tolmie, *Negotiating Child Residence and Contact Arrangements Against a Background of Domestic Violence* (2003).

<sup>12</sup> P Parkinson, J Cashmore and J Single, *Post-Separation Conflict and The Use of Family Violence Orders* (2009). See eg, P Maloney, *Submission FV 230*, 31 May 2010; Shared Parenting Council of Australia, *Submission FV 206*, 28 June 2010; Non-Custodial Parents Party (Equal Parenting), *Submission FV 55*, 1 June 2010; E McGuire, *Submission FV 53*, 28 May 2010.

a tactic to exclude consideration of the protection order in pending family law matters.<sup>13</sup> As noted in a submission by the Peninsula Community Legal Centre, ‘this practice is concerning as it has the potential to reduce the potency of family violence protection orders and devalue their impact before the federal family courts’.<sup>14</sup>

### **Options for reform**

17.16 The Parkinson study suggested that consideration should be given to removing the references to protection orders in s 60CC(3)(k) of the *Family Law Act*. Given that the list of considerations in s 60CC already refers twice to family violence, the authors considered that the additional reference in s 60CC(3)(k) to protection orders was ‘superfluous’. Instead, ‘[w]hat the court will really be concerned with is the substance of the matters with which the [protection order] sought to deal’.<sup>15</sup>

17.17 The Chisholm Review also emphasised that the court must consider the actual risk of family violence:

the law should do everything possible to enable the court to know about current family violence orders, so it can avoid making orders that inadvertently clash with them. Otherwise what is important is that the court should learn about the *factual circumstances* that might suggest a risk to the child or other person, regardless of what was the basis of a previous family violence order. As one legal submission pointed out, ‘It is the underlying allegations that are far more important to the Court in determining the case than the existence or otherwise of an order’.<sup>16</sup>

17.18 The Chisholm Review concluded that the law should ‘avoid creating an impression that the Family Court will draw adverse inferences from the [protection] order itself, rather than on the evidence put before the Family Court’.<sup>17</sup>

17.19 As discussed in Chapter 16, the Chisholm Review made several recommendations aimed at improving the way in which federal family courts consider allegations of family violence. In particular, the Chisholm Review recommended that the *Family Law Act* should list a range of factors that a court must take into account when considering the making of parenting orders. Rather than expressly listing family violence, courts would be required to consider, among other things, the child’s ‘safety, welfare and wellbeing’ when making parenting orders. Parents, advisers and courts would then be encouraged to consider the arrangements that are best for the child in each particular case.<sup>18</sup> The Chisholm Review concluded that, if such reforms were adopted, there would be no need for s 60CC(3)(k) of the *Family Law Act*.<sup>19</sup>

17.20 In the Consultation Paper, the Commissions expressed the view that the distinction made in s 60CC(3)(k) between considering final or contested protection

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13 Confidential, *Submission FV 171*, 25 June 2010.

14 Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

15 P Parkinson, J Cashmore and J Single, *Post-Separation Conflict and The Use of Family Violence Orders* (2009), 36.

16 R Chisholm, *Family Courts Violence Review* (2009), 140 (emphasis in original).

17 Ibid, 140.

18 Ibid, 131–132.

19 Ibid, 140, Rec 3.4.

orders on the one hand, and interim or uncontested orders on the other, should be removed. The Commissions proposed two options for reform, both of which would remove express reference to protection orders per se and instead focus on the fact of family violence.

17.21 The first option is to remove consideration of protection orders from s 60CC altogether and, instead, rely on a general consideration of family violence when determining what is in a child's best interests.<sup>20</sup> In the Consultation Paper, the Commissions noted that, when considering family violence, a family court would be permitted—but not required—to consider any protection order, along with other evidence of family violence on a case-by-case basis. The Commissions noted, however, that a potential disadvantage of this approach may be to decrease the visibility of family violence as a factor in making parenting orders.

17.22 The second option is to include a reference to protection order proceedings, in recognition that many victims of family violence have sought protection orders prior to commencing family law proceedings. This option would require courts to consider any family violence when determining what is in the best interests of a child, but also direct the court to consider any evidence of family violence given in protection order proceedings.<sup>21</sup> While the policy approach is similar to the first option, the Commissions expressed the preliminary view that framing the consideration in this way may highlight more clearly the weight that courts making parenting orders can give to evidence of violence given in protection order proceedings.

### ***Submissions and consultations***

17.23 Most stakeholders who commented on this proposal supported the second option, that is, amending s 60CC(3)(k) to provide that any family violence, including evidence of such violence given in any protection order proceeding, is an additional consideration when determining the best interests of a child.<sup>22</sup>

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20 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Proposal 8–5(a).

21 Consultation Paper, Proposal 8–5(b).

22 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 190*, 25 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 82*, 2 June 2010;

17.24 The Australian Domestic and Family Violence Clearinghouse preferred this option because ‘it highlights and validates the outcomes of protection order applications’.<sup>23</sup> Other stakeholders noted that removing the express reference to protection orders from s 60CC may decrease the visibility of family violence.<sup>24</sup> For example, Women’s Legal Services NSW submitted that:

Directing judicial officers to consider protection orders as one of the best interest factors avoids the potential situation where a judicial officer does not give any weight at all to the existence of a protection order. Clients have reported ... that some judicial officers see protection orders as easy to obtain or as a tactical move for family law proceedings. In combination with the affidavit evidence of the nature and extent of the violence, judicial officers should be encouraged to consider protection orders as good evidence of the existence of family violence.<sup>25</sup>

17.25 There was also support for removing the distinctions currently made between interim and final protection orders and between contested orders and orders by consent.<sup>26</sup> The Australian Domestic and Family Violence Clearinghouse noted that removing this distinction would enable

the introduction of other evidence from victims who have been issued with orders arising from cross-applications, as well as other evidence from health care providers, counsellors, refuge workers etc which should be similarly weighted in adducing the factual basis of domestic violence allegations.<sup>27</sup>

17.26 Similarly, the Queensland Commission for Children and Young People and Child Guardian supported removing the exclusion of interim and uncontested orders on the basis that courts should be free to explore any allegations of family violence in order to properly assess if there is a risk to the child.<sup>28</sup>

17.27 A number of stakeholders expressed support for the proposal’s focus on the evidence of family violence that lies behind the protection order, regardless of the type of protection order that has been made.<sup>29</sup> A confidential submission noted that a federal family court

needs to inform itself fully of any acts of violence, particularly where they are occurring as part of a context of power and campaign of controlling behaviour. Where

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Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; P Easteal, *Submission FV 40*, 14 May 2010.

23 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

24 J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

25 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

26 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010.

27 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

28 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

29 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 190*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

this evidence is available from the proceedings and applications to other courts, this should absolutely be admissible.<sup>30</sup>

17.28 However, Women's Legal Services NSW submitted that, when a protection order is made by consent, evidence of the family violence may be limited to the order itself:

many protection orders are consented to because there is little chance the defendant would succeed if the application proceeded to hearing due to the police being able to obtain sufficient evidence of the violence. This means that many of the most serious cases of family violence would involve protection orders made by consent. Unfortunately, as a result of the defendant consenting to the protection order, the police may not investigate further so evidence from witnesses is not obtained. This means that the protection order itself will often be the main contemporaneous evidence available to the judicial officer when determining subsequent parenting proceedings.<sup>31</sup>

17.29 The Magistrates' Court and the Children's Court of Victoria supported the second option, but proposed that it be amended to ensure that findings by a state or territory court hearing an application for a protection order that there has been family violence, as well as evidence given during such proceedings, are taken into account by a court when considering the child's best interests:

For example, where a court of summary jurisdiction has found, after a contested hearing, that the test for a protection order has been met (that is that the respondent has committed family violence against the affected family member and is likely to do so again) then the court exercising family law jurisdiction should be able to give this due consideration. It is particularly important that if family violence matters have been litigated that they are not re-litigated in another proceeding. Where family violence is at play such re-litigation can be a tactic of further abuse.<sup>32</sup>

17.30 Legal Aid NSW also supported the second option but proposed that the amendment make clear that the provision covers any family violence involving the child or a member of the child's family.<sup>33</sup>

17.31 Some stakeholders noted that protection orders and evidence of family violence given in protection order proceedings may already be considered by a federal family court when determining a child's best interests. In their submission, the Chief Justice of the Family Court and the Chief Federal Magistrate noted that s 60CC(3)(m) of the *Family Law Act* allows courts to consider 'any other fact or circumstance' when deciding what parenting arrangements would be in the best interests of a child, and this could include evidence that an interim or uncontested family violence order was made.<sup>34</sup> In addition, the Shared Parenting Council of Australia noted that s 60CC(3)(j) permits a court to take account of any family violence involving the child or a member of the child's family, which 'seems to imply that affidavit evidence and any other

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30 Confidential, *Submission FV 190*, 25 June 2010.

31 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

32 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

33 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

34 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

available evidence could be put forward, even where, for example, the family violence order is only an interim order made ex parte or by consent.<sup>35</sup>

17.32 In their joint submission, the Chief Justice of the Family Court and the Chief Federal Magistrate stated that they would not support any proposal to

amend the *Family Law Act* to include a requirement that family courts take family violence orders into account as evidence of continuing risk, without any independent judicial consideration of the existence, degree or magnitude of that risk.<sup>36</sup>

17.33 Rather, they expressed a preference for the recommendation made in the Chisholm Review to omit any specific reference to protection orders in s 60CC(3) and instead refer to a child's safety and wellbeing, on the basis that this appropriately directs the court consider the factual circumstances that might suggest a risk to the child (including risk to a parent), rather than to the fact that a family violence order was in place at some point in time.<sup>37</sup>

17.34 Although expressing this preference, the Chief Justice of the Family Court and the Chief Federal Magistrate considered that it was a 'logical approach' to remove the reference to final and contested protection orders in s 60CC(3)(k). They noted that this would be consistent with div 12A of the *Family Law Act* and the principles for conducting child-related proceedings, whereby all evidence is conditionally admitted and given the weight considered by the court to be appropriate in the circumstances, having regard to the entirety of the evidence before the court.<sup>38</sup>

17.35 A number of stakeholders expressed concerns about the potential implications of this proposal on the operation of state and territory protection order regimes. A confidential submission cautioned that there are risks in using protection orders for too many collateral purposes, submitting that:

The purpose for which family violence orders ought to be available is to protect people from violence and intimidation. Care must be taken as far as possible, to remove incentives for them to become weapons in a wider conflict between parents following an unhappy breakup.<sup>39</sup>

17.36 Concerns were also expressed that such an amendment may reduce the number of protection orders made by consent.<sup>40</sup> For example, Women's Legal Services NSW noted that:

Presently, defendants are advised of the implications of s 60CC(3)(k) and WLS NSW understands that some defendants choose not to contest the protection order on the basis of this advice. Accordingly, there is a risk that by amending this section to

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35 Shared Parenting Council of Australia, *Submission FV 206*, 28 June 2010.

36 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

37 Ibid.

38 Ibid.

39 FV Confidential C, *Submission FV Confidential C*, 5 June 2010.

40 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

include all protection orders, there may be an increase in the number of orders being contested.<sup>41</sup>

17.37 The Law Council of Australia did not support this proposal, citing concerns about the effect on protection order proceedings:

Protection orders, especially interim protection orders, should be readily obtainable without serious investigations into the truth or otherwise of the allegation. Interim protection orders do nothing more than provide a conservative, protective approach to domestic violence allegations. Protection orders generally should not be determinative of parenting orders unless evidence is led in parenting proceedings detailing the domestic violence alleged. Creating situations by which parenting order litigants can manipulate the process by bringing spurious protection order applications will result in a dramatic increase in spurious protection order cross-applications.<sup>42</sup>

#### *Commissions' views*

17.38 The distinction made between interim or uncontested orders on the one hand, and final or contested orders on the other, of itself does not reflect the many reasons interim orders do not progress to a final hearing, or the fact that protection orders may be made by consent. An interim protection order may be made for a number of reasons that do not reflect the level of risk, or evidence, of family violence. For example, judicial officers may make interim protection orders until related criminal proceedings are resolved. Similarly, a protection order may be made by consent without admissions so as not to prejudice current or pending criminal proceedings. The Commissions therefore consider that there is no principled basis to exclude these kinds of protection orders, merely because of their form, from consideration by federal family courts determining issues of family violence.

17.39 A state or territory court may make a protection order on the basis of findings that there has been, or there is a risk of, family violence. A court may also make a protection order without making any findings where both parties consent to the order. As such, the Commissions consider that protection orders should not be included as a *separate* factor to be considered by a court when determining the best interests of the child. Rather, a protection order should act as a flag to parties, their representatives and the court that there may be issues of family violence that should be considered by the court when determining the best interests of the child.

17.40 As noted by a number of stakeholders, when determining what is in the best interests of a child, a court must consider *all* evidence of family violence and give appropriate weight to that evidence. The legislative guidance in s 60CC(3)(k) of the *Family Law Act*—which suggests that some, but not all, protection orders are relevant to determining a child's best interests—is misleading, in that it suggests that courts give more or less consideration to various kinds of protection orders, rather than looking behind those orders to consider all the evidence regarding the nature, impact and risk of past or future family violence. The fact that a victim of family violence has a protection order may be one element in the evidence that a party provides to a family

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41 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

42 Law Council of Australia, *Submission FV 180*, 25 June 2010.

court to support allegations of family violence in the context of consideration of parenting orders. Other evidence could include, for example, affidavit or oral evidence from the victim, statements from police or other witnesses, doctors' reports or information provided by a child protection agency, and transcripts of magistrates court proceedings, where available.

17.41 The Commissions note the recommendations of the Chisholm Review which would effectively remove any specific reference to protection orders or family violence from the list of matters that a court must consider when determining what is in a child's best interests. However, given the prevalence of family law matters that raise issues of family violence, and in the light of the consultations and submissions made in the course of this Inquiry, the Commissions are of the view that the considerations for determining what is in a child's best interests should expressly refer to any family violence involving the child or a member of the child's family. The Commissions therefore go further than the Chisholm Review in this regard.

17.42 The Commissions also consider that it is important to recognise that, in many cases in which family violence is an issue, a victim of family violence will often have sought a protection order from a state or territory magistrates court. The court making the protection order, will, in many cases, have considered evidence provided by the parties in support or opposition to the order, such as affidavits or oral testimony. Directing a court to consider that evidence—in addition to any other evidence of family violence given in the family law proceeding—will minimise the duplication of evidence and the need for victims of family violence to retell their stories in different courts.

17.43 In some cases, a state or territory magistrates court may also have made findings after a contested hearing that there has been family violence and there is a risk of further family violence. While it is up to the court to determine what weight to give to such evidence, the Commissions consider that such findings should be given due consideration by a family court determining what is in the best interests of the child when making a parenting order. This also avoids the prospect of the issue of family violence being re-litigated where a court has already made findings of violence.

17.44 While they overlap and interact in varying ways, protection orders and parenting orders fulfil two distinct purposes—and the issues are often considered at different times, possibly at considerable remove from each other. The focus of protection order proceedings must be the protection of persons who are at risk of family violence. State and territory magistrates courts only make family violence protection orders when satisfied, on the evidence, that the grounds for making the protection order are met. As part of this process, such courts assess the person's risk of family violence and make appropriate orders. If an application for a protection order does not meet these grounds, the court dismisses the application. Family law proceedings for parenting orders must focus on the parenting arrangements that are in the best interests of the child—and at the time that such matters are being considered, which may be much later than any proceedings for protection orders in the magistrates courts.

17.45 The Commissions are of the view that the *Family Law Act* should be amended to direct courts, when determining the best interests of a child, to consider any family violence involving the child or a member of the child's family—including evidence given, or findings made, in any protection order proceeding. This amendment may also go some way to address the perception that the mere fact that a person has a protection order is, of itself, critical to the outcome of parenting matters.

**Recommendation 17–1** The ‘additional consideration’ in s 60CC(3)(k) of the *Family Law Act 1975* (Cth), which directs courts to consider only final or contested protection orders when determining the best interests of a child, should be amended to provide that a court, when determining the best interests of the child, must consider evidence of family violence given, or findings made, in relevant family violence protection order proceedings.

### **Ensuring orders do not expose a person to a risk of family violence**

17.46 Inconsistency between parenting orders and protection orders may occur, for example, if a protection order prohibits one parent from coming within a specified distance of the other parent’s home, while a parenting order allows the parent to collect and return the children at the home. The *Family Law Act* has a number of provisions that address issues of possible inconsistency of parenting orders with protection orders:

- s 60CG—ensuring parenting orders are consistent as possible with protection orders;
- s 68P—where an inconsistent parenting order is made, requiring a detailed explanation of how the contact specified in the order is to occur; and
- s 68Q—allowing for a declaration that a protection order is inconsistent with a parenting order.

#### ***Section 60CG of the Family Law Act***

17.47 In addition to considering any family violence or risk of family violence when determining what parenting orders are in a child’s best interests, s 60CG of the *Family Law Act* expressly requires that federal family courts must also ensure that a parenting order is consistent with a protection order and does not expose a person to an unacceptable risk of family violence, ‘to the extent that it is possible to do so consistently with the child’s best interests being the paramount consideration’.<sup>43</sup> The provision also allows the court to include in the order any safeguards that it considers necessary for the safety of those affected by the order.<sup>44</sup>

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43       *Family Law Act 1975* (Cth) s 60CG(1).  
 44       Ibid s 60CG(2).

17.48 While it may be unlikely in practice, it is possible for a federal family court to make a parenting order that is inconsistent with a protection order when it is not made aware of the existence of a protection order made under state or territory family violence legislation. In Chapter 30, the Commissions make a number of recommendations to improve information sharing between courts, and in particular to ensure that federal family courts are made aware of existing protection orders. The Commissions consider that by improving courts' awareness of relevant orders made in other courts, they will be less likely to inadvertently make inconsistent orders.

17.49 In some circumstances, while the federal family court may be aware of the terms of the protection order it may, nonetheless, decide to make an inconsistent parenting order because it has come to a different view of the risk of violence on the evidence before it, or considers that it is in the child's best interests to spend time and communicate with both parents notwithstanding the protection order. The focus of this section is on the rules and principles that apply when a federal family court deliberately makes a parenting order that is inconsistent with an existing protection order.

17.50 Chapter 16 discusses the reverse situation of how state and territory magistrates courts, when making or varying a protection order, can address inconsistencies between the protection order and an existing parenting in order to ensure that the parenting order does not put a person at risk of family violence. Because a parenting order will override an inconsistent protection order,<sup>45</sup> the obligations on federal family courts when faced with inconsistent orders differ from the obligations and powers of state and territory courts.

17.51 In Chapter 16, the Commissions discuss the problematic operation of s 60CG where a court determines, having regard to all the relevant considerations, that it is in the best interests of a child to spend time or communicate with a parent who has used, or threatened to use family violence against a family member other than the child. The Commissions express the view that a parenting order should not operate to place a person at risk of family violence, and that the best interests of a child should not be given priority over the protection of another person from family violence.

17.52 In Chapter 16, the Commissions recommend that, where there are issues of family violence, and whether or not there is a current protection order in place, courts making parenting orders should undertake a two-step process, in which, after determining what parenting orders would be in the child's best interests, the court also considers the effect of those orders on the safety of other family members from family violence. If the parenting order operates to place a person at risk of family violence, the court should make the amendments necessary to the order to ensure that the person is protected from an unacceptable risk of family violence. When considering these amendments, the court should consider what is necessary for the safety of those affected by the order and the best interests of the child should not be the paramount consideration.

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<sup>45</sup> Ibid s 68Q(1).

17.53 A further complication is that, because a protection order is invalid to the extent that it is inconsistent with a parenting order,<sup>46</sup> breach of the invalidated conditions in the protection order is technically not a criminal offence, and such conditions cannot be enforced by police. So even where a court includes safeguards in a parenting order to ensure a person other than the child is protected from family violence, if such conditions are inconsistent with a protection order, they cannot be enforced by police. Where it is necessary to protect a person from family violence, federal family courts should consider issuing an injunction for the personal protection of that person, as well as including conditions in the parenting order. In the second part of this chapter, the Commissions make recommendations relating to the ability of federal family courts to make enforceable injunctions for personal protection.

### ***Section 68P of the Family Law Act***

17.54 As set out in the Explanatory Memorandum for the amending legislation that introduced s 68P, the provision

places obligations on the court to explain to the parties affected (or arrange for someone else to explain to them), the effect and consequences of the order and how it is to be complied with.<sup>47</sup>

17.55 Where a court makes a parenting order that is inconsistent with an existing protection order, the order must state that it is inconsistent with an existing protection order and provide a detailed explanation of how the contact specified in the order is to occur.<sup>48</sup> The court must also explain to the parties:

- the purpose, effect and consequences of the order;
- the court's reasons for making an inconsistent order; and
- the circumstances in which a person may apply for variation or revocation of the order.

17.56 Section 68P also requires the court 'as soon as practicable', and no later than 14 days, after making the parenting order to provide a copy of the order to: the parties; the registrar or other appropriate officer of the court that last made or varied the protection order; the Commissioner for Police; and a child welfare officer in the relevant state or territory. Failure to comply with the requirements in s 68P does not, however, affect the validity of the parenting order.<sup>49</sup>

17.57 The Family Court's *Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged* (Best Practice Principles) include a checklist for judicial officers, setting out the issues that need to be considered when making parenting orders in cases where family violence has been alleged. While the checklist notes that a court will generally need to consider the extent to which a parenting order

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46 Ibid s 68Q(1).

47 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), 149.

48 *Family Law Act 1975* (Cth) s 68P(2)(a), (b).

49 Ibid s 68P(4).

is inconsistent with an existing family violence order, it does not draw attention to the procedural requirements in s 68P that follow if the court makes an inconsistent parenting order.<sup>50</sup>

17.58 The review of div 11 of the *Family Law Act* by Kearney McKenzie and Associates in 1998, noted that while it is ‘clearly desirable’ for people affected by a court order to be given the information required under s 68P, these obligations do

not, however, reduce the risk that a woman who is losing the protection of her family violence order will be exposed to violence. Information about the circumstances in which she can apply to have the contact order changed or revoked may help her avoid repeated violence. The most effective requirement in [the provisions requiring federal family courts to give parties certain information] is the requirement that the judge or registrar include details of how the contact should take place. ... In cases where there is violence between the parties, detailed contact orders reduce the opportunities for harassment of one party by another, for example, by constant telephone calls to make arrangements for contact.<sup>51</sup>

17.59 In the Consultation Paper, the Commissions sought stakeholder views about the operation, in practice, of the requirements in s 68P of the *Family Law Act*, and whether any reforms are necessary to improve the operation of the provision.

#### ***Section 68Q of the Family Law Act***

17.60 Section 68Q of the *Family Law Act* allows parties to parenting proceedings and persons subject to, or protected by, a protection order under state or territory family violence legislation, to apply to a court for a declaration that a protection order is inconsistent with a parenting order. The Explanatory Memorandum for the amending legislation that introduced s 68Q stated that it is ‘an important provision which clarifies the relationship between family law orders which provide for a child to spend time with a person and State or Territory family violence orders’.<sup>52</sup>

17.61 In the Consultation Paper, the Commissions asked how frequently s 68Q was used in practice, and whether it was working effectively.<sup>53</sup>

#### ***Submissions and consultations***

17.62 A number of stakeholders commented on how rarely s 68P was used in practice.<sup>54</sup> The Queensland Law Society suggested that this may be because protection

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50 Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (2009), 2.

51 Kearney McKenzie & Associates, *Review of Division 11* (1998), [2.8].

52 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), 152.

53 Consultation Paper, Questions 8–4, 8–5.

54 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010, Queensland Law Society, *Submission FV 178*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

orders typically have an exception for orders made under the *Family Law Act*, meaning that formal inconsistency between orders does not arise.<sup>55</sup>

17.63 Some stakeholders noted that, in their experience, some of the requirements of s 68P are followed where there is a final hearing. The Queensland Law Society and Legal Aid NSW both noted that where a matter is contested to final hearing, judicial officers will provide reasons why an inconsistent parenting order has been made.<sup>56</sup> National Legal Aid and Legal Aid NSW commented that the explanation of the orders given by the court is more detailed if parties are unrepresented.<sup>57</sup> Peninsula Community Legal Centre commented that, where family law orders are inconsistent with protection orders, parties are advised that the family law order will prevail over the protection order to the extent of the inconsistency.<sup>58</sup>

17.64 However, Women's Legal Services Australia submitted that the situation is different in interim hearings in federal family courts, in which the 'lack of court time and resources allocated to interim hearings mean that family violence issues cannot be assessed comprehensively'.<sup>59</sup>

17.65 Women's Legal Services Australia and Women's Legal Services NSW commented on the importance of s 68P, in that it

ensures the family court undertakes a valuable process: first, judicial officers are directed to consider the implications of their orders and ensure that there are no unintended consequences; and second, steps are taken to make certain that affected people clearly understand the full impact of the family law orders.<sup>60</sup>

17.66 However, the Family Violence Prevention and Legal Services Victoria noted that the process under s 68P was cumbersome, and submitted that:

It would be better if the Family Court could amend the [protection] order or send the proposed variation to the Magistrates Court to make a new order. There is a lot of to and fro-ing when orders are being varied between Courts. It is very problematic, confusing for parties involved and demanding on limited resources.<sup>61</sup>

17.67 Some stakeholders noted that ss 68P and 68Q, which require courts only to acknowledge inconsistency, do not necessarily achieve safety for victims of family violence, and submitted that the *Family Law Act* should prohibit courts from making orders which are inconsistent with protection orders made under state and territory family violence legislation.<sup>62</sup> Other stakeholders commented on the need, when making

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55 Queensland Law Society, *Submission FV 178*, 25 June 2010.

56 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

57 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010.

58 Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

59 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010.

60 Ibid; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

61 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

62 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

parenting orders, for federal family courts to recognise and address issues of family violence.<sup>63</sup>

17.68 While fewer stakeholders commented on the use of s 68Q of the *Family Law Act*, many noted that it was rarely used in practice.<sup>64</sup>

#### **Commissions' views**

17.69 Section 68P of the *Family Law Act* contains an important procedural requirement in that it requires courts to highlight and explain any inconsistency between a parenting order being made by the court and a current protection order. The Commissions consider that it is particularly important that parties are aware that, in such circumstances, the protection order is invalid to the extent that it is inconsistent with the parenting order.<sup>65</sup>

17.70 The Commissions consider that the procedural requirements in s 68P are valuable, in that they draw the parties' attention to the fact that orders are inconsistent. From the submissions to this Inquiry, the Commissions note that s 68P appears to be little used in practice, and suggest that one way to encourage courts to follow the requirements in s 68P when making both interim and final parenting orders that are inconsistent with a protection order would be to include a prompt about the requirements in the Family Court's Best Practice Principles.

17.71 The Commissions note that s 68Q also appears to be used infrequently. This may be because, while a declaration of inconsistency between a protection order and a parenting order would provide clarity, it does not necessarily address the implications of any inconsistency—specifically, the risk that a person is exposed to family violence. As noted above, the Commissions have recommended an amendment to s 60CG to ensure that federal family courts separately consider and address any risk that parenting orders expose a person to family violence. In addition, later in this chapter, the Commissions recommend that federal family courts have power to issue injunctions for personal protection, breach of which is a criminal offence.

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63 See, eg. Murray Mallee Community Legal Service, *Submission FV 167*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 82*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

64 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 82*, 2 June 2010.

65 *Family Law Act 1975* (Cth) s 68Q(1). Section 109 of the *Australian Constitution* provides for Commonwealth legislation to take precedence over inconsistent legislation in a state or territory when the Commonwealth and state and territory legislation purport to cover the same field. The constitutional framework is discussed in Ch 2.

### **Parenting orders made by consent**

17.72 Where parenting orders are made with the consent of both parties, there are concerns that issues of family violence do not come to the attention of the court, or are insufficiently considered, and so cannot be adequately addressed.

17.73 The issue of consent orders is expressly covered in the Family Court's Best Practice Principles, which set out the matters that courts should consider when parties propose parenting orders by consent that provide for a child to spend time with a person against whom family violence allegations have been made. The considerations include an assessment of:

- the seriousness of the allegations;
- whether the child has been involved in or exposed to violence;
- whether the parent against whom violence is alleged is seeking to spend time with the child as a way of continuing to control or maintain contact with the other parent; and
- whether it is clear that the parties have agreed to the order without pressure from others.<sup>66</sup>

17.74 The Best Practice Principles suggest steps that the court may take if it has concerns about the proposed consent orders, including ordering the preparation of a family report; ordering the appointment of an independent children's lawyer; requesting an interview by a family consultant; hearing further evidence; or referring one or both parents to an appropriate service and adjourning the proceedings.<sup>67</sup>

17.75 Where parties have commenced parenting proceedings, and allegations of child abuse have been raised, r 10.15A of the *Family Law Rules 2004* (Cth) requires the party, or the party's lawyer, to advise the court of the allegations, and to explain to the court how the order attempts to deal with the allegations.

17.76 The Chisholm Review suggested that consideration should be given to applying the requirements in r 10.15A to matters in which consent orders are sought where there are allegations of family violence, and introducing a similar rule to matters heard in the Federal Magistrates Court (FMC).<sup>68</sup> In the Consultation Paper for this Inquiry, the Commissions proposed that the *Family Law Rules* should be amended to implement the suggestions made in the Chisholm Review.<sup>69</sup> There was widespread support among stakeholders for this proposal.<sup>70</sup>

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66 Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (2009), 12.

67 Ibid, pt G.

68 R Chisholm, *Family Courts Violence Review* (2009), 88–89. The Review did not make a specific recommendation to this effect on the basis of insufficient information.

69 Consultation Paper, Proposal 8–6.

70 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; WESNET—The Women's Services Network, *Submission FV 217*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*,

17.77 Since the time of writing the Consultation Paper, r 10.15A of the *Family Law Rules* has been amended so that it applies to matters in which allegations of family violence, as well as child abuse, have been made.<sup>71</sup> In their submission in this Inquiry, the Chief Justice of the Family Court and the Chief Federal Magistrate noted that the Family Court and FMC Family Violence Committee has formed the view that the rule should also be adopted in the FMC, and the proposed amendment has been referred to the FMC Legal Committee.<sup>72</sup>

17.78 Rule 10.15A does not apply, however, where parties apply for consent orders without commencing proceedings in the Family Court. The *Application for Consent Orders* form, which can be used in the Family Court and FMC, asks whether the parenting orders sought are consistent with any current protection order.<sup>73</sup> In their submission, the Chief Justice of the Family Court and the Chief Federal Magistrate noted that registrars in federal family courts regularly requisition consent orders where this question is answered ‘no’, and will often determine not to approve such orders in chambers and either dismiss the application or list the matter before a judicial officer for consideration.<sup>74</sup> The *Application for Consent Orders Kit* published by the Family Court states that if the proposed consent orders are inconsistent with an existing protection order the matter must be heard in court. The Kit also advises parties to seek legal advice in this situation.<sup>75</sup>

17.79 The *Federal Magistrates Court Rules 2001* (Cth) do not include a procedure for the court to make parenting orders by consent where no proceedings have been commenced. The Chisholm Review reported anecdotal evidence that, in practice, court officers at the FMC direct parties to apply to the Family Court when they seek to make consent orders without instituting parenting proceedings.<sup>76</sup>

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25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

71 *Family Law Amendment Rules 2010 (No 1)* (Cth) items 10–12.

72 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

73 Family Court of Australia, *Form 11: Application for Consent Orders* <<http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Family+Court+of+Australia+forms/>> at 2 August 2010, item 15.

74 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

75 Family Court of Australia, *Application for Consent Orders Kit* <[www.familycourt.gov.au](http://www.familycourt.gov.au)> at 22 February 2010, ‘Important Note’, A.

76 R Chisholm, *Family Courts Violence Review* (2009), 270.

17.80 In the Consultation Paper, the Commissions asked how often federal family courts make consent orders that are inconsistent with current protection orders without requiring parties to institute parenting proceedings. The Commissions also asked whether the policy in the *Application for Consent Orders Kit* to require parties to institute parenting proceedings where they propose consent orders that are inconsistent with current protection orders should be reflected in the *Family Law Rules*.<sup>77</sup>

### **Submissions and consultations**

17.81 Stakeholders raised a number of concerns about consent orders, including the incidence of inconsistent orders made by consent, the impact of the costs of contested litigation and a concern that some parties are pressured or intimidated into consenting to parenting orders that expose them to a risk of family violence.

17.82 A number of stakeholders commented that it is difficult to judge how often parenting orders that are inconsistent with protection orders are made by consent.<sup>78</sup> Women's Legal Services Australia submitted that while it did not have statistics on the incidences of federal family courts making consent orders that are inconsistent with protection orders without requiring parties to institute parenting proceedings,

anecdotal evidence obtained from women accessing our services would seem to indicate that there is a significant group of women who have parenting orders made that are inconsistent with protection orders.<sup>79</sup>

17.83 Some stakeholders expressed concerns about victims of family violence consenting to parenting orders that place them at risk of further violence, either because of the costs pressures associated with court hearings and encouragement to settle matters,<sup>80</sup> or because of threats and intimidation by the other parent.<sup>81</sup>

17.84 There was some support for a proposal that parties be required to institute parenting proceedings where they propose consent orders that are inconsistent with current protection orders.<sup>82</sup> However, some stakeholders expressed concerns that the proposal would force people into litigation which they cannot afford.<sup>83</sup> Women's Legal Services NSW noted that:

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77 Consultation Paper, Question 8–2.

78 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

79 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010.

80 National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 82*, 2 June 2010.

81 Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010;

82 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

83 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

Legal aid is extremely limited, and the potential cost of court proceedings can be very high, especially in complex cases such as those involving family violence. This is exacerbated by legal aid merit assessments. Some clients have had difficulties meeting the merit criteria where they have raised concerns about domestic violence and seek to limit the time the other parent spends with children due to a perception that their case does not have good prospects of success.<sup>84</sup>

17.85 Some stakeholders suggested other ways to prevent federal family courts making parenting orders by consent that are inconsistent with current protection orders, including a requirement that applications be accompanied by a statement of agreed facts or an affidavit explaining why the inconsistency should be allowed;<sup>85</sup> or a requirement that parties appear before the court in cases where inconsistent orders are proposed.<sup>86</sup>

#### ***Commissions' views***

17.86 The Commissions support the amendments that have been made to r 10.15A of the *Family Court Rules* to require that parties, or their legal representatives, must advise the court if any allegations of family violence, or risk of family violence, have been raised in the proceedings, and, if so, explain to the court how the order deals with those allegations. The Commissions also support the pending application of this rule to matters heard in the FMC. Such amendments will ensure that parties and courts turn their minds to the effect of inconsistent orders and, in particular, the fact that conditions in the protection order that are inconsistent with the parenting order are invalid.

17.87 The Commissions do not consider that an amendment to the *Family Law Rules* to require parties to institute parenting proceedings where they propose consent orders that are inconsistent with current protection is necessary. The Commissions note the advice in the submission from the Chief Justice of the Family Court and the Chief Federal Magistrate about current court procedures for identifying inconsistencies—where parties seek parenting orders that are inconsistent with a protection order, the registrar will consider the matter closely, and may refer the matter to a judicial officer for consideration. In the Commissions' view, this process means the court retains flexibility to deal with the circumstances of each case and will not necessarily require parties formally to commence litigation.

#### ***Parenting orders made in interim proceedings***

17.88 The Chisholm Review considered that 'one of the greatest practical problems in cases involving family violence is what to do in interim cases'.<sup>87</sup> Where allegations of family violence are raised in interim proceedings, there is often little corroborative evidence and limited opportunity to cross-examine witnesses, meaning that

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84 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

85 Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

86 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010.

87 R Chisholm, *Family Courts Violence Review* (2009), 80.

the judicial officer will often be unable to make a finding about the likely truth of the allegations, and thus unable to reach a confident view about what arrangements are likely to be best for the children in the period—which may well be many months—before the final hearing.<sup>88</sup>

17.89 The Family Court's Best Practice Principles set out some matters that federal family courts should consider when making interim parenting orders in cases where there are disputed allegations of family violence. These considerations include the likely risk of harm to the child if the child spends time with a parent against whom allegations of family violence have been made; and the kinds of conditions that may be included in an interim parenting order.<sup>89</sup>

17.90 In the Consultation Paper, the Commissions asked whether any additional measures are necessary to ensure that allegations of family violence are given adequate consideration in interim parenting proceedings in federal family courts.<sup>90</sup> Stakeholders suggested a range of measures, with many submitting that risk assessment processes in the federal family courts would enable courts to be made aware of, and better understand and address, family violence issues in interim proceedings.<sup>91</sup>

17.91 The Chisholm Review also considered that some improvement to the consideration of family violence in interim proceedings may result from a systematic screening for family violence and also 'from improved educational opportunities for court staff, lawyers and other professionals, and additional guidance such as is contained in the Best Practice Principles'.<sup>92</sup> The review suggested, however, that the problems posed in interim proceedings, especially those involving allegations of violence, were 'not primarily related to the *performance* of judicial officers',<sup>93</sup> but was a wider issue:

Additional judicial and other resources will be required if we wish to improve the family courts' ability to protect children, especially from the consequences of important decisions based on inadequate and untested evidence, that might expose the children to risk of harm, whether by being exposed to the risk of violence or by being separated unnecessarily from a parent. Children would undoubtedly be much safer if through legal aid or otherwise the parties and the children were properly represented, and the number of judicial officers was such that each case could be given the

<sup>88</sup> *Ibid*, 80.

<sup>89</sup> Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (2009), 7.

<sup>90</sup> Consultation Paper, Question 8–3.

<sup>91</sup> The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; P Easteal, *Submission FV 40*, 14 May 2010. Frameworks for risk assessment in the federal family courts are discussed in Chapter 18.

<sup>92</sup> R Chisholm, *Family Courts Violence Review* (2009), 84.

<sup>93</sup> *Ibid*, 84 (emphasis added).

attention it deserved, without causing unacceptable delays in the hearing of other cases.<sup>94</sup>

17.92 As a consequence, the Chisholm Review recommended that the Australian Government consider providing federal family courts with the additional resources necessary to ensure that adequate attention can be given to children's cases in interim proceedings, especially cases involving allegations of family violence.<sup>95</sup>

17.93 While the Commissions acknowledge concerns that in interim proceedings courts do not necessarily have the information to assess issues of family violence comprehensively, the Commissions consider that the interaction issues that arise in interim proceedings are the same as those that arise across all parenting proceedings involving issues of family violence, which are discussed elsewhere in this chapter. As such, the Commissions refer to the recommendations of the Chisholm Review in relation to interim proceedings and do not make any additional specific recommendations for reform of interim parenting proceedings.

### **Relocation and recovery orders**

#### ***Relocation orders***

17.94 As noted in Chapter 15, relocation disputes are a type of parenting dispute that may arise when one parent, with whom a child lives, wants to move to another location, which may limit the other parent's opportunity to spend time with the child. The *Family Law Act* does not expressly address relocation issues. Relocation disputes are determined in accordance with the general parenting order provisions in the *Family Law Act*. The best interests of the child is the paramount consideration in relocation matters, consistent with all parenting proceedings. As discussed above, family violence is a relevant consideration in determining the best interests of the child in accordance with ss 60CC and 60CG of the *Family Law Act*.

17.95 Stakeholders have raised significant concerns that, in practice, relocation orders are being refused where a parent and his or her children are at risk of exposure to family violence, illustrated by the following case study commentary:

One woman who had two young daughters lived with her partner (their father) in a remote community in NT. She had primary responsibility for the care of the girls. She had experienced economic abuse combined with physical abuse throughout her relationship with her partner but finally had the courage to leave him. At that point he started to make threats to kill her. She moved, with their two daughters, into local domestic violence crisis accommodation. The crisis accommodation staff were so concerned for her safety that they organised a rare emergency evacuation to Darwin for her and the girls through a domestic violence legal service. The father then told the court that she had relocated the girls without his consent. In spite of the surrounding circumstances, the judge ordered the woman to return to the remote community she had been evacuated from.

The clear disregard of the woman's safety to one side, there did not seem to be any concern about the appropriateness of the father's style of parenting whereby children

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94 Ibid, 84.

95 Ibid, Rec 2.6.

were witnessing acts of domestic violence and whether, in the balance of things, it was appropriate to disrupt the rest of the family for the sake of access by him to the children. Women who have experienced violence are all the more in need of extended family support, which may only be available outside of the Territory. Many times they have moved to the Territory to be with the man, leaving behind all family and friend networks. The support they get from these networks feeds directly into their ability to be good parents and it may well be in the best interests of the child for relocation in circumstances of [family violence] to be viewed more sympathetically. Refusal to consent to relocation is a prime opportunity for violent partners to retain a pattern of abuse and control of their partner after the relationship has ended. Domestic violence needs to be taken into account in a more significant and central way where relocation is being contested.<sup>96</sup>

17.96 Some literature suggests that some victims choose not to raise allegations of family violence in relocation proceedings. A review of 50 relocation matters heard in the federal family courts from 2003–08 considered the implications of the 2006 shared parenting reforms. It reported that, in the pre-2006 cohort, in all but one case in which allegations of violence by the father towards the mother were accepted as true and relevant to the best interests of the child, the mother was given permission to relocate immediately. In three cases post-2006, where the woman wanted to relocate, a prior history of violence was acknowledged. Two of these mothers were successful in their request to relocate.<sup>97</sup>

17.97 The authors of the review extrapolated from these findings that, when the court acknowledges family violence, it will outweigh the requirement for a ‘meaningful relationship with both parents’. However, they went on to discuss the small number of cases in the post-amendment sample in which allegations were raised about a past history of violence, commenting that:

This is one of the more interesting and unexpected findings of our study. Perhaps the ‘gatekeepers’ are advising clients that relocations are more likely to be allowed where there is family violence, leading to these matters not getting to court, or perhaps movers who have experienced family violence are more reluctant to make such allegations in the post-2006 legislative climate.<sup>98</sup>

17.98 In 2006, the Family Law Council recommended to the Attorney-General that additional provisions should be inserted into the *Family Law Act* to deal specifically with relocation. The recommended provisions included that a court should consider what parenting arrangements could be made if a party were to relocate to ensure that the child maintains a meaningful relationship with both parents, to the extent consistent with the need to protect the child from physical or psychological harm. In justifying its recommended provisions, the Council commented that:

Proposed arrangements must be consistent with the object ... of protecting the child from physical or psychological harm. Council believes that it is useful to specifically

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<sup>96</sup> Comment on ALRC Family Violence Online Forum: Women’s Legal Service Providers.

<sup>97</sup> P Easteal and K Harkins, ‘Are We There Yet? An Analysis of Relocation Judgments in Light of Changes to the Family Law Act’ (2008) 22 *Australian Journal of Family Law* 259, 269–270.

<sup>98</sup> Ibid, 277.

refer to this object here, in light of the submissions received about some relocations being motivated by the need to escape violence and/or abuse.<sup>99</sup>

17.99 In its submission to that inquiry, Women's Legal Services Australia argued that family violence should be accorded a much greater weight in relocation orders:

In our view, the guidelines should emphasise that, in cases where there has been family violence, it is likely to be in the best interests of the child for the resident parent to be able to relocate a safe distance from the perpetrator. The United States National Council of Juvenile and Family Court Judges' *Family Violence Model State Code* provides a model that could be adapted for this purpose. The Code provides for a rebuttable presumption that it is in the best interests of the child to reside with the parent who is not the perpetrator of violence in a location of that person's choice, within or outside the state.<sup>100</sup>

17.100 The 2010 judgment of the High Court in *MRR v GR* may influence the determination of future relocation disputes. In that case, a mother appealed a parenting order made by the FMC for the parents to have equal shared responsibility for the child and for the child to spend equal time with each of them. The orders were made on the basis that—contrary to the mother's expressed wish to return to Sydney—both parents would live in Mount Isa. The High Court held that, in the circumstances, equal time parenting was not 'reasonably practicable' under s 65DAA of the *Family Law Act*. The Court's decision was influenced by the mother's lack of appropriate accommodation, limited opportunities for employment and isolation from her family. The matter was remitted to the FMC for a new hearing.<sup>101</sup>

### **Recovery orders**

17.101 Recovery proceedings may arise when one parent relocates with a child or children. As discussed in Chapter 15, courts exercising jurisdiction under Part VII of the *Family Law Act* may make recovery orders requiring the return of a child, typically to a parent.<sup>102</sup> The Australian Federal Police are generally authorised by the order to recover the child. Section 67V of the *Family Law Act* makes clear that a court must regard the best interests of the child as the paramount consideration when making a recovery order. The note to the section points out that ss 60CB to 60CG deal with how a court determines 'best interests', which leads to s 60CC and the primary and secondary considerations relevant to the best interests of the child. Sections 60CC and 60CG are discussed in detail above.

### **Consultation Paper**

17.102 In the Consultation Paper, the Commissions sought stakeholder feedback on whether issues arise in practice from the interaction between protection orders and relocation orders or allegations of family violence. The Commissions also sought stakeholder views as to whether any additional legal or practical reforms are needed to address issues related to the practical interaction of protection order proceedings and

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99 Family Law Council, *Relocation* (2006), Rec 4.

100 Ibid, [6.42].

101 *MRR v GR* (2010) 84 ALJR 220.

102 Persons who may seek a recovery order are set out in *Family Law Act* 1975 (Cth) s 67T.

relocation disputes. In particular, the Commissions asked whether there should be a presumption that, in cases where a federal family court determines there has been family violence, it is likely to be in the best interests of a child to be able to relocate to a safe distance from the person who has used violence. If such a presumption were to be introduced, the Commissions asked whether it should be included in legislation or in policy—for example, in the Best Practice Principles.<sup>103</sup>

17.103 The Commissions also asked whether the *Family Law Act* should be amended to include provisions dealing with family violence in relocation matters, over and above the provisions of the Act that apply to family violence in parenting proceedings generally;<sup>104</sup> and whether any legal or practical reforms in the context of relocation disputes should apply in all or only some cases of family violence—and, if so, how this should be determined.<sup>105</sup>

17.104 In relation to recovery orders, the Commissions asked whether the *Family Law Act* should be amended to include provisions dealing with family violence in recovery matters, in addition to the provisions of the Act that apply to family violence in parenting proceedings.<sup>106</sup>

### ***Submissions and consultations***

#### ***Family violence and relocation***

17.105 Stakeholders identified that family violence was a common reason that women wish to relocate with their children. The Magistrates' Court and the Children's Court of Victoria reported that magistrates who sit regularly in the jurisdiction 'report applicants seeking to relocate away from family violence perpetrators'.<sup>107</sup>

17.106 Similarly, several other stakeholders also noted that victims of family violence may relocate in order to be a safe distance from the person who uses family violence.<sup>108</sup> The Queensland Law Society submitted that the shortage of refuge accommodation may prompt relocation, as victims who need to live in refuges have to move to a different part of the state.<sup>109</sup> A number of stakeholders commented that some victims relocate following family violence and relationship breakdown to be closer to their family and support networks.<sup>110</sup> Women's Legal Centre (ACT & Region) Inc

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103 Consultation Paper, Question 9–8, [9.144].

104 Ibid, Question 9–9.

105 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 9–8, [9.145].

106 Ibid, Question 9–11.

107 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

108 Confidential, *Submission FV 184*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 81*, 2 June 2010.

109 Queensland Law Society, *Submission FV 178*, 25 June 2010.

110 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

noted that ‘many women are isolated from their families as part of the cycle of domestic violence’.<sup>111</sup>

17.107 Some groups may be particularly affected by relocation issues. One regional legal service drew attention to the particular problems leading to relocation from rural and remote communities, which may be ‘too small for [women] to remain living in close proximity to the offender safely’.<sup>112</sup> The Aboriginal Family Violence Prevention and Legal Service Victoria reported that relocation was a significant issue for their client group, and that ‘family violence is regularly involved along with cultural issues—connection with family and country’.<sup>113</sup>

17.108 A concern expressed by two stakeholders was that the safety of the victim of family violence was being put second to the interest of the other parent, who had used family violence, in maintaining a relationship with the children.<sup>114</sup> Stakeholders also submitted that allegations of family violence were not given enough weight in relocation proceedings.<sup>115</sup> For example, Professor Patricia Easteal, drawing on her research in this area, argued that judicial officers often do not accept that violence has occurred, or that it is relevant in making a determination.<sup>116</sup>

17.109 Several women’s legal services attributed the emphasis on shared parenting in the 2006 reforms to the *Family Law Act* to greater restrictions on relocation.<sup>117</sup> The Women’s Legal Centre (ACT & Region) Inc, for example, commented that:

Because of the ‘friendly parent’ provisions it has been a risky strategy to run the argument that puts forward the primary reason for relocation as being the wish to get away from the violent parent.<sup>118</sup>

17.110 The Women’s Legal Service Victoria compared the approach in child protection cases under state and territory child protection legislation, where a parent was expected to be ‘protective’ of his or her children, with their experience with respect to the family courts’ consideration of relocation matters.

The Child Protection system usually interprets a parent preventing a violent parent from having contact, minimising contact by relocation as being protective. They are

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111 Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

112 Confidential, *Submission FV 89*, 3 June 2010.

113 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

114 Confidential, *Submission FV 184*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

115 Confidential, *Submission FV 184*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

116 P Easteal, *Submission FV 40*, 14 May 2010. See, for example: P Easteal and K Harkins, ‘Are We There Yet? An Analysis of Relocation Judgments in Light of Changes to the Family Law Act’ (2008) 22 *Australian Journal of Family Law* 259.

117 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

118 Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010. Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

approaching it strictly from a child centred point of view so there is no conflict with the idea of parental involvement.<sup>119</sup>

17.111 Stakeholders described the impact on victims of family violence where their applications to relocate were unsuccessful. Victims may be deprived of the support of family and friends,<sup>120</sup> may be exposed to further family violence,<sup>121</sup> and may feel trapped by the family court orders or their situation.<sup>122</sup> Such circumstances may also enable persons who use family violence to ‘maintain a pattern of domination and control’ over the victim of family violence.<sup>123</sup>

#### ***Presumption in favour of relocation***

17.112 Stakeholders were divided in their response to the question of whether there should be a presumption—in cases where a family court determines there has been family violence—that it is likely to be in the best interests of a child to be able to relocate to a safe distance from the person who has used violence.

17.113 A number of stakeholders supported the introduction of such a presumption, for the range of reasons discussed above.<sup>124</sup> Women’s Legal Services Australia and Women’s Legal Services NSW—while considering that the application of a presumption would be beneficial—expressed a number of concerns, including that a presumption

may send the message that it is enough simply to relocate away from a perpetrator. Victims will almost always experience ongoing fear and it can be hard to establish a ‘safe distance’, particularly when there is emotional or psychological abuse.<sup>125</sup>

17.114 They pointed out that some victims do not wish to relocate, and these victims should not be made to feel that fleeing is their only option. They stated:

if a presumption is introduced it must be clear that the presumption will not apply if the victim does not wish to relocate. The effect of the legislation must not replicate the power imbalance that has been present in the violent relationship or cause victims to feel that they are still not in control of their own lives.<sup>126</sup>

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119 Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010.

120 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Confidential, *Submission FV 52*, 28 May 2010.

121 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

122 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

123 Confidential, *Submission FV 164*, 25 June 2010. See also Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

124 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010.

125 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

126 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010, Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

17.115 Women's Legal Services Australia and Women's Legal Services NSW also argued that judicial officers should be prepared to make orders that do not provide for the person who has used family violence to spend time with or communicate with the children.<sup>127</sup>

17.116 Other stakeholders opposed the introduction of this presumption.<sup>128</sup> Stakeholders who held this position generally disagreed with a limitation on the discretion of judicial officers to weigh up 'the individual facts and merits of each case'.<sup>128</sup>

17.117 The Department of Premier and Cabinet, Tasmania, argued that the principal issue in relation to relocation and family violence is 'the quality and cogency of the allegations of family violence'.<sup>129</sup> It expressed concern that introducing a presumption may devalue other considerations in relation to the best interests of the child, and that due to the 'complexity and variety of situations, a presumption is difficult'.<sup>130</sup>

***Amending the Family Law Act to include provisions on relocation and family violence***

17.118 There was support from a range of stakeholders, expressed in general terms, for amending the *Family Law Act* to make express reference to family violence with respect to relocation.<sup>131</sup> Other stakeholders provided more detail. For example, the Aboriginal Family Violence Prevention and Legal Service Victoria urged the inclusion of 'cultural issues' as well as family violence.<sup>132</sup>

17.119 Professor Patricia Easteal agreed with an amendment to the *Family Law Act*, while indicating that such reform would not be sufficient to address the issue: 'that isn't going to solve the problem of judges not accepting either that the violence took place or was serious enough to be relevant'.<sup>133</sup>

17.120 Some stakeholders opposed an amendment to the *Family Law Act* to include additional provisions dealing with family violence in relocation cases. Several stakeholders argued that the issue of family violence is adequately addressed by the

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127 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 183*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

128 Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010. See also National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 183*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010.

129 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

130 Ibid.

131 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

132 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

133 P Easteal, *Submission FV 40*, 14 May 2010.

general parenting provisions, and in particular the considerations relating to the best interests of the child pursuant to s 60CC.<sup>134</sup> In a joint submission, the Chief Justice of the Family Court and Chief Federal Magistrate submitted that

it is well accepted that although relocation disputes may have particular features or complexities when compared with parenting cases generally, they are nevertheless still parenting cases and should be governed by the principles, objects and best factor considerations that apply to all parenting disputes.<sup>135</sup>

17.121 Their Honours stated that the *Family Law Act* is sufficiently flexible to deal appropriately with family violence allegations in relocation cases, referring in particular to the ‘references to family violence in the objects, primary and secondary considerations’.<sup>136</sup>

17.122 Several stakeholders expressed concern that such an amendment may result in increased complexity.<sup>137</sup> For example, the Department of Premier and Cabinet, Tasmania, suggested that this may be an unintended consequence of an additional provision relating to relocation and family violence. Further, the Chief Justice and Chief Federal Magistrate stated that:

Part VII of the [*Family Law Act*] is already a complex and cumbersome piece of legislation to navigate. In this respect the recommendation of Professor Chisholm (recommendation 3.8) that the government undertake a revision of Part VII with a view to clarifying and simplifying the law, is supported. Further fragmentation of Part VII through the insertion of ‘relocation case specific considerations’ would be undesirable for that reason.<sup>138</sup>

17.123 Their Honours referred to the submission of the Family Court of Australia to the Family Law Council in its report on relocation:

amendments to the Act which effectively quarantine relocation cases from other children’s cases may create a more fragmented and complex legislative regime, as well as encouraging threshold litigation around whether a particular proposal is a ‘relocation’ (thereby attracting the application of specific criteria) or a ‘reaccommodation’.<sup>139</sup>

17.124 While National Legal Aid was not opposed to the introduction of specific provisions in relation to family violence and relocation, it submitted that this ‘should be approached with caution’.<sup>140</sup> It argued that family violence may not be the only

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134 Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

135 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

136 Ibid.

137 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

138 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

139 Ibid.

140 National Legal Aid, *Submission FV 232*, 15 July 2010.

relevant consideration in proceedings, and given the complexity of relocation cases, each should be ‘dealt with on their particular facts’.<sup>141</sup>

**Cases in which relocation-specific provisions should apply**

17.125 There were varied responses as to which types of cases a presumption, or relocation-specific provisions of the *Family Law Act*, should apply. Wurringa Baiya Aboriginal Women’s Legal Centre Inc considered that the presumption should apply in cases where there has been physical violence, but was unsure of whether the presumption should apply in other matters.<sup>142</sup> The Women’s Legal Service Victoria submitted that this issue should be determined by further reviews.<sup>143</sup>

17.126 The National Council of Single Mothers and their Children Inc argued that relocation-specific provisions should apply in all cases of family violence:

it is our experience that whilst sometimes acknowledging family violence, the severity of violence is often minimized and its impact on women and children often underestimated by the family law system and therefore any accommodation for the varying severity and nature of the violence is likely to underrate the levels and impact of violence.<sup>144</sup>

17.127 The Department of Premier and Cabinet, Tasmania, and the Law Council of Australia submitted that there are problems identifying the types of cases in which a presumption that should apply.<sup>145</sup> The Law Council of Australia stated that:

there is a broad spectrum of behaviours that constitute family violence and attempting to define circumstances in which the presumption should or should not apply would be very difficult.<sup>146</sup>

17.128 Another threshold issue was identified by the Law Council of Australia, in relation to the suggested presumption that it is likely to be in the best interests of the child to be able to relocate to a safe distance from the person who used violence. The Council queried how a ‘safe distance’ would be legislatively defined.<sup>147</sup>

**Amending the Family Law Act to include provisions on recovery and family violence**

17.129 A number of stakeholders supported an amendment of the *Family Law Act* to include provisions dealing with family violence in recovery matters, in addition to the provisions of the Act that apply to family violence in parenting proceedings.<sup>148</sup> As with

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141 Ibid.

142 Wurringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010.

143 Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010.

144 National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010. The same comments were made by the National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010.

145 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010.

146 Law Council of Australia, *Submission FV 180*, 25 June 2010.

147 Ibid.

148 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Wurringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Women’s Legal Centre (ACT & Region)

parenting proceedings, stakeholders identified family violence as a factor which may prompt recovery proceedings.<sup>149</sup> Women's Legal Services Australia submitted in support of such a provision that recovery orders may in some cases 'largely be about controlling the victim of family violence rather than about seeking to spend time with the child/ren of the relationship'.<sup>150</sup>

17.130 The Aboriginal Family Violence Prevention and Legal Service Victoria described the factors that may lead to recovery proceedings amongst their client group:

Mobility is high for a range of regions—stolen generation issues—maintaining connections to country/family. Often perpetrators take women away from family supports into isolated areas resulting in them needing to leave. In doing so they are acting protectively for children particularly where they seek to connect with other carers etc.<sup>151</sup>

17.131 Women's Legal Services Australia and Women's Legal Services NSW pointed out that as relocation is a priority issue for victims of family violence, this may give rise to recovery proceedings:

Many victims tell us that they want to escape the violence first and once they are safe deal with other issues such as seeking a protection order and any family law matters. However in doing this they are worried that as soon as they leave the other party may be successful in obtaining an ex parte recovery order because the court will not have been advised of the family violence.<sup>152</sup>

17.132 To deal with such situations, Women's Legal Services Australia and Women's Legal Services NSW submitted that there is a need for a procedure

where victims can notify the courts that they have left and taken the children because of family violence. To be effective this would need to include a shared database accessible by all courts having jurisdiction under the *Family Law Act*, which flags a family violence notification. Then if the other party makes an application for a recovery order the court will see that there has been a family violence notification. ... In making such a notification victims would then have to bring family law and/or protection matter before the courts within a specified timeframe.<sup>153</sup>

17.133 They noted that where the victim has a protection order, a national protection order database may address such problems with ex parte recovery proceedings.

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Inc, *Submission FV 175*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

149 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

150 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010.

151 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

152 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

153 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010.

17.134 While Women's Legal Services Australia and Women's Legal Services NSW expressed support for an amendment to the *Family Law Act* to include provisions dealing with family violence and recovery matters, both acknowledged that such a reform may make *Family Law Act* 'legislation and procedures more complex'.<sup>154</sup>

17.135 National Legal Aid considered that such an amendment may not be necessary, arguing that the important issue is that courts 'give appropriate consideration to evidence of family violence' when determining recovery matters.<sup>155</sup>

#### ***Commissions' views***

17.136 Refusing to make relocation orders in situations involving family violence may have serious repercussions for the safety of victims and their children. As noted by stakeholders in this Inquiry, victims in rural or remote areas of Australia may not be or feel safe from violence while remaining in close enough proximity to the person who has used violence to keep child contact arrangements unchanged. For victims who have been distanced geographically from their extended family or primary support network, regaining this support could be crucial to moving forward in their lives.

17.137 The focus in this Inquiry is on interactions of law, in this particular context between the *Family Law Act* and state and territory family violence laws. While the Commissions heard during the Inquiry that stakeholders have a number of concerns with respect to the extent to which family violence is considered in the context of relocation and recovery situations, few stakeholders addressed the particular issue of the interaction of state and territory family violence laws specifically.

17.138 The Commissions note some stakeholders' concerns that amending the *Family Law Act* to include a presumption or specific criteria for relocation and recovery matters in cases of family violence may lead to increased complexity in proceedings, and fragmentation of the *Family Law Act*. A consequence of such fragmentation may be threshold litigation, for example, around terms such as 'relocation' or 'safe distance', as parties litigate on issues of definition to attract or prevent the application of specific considerations in determining the case. Increasing the complexity of the *Family Law Act* in these ways may hinder the accessibility of federal family court proceedings in relocation and recovery cases—thus undermining one of the key aspirations of this Inquiry.

17.139 Identifying the types of case in which a presumption or specific criteria would apply is also problematic. Given that a wide range of behaviours of varying severity constitutes family violence, it may not be appropriate for a presumption or specific criteria to apply in all cases where there is a finding of family violence. However, limiting the application of the presumption or specific criteria may lead to threshold litigation of the kind discussed above. Further, specifying types of family violence that attract the application of specific provisions may operate to disadvantage victims of family violence who may appear to have suffered 'less severe' or, for

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154 Ibid; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

155 National Legal Aid, *Submission FV 232*, 15 July 2010.

example, non-physical forms of family violence, but who have been significantly affected by their experiences.

17.140 The Commissions note that a key recommendation of the Chisholm Review is that the Australian Government undertake a revision of Part VII of the *Family Law Act* with a view to clarifying and simplifying the law. This recommendation has the express support of the Chief Justice of the Family Court and the Chief Federal Magistrate, as indicated in their submission to this Inquiry.<sup>156</sup> The Commissions agree that relocation cases should not be considered as somehow ‘quarantined’ from other children’s cases, nor that the legislation or procedures should be made more complex, as these would work against key reform principles in this Inquiry—accessibility and effectiveness. The Commissions are persuaded, therefore, by the submission of the Chief Justice and Chief Federal Magistrate that ‘further fragmentation of Part VII through the insertion of “relocation case specific” considerations would be undesirable’.<sup>157</sup> The Commissions’ concerns about increased complexity and fragmentation of the *Family Law Act* also apply to the introduction of criteria specific to recovery matters.

17.141 The Commissions further consider that reforms recommended elsewhere in this Report are sufficient to address the interaction of allegations of family violence with both relocation and recovery matters. In this chapter, the Commissions make a recommendation for reform to s 60CC of the *Family Law Act* directed to improving the visibility and weight accorded to protection order proceedings in parenting proceedings generally.<sup>158</sup> If this recommendation is implemented, federal family courts will need to consider more fully any evidence given or findings made in family violence protection order proceedings under state and territory family violence legislation in parenting proceedings. Recommendations to facilitate allegations of family violence being raised in the federal family courts are also set out in two 2009 reviews—the Chisholm Review and the Family Law Council advice *Improving Responses to Family Violence in the Family Law System*.<sup>159</sup>

17.142 Also relevant to relocation and recovery matters is the Commissions’ recommendation with respect to s 60CG of the *Family Law Act*. This section specifically addresses family violence and requires the court to ensure that the order is consistent with any family violence protection order and does not expose a person to an unacceptable risk of family violence; and to impose any safeguards considered necessary for the safety of those affected by the order. In Chapter 16 the Commissions recommended that s 60CG be amended to provide that, when including such

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<sup>156</sup> D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

<sup>157</sup> Ibid.

<sup>158</sup> Recommendation 17–1.

<sup>159</sup> R Chisholm, *Family Courts Violence Review* (2009); Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009). These reports are noted in Ch 1.

safeguards, the court should give primary consideration to the protection of that person over the other factors that are relevant to determining the best interests of the child.<sup>160</sup>

17.143 With respect to the overall objective of this Inquiry—improving safety—and the reform principle that the legal framework needs to be as seamless as possible from the point of view of those who engage with it, the inclusion of the recommended reforms as part of the revision of Part VII would address many of the concerns with respect to the interaction issues identified by stakeholders arising from relocation and recovery proceedings, and allegations of family violence.

17.144 In other chapters in this Report, the Commissions focus on improving the understanding of the dynamics of family violence across the legal systems that victims and their families encounter by enhancing practice through specialisation and information sharing. Federal family courts already operate as specialised courts, however as stakeholders have demonstrated throughout this Inquiry, there is room for improvement with respect to the understanding of family violence and the articulation of information between state and federal systems.

17.145 The Commissions consider that information sharing procedures such as the national protection order register will assist courts in improving the safety of victims of family violence generally, and also relocation and recovery matters specifically. For example, in ex parte recovery proceedings, courts exercising jurisdiction under Part VII may access the register to check if any relevant protection orders have been made against the applicant.<sup>161</sup>

17.146 If the recommendations regarding ss 60CC and 60CG are implemented, as well as other recommendations in this Report, the Commissions consider that there is no additional need to amend the *Family Law Act* with respect to including provisions specific to relocation and recovery matters.

### **Property proceedings**

17.147 Section 79 of the *Family Law Act* permits federal family courts to make orders about the distribution of the property of parties to a marriage upon the breakdown of that marriage. Section 90SM of the *Family Law Act* governs how property is distributed between parties to a de facto relationship, and mirrors s 79 to a large extent.

17.148 In determining how property should be distributed, courts:

- identify the property, liabilities and financial resources of the parties;
- identify and assess the contributions that the parties have made to the property of the parties to the marriage or de facto relationship, including financial and non-financial contributions and contributions to the welfare of the family.<sup>162</sup>

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160 Recommendation 16–4.

161 The national protection order register is discussed in Ch 30. See Rec 30–18.

162 *Family Law Act* 1975 (Cth) ss 79(4)(a)–(c); 90SM(4)(a)–(c).

- identify and assess the needs of each party, such as needs based on a party's age and state of health, mental and physical capacity for gainful employment and any childcare responsibilities;<sup>163</sup> and
- make an order that is just and equitable in all the circumstances.<sup>164</sup>

17.149 The case of *In the Marriage of Kennon* (Kennon) established the principle that, when assessing a party's contributions, the court can take into account a course of violent conduct by one party towards the other that has had a significant adverse impact on that party's contribution or has made his or her contributions significantly more arduous than they ought to have been.<sup>165</sup>

17.150 While family violence, in itself, is not relevant to an assessment of future needs of a party, the *consequences* of family violence—for example its effect on the state of the victim's health or physical and mental capacity to gain appropriate employment—can be considered when assessing future needs.

### ***Options for Reform***

17.151 The ALRC—in its report *Equality Before the Law*—and the Family Law Council both previously recommended that the *Family Law Act* should be amended to require courts to consider the effects of family violence when determining both the contributions and needs of parties to a marriage.<sup>166</sup> In the Consultation Paper, the Commissions outlined a number of benefits of an amendment of this kind, such as:

- highlighting to parties and their legal representatives that family violence is relevant to the determination of property disputes;
- clarifying the scope and application test in *Kennon*, in particular the requirement that there be a 'course of violent conduct'; and
- ensuring that family violence is relevant to an assessment of a party's future needs, as well as his or her contribution to property.

17.152 In the Consultation Paper, the Commissions noted that the broad issue of how issues of family violence should be considered in property disputes is beyond the Terms of Reference for this Inquiry. As such, the Commissions endorsed the recommendation, made by the ALRC in *Equality Before the Law*, that the *Family Law Act* should refer expressly to the impact of family violence on past contributions and future needs.<sup>167</sup> The Commissions also proposed that the Australian Government should undertake a separate inquiry into the manner in which family violence is considered in property proceedings under the *Family Law Act*. The Commissions suggested that this inquiry might consider ways in which family violence can be taken

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163 Ibid ss 79(4)(e); 90SM(4)(e).

164 Ibid ss 79(2); 90SM(3).

165 *In the Marriage of Kennon* (1997) 139 FLR 118, 140.

166 Family Law Council, *Violence and Property Proceedings* (2001), [27]–[31]; Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part I)*, Report 69 (1994), Rec 9.6.

167 Consultation Paper, Proposal 9–4.

into account when determining a party's contribution to property and future needs, how family violence should be defined for the purposes of property proceedings and how the distribution of property may interact with other schemes such as victims' compensation.<sup>168</sup> Finally, the Commissions sought stakeholder views on the interaction issue of whether, in practice, evidence of family violence, including evidence given in protection order proceedings, is considered in the context of property proceedings under the *Family Law Act*.<sup>169</sup>

#### ***Submissions and consultations***

17.153 Stakeholders expressed differing views about whether family violence was considered by federal family courts when making orders for the distribution of the parties' property.

17.154 Some stakeholders commented that, in practice, family violence is considered in property proceedings when it comes to determining both contributions and future needs.<sup>170</sup> In such cases, evidence of family violence—including, but not limited to, evidence given in protection order proceedings and the existence of a protection order—is relevant and should be considered by the court.<sup>171</sup>

17.155 In relation to giving evidence of family violence in property proceedings, the submission from the Chief Justice of the Family Court and the Chief Federal Magistrate noted that, where the impact of family violence is relevant to proceedings relating to both children and property, and the children's proceedings have been finalised, issue estoppel can be relied upon to prevent any findings as to family violence being re-litigated in the property proceedings.<sup>172</sup>

17.156 Conversely, some stakeholders submitted that, in practice, family violence is not considered sufficiently relevant to property proceedings.<sup>173</sup> For example, Women's Legal Centre ACT submitted that, in its experience,

evidence of violence is not being considered in the context of property proceedings. Property proceedings tend to be viewed in a clinical way, focusing on the numbers. The threshold in *Kennon* is too high and it is almost impossible to present evidence that can link family violence directly to contributions or future factors unless, for example, there is a clear physical injury which has impeded or will impede a capacity for employment.<sup>174</sup>

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168 Ibid, Proposal 9–5.

169 Ibid, Question 9–5.

170 Confidential, *Submission FV 183*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

171 National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Service Brisbane, *Submission FV 223*, 2 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

172 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

173 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

174 Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

17.157 Other stakeholders noted that in many cases involving family violence there is no property settlement, or victims ‘agree’ to a minimal portion of the property in situations where they are not able to obtain legal aid funding.<sup>175</sup>

17.158 Most stakeholders who responded to this issue supported the proposal that the provisions of the *Family Law Act* dealing with the distribution of property should refer expressly to the impact of violence on past contributions and on future needs.<sup>176</sup> For example, the Aboriginal Family Violence Prevention and Legal Service Victoria submitted that:

The current tests are difficult to succeed on. The impact of family violence permeates all aspects of a victim’s life. It is sometimes the case that women separating from violent relationships actually do not pursue entitlements or full entitlements as they consider it will place them at greater risk of harm and prolong their psychological trauma. Specific legislative provisions stipulating family violence is to be considered as a factor in property proceedings are likely to go some way to address this.<sup>177</sup>

17.159 However, another stakeholder submitted that, because the family courts already make adjustments to parties’ entitlements to property on the basis of family violence, the *Family Law Act* does not need to be directly amended.<sup>178</sup> While the Law Council of Australia supported an amendment of s 79 of the *Family Law Act* to recognise the impact of family violence on contributions, it did not consider it necessary to amend the provisions relating to future needs as the current provisions already enables a court to take account of family violence in appropriate circumstances.<sup>179</sup>

17.160 Many stakeholders also supported a further inquiry into the consideration of family violence in property proceedings under the *Family Law Act*.<sup>180</sup> For example, the

175 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

176 Women’s Legal Service Brisbane, *Submission FV 223*, 2 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Justice for Children, *Submission FV 177*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; P Easteal, *Submission FV 40*, 14 May 2010.

177 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

178 A Brunacci, *Submission FV 97*, 4 June 2010.

179 Law Council of Australia, *Submission FV 180*, 25 June 2010.

180 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Service Brisbane, *Submission FV 223*, 2 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women’s Legal Service Victoria,

Queensland Law Society supported an inquiry, noting some of the limitations of the *Kennon* test, including the costs involved in making a *Kennon* claim as compared to the perceived benefits for making such claim; the requirement that the family violence occur before separation as part of a pattern, meaning that serious isolated incidents, including at separation, are not taken into account; and the effect of family violence on future needs.<sup>181</sup>

17.161 Two stakeholders commented on the Commissions' proposal that a further inquiry consider how the distribution of property may interact with victims' compensation schemes. The Chief Justice of the Family Court and the Chief Federal Magistrate submitted that the philosophy underlying s 79 is not one of compensation for loss, and stated that they would be opposed to the creation of a matrimonial tort or procedures whereby people are able to bring an action in the federal family courts for damages arising from violence experienced during a marriage or de facto relationship.<sup>182</sup> The Wurringa Baiya Aboriginal Women's Legal Centre also expressed opposition to any proposal that considered an award of victims' compensation as part of the assets of the relationship.<sup>183</sup>

#### ***Commissions' views***

17.162 The Terms of Reference for this Inquiry provide a limited lens through which the Commissions can propose reforms—that is, to resolve issues arising from the practical interaction between state and territory family violence laws and the *Family Law Act*. In the context of property proceedings under the *Family Law Act*, the principal issue of interaction is the provision and consideration of evidence of family violence, including evidence relating to a protection order sought or made under state and territory family violence legislation. The response of some stakeholders seems to indicate that evidence of family violence is considered in property matters where relevant.

17.163 The Commissions note concerns that the test set out in *Kennon* is difficult to meet, and may not be an adequate response to the effect of family violence on parties' contribution to the property of the marriage or de facto relationship and future needs. While stakeholders expressed support for the proposal that the provisions of the *Family*

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*Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Justice for Children, *Submission FV 177*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; P Easteal, *Submission FV 40*, 14 May 2010.

<sup>181</sup> Queensland Law Society, *Submission FV 178*, 25 June 2010.

<sup>182</sup> D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

<sup>183</sup> Wurringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

*Law Act* dealing with the distribution of property should refer expressly to the impact of violence on past contributions and on future needs, the Commissions consider that developing recommendations to address the concerns expressed about the operation of the *Kennon* test would involve complex considerations outside the Terms of Reference to this Inquiry.

17.164 The Commissions therefore recommend that the Australian Government should initiate a separate inquiry into the manner in which federal family courts consider family violence in property proceedings. An inquiry could consider, for example, whether the *Family Law Act* should refer expressly to the impact of violence on past contributions and on future needs; the form that any such legislative provisions should take; and the definition of family violence that should apply for the purposes of property proceedings under the *Family Law Act*. The Family Law Council may be well placed to conduct such an inquiry, given its previous letter of advice to the Attorney-General on this issue.

**Recommendation 17–2** The Australian Government should initiate an inquiry into how family violence should be dealt with in property proceedings under the *Family Law Act 1975* (Cth).

## Injunctions for personal protection

### Protection orders and injunctive relief

17.165 This section examines the interaction between protection orders made under state and territory family violence legislation and injunctions granted under the *Family Law Act*. The section considers three particular issues:

- the general preference of victims of family violence to seek protection orders under state and territory family violence legislation rather than *Family Law Act* injunctions, and ways in which *Family Law Act* injunctions may be reformed to increase their effectiveness in protecting victims of family violence;
- the potential for inconsistencies between protection orders under state and territory family violence legislation and *Family Law Act* injunctions; and
- the appropriateness of the injunction to relieve a party to a marriage from ‘any obligation to perform marital services or render conjugal rights’ currently available under the *Family Law Act*.

### Injunctions available under the *Family Law Act*

17.166 An injunction is a kind of order made by a court that requires a person to do, or refrain from doing, a particular act.<sup>184</sup> Courts exercising jurisdiction under the *Family Law Act*—that is, the Family Court, FMC and local state and territory

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184 The granting of injunctions is historically associated with equitable jurisdiction.

magistrates courts<sup>185</sup>—can grant injunctions for a variety of purposes. The power to grant injunctions is contained in two separate sections of the *Family Law Act*—one in relation to the courts' child welfare jurisdiction, and the other in the courts' jurisdiction in relation to matrimonial causes, reflecting the constitutional limits of power in relation to family law matters.

#### ***Injunctions to protect the welfare of a child***

17.167 Section 68B of the *Family Law Act* permits a court to grant an injunction to protect the welfare of a child. The injunction may be:

- for the personal protection of the child, the child's parent, a person with a parenting order in respect of the child, or a person who has parental responsibility for the child;<sup>186</sup> or
- to restrain a person from entering or remaining in the place of residence, employment or education or other specified area of the child, the child's parent, a person with a parenting order in respect of the child, or a person who has parental responsibility for the child.<sup>187</sup>

17.168 If, during an application under pt VII of the *Family Law Act*, there is an allegation of child abuse or family violence, or the risk of such conduct, the court must consider whether a s 68B injunction should be granted.<sup>188</sup>

#### ***Injunctions to protect a party to a marriage***

17.169 Section 114 of the *Family Law Act* permits a court to grant an injunction in circumstances arising out of the marital relationship, where the court considers it proper. An injunction may be granted:

- for the personal protection of a party to the marriage;
- to restrain a party to the marriage from entering or remaining in the matrimonial home or the other party's residence or place of work;
- for the protection of the marital relationship;
- in relation to the property of a party to the marriage; or
- in relation to the use or occupancy of the matrimonial home.<sup>189</sup>

17.170 A victim of family violence is most likely to seek an injunction for personal protection. The *Family Law Act* does not define 'personal protection', but courts have interpreted the term to include protection from physical harm as well as protection of a

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185 *Family Law Act* 1975 (Cth) ss 39–41.

186 Ibid s 68B(1)(a)–(b).

187 Ibid s 68B(1)(c)–(d).

188 Ibid s 60K(4).

189 Ibid s 114(1). Courts exercising jurisdiction under the *Family Law Act* have a more limited power to issue an injunction in de facto financial proceedings, in that the injunction is confined to the use or occupancy of the parties' property or residence.

person's wellbeing and freedom from interference and harassment.<sup>190</sup> A victim of family violence may also seek an order to exclude a person from particular places.

#### **Persons protected by Family Law Act injunctions**

17.171 *Family Law Act* injunctions protect a limited range of people. Section 114 injunctions are only available to protect people who are, or have been, married. On the other hand, s 68B injunctions can protect a child, the child's parent, a person with parental responsibility for the child or a person with a parenting order in respect of the child. Because the constitutional foundation of the *Family Law Act* lies in the Commonwealth's power with respect to marriage, divorce and matrimonial causes, *Family Law Act* injunctions are not available to protect unmarried couples without children, same-sex couples without children, siblings or other family members.<sup>191</sup>

#### **Enforcement**

17.172 If a *Family Law Act* injunction is breached, it is up to the person protected by the injunction to file an application to seek an order from the court regarding the contravention. The application must be accompanied by an affidavit setting out the facts, and a filing fee paid. A similar process is required regarding allegations of contempt.<sup>192</sup>

17.173 Sections 68C and 114AA of the *Family Law Act* provide an automatic power of arrest where a person breaches an injunction for personal protection. A police officer may arrest a person if the officer believes on reasonable grounds that the person has breached the injunction by causing, or threatening to cause, bodily harm to the person protected by the injunction, or has harassed, molested or stalked that person.<sup>193</sup> Both members of the Australian Federal Police and state and territory police forces are empowered to conduct arrests.<sup>194</sup> There is no power of arrest in relation to injunctions for matters other than personal protection.

17.174 Once arrested, the person must be brought before the court that granted the injunction, or another court having jurisdiction under the Act, by close of business of the day following the arrest, as long as it is not a weekend or public holiday. The police officer making the arrest must take all reasonable steps to ensure that the person who obtained the injunction is aware of both the arrest and the court hearing in relation to the breach of the injunction.<sup>195</sup>

17.175 If a person makes an application to seek an order from the court regarding the contravention, the court will hear the application within the strict time period. However, if an application is not made in time, the person arrested must be released.<sup>196</sup>

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190     *In the Marriage of Kemsley* (1984) 10 Fam LR 125, 130.

191     R. Alexander, 'Family Violence' in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.313]. The constitutional framework is set out in Ch 2.

192     *Family Law Rules 2004* (Cth).

193     *Family Law Act 1975* (Cth) ss 68C(1); 114AA(1).

194     Ibid ss 4(1); 68C(1); 114AA(1).

195     Ibid s 114AA(3). Section 68C(3) applies this section to breaches of injunctions granted under s 68B.

196     Ibid s 114AA(4).

### ***Consequences of contravention***

17.176 Federal family courts may impose a range of sanctions on a person who contravenes an injunction without reasonable excuse.<sup>197</sup> The *Family Law Act* attaches different consequences to a failure to comply with an injunction that affects a child—a s 68B injunction, or a s 114 injunction in so far as it is for the protection of the child—and one that does not. Sanctions available include fines, bonds and community service orders.<sup>198</sup> A term of imprisonment for a maximum of 12 months may be imposed for serious contraventions.<sup>199</sup>

17.177 In some circumstances, penalties may also be imposed for contempt of court. Where a contempt of court does not constitute a contravention of an order, or does constitute contravention and ‘involves a flagrant challenge to the authority of the court’, the court may punish the contempt by imposing a sentence of imprisonment, a fine, or both.<sup>200</sup>

### ***Aid and abet provisions***

17.178 The *Family Law Act* provides that a person is taken to have contravened an order where that person aids or abets contravention of an injunction by a person who is bound by it.<sup>201</sup> The range of sanctions described above may be imposed as a consequence. Like other contraventions provided for in the *Family Law Act*, there are different consequences attached to aiding and abetting the contravention of s 68B injunctions and s 114 injunctions insofar as they are for the protection of the child, and s 114 injunctions which do not affect children.

### ***Use of Family Law Act injunctions in practice***

17.179 Many more victims of family violence seek protection orders under state and territory family violence legislation than seek *Family Law Act* injunctions.<sup>202</sup> Dr Renata Alexander has noted that since the introduction of state and territory legislation aimed specifically at family violence—and particularly the ready availability of family violence protection orders—the number of family violence injunctions sought in the Family Court has fallen dramatically.<sup>203</sup>

17.180 Associate Professor Lisa Young and Federal Magistrate Geoff Monahan have identified two reasons victims of family violence generally seek protection orders

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197 A person may have a reasonable excuse for contravening an order that affects a child if he or she did not understand the obligations imposed or if he or she believed on reasonable grounds that actions were necessary to protect the health or safety of a person: *Ibid* s 70NAE(2), (4), (5), (6), (7). In relation to s 114 injunctions that do not affect a child, a person may have a reasonable excuse for contravention if he or she did not understand the obligations imposed and the court is satisfied that the person ‘ought to be excused’: *Family Law Act 1975* (Cth) s 112AC.

198 *Family Law Act 1975* (Cth) ss 70NFB, 112AD, 112AG.

199 *Ibid* ss 70NFB(2), 70NFG, 112AD(2), 112AE. A term of imprisonment may only be imposed for contravention of an injunction which is not for the protection of a child if that contravention was intentional or fraudulent: *Family Law Act 1975* (Cth) s 112AD(2A).

200 *Family Law Act 1975* (Cth) s 112AP.

201 *Ibid* ss 70NAC(b), 112AB(1)(b).

202 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [16.8].

203 R Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, 2002), 64.

rather than *Family Law Act* injunctions—first, the cost and complexity of the application proceedings for an injunction and, secondly, the inadequacy of enforcement mechanisms under the *Family Law Act*.<sup>204</sup> These two key points of difference are discussed further below.

17.181 Other advantages of state and territory protection orders over *Family Law Act* injunctions include:

- protection orders can protect a wider range of family members—such as siblings, extended family and other members of a household;
- a wider range of people can *initiate* proceedings for a protection order, including the police;
- state and territory family violence Acts specify a wide range of conditions or prohibitions that can be included in a protection order;<sup>205</sup> and
- police are more familiar with procedures under state and territory family violence legislation.<sup>206</sup>

#### ***Cost and complexity of proceedings***

17.182 The processes for seeking a protection order under state and territory family violence legislation are generally quicker and cheaper than an application for an injunction under the *Family Law Act*.

17.183 For example, in Victoria, a person seeking a protection order under the *Family Violence Protection Act 2008* (Vic) will usually complete an *Information Form for Application for Intervention Order*, setting out the background and the orders sought.<sup>207</sup> The form is then given to a registrar who prepares an application and warrant (for urgent matters where there is immediate concern for the person's safety, or a criminal offence is involved) or application and summons (if the matter is not urgent) and lists the hearing before a magistrate. There is no filing fee for the application.<sup>208</sup>

17.184 It is also possible for the Victorian police to apply for a protection order for a victim of family violence. The *Code of Practice for the Investigation of Family Violence*, issued by Victoria Police, requires police to make an application for a protection order wherever the safety, welfare or property of a family member appears to be endangered by another.<sup>209</sup>

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204 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [16.8].

205 Conditions that may be imposed by a protection order under state and territory family violence legislation are discussed in Ch 11.

206 These, and a number of other advantages of using protection orders under state and territory family violence legislation, are listed in R Alexander, 'Family Violence' in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.317].

207 Ibid, [2.8.602], app C.

208 Ibid, [2.8.602]. Where a person is arrested under warrant, the person may be bailed to appear in court within five days or may be held in custody until the hearing of the application. R Alexander, 'Family Violence' in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.601].

209 Victoria Police, *Code of Practice for the Investigation of Family Violence* (2005), [5.3.2]. Not all state and territory family violence legislation provides a role for police in making an application for a

17.185 In contrast, the process to obtain a *Family Law Act* injunction is more complex and time consuming. To apply for an injunction under the *Family Law Act*, an applicant must file an Initiating Application either in the Family Court, the FMC or a state or territory magistrates court. Where an application for an injunction is urgent, interim or interlocutory orders—rather than final orders—are usually sought. In such cases, the application must be accompanied by an affidavit setting out the details of the marriage or relationship, any children and the facts relied on for the injunction.<sup>210</sup> The applicant must pay a filing fee, unless the fee is waived by the court in specific circumstances. The applicant may also need to file a *Notice of Child Abuse or Family Violence* (Form 4) setting out the alleged family violence or risk of family violence.<sup>211</sup>

17.186 The respondent must be given notice of the hearing by being served with a copy of the application and affidavit. Police do not assist in serving documents in relation to *Family Law Act* injunctions because they are classified as a civil matter. Accordingly, the applicant will generally need to use a commercial process server to effect service.<sup>212</sup> In contrast, state and territory family violence legislation permits or requires police to serve applications for a protection order on a respondent in certain circumstances, or there are protocols in place to ensure that police can serve applications.<sup>213</sup>

### **Enforcement**

17.187 Breach of a protection order under state or territory family violence legislation is a criminal offence, attracting a police response and invoking the criminal justice system.<sup>214</sup> In contrast, breach of a *Family Law Act* injunction must be followed up by the person protected by the injunction as a private matter pursuant to the *Family Law Act*.

17.188 While injunctions for personal protection attach an automatic power of arrest and allow for state and territory police involvement,<sup>215</sup> it has been suggested that state

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protection order: see, eg, *Domestic Violence and Protection Orders Act 2008* (ACT). The role of police in assisting persons to apply for a protection order under state and territory family violence legislation is discussed in Ch 9.

210 R Alexander, ‘Family Violence’ in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.802].

211 Family Court of Australia, *Form 4—Notice of Child Abuse or Family Violence* <[www.familylawcourts.gov.au](http://www.familylawcourts.gov.au)> at 9 February 2010. See also R Alexander, ‘Family Violence’ in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.802]. Form 4 is discussed in detail in Ch 30.

212 R Alexander, ‘Family Violence’ in Springvale Legal Centre (ed) *Lawyers Practice Manual Victoria* (2009) 208–1, [2.8.803].

213 See eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 55, 77, 90; *Domestic Violence and Protection Orders Act 2008* (ACT) s 81.

214 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 14; *Family Violence Protection Act 2008* (Vic) s 123; *Domestic and Family Violence Protection Act 1989* (Qld) s 80; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 31; *Restraining Orders Act 1997* (WA) s 61; *Family Violence Act 2004* (Tas) s 35; *Domestic Violence and Protection Orders Act 2008* (ACT) s 90; *Domestic and Family Violence Act 2007* (NT) s 120. The consequences of contravening a protection order under state and territory family violence legislation, including offence provisions and maximum penalties, are discussed in Ch 12.

215 *Family Law Act 1975* (Cth) ss 68C, 114AA.

and territory police are reluctant to exercise their power of arrest under the *Family Law Act*, or do not always understand their role in this regard.<sup>216</sup>

17.189 In the report, *Equality Before the Law*, the ALRC reiterated a recommendation it made in an earlier inquiry into contempt that a wilful breach of an order for personal protection should be a criminal offence.<sup>217</sup> The ALRC considered that making breach a criminal offence had several advantages:

It helps to reinforce the message that the violence is not merely a civil matter between the parties; it brings police into the matter; and it relieves the woman from having to instigate proceedings against the man, a matter which may be both financially and emotionally costly. It also brings the Family Court proceedings in line with State and Territory restraining order proceedings which police may initiate.<sup>218</sup>

### **Increasing the effectiveness of injunctions for personal protection**

17.190 In the Consultation Paper, the Commissions discussed potential reforms to increase the effectiveness of injunctions for personal protection, thereby enabling victims of family violence to resolve their personal protection, parenting and property matters in one court, in this instance, a federal family court.<sup>219</sup> Without such reforms, parties may need to be involved in proceedings in both federal and state courts to resolve all relevant issues, including safety concerns.

17.191 In its 2009 advice on improving responses to family violence in the family law system, the Family Law Council recommended that to address this issue, consideration should be given to granting federal family courts *concurrent jurisdiction* with the state and territory courts to make protection orders.<sup>220</sup> It stated this could be achieved by a referral of powers from the states to federal family courts.<sup>221</sup>

17.192 The Commissions agree with the aspiration of the Family Law Council, to minimise duplicate proceedings and enable parties to obtain as many legal solutions as possible—including those for personal safety—in the one forum. This is an essential measure in making the court process as seamless as possible for victims of family violence. However such solutions must sit within the constitutional limits of power framing any family law reforms.

17.193 In this regard the Commissions note that the Australian Government already has legislative competence to make laws relating to family violence with respect to the limited range of persons specified above. This legislative competence arises from the power of the Australian Government to make laws with respect to matrimonial causes

216 L Young and G Monahan, *Family Law in Australia* (7th ed, 2009), [16.18]; R Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, 2002), 72.

217 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), Rec 9.12; Australian Law Reform Commission, *Contempt*, Report 35 (1987), [671].

218 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), [9.75].

219 Consultation Paper, Ch 9.

220 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), [7.4.1].

221 Ibid, [7.7].

under the *Australian Constitution*, and the referral of the power by the states to the Commonwealth to make laws with respect to children in certain circumstances.<sup>222</sup>

17.194 Although federal family courts already have powers directed towards the safety of victims of family violence who are eligible under the *Family Law Act*, the Commissions have heard that solutions available for victims of family violence in federal family courts are largely ineffective. Consequently, the Commissions have considered various reforms to make injunctions for personal protection more effective legal solutions for victims of family violence. This strategy is consistent with the aspirations of the Family Law Council, in enabling victims of family violence to resolve their legal issues in one court.

17.195 The Commissions' approach in the Consultation Paper to address multiple proceedings was to propose reform to the operation of injunctions for personal protection—separate from other *Family Law Act* injunctions—to increase their utility and effectiveness.<sup>223</sup> This enables parties to obtain enforceable injunctions for personal protection in federal family courts, by making breach of an injunction a criminal offence. The Commissions also sought feedback on other strategies to make injunctions for personal protection resemble more closely protection orders issued by state and territory courts.

17.196 The Commissions proposed that the *Family Law Act* should be amended to provide that a wilful breach of an injunction for personal protection under ss 68B and 114 is a criminal offence, as recommended by the ALRC in *Equality Before the Law*.<sup>224</sup>

17.197 The Commissions also asked whether the *Family Law Act* should provide separate procedures in relation to injunctions for personal protection available under s 114 of the Act, in order to improve their accessibility.<sup>225</sup> The Commissions made two suggestions for a change of procedure: removing filing fees, and permitting an application for an injunction for personal protection to be made without an affidavit. The Commissions also queried what other procedures would be appropriate.

### **Submissions and consultations**

#### **Breach of injunction for personal protection a criminal offence**

17.198 Stakeholders who commented overwhelmingly agreed with the proposal that the *Family Law Act* should be amended to provide that a wilful breach of an injunction for personal protection is a criminal offence.<sup>226</sup> For example, the Queensland Law

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222 See Ch 2.

223 Consultation Paper, Proposal 9–1, Question 9–1.

224 Ibid, Proposal 9–1; Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), Rec 9.12.

225 Consultation Paper, Question 9–1.

226 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission*

Society argued it should be recognised that, as with breaches of state and territory protection orders, ‘the offence of breaching an injunction for personal protection is a crime against the State and ought to be prosecuted by the State.’<sup>227</sup>

17.199 In a joint submission with other stakeholders, Domestic Violence Victoria noted the potential benefits of family law injunctions for personal protection:

some victims will find themselves in a family law court instead of or before they are involved in family violence proceedings, and therefore in those circumstances it will be easier and more appropriate for victims to address the family violence issues as part of their family law proceedings.<sup>228</sup>

17.200 They argued that these victims should justly receive the same protection available under a state and territory protection order, with a breach of the order constituting a criminal offence.

17.201 Women’s Legal Services NSW expressed concern about the wording of the Commissions’ proposal, which stated that a ‘wilful breach’ should be a criminal offence. It submitted that

this imports a higher standard of proof than is currently required in the state legislation, for example, the requirement in the NSW [Act] is ‘knowingly contravenes’.

17.202 National Legal Aid and, in a joint submission, the Chief Justice of the Family Court and the Chief Federal Magistrate, stated they did not support the proposal to amend the *Family Law Act* to provide that a breach of an injunction for personal protection is a criminal offence.<sup>229</sup> The Chief Justice and the Chief Federal Magistrate suggested

there are adequate powers available under the [*Family Law Act*] to deal with wilful breaches of orders, which are complemented by an effective and accessible family violence protection system in the states and territories. Features of that system do not need to be replicated in the federal sphere.<sup>230</sup>

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<sup>227</sup> *FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; P Easteal, *Submission FV 40*, 14 May 2010.

<sup>228</sup> Queensland Law Society, *Submission FV 178*, 25 June 2010.

<sup>229</sup> Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

<sup>230</sup> National Legal Aid, *Submission FV 232*, 15 July 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

<sup>230</sup> D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

17.203 Other stakeholders also expressed concern about replication,<sup>231</sup> with some magistrates of the Magistrates' Court and Children's Court of Victoria arguing that this provides opportunity for 'inconsistency and confusion'.<sup>232</sup>

17.204 In their joint submission, the Chief Justice of the Family Court and the Chief Federal Magistrate also stated that the indefinite nature of family law injunctions is problematic, as 'parties may, over time, make different, informal arrangements without applying to vary the orders and discharge the injunction'.<sup>233</sup> By contrast, state and territory protection orders which are in force for specified periods of time, for example 12 months or two years.

#### ***Separate procedures for family law injunctions for personal protection***

17.205 Stakeholder responses to the question of whether separate procedures should be provided for family law injunctions available under s 114 of the Act were mixed. A number of stakeholders expressed their support for the introduction of separate procedures.<sup>234</sup> The Magistrates' and Children's Court of Victoria were divided on the issue of *Family Law Act* injunctions, but some magistrates considered the operation of injunctions for personal protection 'would work better if the personal protection provisions were separated from other injunction provisions'.<sup>235</sup>

17.206 Other stakeholders expressed 'in principle' agreement, but questioned the practical operation of separate procedures for injunctions,<sup>236</sup> or indicated that their support was contingent on other changes being made to the enforceability and recognition of injunctions.<sup>237</sup>

17.207 In answer to the Commissions' question regarding which separate procedures for injunctions for personal protection would be appropriate, stakeholders proposed a range of measures. Women's Legal Services NSW made a number of suggestions, including issuing injunctions for personal protection as a separate court order to enhance recognition and enforcement by police. Other avenues for potential reform it identified were enabling parties to consent to injunctions on a 'without admissions' basis, and allowing for parties to make undertakings.<sup>238</sup>

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231 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

232 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

233 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

234 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

235 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

236 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

237 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

238 Ibid. See Ch 18 for discussion on practice in state and territory courts relating to consent to protection orders on a 'without admissions' basis and undertakings.

17.208 Women’s Legal Services NSW also proposed changes to federal family court forms. It suggested putting a check box for an injunction for personal protection on the *Initiating Application* and *Response to the Initiating Application* forms, and including a prompt to apply for an injunction for personal protection on the *Notice of Child Abuse or Family Violence* form (Form 4).<sup>239</sup>

17.209 Some stakeholders expressed support for the Commissions’ suggestion to remove filing fees to apply for injunctions for personal protection.<sup>240</sup> The Magistrates’ Court and Children’s Court of Victoria argued that charging a filing fee is ‘inconsistent with the high level of concern that ought to apply to personal safety issues’.<sup>241</sup>

17.210 The Commissions’ suggestion to dispense with the requirement for affidavit evidence to support applications for injunctions for personal protection did not receive widespread support. While benefits were identified, namely, ‘cost and time savings’,<sup>242</sup> stakeholders pointed out that affidavit evidence is an efficient way of supporting an application,<sup>243</sup> and may provide an alternative to the requirement for lengthy oral evidence.<sup>244</sup>

17.211 The benefits of separate procedures for injunctions for personal protection were identified by stakeholders. Women’s Legal Services Australia considered that separate procedures could introduce a more streamlined process to obtain injunctions for personal protection in federal family courts.<sup>245</sup> Women’s Legal Services NSW argued that separate procedures for injunctions for personal protection would help to educate the community about the existence of these injunctions.<sup>246</sup>

17.212 Some stakeholders did not support separate procedures for injunctions for personal protection, due to a view that state and territory family violence legislation should remain the principal avenue to deal with family violence.<sup>247</sup> Stakeholders referred to the advantages of state and territory protection orders: for example, National Legal Aid submitted that processes for obtaining a protection order in state and territory courts are ‘simple, quick and low cost’.<sup>248</sup> Other stakeholders—including stakeholders who supported separate procedures and provisions for injunctions for personal protection—expressed concern about two issues: enforcement of injunctions for personal protection by police; and human rights implications.

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239 Ibid.

240 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

241 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

242 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

243 Law Council of Australia, *Submission FV 180*, 25 June 2010.

244 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

245 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

246 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

247 National Legal Aid, *Submission FV 232*, 15 July 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

248 National Legal Aid, *Submission FV 232*, 15 July 2010.

### ***Enforcement of orders by police***

17.213 Stakeholders expressed concern about enhancing *Family Law Act* injunctions for personal protection due to concerns that enforcement by police may be problematic, particularly in comparison with well established breach processes for state and territory protection orders.<sup>249</sup> Stakeholders noted that state and territory police seldom exercise their current existing powers under the *Family Law Act* in relation to injunctions for personal protection,<sup>250</sup> and many are not aware of their obligations and powers under the Act.<sup>251</sup>

### ***Human rights implications***

17.214 Two stakeholders raised concerns about the human rights implications of reforms enhancing family law injunctions, as these injunctions are unavailable to same-sex couples without children and unmarried couples without children. They argued that family law injunctions should be accessible to all victims of family violence.<sup>252</sup> In a joint submission, Domestic Violence Victoria and others suggested the first step in ensuring consistency for all victims who wish to resolve their matters in one court would be an amendment to the *Marriage Act 1961* (Cth) to recognise same-sex marriage.<sup>253</sup>

### ***Commissions' views***

#### ***Corresponding jurisdictions***

17.215 In Chapter 3 the Commissions set out a framework for reform of the jurisdictions of courts that deal with issues of family violence. As discussed in that chapter, the Commissions do not consider it practicable to establish a single 'stand alone' court to deal with all legal matters relating to family violence. The Commissions are of the view that a more effective way to provide the benefits of an integrated system is to develop corresponding jurisdictions, in which the jurisdictions of courts dealing with family violence overlap to an appropriate degree. Enhancing the ability of courts to deal with matters outside their core jurisdiction allows victims of family violence to resolve their legal issues relating to family violence in the same court, as far as practicable consistent with the constitutional division of powers.

17.216 State and territory courts are often the first point of contact with the legal system for separating families who have experienced family violence, and family

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249 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

250 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

251 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010.

252 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

253 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

violence legislation is a core business of these courts. The Commissions do not recommend the development of a protection order practice in federal family courts to replicate the jurisdiction of state and territory courts. The Commissions consider that state and territory courts should remain the primary jurisdiction for obtaining a protection order—particularly given the role of police in proceedings in those courts, the wider range of persons who may be protected by state and territory family violence legislation, and the considerable experience of state and territory magistrates and court staff with respect to family violence protection order proceedings.

17.217 However, the Commissions are of the view that victims of family violence—in particular, those for whom family law proceedings are on foot or anticipated—should be able to obtain effective orders for their protection in federal family courts. This allows victims to resolve their legal issues to a great extent in the one court process. The Commissions consider that fostering the seamlessness of the court process in this way has significant benefits for victims of family violence. This approach minimises victims' exposure to multiple proceedings in different jurisdictions, thereby avoiding the personal and financial impacts of repeated proceedings and consequent reiteration of the same facts before different courts.

17.218 The Commissions acknowledge the potential resource implications in developing corresponding jurisdictions, notably in the provision of training to judicial officers and police, discussed below. Developing the ability of federal family courts to deal with matters of personal protection may also have an effect on legal aid funding. However, the Commissions consider these reforms will lead to long term savings, by reducing replication across different jurisdictions.

#### ***Separate provisions for injunctions for personal protection***

17.219 The Commissions consider that the *Family Law Act* should be amended to provide provisions for injunctions for personal protection separate from other types of injunctions available in federal family courts. This is an important measure in enhancing the ability of federal family courts to deal with family violence, thus developing corresponding jurisdictions.

17.220 Separate provisions are important as the Commissions consider injunctions for personal protection should operate differently from other *Family Law Act* injunctions, as follows:

- federal family courts should be empowered to make injunctions for personal protection for discrete periods of time;
- in making injunctions for personal protection, federal family courts should be able to impose a range of conditions on a person who has used family violence, similar to those conditions available in state and territory courts (discussed below); and
- a breach of an injunction for personal protection should be a criminal offence (discussed below).

17.221 The Commissions also consider that separate provisions in the *Family Law Act* for injunctions for personal protection will enhance their operation in a number of ways. Separate provisions will increase awareness and recognition of such injunctions by parties, police, legal representatives and the community, and improve the accessibility and effectiveness of injunctions for personal protection.

17.222 Separate provisions for injunctions for personal protection may also be necessary to address the application of aid and abet provisions in the *Family Law Act* to these injunctions. In Chapter 12, the Commissions discuss aid and abet provisions in relation to state and territory legislation. Currently, aid and abet provisions in some state and territory legislation result in victims of family violence being charged, where police consider that they have consented to the breach of a protection order made for their protection. The Commissions recommend that state and territory legislation should be amended where necessary to provide that a person protected by a protection order under family violence legislation cannot be charged with an offence of aiding or abetting the breach of protection order.<sup>254</sup>

17.223 The Commissions are also of the view that, similarly, the *Family Law Act* should be amended to provide that a person protected by an injunction for personal protection should not face sanctions for aiding or abetting a contravention by the person bound by the injunction. The Commissions consider such an amendment is appropriate for the reasons expounded in detail in Chapter 12. In particular, imposing sanctions on victims in these circumstances may subject them to further trauma, and may deter them from reporting future incidences of family violence. Further, the Commissions consider that such a response is inappropriate, given the nature and dynamics of family violence.

#### ***Breach of injunction for personal protection a criminal offence***

17.224 The Commissions consider that to enable federal family courts to provide effective protection for victims of family violence, a breach of an injunction for personal protection should constitute a criminal offence. The Commissions recommend that the *Family Law Act* should be amended in this regard.

17.225 Making a breach of an injunction for personal protection a criminal offence is the key reform in enhancing the effectiveness of these injunctions. Such an amendment provides clear benefits to victims of family violence. The creation of this criminal offence would remove the onus from the victim of family violence to bring the application for contravention of the injunction. It would relieve the victim of having to undertake possibly costly family law proceedings to enforce the injunction and reinforce the message that family violence is not a private matter, but a criminal offence of public concern.

17.226 The Commissions note the concern of Women's Legal Services NSW regarding the Commissions' use of the term 'wilful breach' in relation to the proposed criminal offence. It is not the Commissions' intention to introduce a more onerous test

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254 Rec 12-1.

for breach of injunctions for personal protection than for breach of protection orders under state and territory family violence legislation. The Commissions therefore omit reference to the term ‘wilful’ in the recommendation that breach of an injunction for personal protection should be a criminal offence. The Commissions consider that the precise formulation of this provision is a matter for the Australian Government.

#### ***Procedures***

17.227 A complementary measure in fostering the use of injunctions for personal protection is to provide separate procedures for their operation in federal family courts. The Commissions consider that separate procedures for injunctions for personal protection will increase their accessibility and utility.

17.228 The Commissions consider separate procedures should be considered to improve the operation of injunctions for personal protection, including the following:

- removal of filing fees;
- a check box for an injunction for personal protection included on *Initiating Application* and *Response to the Initiating Application* forms;
- a prompt to apply for an injunction for personal protection included on the *Notice of Child Abuse or Family Violence form* (Form 4); and
- the issue of injunctions for personal protection as a separate court order.

17.229 The Commissions consider that—in addition to enhancing accessibility—these procedural changes will improve awareness and recognition of injunctions for personal protection and, therefore, lead to improved safety, the principal objective in this Inquiry.

17.230 A further procedure which should apply once an injunction for personal protection is made is the inclusion of this injunction on the national protection order register. Currently, the Australian Government’s commitment to a national protection order registration system is limited to information about protection orders obtained under state and territory family violence legislation. In Chapter 30, the Commissions recommend that the national protection order register should be extended to include other information, including injunctions for personal protection.<sup>255</sup>

17.231 Including injunctions for personal protection on the national register is an important information-sharing procedure. The Commissions have recommended that the register be available to police officers, federal family courts and state and territory courts.<sup>256</sup> This would alleviate potential problems of duplication across jurisdictions and facilitate enforcement of orders by state and territory police, as discussed below. The Commissions also consider that registering injunctions for personal protection will increase recognition and awareness of these injunctions, and serve an important educative function about their importance as an additional measure to improve safety.

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255 Rec 30–18(a).

256 Rec 30–18(b).

### ***Enforcement of orders***

17.232 While both the Australian Federal Police and state and territory police may be empowered to enforce breaches of injunctions for personal protection, the Commissions consider that these duties are more effectively situated with the state and territory police. State and territory police have established practices and procedures for enforcing protection orders, and these may be extended to the enforcement of *Family Law Act* injunctions. However, the Commissions acknowledge the concerns of stakeholders regarding the role of state and territory police in this regard, given that the existing powers of arrest under the *Family Law Act*—extending to state and territory police—in relation to injunctions are seldom exercised.

17.233 The Commissions are of the view that a number of measures would assist state and territory police in establishing processes for the enforcement of injunctions for personal protection. Most importantly, providing that breach of an injunction for personal protection is a criminal offence provides clear direction to state and territory police to enforce such injunctions. Other measures, discussed above, that may assist state and territory police in recognition and enforcement of injunctions for personal protection include: separating injunctions for personal protection from other family law injunctions in the *Family Law Act*; and issuing injunctions for personal protection as a separate court order.

17.234 The Commissions consider that providing training to state and territory police in relation to their powers and duties with regard *Family Law Act* injunctions is an important and necessary measure in ensuring these injunctions are properly enforced. Training of persons involved in family violence matters in federal family courts is discussed below.

17.235 Including injunctions for personal protection in the scheme for the national registration of protection orders is an essential step in ensuring the enforcement of injunctions for personal protection by state and territory police. Registration of state and territory protection orders on the national register enables them to be enforced in external jurisdictions. This is not necessary to give effect to the enforceability of injunctions for personal protection, as these are *already* enforceable in all states and territories. However, registration of injunctions for personal protection is an important step with regard to recognition of injunctions for personal protection, and information sharing.

17.236 Registration of the injunctions for personal protection ensures that state and territory police are aware of existing injunctions. Registration also provides clear direction to police in relation to their duties to enforce these injunctions. Further, once the national database is implemented, it will become the practice of state and territory police to enforce protection orders made outside their jurisdiction. While injunctions for personal protection are not external orders, the Commissions consider that this practice will extend to *Family Law Act* injunctions for personal protection.

***Training***

17.237 Training and education is an essential strategy in developing corresponding jurisdictions. In particular, training of judicial officers in federal family courts will guide and support them in making injunctions for personal protection which are analogous to protection orders available in state and territory courts.

17.238 The Commissions consider that training for federal judicial officers should cover the following factors in particular:

- circumstances where injunctions for personal protection may be appropriate;
- considerations relevant when making injunctions for personal protection; and
- conditions appropriate to impose on persons who use family violence.

17.239 Information and guidance for judicial officers in relation to injunctions for personal protection should also be included in the Best Practice Principles. In particular, a list of standard conditions—similar to those available in state and territory courts—should be listed in this publication.

17.240 Training legal practitioners and registry staff in relation to new provisions relating to injunctions for personal protection is also essential to raise awareness of this option, and to promote the use of these provisions.

***Human rights implications***

17.241 The Commissions note the concerns raised by some stakeholders regarding the limited range of persons who may apply for injunctions for personal protection.

17.242 Most state and territory courts have jurisdiction to make protection orders in relation to a wide range of relationships, for example siblings, relatives and persons in dating relationships. The Commissions do not consider it appropriate for this broad jurisdiction to be duplicated by federal family courts. Rather, the Commissions consider that the core jurisdiction of the family court should be extended only to the extent that those persons who have family law proceedings on foot or anticipated, may resolve all—or most of—their legal matters in this forum.

17.243 The Commissions acknowledge that some persons who may be involved in or anticipate federal family court proceedings will not be eligible for an injunction for personal protection, in particular, unmarried partners without children, and same-sex partners without children. These persons may be involved in federal family court proceedings in relation to property. It is also worth noting that unmarried partners with children may only obtain an injunction for personal protection where it is appropriate for the welfare of the child.<sup>257</sup>

17.244 The Commonwealth has limited legislative competence in this arena, as noted above. Due to these limitations, the Australian Government cannot currently

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257 *Family Law Act 1975* (Cth) s 68B(1).

amend the *Family Law Act* to provide for the protection of all persons who may be involved in federal family court proceedings.<sup>258</sup>

17.245 As noted above, some stakeholders argued that one strategy to address the issue of limited coverage is to amend the *Marriage Act* to recognise same-sex marriage. This would enable federal family courts to make injunctions in relation to married same-sex partners, whether or not there are children of the relationship. However, a recommendation regarding the *Marriage Act* is beyond the Terms of Reference of this Inquiry.

17.246 Despite the limited coverage of injunctions for personal protection, the Commissions are of the view that these injunctions should continue to be available in a more effective form for improving the safety of persons currently eligible pursuant to ss 68B and 114 of the *Family Law Act*. The Commissions consider that state and territory courts—as the primary jurisdictions to resolve issues of personal protection—are the appropriate jurisdictions for the broad range of persons who fall outside the jurisdiction of the *Family Law Act*.

**Recommendation 17–3** The *Family Law Act 1975* (Cth) should be amended to provide separate provisions for injunctions for personal protection.

**Recommendation 17–4** The *Family Law Act 1975* (Cth) should be amended to provide that a breach of an injunction for personal protection is a criminal offence.

### Interaction between *Family Law Act* injunctions and protection orders

17.247 Injunctions granted under ss 68B and 114 of the *Family Law Act* may operate alongside protection orders made under state and territory family violence legislation. Currently, victims of family violence tend to seek protection orders under state and territory family violence legislation in preference to *Family Law Act* injunctions for personal protection. Improving the effectiveness of injunctions for personal protection will foster the use of the injunction provisions, increasing the interaction between state and territory protection orders and *Family Law Act* injunctions for personal protection.

17.248 Section 114AB of the *Family Law Act* provides that if a person has sought, or is seeking, a protection order under prescribed state or territory family violence legislation,<sup>259</sup> he or she is not entitled to seek, in addition, an injunction under the *Family Law Act*, unless the protection order proceedings have lapsed, been discontinued or dismissed, or the orders are no longer in force.

<sup>258</sup> For a discussion of persons protected in state and territory legislation, see Ch 7.

<sup>259</sup> *Family Law Regulations 1984* (Cth) reg 19 prescribes the following laws for the purpose of s 114AB: *Crimes (Domestic and Personal Violence) Act 2007* (NSW); *Family Violence Protection Act 2008* (Vic); *Domestic and Family Violence Protection Act 1989* (Qld); *Peace and Good Behaviour Act 1982* (Qld); *Restraining Orders Act 1997* (WA) pts 1–6; *Domestic Violence Act 1994* (SA); *Family Violence Act 2004* (Tas); *Justices Act 1959* (Tas) pt XA; *Domestic Violence and Protection Orders Act 2008* (ACT); *Domestic and Family Violence Act 2007* (NT); *Domestic Violence Act 1995* (NI).

17.249 A person who has sought or obtained a protection order under state or territory legislation is not prohibited from seeking a *Family Law Act* injunction in relation to family law matters not able to be dealt with by a protection order. This is because s 114AB of the *Family Law Act* only prohibits applications for an injunction ‘in respect of a matter’ for which a protection order has been sought or obtained.<sup>260</sup>

17.250 There is no bar to a person who is seeking, or has obtained, a *Family Law Act* injunction to apply for a protection order under state or territory family violence legislation. Neither is there a formal prohibition on one party seeking a *Family Law Act* injunction even though a related party has already obtained a protection order under state or territory family violence legislation. The effect is that ‘the prohibition under s 114AB only extends to the same party using both procedures and then only when the State or Territory procedure has been used first’.<sup>261</sup>

17.251 In the Consultation Paper, the Commissions asked how often a person who has obtained an injunction under the *Family Law Act* subsequently needs to seek additional protection under state or territory family violence legislation.<sup>262</sup> Most stakeholders who commented responded that this rarely arises, as victims overwhelmingly obtain protection orders in state and territory courts at first instance.<sup>263</sup> Stakeholders explained this preference by referring to the various advantages that state and territory protection orders have over *Family Law Act* injunctions for personal protection.<sup>264</sup>

17.252 In the Consultation Paper, the Commissions also asked if a person who has sought or obtained an injunction for personal protection under the *Family Law Act* should be able to seek a protection under state or territory violence legislation.<sup>265</sup> Most stakeholders who commented submitted that persons who have obtained, or who have sought, injunctions for personal protection should remain able to seek a protection order under state and territory family violence legislation.<sup>266</sup> However several

260 *Family Law Act* 1975 (Cth) s 114AB(2).

261 R Alexander, *Domestic Violence in Australia: The Legal Response* (3rd ed, 2002), 63.

262 Consultation Paper, Question 9–2.

263 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; A Harland, *Submission FV 80*, 2 June 2010.

264 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 184*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

265 Consultation Paper, Question 9–3.

266 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010 Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Domestic

stakeholders indicated that their comments assumed that the current provisions for injunctions for personal protection apply unchanged.<sup>267</sup>

17.253 Stakeholders cited numerous reasons in support of the position that persons who have sought or obtained injunctions for personal protection should have access to protection orders. These reasons were consistent with those discussed above in relation to the greater protection offered by state and territory family violence legislation, namely:

- the more effective remedies offered by state and territory family violence legislation, in particular, that breach of a protection order is a criminal offence;<sup>268</sup>
- difficulties in enforcing injunctions for personal protection,<sup>269</sup> including lack of recognition of injunctions for personal protection by state and territory police;<sup>270</sup> and
- procedural advantages, with protection orders under family violence legislation described as ‘simple, quick and low cost’.<sup>271</sup>

17.254 Women’s Legal Service NSW argued that forcing victims to stay within the family law system may put victims at risk:

if victims are forced to stay within the family law system they may elect not to pursue personal protection injunctions because it is too daunting and difficult without police assistance or established enforcement mechanisms.<sup>272</sup>

17.255 The Magistrates’ Court and Children’s Court of Victoria, while arguing that a person with an injunction for personal protection should not be prevented from obtaining a protection order, considered that ‘perhaps there should be a limitation that only allows a further order if additional circumstances giving rise to the order have occurred since the family law order was made’.<sup>273</sup>

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Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 82*, 2 June 2010 C Pragnell, *Submission FV 70*, 2 June 2010.

267 J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

268 Confidential, *Submission FV 184*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

269 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010.

270 Queensland Law Society, *Submission FV 178*, 25 June 2010.

271 National Legal Aid, *Submission FV 232*, 15 July 2010.

272 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

273 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

17.256 Women's Legal Service Victoria pointed out that enabling a victim to deal with their protection issues in both jurisdictions may lead to inconsistencies between injunctions for personal protection and protection orders.<sup>274</sup>

#### ***Commissions' views***

17.257 A person who has a *Family Law Act* injunction for personal protection may require further protective orders in certain circumstances. For example, a person may be subject to further threats or acts of violence after an injunction has been issued by a federal family court.

17.258 Restricting persons who have obtained injunctions for personal protection from applying for a protection order under state and territory family violence legislation may operate to the disadvantage of victims of family violence. Such a restriction would require persons to apply to a federal family court to revive or vary an existing injunction for personal protection. The Commissions consider this may be onerous for victims, given state and territory courts—as the primary jurisdiction in which to obtain protection orders—are likely to remain a more accessible jurisdiction in addressing personal protection issues, particularly where family law proceedings have concluded.

17.259 The advantages of state and territory courts dealing with issues of personal protection should, as far as possible, correspond in federal family courts, as discussed above. However, there are several features of state and territory protection orders that may be difficult or unsuitable in the corresponding jurisdiction of federal family courts. Of particular note is the role of state and territory police in applying for protection orders on a victim's behalf. Further, both police and state and territory courts have procedures in place to deal promptly with urgent applications. The Commissions therefore consider that a person who has an injunction for personal protection should retain their ability to obtain a protection order from state and territory courts.

17.260 The Commissions acknowledge that continuing to permit persons with injunctions for personal protection to apply for and obtain protection orders in state and territory courts may lead to inconsistency between orders. However, precluding a person from bringing proceedings for a protection order, if he or she has already sought a *Family Law Act* injunction, does not address the potential for inconsistency between orders. This is because a respondent, or other person affected by the injunction for personal protection, would still be able to seek protection order in state and territory courts. Inconsistencies between orders—and measures to deal with such inconsistencies—are considered below.

#### **Inconsistencies between *Family Law Act* injunctions and protection orders**

17.261 The *Family Law Act* provides that injunctions available under ss 68B and 114 are 'not intended to exclude or limit the operation' of prescribed state or territory

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274 Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

family violence legislation.<sup>275</sup> If an injunction made under ss 68B or 114 is capable of operating concurrently with the protection order, both orders can operate together. However, where orders cannot operate concurrently, principles of constitutional law require that an order made pursuant to the *Family Law Act*, as Commonwealth legislation, prevails over an order made under a state or territory law, to the extent that the orders are inconsistent.<sup>276</sup>

17.262 The *Family Law Act* contains specific provisions to deal with such inconsistencies, discussed below, which differ depending on whether the injunction expressly or impliedly requires or authorises a person to spend time with a child, or does not involve a child.

#### ***Injunctions that relate to a child***

##### ***Making a protection order that is inconsistent with a current Family Law Act injunction***

17.263 A person who is seeking, or who has obtained, a *Family Law Act* injunction may also seek a protection order under state or territory family violence legislation. The *Family Law Act* provides that a protection order made under state or territory family violence legislation that is inconsistent with a *Family Law Act* injunction that expressly or impliedly requires or authorises a person to spend time with a child, is invalid to the extent of the inconsistency.<sup>277</sup> The language in this section is somewhat unclear, as injunctions work by constraining conduct, and would not in themselves provide for a person to spend time with a child—although an injunction may complement a parenting order which provides for this.

17.264 Pursuant to s 68R of the *Family Law Act*, a court with jurisdiction under pt VII of the *Family Law Act* may revive, vary, discharge or suspend an injunction made under ss 68B or 114 to the extent it expressly or impliedly requires or authorises a person to spend time with a child.<sup>278</sup> A court may only do so if it also makes or varies a protection order under state or territory family violence legislation and there is material before the court that was not before the court that made that original *Family Law Act* injunction.<sup>279</sup> Where a state or territory court is making or varying an interim order, it may not discharge the original family law injunction.<sup>280</sup>

17.265 If, when the original ss 68B or 114 injunction was granted, it was inconsistent with an existing protection order, the court must be satisfied that it is appropriate to revive, vary, discharge or suspend the injunction because the person has

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275 *Family Law Act 1975* (Cth) s 114AB(1).

276 See Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [6.2.14], and discussion in Chs 2 and 23.

277 *Family Law Act 1975* (Cth) s 68Q(1).

278 Ibid s 68R(1)(c). Courts with jurisdiction under pt VII of the *Family Law Act* include: the Family Court of Australia, each Family Court of a state, the Supreme Court of the Northern Territory, the Federal Magistrates Court, and, subject to some conditions, courts of summary jurisdiction of each state and territory: *Family Law Act 1975* (Cth) ss 69H and 69J.

279 *Family Law Act 1975* (Cth) s 68R(3).

280 Ibid s 68R(4).

been exposed, or is likely to be exposed, to family violence as a result of the operation of that injunction.<sup>281</sup>

17.266 As noted in Chapter 16, state and territory courts are currently reluctant to use their powers under s 68R of the *Family Law Act* to revive, vary, discharge or suspend parenting orders made by a family court. State and territory courts may be similarly reluctant to use s 68R to revive, vary, discharge or suspend a *Family Law Act* injunction. However, due to the current infrequent use of injunctions for personal protection, it is not evident whether this is the case.

17.267 In order to bring the matter to the attention of magistrates, some state and territory family violence legislation directs a court, when making a protection order, to consider the terms of any *Family Law Act* injunctions in relation to the proceedings.<sup>282</sup>

#### ***Making a Family Law Act injunction that is inconsistent with a current protection order***

17.268 The *Family Law Act* does not prohibit a party to a marriage from seeking an injunction under the *Family Law Act* even though the other party to the marriage has already obtained a protection order under state or territory legislation.

17.269 Where a court grants a *Family Law Act* injunction that expressly or impliedly requires or authorises a person to spend time with a child, which is inconsistent with a protection order made under state or territory family violence legislation, it must specify that the injunction is inconsistent with the protection order and explain why that is the case. The court must also explain the terms of the injunction, and consequences of breaching it, to the applicant, the persons protected by the injunction and the persons to whom the injunction is directed.<sup>283</sup> Within 14 days of granting the injunction, the court must distribute copies to relevant bodies, including the state or territory court that issued the protection order, and the head of the police force and a child welfare officer in the relevant state or territory.<sup>284</sup>

#### ***Injunctions that do not relate to a child***

17.270 The *Family Law Act* does not expressly deal with inconsistency between a s 114 injunction, that does not relate to a child, and a protection order under state or territory family violence legislation. While the *Family Law Act* is silent on this issue, in accordance with the general principle of constitutional law discussed above, an injunction made pursuant to s 114 of the *Family Law Act* will prevail over an inconsistent order made under a state or territory law.<sup>285</sup>

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281 Ibid s 68R(5)(c). The operation of s 68R in relation to parenting orders made under the *Family Law Act* is discussed in Ch 16.

282 See, eg, *Family Violence Act 2004* (Tas) s 18(1)(c); *Domestic Violence and Protection Orders Act 2008* (ACT) ss 31, 47(1)(f); 71; *Domestic and Family Violence Act 2007* (NT) s 19(2)(a).

283 *Family Law Act 1975* (Cth) s 68P(2).

284 Ibid s 68P(3).

285 *Australian Constitution* s 109. The constitutional framework is discussed in Ch 2.

### ***Option for reform***

17.271 In the Consultation Paper, the Commissions asked whether problems arise in practice from the provisions dealing with inconsistencies between injunctions granted under ss 68B and 114 of the *Family Law Act*, and protection orders made under state and territory family violence legislation.<sup>286</sup> Most stakeholders responded that they were unaware of problems arising in practice,<sup>287</sup> as *Family Law Act* injunctions are rarely used to deal with issues of personal protection.<sup>288</sup>

17.272 In the Consultation Paper, the Commissions noted that the mechanism in s 68R of the *Family Law Act* may be a useful way for courts, when making a protection order under state or territory family violence legislation, to address inconsistencies with *Family Law Act* injunctions. Currently, s 68R only applies to injunctions pursuant to ss 68B, and 114 to the extent that an injunction expressly or impliedly requires or authorises a person to spend time with a child. The Commissions proposed enacting a provision similar to s 68R to allow state and territory courts making or varying a protection order, to revive, vary, discharge or suspend a s 114 injunction which does not relate to a child.<sup>289</sup> The Commissions stated that such power should only be exercised when there is material before the court that was not before the court that made that original *Family Law Act* injunction, consistent with the current s 68R.<sup>290</sup>

17.273 Most stakeholders who commented on this proposal expressed their support.<sup>291</sup> Two stakeholders expressed conditional support. Women's Legal Services NSW supported the proposal contingent on other amendments being made to make injunctions for personal protection more 'effective and protective'.<sup>292</sup> National Legal Aid supported the proposal on the basis that

appropriate education/training in relation to family law and family violence has been provided to state and territory judicial officers, and that consideration of the issues is supported by the provision of relevant documentation from the Family Court proceedings.<sup>293</sup>

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286 Consultation Paper, Question 9–4.

287 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

288 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

289 Consultation Paper, Proposal 9–2. Ch 16 discusses s 68R in the context of parenting orders.

290 *Family Law Act 1975* (Cth) s 68R(3).

291 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 82*, 2 June 2010.

292 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

293 National Legal Aid, *Submission FV 232*, 15 July 2010.

17.274 One stakeholder, who did not support the proposal, pointed to the different purposes of the legislative schemes, arguing that they

do not have the same core principles and as such it is not feasible that the state legislation should be able to override, vary or otherwise suspend a *Family Law Act* 1975 injunction.<sup>294</sup>

17.275 This stakeholder argued that if state and territory legislation could override injunctions for personal protection, parties may apply to state and territory courts to vary a *Family Law Act* injunction for personal protection, thus ‘circumvent[ing] the protections in place by utilising the different principles of the legislation’.<sup>295</sup>

#### *Commissions’ views*

##### *Procedural strategies to prevent inconsistencies between orders*

17.276 In Chapter 30 the Commissions discuss a number of procedural strategies to address problems arising from the interaction between federal family court orders and protection orders made in state and territory courts. These include recommendations to increase each jurisdiction’s awareness of relevant orders made in the other. Many of these measures will help to address potential inconsistencies arising from the interaction between *Family Law Act* injunctions and state and territory protection orders under state and territory family violence legislation.

17.277 For example, inadvertent inconsistencies between protection orders and injunctions for personal protection should not arise if—as recommended by the Commissions—these injunctions and orders are included on the national protection order register, and both federal family courts and state and territory courts have access to the register.<sup>296</sup> Another measure which may avoid inconsistency is seeking information about protection orders on federal family court application forms, and about *Family Law Act* injunctions on application forms for protection orders in state and territory courts.<sup>297</sup> These information strategies also assist in ensuring state and territory courts are furnished with relevant documents from federal family courts, and vice versa.

##### *Legislative strategies to prevent inconsistencies between orders*

17.278 The procedural strategies outlined above address inadvertent inconsistencies between orders. A legislative strategy that state and territory governments may wish to consider to avoid such inconsistencies is including provisions in family violence legislation to direct a court making a protection order to consider the terms of any *Family Law Act* injunctions. Such provisions are currently in force in several jurisdictions.

17.279 However, there are some circumstances where it will be appropriate for state and territory courts to deliberately make protection orders which are inconsistent with a

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294 A Brunacci, *Submission FV 97*, 4 June 2010.

295 Ibid.

296 See Rec 30–18.

297 See Ch 30 and Rec 30–1.

prior *Family Law Act* injunction. In these circumstances, s 68R empowers a court to revive, vary, discharge or suspend an injunction pursuant to s 68B, or a s 114 injunction to the extent that it expressly or impliedly requires or authorises a person to spend time with a child. State and territory courts do not have this power in relation to s 114 injunctions which do not relate to a child.

17.280 The Commissions are of the view that a provision similar to s 68R should be enacted to address inconsistencies arising from the interaction of protection orders, and injunctions made under s 114 of the *Family Law Act* which do not relate to a child. This is necessary to address a gap in protection which is otherwise likely to emerge from the interaction of these orders. In particular, such a provision is necessary to protect victims of family violence where threats or acts of violence continue or escalate after an injunction for personal protection has been made. Another scenario where an inconsistent protection order may be appropriate is where a change in circumstances exposes a victim of family violence to new or escalated risk.

17.281 Enabling a state or territory court to amend a s 114 injunction which does not relate to a child would remove the requirement for a person seeking additional protection to return to a federal family court, which may be unduly onerous on a victim of family violence, as discussed above.

17.282 Such a provision also establishes a consistent approach in relation to the powers of state and territory courts to vary *Family Law Act* injunctions for personal protection. The current situation, in which state and territory courts may revive, vary, discharge or suspend a s 68B injunction and a s 114 injunction to the extent that it expressly or impliedly requires or authorises a person to spend time with a child, but not other s 114 injunctions, is complex and may lead to confusion.

17.283 The Commissions note the concerns raised by a stakeholder regarding the different principles of the *Family Law Act* and state and territory family violence legislation. The Commissions acknowledge that different principles underlie the *Family Law Act* and state and territory family violence legislation and that different purposes are served by the different laws, as discussed in Chapter 4. However, an overarching principle of this Inquiry is to transcend the ‘silos’ between different jurisdictions in dealing with family violence. The Commissions have made a number of recommendations to establish a common interpretative framework around family violence in both the *Family Law Act* and state and territory family violence legislation.<sup>298</sup> In this context, the Commissions consider it appropriate for state and territory courts to revive, vary, discharge or suspend an injunction made by the federal family court consistently with existing jurisdiction.

17.284 The same stakeholder also expressed the concern that parties may apply to state and territory courts to vary injunctions for personal protection in order to circumvent those injunctions. The Commissions consider that s 68R contains sufficient safeguards to deal with applications made to circumvent existing injunctions. The *Family Law Act* restricts the power of a court to exercise s 68R to circumstances where

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298 See Chs 4–7.

the court is making or varying a protection order, where the court has material that was not before the court that made the original injunction.<sup>299</sup>

17.285 These safeguards should be replicated in any similar provision made applicable to injunctions that do not relate to children pursuant to s 114 of the *Family Law Act*. The Commissions also consider that state and territory family violence legislation contains appropriate safeguards to deal with unmeritorious applications, which, in conjunction with the limitations on the exercise of s 68R, is sufficient to address the possibility of potential misuse of s 68R.

17.286 The Commissions agree with National Legal Aid that training of state and territory judicial officers is an important measure in fostering the appropriate use of s 68R and the recommended analogous provision that would apply to s 114 injunctions which do not relate to a child. In Chapter 16, the Commissions recommend that judicial officers and practitioners involved in protection order proceedings should receive education and training regarding the jurisdiction of state and territory courts under the *Family Law Act*.<sup>300</sup> The Commissions express the view that such training should cover s 68R, and any new provisions of the *Family Law Act*.

**Recommendation 17–5** The *Family Law Act 1975* (Cth) should be amended to provide that, in proceedings to make or vary a protection order under state or territory family violence legislation, a state or territory court may revive, vary, discharge or suspend a *Family Law Act* injunction for personal protection of a party to a marriage.

### **Injunctions to relieve a party to a marriage from rendering conjugal rights**

17.287 Section 114(2) of the *Family Law Act* provides a further power to grant an injunction in the context of a marriage. It permits the court to ‘make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights’. Orders under s 114(2) are rare—the only reported case of such an order made by the Family Court was in 1978.<sup>301</sup>

17.288 While the *Family Law Act* does not define ‘marital services’ and ‘conjugal rights’, they are generally taken to include the right of married persons to cohabit and have sexual intercourse with their spouse. Under the *Matrimonial Causes Act 1959* (Cth), the court had the power to make a ‘decree of restitution of conjugal rights’ to enforce the marital duty of a husband and wife to live together. This remedy has been abolished.<sup>302</sup>

299 *Family Law Act 1975* (Cth) s 68R(3).

300 Recommendations 30–8 and 30–9.

301 *In the Marriage of Gillie* (1978) 30 FLR 565. The Family Court considered, but did not make, an order under s 114(2) in *In the Marriage of Hayne* (1994) FLC ¶92–512: A Dickey, ‘Relief from the Performance of Marital Obligations’ (1995) 69 *Australian Law Journal* 402, 402.

302 *Family Law Act 1975* (Cth) s 8(2).

17.289 In addition, there has historically been a view that, at common law, it was not possible for a husband to rape his wife because a wife impliedly and irrevocably consented to all acts of sexual intercourse with her husband by entering into the marriage.<sup>303</sup> In 1991, the High Court held that there is no rule in Australia that a husband cannot be guilty of raping his wife. The majority decision of Mason CJ, Deane and Toohey JJ stated that such a notion is ‘out of keeping with the view society now takes of the relationship between the parties to a marriage’.<sup>304</sup> Their Honours held that ‘if it was ever the common law that by marriage a wife gave irrevocable consent to sexual intercourse by her husband, it is no longer the common law’.<sup>305</sup>

17.290 At the time that s 114(2) was enacted, three Australian states—Queensland, Western Australia and Tasmania—defined rape in a way that excluded non-consensual sexual intercourse between a man and his wife.<sup>306</sup> Changes to the criminal law by statute now make it clear that the fact that a person is married to the person whom they sexually assault is no defence.<sup>307</sup>

17.291 In the Consultation Paper, the Commissions proposed that s 114(2) of the *Family Law Act* should be repealed.<sup>308</sup> This proposal received overwhelming support from stakeholders.<sup>309</sup> Stakeholders argued that the provision was obsolete,<sup>310</sup> and its language inappropriate,<sup>311</sup> giving ‘a false impression that there is such a thing as ‘conjugal rights’.<sup>312</sup>

#### **Commissions’ views**

17.292 Section 114(2) of the *Family Law Act* implies that there is a continuing obligation to render conjugal rights and provide marital services—obligations that no longer exist in law and which should not be assumed to form part of a marriage as a

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303 *R v L* (1991) 174 CLR 379, 398.

304 Ibid, 390.

305 Ibid.

306 Ibid, 387.

307 See Ch 24.

308 Consultation Paper, Proposal 9–3.

309 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Gosnells Community Legal Centre Inc, *Submission FV 56*, 31 May 2010.

310 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

311 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010.

312 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

social or legal institution. This section implies a view of marriage, and particularly the role of women in marriage, that is out of keeping with modern standards of equality and autonomy in the marriage relationship.

17.293 Section 114(2) gives the court power to relieve a person from performing certain perceived obligations within a marriage. In the Commissions' view, this purpose is adequately served by s 114(1) alone. The need to protect a party to the marriage from unwanted sexual intercourse, or to require that a married couple not live together, can be achieved using injunctions under s 114(1) for the personal protection of a party to the marriage, or to restrain a party to the marriage from entering or remaining in the matrimonial home. More generally, the court's broad discretion to grant an injunction where it is just or convenient to do so, and upon such terms and conditions as the court considers appropriate, allows the court to tailor an injunction to the specific needs of the parties.

17.294 There is no need for federal family courts to have a particular power to relieve a person from performing 'duties' where those duties do not exist. The Commissions consider that the power to make an order relieving a party to a marriage from any obligation to perform marital services or render conjugal rights is unnecessary and inconsistent with current principles of family and criminal law, and, as such, should be repealed.

**Recommendation 17–6** Section 114(2) of the *Family Law Act 1975* (Cth), which permits a court to make an order relieving a party to a marriage from any obligations to perform marital services or render conjugal rights, should be repealed.

## Hague Convention

### Principle of prompt return

17.295 As noted in Chapter 2, the *Convention on the Civil Aspects of International Child Abduction* (Hague Convention) is one of the international conventions to which Australia is a signatory. The Hague Convention is a multilateral treaty, which seeks to protect children from the harmful effects of abduction and retention across international boundaries by providing a procedure to bring about their prompt return. The Convention seeks to ensure that any child abducted from one Convention country to another Convention country is promptly returned to the child's country of residence unless exceptional circumstances apply.

17.296 The basis of the Convention is the best interests of all children for issues of their welfare to be determined by the courts of the country in which they habitually reside, rather than the best interests of an individual child.<sup>313</sup> As noted by the

<sup>313</sup> M Kaye, 'The Hague Convention and the Flight from Domestic Violence: How Women and Children are being Returned by Coach and Four' (1999) 13 *International Journal of Law, Policy and the Family* 191, 195.

Australian Government Attorney-General's Department in a submission to this Inquiry, the Convention 'is designed to ensure that decisions about the welfare of the child should be made in the jurisdiction in which the child habitually resides'.<sup>314</sup>

17.297 The Hague Convention sets up a Central Authority in countries party to the Convention. The Central Authority has a number of functions to facilitate the return of children to and from other countries. In Australia, the Central Authority is the Australian Government Attorney-General's Department. There are also Central Authorities in each state and territory.

### Exceptions

17.298 There are several exceptions to the requirement for the immediate return of a child under the Hague Convention. One exception is where there is a grave risk that return 'would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation'.<sup>315</sup> Another exception is where the return of the child would violate 'fundamental principles of Australia in relation to human rights and fundamental freedoms'.<sup>316</sup>

### Conditions on orders

17.299 One approach that courts have used to attempt to alleviate concerns about the risk of physical or psychological harm to a child is to request 'non-molestation' and other undertakings from the 'left-behind' parent, or place conditions on the return of the child.<sup>317</sup> However, under the Convention there is no power to make such conditions nor for them to be enforced in Australia.<sup>318</sup> The *Guide to Good Practice* under the Hague Convention, produced by the Hague Conference on Private and International Law states that the obligation of the Central Authority as follows:

If conditions were imposed or undertakings given with the return order, take whatever steps are appropriate within the limits of the Central Authority's powers, to ensure that the conditions are met or the undertakings are fulfilled.<sup>319</sup>

17.300 However, the practical use and effect of conditions and undertakings has been questioned, as there is no provision in the Convention for automatic enforcement of conditions and undertakings made in the returning state. A 2003 report by the United Kingdom Reunite Research Unit reported that, of the six non-molestation orders given

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314 Australian Government Attorney-General's Department, *Submission FV 166*, 25 June 2010.

315 *Convention on the Civil Aspects of International Child Abduction*, [1987] ATS 2, (entered into force generally on 1 December 1983) art 13(1)(b). See also *Family Law (Child Abduction Convention) Regulations 1987* (Cth) reg 16(3).

316 *Family Law (Child Abduction Convention) Regulations 1987* (Cth) reg 16(3)(c) and (d).

317 See discussion in M Kaye, 'The Hague Convention and the Flight from Domestic Violence: How Women and Children are being Returned by Coach and Four' (1999) 13 *International Journal of Law, Policy and the Family* 191, 200–202.

318 See Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), [9.39] ff.

319 Hague Conference on Private and International Law, *Guide to Good Practice under the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, Part I—Central Authority Practice* (2003), [3.21].

in abduction cases which the Unit considered, all six were broken.<sup>320</sup> Where a parent sought to enforce the undertakings through police complaints, the outcome generally was unsuccessful.<sup>321</sup>

In one case the mother called the police in relation to the constant pestering and harassment by the father in the home State in contravention of an undertaking given to an English Court. These undertakings had been registered in the local Court in the home State. Nevertheless, the mother states that the police advised her that she would have to obtain a protection Order as the undertaking had ‘no real effect’. The mother states that she has heard this story time and again from women who have been sent home subject to undertakings. She states her view that undertakings are ‘completely ineffective’.<sup>322</sup>

17.301 The difficulty of enforcement of undertakings in Hague Convention cases was noted by the ALRC in *Equality Before the Law*, and that there is ‘potential for it to be misused by mean as a means of exercising continuing powers over their partners’:

A man may commence custody proceedings in Australia to bring the woman and children back from overseas and then may discontinue proceedings. The woman is then in an invidious position, usually in a refuge, without income, and unable to leave. It was suggested that in such cases the Contracting Authority Representatives should accept responsibility to continue proceedings.<sup>323</sup>

17.302 The ALRC recommended that reg 16 of the *Family Law (Child Abduction Convention) Regulations* be amended to provide that in deciding whether there is a grave risk that the child’s return would expose the child to physical or psychological harm or an intolerable situation, regard may be had to the harmful effects on the child of past violence, or of violence likely to occur in the future, towards the abductor by the other parent if the child is returned. It was also recommended that the regulations should provide that the child should not be returned if there is a reasonable risk that to do so will endanger the safety of the parent who has the care of the child.<sup>324</sup> This recommendation has not been implemented.

### ***Submissions and consultations***

17.303 In the Consultation Paper, the Commissions sought stakeholder feedback on whether there should be a formal legal or practical connection between undertakings sought as a condition of returning a child pursuant to the Hague Convention and protection orders under family violence legislation. This could involve, for example, a formalised process through which entry into non-molestation undertakings in a Convention country outside Australia, pursuant to a Hague Convention recovery order, trigger proceedings for a protection order in favour of the child under state and territory

320 Reunite International, *The Outcome for Children Returned Following an Abduction* (2003), 28.

321 Ibid, 31.

322 Ibid.

323 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994).

324 Ibid, Rec 9.5.

family violence legislation, bringing all this information to the attention of magistrates.<sup>325</sup>

17.304 Further, in Chapter 30, the Commissions consider the development of a national protection order register. One of the issues raised by such an initiative is which orders should be included and whether, for example, undertakings or conditions entered into as a condition of returning a child pursuant to the Hague Convention should be included.<sup>326</sup>

17.305 A particular concern of most stakeholders who responded to these issues was insufficient consideration given to matters of family violence in considering the return of a child pursuant to the Hague Convention.<sup>327</sup> The Australian Government Attorney-General's Department emphasised, however, that the role of the Convention was not primarily to resolve disputes between parents, which is the case in relocation and recovery matters within Australia. The Department noted that 'under the Hague Convention the child is returned to the jurisdiction, not necessarily the left behind parent'.<sup>328</sup>

17.306 Because of this focus, however, the Queensland Law Society submitted that 'there is concern that the presumption for return is so strong that the issue of domestic violence may be inadequately dealt with'.<sup>329</sup>

17.307 In considering how to provide a better focus on safety in Hague Convention returns, the Australian Government Attorney-General's Department suggested that:

while one option courts have to alleviate concerns about the risk of harm is to request undertakings from the left behind parent to not approach the other parent, there is also the option of keeping the return location secret from the left behind parent.<sup>330</sup>

17.308 With respect to the making of undertakings, the Chief Justice of the Family Court and the Chief Federal Magistrate noted the problem of enforceability:

Historically, there have been considerable difficulties in relying on protective undertakings in Hague Child Abduction Convention proceedings because of their lack of enforceability. In fact, undertakings can give a misleading impression of safety and protection.<sup>331</sup>

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325 Consultation Paper, Questions 9–10 and 9–11.

326 Ibid, Question 10–21.

327 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010. A number of stakeholders responded to both recovery within Australia and recovery pursuant to the Hague Convention, without clearly distinguishing between them. The comments in those submissions are more pertinent to the former.

328 Australian Government Attorney-General's Department, *Submission FV 166*, 25 June 2010.

329 Queensland Law Society, *Submission FV 178*, 25 June 2010.

330 Australian Government Attorney-General's Department, *Submission FV 166*, 25 June 2010.

331 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

17.309 In view of such difficulties, the Chief Justice and Chief Federal Magistrate considered that it would be beneficial for the Family Court to monitor any proceedings commenced after a child is returned to Australia pursuant to the Hague Convention:

This would not be in the form of judicial management per se but could, for example, be undertaken by the Chief Justice's chambers or Principal Registrar's chambers if sufficient resources were made available to enable monitoring to occur.

With very few exceptions, a returning child will already have come to the attention of the Commonwealth Central Authority ('CCA'). The CCA should be able to send a copy of whatever orders or agreements were obtained in the returning jurisdiction. Whoever is notified within the court could refer the matter to a case manager or the listing judge in that state for the re-listing of any associated proceedings pending in the Family Court and for the appointment of an independent children's lawyer. An amendment to *Family Law (Child Abduction Convention) Regulations* should provide appropriate authority to notify the court of returning cases. Section 111B enables regulations to be made for 'such provision as is necessary or convenient to enable the performance of the obligations of Australia, or to obtain for Australia any advantage or benefit, under the *Convention on the Civil Aspects of International Child Abduction*'.

17.310 The Chief Justice and Chief Federal Magistrate also pointed out that it is not necessarily the case that conditions and undertakings can be obtained in the returning country:

For instance, the Family Court of Australia understands that, in New Zealand, it is not possible for someone to get an apprehended family violence order against themselves (as left behind parents may be called upon to do), because of the difficulties in proving immediate apprehension of harm if you are in another country. Likewise, a child usually has to be within a jurisdiction before an order can be made about that child.<sup>332</sup>

17.311 Their Honours opposed any implication that family violence protection orders should be made automatically following non-molestation undertakings or conditions:

Any suggestion that family violence orders be automatically made is not supported. Family violence orders should only be imposed where warranted and after due process. To facilitate arrangements where a family violence order is consented to, consideration may be given to amending the relevant legislation to make such a consent order possible. It is important to ensure that mutual family violence orders being made in relation to the requesting parent and the returning parent are scrutinised, to ensure that they are able to operate effectively.<sup>333</sup>

17.312 Other stakeholders expressed support for the suggestion that non-molestation undertakings should trigger protection order proceedings.<sup>334</sup>

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332 Ibid.

333 Ibid.

334 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

**Commissions' views**

17.313 While the issue of escaping family violence may well have been a precipitating factor in a parent taking a child out of Australia, the Hague Convention provides limited opportunity for the previous occurrence of violence and a fear of future violence to be considered, given the emphasis on securing the child's return to the jurisdiction. The concern in this Inquiry is on the relationship between the return of a child pursuant to the Hague Convention and, in particular, state and territory family violence legislation. The focus is therefore on cases of children who are returned to Australia, not the reverse situation of children being returned to another Convention country pursuant to the Hague Convention. Concerns of a different nature may arise where a victim flees with his or her children to Australia to escape family violence in another country. However, the issues arising from these circumstances do not relate to interaction of state and territory laws and the *Family Law Act*, and so are beyond the scope of this Inquiry.

17.314 The Commissions note the observations of the Chief Justice of the Family Court and the Chief Federal Magistrate concerning any automatic triggering of protection orders by conditions or undertakings made in another Convention country.

17.315 The Commissions also acknowledge the suggestion for reform proposed in their submission that the *Family Law (Child Abduction Convention) Regulations* should be amended to provide appropriate authority to notify the Family Court of returning cases. The Commissions agree that this would be a sensible amendment and consistent with the principles of reform in this Inquiry—namely to ensure that the legal framework is as seamless as possible from the point of view of those who engage with it, and to facilitate effective interventions and support in circumstances of family violence. The Commissions also affirm the recommendation in relation to reg 16 made in the ALRC's report *Equality Before the Law*, to give greater prominence to considerations of family violence. Although neither amendment pertains to issues of interaction—and therefore the Commissions make no recommendations with respect to them in this Inquiry—they highlight the importance of family violence in the assessment of risk, as well as improving the interconnectedness of the Family Court and the Central Authority when children are returned to Australia.

17.316 The issue of including conditions or undertakings made to another Convention country on a national protection order register in Australia is relevant to this Inquiry. Registration would not affect the enforceability of Hague Convention conditions and undertakings, but may be a useful information-sharing measure, in particular to ensure federal family courts, state and territory courts and police are aware of conditions and undertakings relevant to the safety and protection of parties. This is discussed further in Chapter 30.



# **18. Evidence of Family Violence**

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## **Contents**

Introduction	831
Difficulties in giving evidence	832
Family law proceedings	833
Protection order proceedings	835
Perceptions about false allegations of family violence	835
Common risk assessment framework	838
Improving evidence in protection order proceedings	843
A flexible approach	844
Written evidence	845
Oral evidence	856
Outcomes of protection order proceedings	864
Undertakings	864
Protection orders made by consent	869
Cross applications and mutual protection orders	877
Vexatious proceedings	880

## **Introduction**

18.1 A central theme of this Inquiry is ‘seamlessness’—the idea that, from the perspective of people affected by family violence—legal frameworks relating to family violence should work together to ensure that people are safe. One aspect of a seamless legal framework is the degree to which evidence of family violence given in one court can be considered in another court.

18.2 This chapter considers two interrelated issues: the factors that may inhibit victims from disclosing family violence; and difficulties associated with giving evidence about family violence, particularly when that evidence needs to be considered or repeated in different courts. The Commissions consider how a common definition of family violence and a common risk assessment framework can assist courts to identify and respond to issues of family violence that arise in cases before them. The Commissions also make recommendations to facilitate the use of evidence given in protection order proceedings in concurrent or pending family law proceedings.

18.3 Finally, this chapter considers a number of outcomes of protection order proceedings which have been identified as particularly problematic when parties are also engaged, or likely to be engaged, in parenting proceedings in federal family courts. These problems occur where protection orders are made by consent; and where a victim of family violence agrees to withdraw an application for a protection order and

instead relies on undertakings given by the respondent to the court. This section also considers safeguards against vexatious litigation in protection order proceedings.

### **Difficulties in giving evidence**

18.4 A number of submissions to this Inquiry highlighted the difficulties that victims of family violence face when disclosing family violence to courts or other service providers and when providing evidence of family violence to courts.<sup>1</sup> Stakeholders set out a range of reasons why people who have experienced family violence may not readily disclose it. A victim of family violence may hide the abuse due to feelings of shame, low self esteem or a sense that he or she, as the victim, is responsible for the violence. A victim may feel that he or she will not be believed. A victim may hope that the violence will stop, or might believe that violence is a normal part of relationships. Because of the family violence, a victim may feel powerless and unable to trust others, or fear further violence if caught disclosing it.<sup>2</sup>

18.5 Further, there may be a lack of understanding by courts, service providers and the community of what constitutes family violence. This may mean that, even if family violence is disclosed, it may not be recognised, or acted on, as family violence. In her submission, Professor Patricia Easteal commented that ‘the dynamics of violence in the home are complex and often difficult for those on the “outside” to understand’. She noted that family violence cannot be understood as separate incidents:

Any one ‘incident’ is in actuality just a small part of a complex pattern of control and *cannot* be adequately understood nor its gravity measured in isolation from that background. At the centre is disempowerment and degradation.<sup>3</sup>

18.6 Easteal submitted that the many manifestations of family violence may not be effectively understood or weighted and, therefore, not screened for or adequately considered in judicial decision making.<sup>4</sup>

18.7 Once family violence is disclosed, the victim may then need to provide evidence of the violence to a court. As noted by the Victorian Law Reform Commission (VLRC), giving evidence ‘can be one of the most intimidating and distressing aspects of the legal system for people who have been subject to family violence’.<sup>5</sup> It can involve giving evidence of traumatic and personal events in public and in the presence of the person who has used violence.

18.8 This trauma is heightened if a victim is involved in multiple proceedings, which take place in different courts. Different courts may impose different evidentiary and procedural requirements—for example, some may require evidence by affidavit while

1 C Stoney, *Submission FV 134*, 22 June 2010; K Hall, *Submission FV 113*, 8 June 2010; Confidential, *Submission FV 91*, 3 June 2010; P Easteal, *Submission FV 40*, 14 May 2010.

2 Confidential, *Submission FV 91*, 3 June 2010; P Easteal, *Submission FV 40*, 14 May 2010.

3 P Easteal, *Submission FV 40*, 14 May 2010.

4 Ibid. See also L Laing, ‘*No Way to Live’: Women’s Experiences of Negotiating the Family Law System in the Context of Domestic Violence: Interim Report* (2009), 13–15; T Brown and D Bagshaw, *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006* (2010), 6.

5 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [11.1].

others allow only oral testimony—and the victim may have different, or no legal representation. These difficulties may be compounded for Indigenous women and women from culturally and linguistically diverse backgrounds.

18.9 In addition, family violence, by its nature, is often difficult to corroborate and prove. As noted by the Australian Institute of Family Studies, in its research into allegations of family violence made in relation to parenting matters under the *Family Law Act* (the Moloney study):

Obtaining corroborative evidence is likely to be very difficult when the violence has occurred over an extended period of time, potential sources of proof may be lost, witnesses (where there were any) may no longer be available, injuries may have faded and the non-physical symptoms of trauma may not be obvious.<sup>6</sup>

18.10 Sometimes there will be evidence of family violence incidents—such as a police report or medical records. In other cases however, there may be no evidence available because the victim has not previously disclosed the violence or has, for example, sought to explain it away as ‘accidental’. These difficulties are compounded where family violence is manifested by controlling or coercive emotional or economic abuse, rather than physical abuse.

### Family law proceedings

18.11 A number of reports have identified that victims of family violence fear the impact that disclosure of family violence may have on family law matters.<sup>7</sup> In her study of women’s experience of the family law system in the context of family violence, Dr Lesley Laing found that many women reported that they ‘received the strong message not to raise allegations of abuse or violence in the Family Courts’ and felt unable to put their full stories of violence to the court.<sup>8</sup>

18.12 There is also a concern that family violence may not be raised in cases where there is not strong evidence, because if family violence is revealed but cannot be proved, it may compromise the credibility of the party. In the family courts violence review conducted by Professor Richard Chisholm (Chisholm Review), this was described as the ‘victim’s dilemma’:

The dilemma is that the seeking of such orders, and spelling out the reasons for the fear of risk, may be seen as vindictive or punitive, dwelling on the past and old grievances, or as a way of alienating the children from the perpetrator. The victim might therefore be rightly concerned that if the court does not accept his or her evidence, or if it considers that the protective orders are not warranted, it might take

6 L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies, 117–118.

7 L Laing, ‘No Way to Live’: Women’s Experiences of Negotiating the Family Law System in the Context of Domestic Violence: Interim Report (2009), 12–13; R Chisholm, *Family Courts Violence Review* (2009), 27.

8 L Laing, ‘No Way to Live’: Women’s Experiences of Negotiating the Family Law System in the Context of Domestic Violence: Interim Report (2009), 13, 15. See also T Brown and D Bagshaw, *Family Violence and Family Law in Australia: The Experiences and Views of Children and Adults from Families who Separated Post-1995 and Post-2006* (2010), 5.

an adverse view of the victim, and not only fail to make the orders sought by the victim, but make orders placing the children with the perpetrator for longer periods, to protect them from what it might see as a style of parenting by the victim that would harm the children by alienating them from the other parent. Such an outcome, the victim would believe, would place the children at *additional* risk of harm.<sup>9</sup>

18.13 The Chisholm Review noted that a number of circumstances contribute to the victim's dilemma, including that:

- the victim may not have complained of the family violence at the time—perhaps because of feelings of shame, or a belief that the violence may stop, or for fear of further violence—and it may then be argued that the victim's lack of action demonstrates that there has been no family violence, or that it was of a trivial nature;
- because family violence generally occurs in the home and may not be documented, it may be difficult for the victim to provide persuasive evidence of the violence;
- the trauma of family violence may lead the victim to be 'somewhat unorganised, anxious or depressed, and, for such reasons, an unimpressive witness'.<sup>10</sup>

18.14 The Moloney study considered, among other matters, the prevalence and nature of allegations of family violence in family law proceedings involving children before the 2006 amendments to the *Family Law Act 1975* (Cth). The research indicated that most allegations of family violence in federal family courts were accompanied by little or no supporting evidence.<sup>11</sup> The study concluded that this 'scarcity of supporting evidentiary material suggests that legal advice and legal decision-making may often be taking place in the context of widespread factual uncertainty'.<sup>12</sup>

18.15 This Inquiry concerns the interaction of laws, and a major focus of this chapter is on evidence of family violence in protection order proceedings and how this evidence affects proceedings in federal family courts. The recommendations in this chapter will assist in information capture about family violence at the level of state and territory magistrates courts. A number of recommendations throughout this Report provide complementary measures in ensuring that evidence of family violence is presented in federal family courts. Recommendations in Chapter 31 support education for all those involved in the legal system about the nature and dynamics of family violence, along with a bench book to assist judicial officers dealing with family violence matters. Extensive recommendations relating to information sharing are made in Chapter 30.

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<sup>9</sup> R Chisholm, *Family Courts Violence Review* (2009), 27.

<sup>10</sup> Ibid, 27–28.

<sup>11</sup> L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies, 117.

<sup>12</sup> Ibid, viii.

### Protection order proceedings

18.16 The procedures for seeking a protection order under state or territory family violence legislation differ across jurisdictions. Family violence legislation, and the courts exercising family violence jurisdiction, differ in relation to the nature of evidence required before the court will make a protection order. Specific procedural differences in relation to requirements for written and oral evidence are discussed below.

18.17 Local and magistrates courts deal with a high volume of applications for protection orders. Given this, list hearings for protection orders are often brief. Dr Jane Wangmann, in her study of protection order proceedings in NSW Local Courts, estimated that most protection order mentions in NSW Local Courts were dealt with in less than three minutes, meaning that opportunities to give oral evidence are limited.<sup>13</sup> In addition, many applications are finalised without a contested hearing.

18.18 Further, Wangmann's study found that the 'complaints'—the section of the application form in which the applicant sets out why he or she is seeking a protection order—were often inadequate, in that they were brief, lacking in detail, focused on a single incident and/or contained a considerable amount of irrelevant detail.<sup>14</sup> Wangmann noted that 'such an approach adds nothing to the complaint and its role as a statement about the experience of family violence to support the making of a protection order'.<sup>15</sup>

18.19 The often perfunctory and repetitive nature of the allegations in complaints can be attributed to: lack of representation; limited assistance by hard-pressed court staff; and busy and sometimes inexperienced police (where applications are initiated by police). This combination of factors can lead to the repetition of formulas rather than a carefully considered narrative which relates to the individual circumstances of the applicant.

18.20 While this assessment is not applicable to all applications or narratives of family violence in protection order proceedings, either in NSW or across all other states and territories, similar concerns about protection order proceedings were noted in the course of this Inquiry.

### Perceptions about false allegations of family violence

18.21 There are concerns that courts, service providers and others in the community may disbelieve disclosures of family violence made when the victim is engaged in

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13 J Wangmann, “‘She Said ...’ ‘He said ...’ : Cross Applications in NSW Apprehended Domestic Violence Order Proceedings”, *Thesis*, University of Sydney, 2009, 104. See also R Hunter, *Domestic Violence Law Reform and Women’s Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (2008). In the ACT, as observed during this Inquiry, the proceedings were longer, but the list was significantly shorter than, for example, in Local Courts in NSW.

14 J Wangmann, “‘She Said ...’ ‘He said ...’ : Cross Applications in NSW Apprehended Domestic Violence Order Proceedings”, *Thesis*, University of Sydney, 2009, 95–100.

15 J Wangmann, *Submission FV 170*, 25 June 2010.

litigation, particularly in family law matters. For example, the NSW Women's Migrant Movement commented that:

The current, extremely limited interpretation of admissible evidence does not reflect the reality of violence and abuse within families and the limited disclosure to State/Territory systems—after years of violence and abuse, women often have very limited or no documented evidence ... The word of a woman making an allegation of violence and abuse without documented evidence is treated with disbelief, without providing opportunities for corroboration by other means. This indicates that, despite all the research to date and experience of legal practitioners showing that false allegations of violence and abuse are not widespread, and therefore aligning with research that shows domestic violence is an under-reported crime, the Court and legal representatives still respond to such allegations with a presumption that they are false.<sup>16</sup>

18.22 Views differ about how common it is for people to give false evidence to a court about family violence. Some stakeholders have expressed concerns that allegations of family violence or child abuse are sometimes fabricated in order to gain an advantage in family law proceedings, or to remove a person's partner from the home and deny him or her contact with children.<sup>17</sup>

18.23 However, there is no clear evidence to support the claim that false allegations of family violence are routinely made to gain an advantage in family law matters. The Human Rights and Equal Opportunity Commission (as it then was) urged 'caution against accepting this contention uncritically':

There is no doubt that Family Court proceedings often are accompanied by allegations of domestic violence and the use of protection orders. However, this may reflect the fact that domestic violence often escalates when couples separate. Australian data demonstrate that women are as likely to experience violence by previous partners as by current partners and that it is the time around and after separation which is most dangerous for women.<sup>18</sup>

18.24 Research has found that most allegations of family violence, including child abuse, made in the context of family law proceedings are made in good faith and with support for the claims.<sup>19</sup> For example, a study in 2000 found that allegations of child

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16 NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010. See also K Johnstone, *Submission FV 107*, 7 June 2010.

17 One in Three Campaign, *Submission FV 35*, 12 May 2010, citing N Trocmé and N Bala, 'False Allegations of Abuse and Neglect when Parents Separate' (2005) 29 *Child Abuse & Neglect* 1333. See also NT Office Status of Family, *Submission FV 123*, 18 June 2010; G Hilton-Smith, *Submission FV 95*, 3 June 2010; D Matthews, *Submission FV 67*, 1 June 2010; Non-Custodial Parents Party (Equal Parenting), *Submission FV 55*, 1 June 2010; E McGuire, *Submission FV 53*, 28 May 2010.

18 Australian Human Rights Commission, *Submission to the Senate Legal and Constitutional Committee's Inquiry into the Provisions of the Family Law Amendment (Shared Parental Responsibility) Bill 2005* (2006) <[www.hreoc.gov.au/legal/submissions/shared\\_parental\\_responsibility.html](http://www.hreoc.gov.au/legal/submissions/shared_parental_responsibility.html)> at 29 March 2010.

19 See research cited in M Flood, *Fact Sheet #2: The Myth of Women's False Accusations of Domestic Violence and Rape and Misuse of Protection Orders* (2010) XY Online <[www.xyonline.net/content/fact-sheet-2-myth-women-s-false-accusations-domestic-violence-and-misuse-protection-orders](http://www.xyonline.net/content/fact-sheet-2-myth-women-s-false-accusations-domestic-violence-and-misuse-protection-orders)> at 17 August 2010; L Laing, *Domestic Violence and Family Law* (2003) prepared for Australian Domestic & Family Violence Clearinghouse.

abuse made in family law proceedings were found to be false no more frequently than allegations of child abuse made in other circumstances.<sup>20</sup>

#### ***False allegations and statements in family law proceedings***

18.25 Section 117AB of the *Family Law Act* requires a court to make a costs order against a person who ‘knowingly made a false allegation or statement in the proceedings’. This section was included to address ‘concerns expressed, in particular that allegations of family violence and abuse can be easily made and may be taken into account in family law proceedings’.<sup>21</sup> Conversely, there is no specific provision in the *Family Law Act* to deal with false denials of family violence.

18.26 The Chisholm Review raised concerns that this provision could impede the disclosure of family violence in cases where a vulnerable parent’s allegations of family violence cannot be corroborated by reliable evidence.<sup>22</sup> The Chisholm Review recommended that the costs order provision in s 117AB of the *Family Law Act* should be repealed and suggested that consideration should instead be given to amending the general costs provision in s 117 of the Act to direct a court to have regard to whether any person knowingly gave false evidence in the proceedings.<sup>23</sup> This provision would cover both false allegations and false denials of family violence.

18.27 In addition, the Family Law Council found that there is no evidence that s 117AB ‘has achieved its purpose’ in relation to false allegations of family violence and recommended that the Attorney-General give consideration to clarifying the intention of s 117AB, either through legislative amendment or public education.<sup>24</sup>

#### ***False evidence given in protection order proceedings***

18.28 State and territory family violence legislation generally deals with persons who give false evidence or make false allegations or denials by using provisions relating to vexatious applications or other legislation protecting court processes. A person who gives false evidence may also be charged with a number of offences, including perjury, false swearing and false testimony.<sup>25</sup>

18.29 In some circumstances, a court’s ability to award costs against a person who brings an application for, or to revoke, a protection order that is ‘deliberately false’ or made in ‘bad faith’ is linked to vexatious application provisions. For example, s 61 of

20 T Brown, M Frederico, L Hewitt and R Sheehan, ‘Revealing the Existence of Child Abuse in the Context of Marital Breakdown and Custody and Access Disputes’ (2000) 24 *Child Abuse and Neglect* 849 cited in L Laing, *Domestic Violence and Family Law* (2003) prepared for Australian Domestic & Family Violence Clearinghouse.

21 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), 41.

22 R Chisholm, *Family Courts Violence Review* (2009), 118.

23 Ibid, 108–120, Rec 3.2.

24 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Rec 11.

25 *Crimes Act 1900* (NSW) ss 327–330; *Crimes Act 1958* (Vic) s 314; *Criminal Code* (Qld) s 123; *Criminal Code Act Compilation 1913* (WA) s 124; *Criminal Law Consolidation Act 1935* (SA) ss 242–243; *Criminal Code* (Tas) ss 94–95; *Criminal Code* (ACT) ss 703, 705; *Criminal Code* (NT) ss 96, 99.

the *Domestic and Family Violence Protection Act 1989* (Qld) provides that a court may not award costs on an application for a protection order, or a revocation or variation of the order, unless the court dismisses the application as ‘malicious, deliberately false, frivolous or vexatious’. In other jurisdictions, costs may be awarded against a person if the court is satisfied that an application for a protection order was made ‘in bad faith’<sup>26</sup> or ‘has not been made honestly’.<sup>27</sup>

18.30 In 2004, the Parliament of Tasmania considered whether the *Family Violence Act 2004* (Tas) should include a provision to impose a penalty for false or contrived claims of family violence. The government did not support such amendments on the basis that there were adequate sanctions in the *Police Offences Act 1935* (Tas) and other legislation for making false allegations:

If you make a false report to the police you can be charged; if you make a false statutory declaration you can be charged. If you falsely swear you can be charged and it is perjury. All of these things are available for people who fabricate claims, under the *Criminal Code* as well as the *Police Offences Act*. Anyone who does that will be charged and people have been charged. We would not put it in here because it is in other legislation and it is covered.<sup>28</sup>

#### *Commissions’ views*

18.31 The Commissions consider that existing measures to sanction persons who give false evidence of family violence are sufficient. Such measures include the courts’ power to dismiss vexatious applications and award costs against a person who brings a vexatious application. The Commissions consider that these measures are sufficient safeguards against giving false evidence before courts generally, and that there is no need for specific provisions relating to false allegations of family violence, in protection order or family law proceedings.

18.32 There are concerns that s 117AB of the *Family Law Act* may inhibit the disclosure of family violence in family law proceedings where a party cannot provide strong evidence of family violence to the court. The Commissions endorse the recommendations relating to s 117AB made in the Chisholm Review and by the Family Law Council. The Commissions agree that false denials of family violence, as well as false allegations, should trigger the court’s discretion to make a costs order.

#### **Common risk assessment framework**

18.33 Family violence cannot be considered by a court unless it is aware of the fact of the violence, and the circumstances. Risk assessment is a key way in which courts, police, and others who provide services to victims of family violence can identify and respond to family violence.

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26 See, eg, *Family Violence Protection Act 2008* (Vic) s 154(3)(b); *Domestic and Family Violence Act 2007* (NT) s 61.

27 See, eg, *Domestic Violence and Protection Orders Act 2008* (ACT) s 117.

28 Tasmania, *Parliamentary Debates*, House of Assembly, 18 November 2004, 166 (J Jackson—Attorney General and Minister for Justice and Industrial Relations).

18.34 Risk assessment involves identifying and evaluating any risks to the safety of a person or child which arise as a result of family violence. All service providers involved in protection order proceedings under family violence legislation and family law proceedings must, to some extent, identify and manage the risk of family violence for their clients. However, the degree to which risk assessment is a formalised process, and the types of risk assessment practices used by different participants in the legal system, varies across courts and jurisdictions.

18.35 Risk assessment can occur at a number of points in the family violence system, including when a person: accesses a family violence service; applies to a state or territory court for a protection order; discloses family violence during family law proceedings; seeks legal advice; or when police are involved in a family violence incident. Risk assessment is also an ongoing process—first, because it should not be assumed that risk assessment has already occurred elsewhere in the system; and secondly, because risk may change over time, particularly as a victim's circumstances change through the taking of steps such as separation or legal action. Further, over time a person may be willing to disclose more, as trust is built, if they continue to deal with the same service provider; or if they are feeling supported more generally by the system. The difficulties experienced by victims in disclosing sexual assault provide a key example of why this repeated approach is necessary.<sup>29</sup>

#### ***Risk assessment in state and territory courts***

18.36 Many organisations, such as family violence service providers, police services and legal aid commissions have developed risk assessment policies and procedures to screen and assess family violence.

18.37 The Victorian Government has developed a state-wide risk assessment and management framework that applies to all service providers.<sup>30</sup> By incorporating common language, definitions of family violence and risk assessment and management procedures, the Victorian framework is intended to 'significantly increase the ability of the service system to respond in an integrated and coordinated way' to family violence.<sup>31</sup>

18.38 The framework includes three practice guides directed towards different levels of risk assessment for different categories of service providers. The first practice guide deals with identifying family violence and assists mainstream service providers who may encounter people who are victims of family violence, such as medical practitioners or teachers. The second practice guide, regarding preliminary assessment, assists professionals who work with victims of family violence but for whom it is not their only core business, such as police, court staff and community legal centres. The third practice guide involves a comprehensive assessment for specialist family violence professionals working with victims of family violence.<sup>32</sup>

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29 See Ch 26.

30 Department of Human Services (Vic), *Family Violence Risk Assessment and Risk Management Framework* (2007).

31 Ibid, 19.

32 Ibid, 8.

18.39 The risk assessments in these practice guides combine three elements to determine the level of risk of family violence:

- the victim's view of their level of risk;
- the presence of evidence-based risk indicators; and
- professional judgment that takes into account all other circumstances for the victim, child and person who has used violence.<sup>33</sup>

18.40 The framework also provides for appropriate referral pathways and information sharing between service providers; risk management strategies including ongoing case management; data collection; and quality assurance strategies. The provision of training aimed at building capacity and consistency in risk assessment and management across service providers, is an integral part of the framework.<sup>34</sup>

18.41 The practice guides are flexible, and particular service providers, such as Victoria Police, have developed their own risk assessment processes, based on the common framework.<sup>35</sup>

#### ***Risk assessment in family courts***

18.42 Some participants in the family law system already undertake formal risk assessment. In particular, a key element of family dispute resolution (FDR) practice is screening and risk assessment for family violence, which is designed to ensure that FDR is not used in inappropriate circumstances, and to identify and mitigate any risk factors in cases where FDR is considered appropriate.<sup>36</sup>

18.43 The Australian Government Attorney-General's Department and the Australian Catholic University have published a *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line*,<sup>37</sup> which includes a screening and assessment framework, referral guidelines and indicators of family violence and child abuse and risk of self-harm. It discusses issues of supervision and support, and provides a range of resources for practitioners, including sample questions to identify family violence.

18.44 The Chisholm Review and the Family Law Council's report on improving responses to family violence in the family law system both made recommendations about risk assessment by federal family courts.<sup>38</sup>

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33 Ibid, 7.

34 L Eltringham, 'The Craf Train(ing): Building a Common Approach to Risk Assessment and Management' (2010) Issue 1 *DVRCV Quarterly* 10.

35 Victoria Police, *Code of Practice for the Investigation of Family Violence* (2005).

36 Australian Catholic University and Australian Government Attorney-General's Department, *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* (2008), 13.

37 Ibid.

38 R Chisholm, *Family Courts Violence Review* (2009), Recs 2.3, 2.4, 2.5; Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Rec 8.2.2.

18.45 The Family Law Council makes a number of recommendations about family violence ‘if and when it becomes visible in the family law system in Australia’.<sup>39</sup> In particular, it considered that it is essential that all people involved in the family law system screen for matters likely to impact on children and parenting, including, amongst other things, family violence.<sup>40</sup> The Family Law Council also recommended that a consistent framework for screening and risk assessment be developed in accordance with principles adopted in the common knowledge base.<sup>41</sup>

18.46 The Chisholm Review recommended that the *Family Law Act* should require federal family courts to conduct a risk identification and assessment.<sup>42</sup> It considered that the current approach, in which parties file a notice that allegations of family violence or child abuse have been made (Form 4 notice) was ‘not working’. The Review stated that:

it would be better to have a system of risk identification and assessment that applies to all parenting cases. This approach would reflect the best available thinking about these issues, and would reinforce a lot of measures that are already being taken by the courts to identify and deal with issues of violence as early as possible.<sup>43</sup>

18.47 The Chisholm Review recommended that the Australian Government consider the most appropriate ways of conducting this kind of risk assessment, having regard to the resources available to the courts, and to the possibility of arranging for an external agency to conduct some or all of the risk assessment.<sup>44</sup>

18.48 In a submission to this Inquiry the Attorney-General’s Department noted the development of several measures to improve the way in which the family law system responds to family violence and child abuse, including a national framework to support screening and assessment for family violence across the family law system. It submitted that:

The main purpose of screening is to identify clients who are at risk of harm, including the currency and extent of the risk. In the first instance, it is envisaged that all clients entering the family law system will be screened consistently, and at a general level to identify risk of harm at the earliest stage. Further and more comprehensive risk assessment may follow depending on the path taken in the resolution of the client’s dispute. Assessing client needs will follow on from screening and focus on the needs of the client and the type of service that may be required. The common screening and risk identification framework will ensure that regardless of their entry point, clients receive access to the range of information and referral options that are available to meet their needs. It is anticipated that all practitioners will be trained in the consistent use of the framework.<sup>45</sup>

39 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 7.

40 Ibid, 42–3.

41 Ibid, 43. The Family Law Council also recommended that the federal Attorney-General facilitate the establishment of an expert panel and reference group to develop, maintain and promote a family violence common knowledge base for those involved in the family law system: Rec 6.1.

42 R Chisholm, *Family Courts Violence Review* (2009), Rec 2.3.

43 Ibid, 6.

44 Ibid, Rec 2.4.

45 Australian Government Attorney-General’s Department, *Submission FV 166*, 25 June 2010.

### ***Submissions and consultations***

18.49 Some stakeholders commented on the importance of risk assessment procedures, particularly in federal family courts.<sup>46</sup> Women's Legal Service Queensland, for example, considered that:

A risk assessment and risk management framework, similar to the one introduced in Victoria, should be developed and applied across Government agencies and funded services dealing with matters involving domestic and family violence, including police and courts and related services. This would help ensure there is a clear, transparent and standardised approach to the risk management and the assessment of safety and risk in each family coming into contact with services.<sup>47</sup>

18.50 Domestic Violence Victoria and others in a joint submission expressed the view that a common approach to risk assessment would improve the evidence given to support claims of family violence in court:

We would argue that a shared understanding of risk factors and shared approaches to assessing risk helps in gathering evidence that can be used in applications for protection orders through state courts, and parenting orders through federal courts. Good evidence is contained in the woman's story about the violence—it helps her to identify and think about possible witnesses, others she's told, others who have seen and documented her injuries etc. We know from research that women usually tell someone at a point of crisis.

Shared frameworks for supporting a woman to tell her story, and clear practice directions about asking questions about violence can assist her to tell her story more clearly, regardless of where she first presents for support. The flow on is that greater clarity and more detail about the violence that is available to the court will usually lead to good evidence to support the allegations.<sup>48</sup>

### ***Commissions' views***

18.51 In Chapters 5 and 6, the Commissions recommend a common definition of family violence across state and territory family violence legislation, the *Family Law Act* and other legislation. The Commissions recommend that family violence be defined as violent or threatening behaviour or any other form of behaviour that coerces or controls a family member or causes that family member to be fearful; and the

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46 See, eg, The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Victorian Aboriginal Legal Service Cooperative Ltd, *Submission FV 179*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; P Easteal, *Submission FV 40*, 14 May 2010.

47 Women's Legal Service Brisbane, *Submission FV 223*, 2 July 2010.

48 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

definition sets out non-exhaustive examples of the types of physical and non-physical behaviour that may constitute family violence.<sup>49</sup>

18.52 The Commissions consider that a common definition of family violence, together with a shared understanding of particular conduct that may comprise family violence, would provide the groundwork for a common approach to risk assessment for family violence. Across all jurisdictions a common approach to risk assessment would mean that the needs of victims of family violence are consistently understood and addressed by all service providers, including specialist family violence services, courts, police, lawyers and mainstream service providers such as education and health care providers.

18.53 How to ensure proper screening to identify family violence and child abuse was a significant theme in the Family Law Council's report on improving responses to family violence in the family law system.<sup>50</sup> The issue was also considered in the Chisholm Review, which emphasised 'that family violence must be disclosed, understood, and acted upon'.<sup>51</sup> Given the attention to risk assessment in both reviews, any consideration in this Report to such initiatives complements, rather than duplicates them.

18.54 While this work has not been duplicated, taking into account the recommendations in these reviews and the submissions and consultations in this Inquiry, the Commissions consider the Victorian framework for common risk assessment to be an instructive model. The Commissions suggest that other state and territory governments consider the development of similar frameworks to assess and manage the risk of family violence in their jurisdictions.

18.55 Work is currently underway to develop a national framework to support screening and assessment for family violence across the federal family law system. In order to promote consistency in understanding and identifying family violence across jurisdictions, it would also be desirable if the federal framework currently being developed was consistent with the overarching risk assessment and management frameworks that apply in states and territories.

## Improving evidence in protection order proceedings

18.56 Improving the availability and quality of evidence about family violence is an important aspect of promoting better outcomes for victims of family violence involved in multiple legal proceedings. As noted in Laing's study of the experiences of victims of family violence in family court proceedings:

The Family Court relies on evidence from interventions in other parts of the domestic violence and child protection systems. If the response of other agencies was inadequate, as was frequently the case, the women did not have evidence of the

49 Rec 5–1.

50 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009).

51 R Chisholm, *Family Courts Violence Review* (2009), 5.

violence and the Family Courts have to make difficult decisions with incomplete information.<sup>52</sup>

18.57 Currently, the *Family Law Act* requires courts, when determining what is in the best interests of a child, to consider, among other factors, any protection order that applies to the child or a member of the child's family, provided that the protection order is a final order, or was made after a contested hearing.<sup>53</sup> In Chapter 17, the Commissions recommend an amendment to this provision to require courts, when determining the best interests of the child, to consider evidence of family violence given, or findings made, in relevant family violence protection order proceedings.<sup>54</sup> The existence of a protection order made under state or territory family violence legislation will operate as a 'red flag' to federal family courts that there are issues of family violence that need to be considered. The court must then look at the facts of family violence, including evidence given and findings made in protection order proceedings, along with any other evidence of family violence.

18.58 The *Family Law Act* and *Family Law Rules* require parenting proceedings to be conducted as a 'less adversarial' trial, in which the court is to actively direct, control and manage the conduct of proceedings. Section 69ZX of the *Family Law Act* permits the court to give directions or make orders about the matters on which the parties are to give evidence and how evidence is to be given. The court is also permitted to ask questions of parties, witnesses and experts and seek evidence or documents.<sup>55</sup> In particular, a court deciding parenting proceedings may receive into evidence the transcript of evidence in any other proceedings before a federal family court or other court or tribunal, and draw any conclusions of fact or adopt any recommendation, finding, decision or judgment of those courts or tribunals that it thinks proper.<sup>56</sup>

18.59 Generally, sworn written evidence, as opposed to oral evidence, is more readily available for use in subsequent proceedings or separate family law proceedings.<sup>57</sup> Affidavit evidence submitted in protection order proceedings can, for example, be tendered and utilised in other family violence or family court proceedings where appropriate.<sup>58</sup>

18.60 This section considers ways in which evidence in protection order proceedings may be given in such a way that it can be more readily used where it is relevant to family law proceedings.

### **A flexible approach**

18.61 Stakeholders in this Inquiry highlighted a number of areas in which flexibility is required in: responding to the needs of individuals affected by family violence;

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52 L Laing, 'No Way to Live': Women's Experiences of Negotiating the Family Law System in the Context of Domestic Violence: Interim Report (2009), 18.

53 *Family Law Act 1975* (Cth) s 60CC(3)(k).

54 Rec 17–1.

55 *Family Law Act 1975* (Cth) s 69ZX(1). See also *Family Law Rules 2004* (Cth) ch 16.

56 *Family Law Act 1975* (Cth) s 69ZX(3).

57 Law Council of Australia, *Submission FV 180*, 25 June 2010.

58 Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

recognising the advantages and disadvantages of written and oral evidence; and accommodating the needs and practices of courts making protection orders.

18.62 As discussed, the dynamics of family violence are complex. The manifestations of family violence and the victim's response to that violence will be different for each family affected by it. Court proceedings need, therefore, to be able to respond flexibly to the different circumstances of victims in order to obtain and interpret evidence of family violence.

18.63 In addition to recognising that family violence can take many forms and the ability to provide strong or corroborated evidence of family violence may be limited, rules about giving evidence need to recognise that victims of family violence may have different needs in giving evidence. For example, allowing a victim of family violence to provide written, rather than oral, evidence has a number of benefits—but may disadvantage some people, such as unrepresented parties<sup>59</sup> and parties who have low literacy, have an intellectual disability or are from a CALD background.<sup>60</sup>

18.64 Finally, the Commissions note that not all people seeking protection orders will be involved in later family law proceedings. The focus of protection order proceedings is the immediate protection of a person from family violence—and parties to proceedings and courts making protection orders must make that their primary concern.<sup>61</sup> There is a danger in

making the process too onerous and/or time consuming when the crucial focus is immediate and/or urgent protection. The right balance between expediency and increased evidentiary value will have to be struck.<sup>62</sup>

18.65 Protection order proceedings should not become a preliminary hearing or fact-finding exercise for the purposes of later family law proceedings. Rather, where evidence is given in protection order proceedings, the Commissions consider that victims of family violence should be able to present that evidence in concurrent or pending family law proceedings.

### **Written evidence**

18.66 As noted above, the quality and degree of written evidence given in protection order proceedings varies across different courts in different states and territories. In the Consultation Paper, the Commissions sought stakeholder views about the advantages and disadvantages of providing written rather than oral evidence to a court in protection order proceedings.<sup>63</sup>

18.67 Stakeholders identified a number of benefits of written evidence. A number of stakeholders noted that a key advantage for victims of family violence is that providing

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59 Queensland Law Society, *Submission FV 178*, 25 June 2010.

60 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

61 The purpose of family violence legislation is discussed in detail in Ch 4.

62 Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

63 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010) (Consultation Paper), Question 10–5.

written, rather than oral, evidence is less intimidating, particularly where oral evidence is to be given in the presence of the person alleged to have used family violence.<sup>64</sup> By giving written evidence, the applicant avoids the need to discuss personal details or re-live traumatic events in a crowded courtroom.<sup>65</sup>

18.68 Another benefit is that written evidence allows applicants to present information comprehensively and in a coherent manner:

The advantage of a written report is that a victim can go through the abuse chronologically and document the details clearly to aid the Judge in his/her decision. It gives them time to sit and think and sort out their history clearly in a non threatening environment. The documenting of the history of abuse is a big eye opener for the victim when they can see the details written down and realise how much has happened. A social worker or suitably trained support person can assist them to formulate their paperwork at a pace they can handle, with minimum stress.<sup>66</sup>

18.69 The Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service also noted that giving written evidence may be more practical, in that many of its clients live in remote communities, making it very difficult logistically for women to attend to give evidence in the courts in the bigger towns.<sup>67</sup>

18.70 However, some stakeholders noted that a requirement that parties provide written evidence can disadvantage some people, such as unrepresented parties<sup>68</sup> and parties who are of low literacy, have an intellectual disability or are from a CALD background.<sup>69</sup>

18.71 In the Consultation Paper, the Commissions considered several options to improve the quality of written evidence in protection order proceedings, including:

- ensuring that application forms for family violence protection orders include information about the kinds of conduct that constitute family violence;
- requiring that applications for family violence protection orders are sworn or affirmed;
- giving applicants for protection orders the opportunity of providing affidavit evidence in support of their application; and
- providing a standard form of affidavit in family violence matters.

<sup>64</sup> See, eg, Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Confidential, *Submission FV 105*, 6 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

<sup>65</sup> Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 164*, 25 June 2010.

<sup>66</sup> Confidential, *Submission FV 69*, 2 June 2010. See also Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

<sup>67</sup> Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

<sup>68</sup> Queensland Law Society, *Submission FV 178*, 25 June 2010.

<sup>69</sup> Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

***Information provided in application forms***

18.72 A person seeking a protection order under state or territory family violence legislation applies for the order by completing an application form. There is some variation in this process across jurisdictions—for example, in Victoria, a person seeking a protection order fills out an information form, and the Court Registry uses this information to lodge a formal application for an order on the person's behalf. In some cases, the police may also apply for a protection order on behalf of a victim of family violence.

18.73 The information and degree of detail sought in the application forms vary across jurisdictions. Some application forms simply ask the applicant to set out the grounds on which he or she relies.<sup>70</sup> This approach assumes that the person seeking a protection order understands the legislative definition of family violence and can frame his or her application accordingly—knowledge that a person is unlikely to have without assistance from the police or a lawyer. Other forms ask the applicant to describe the respondent's behaviour, but give no guidance as to the kinds of behaviour that may constitute family violence and lead the court to make a protection order.<sup>71</sup>

18.74 In contrast, some application forms guide the applicant step by step through the application. Some include a list of conduct that reflects the statutory definition of family violence and asks for details of recent conduct.<sup>72</sup> Other application forms include the statutory definition of family violence as part of the form.<sup>73</sup>

18.75 In the Consultation Paper, the Commissions proposed that court forms for applications for a protection order under state and territory family violence legislation should include information about the kinds of conduct that constitute family violence.<sup>74</sup>

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70 See, eg, New South Wales, *Application—Apprehended Domestic Violence Order*; Northern Territory Magistrates Courts, *Application for Domestic Violence Order* <[www.nt.gov.au/justice/ntmc/forms-fees.shtml](http://www.nt.gov.au/justice/ntmc/forms-fees.shtml)> at 29 March 2010.

71 See, eg, Magistrates Court of Western Australia, *Violence Restraining Order Application* <[www.magistratescourt.wa.gov.au/content/restraining.aspx](http://www.magistratescourt.wa.gov.au/content/restraining.aspx)> at 9 April 2010.

72 See, eg, Magistrates' Court of Victoria, *Information for Application for an Intervention Order* (2009) <[www.magistratescourt.vic.gov.au](http://www.magistratescourt.vic.gov.au)> at 2 February 2010; Magistrates Court of Tasmania, *Application for a Family Violence Order* <[www.magistratescourt.tas.gov.au/divisions/family\\_violence/forms](http://www.magistratescourt.tas.gov.au/divisions/family_violence/forms)> at 29 March 2010.

73 See, eg, Magistrates Court of Queensland, *Protection Order Application* <[www.communityservices.qld.gov.au/violenceprevention/legislation/dom-violence-orders.html](http://www.communityservices.qld.gov.au/violenceprevention/legislation/dom-violence-orders.html)> at 9 February 2010; Magistrates Court of the Australian Capital Territory, *Application for a Domestic Violence Order* (2009) <[www.courts.act.gov.au/magistrates](http://www.courts.act.gov.au/magistrates)> at 9 February 2010.

74 Consultation Paper, Proposal 10–3.

### ***Submissions and consultations***

18.76 Many stakeholders supported the proposal.<sup>75</sup> For example, Women’s Legal Services NSW commented that including more information about the kinds of conduct that constitute family violence:

would be helpful in assisting applicants understand the types of conduct that constitute family violence, would facilitate ease of applying for a protection order and would ensure full particulars of relevant behaviour are included on applications.<sup>76</sup>

18.77 Similarly, National Legal Aid considered that including information about the kinds of conduct that constitute family violence in application forms would ‘be helpful for victims who often think that it is not possible to obtain a protection order unless the abuse is physical or there is damage to property’.<sup>77</sup>

18.78 Stakeholders cautioned that application forms should make it clear that the information about what constitutes family violence is only illustrative—and not an exhaustive list—as, otherwise, applicants may not include all relevant information.<sup>78</sup>

18.79 Some stakeholders emphasised the need to give victims of family violence support when applying for a protection order. Domestic Violence Victoria and others commented that, while including information about types of family violence on court forms can be helpful, it is

important for an applicant to be able to access support from legal and non-legal support workers when making an application for an intervention order. An already traumatised victim of violence is often overwhelmed by the requirements of a court setting and is likely to prepare a better and clearer application with good informed support.<sup>79</sup>

18.80 Similarly, Wangmann agreed with the need for measures to assist applicants to provide information, including detail about the history of family violence and not just a single incident. However, she submitted that:

At the same time it must be noted that this is a careful balance that must also acknowledge the experience of family violence is one that means that it may be difficult to provide specific detail for every incident, or provide other supportive or

<sup>75</sup> Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; A Harland, *Submission FV 80*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

<sup>76</sup> Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

<sup>77</sup> National Legal Aid, *Submission FV 232*, 15 July 2010.

<sup>78</sup> Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010.

<sup>79</sup> Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010. See also Confidential, *Submission FV 184*, 25 June 2010.

corroborative evidence. Any approach must be flexible enough to allow persons in need of protection to mention acts and behaviours that are not specifically mentioned but would indeed fall under the legislative scheme.<sup>80</sup>

18.81 In addition, Wangmann noted the importance of providing applicants for protection orders with support when completing application forms.<sup>81</sup>

18.82 Legal Aid NSW and the Women's Domestic Violence Court Advocacy Service submitted that including information about the kinds of conduct that constitute family violence in application forms was unnecessary and could cause confusion.<sup>82</sup> Another stakeholder noted that there is a benefit to keeping the forms 'simple so that individuals, particularly from non-English speaking backgrounds, are not overwhelmed by pages of words'. The stakeholder considered that an accompanying information booklet could be provided rather than including further detail in application forms.<sup>83</sup>

#### ***Commissions' views***

18.83 One way in which the quality of evidence supporting allegations of family violence can be improved is to improve the information provided in application forms. To this end, the Commissions consider that application forms should include an illustrative list of the kinds of conduct that constitute family violence.

18.84 This will help make victims aware of the full range of conduct that may constitute family violence and prompt them to provide evidence of the types of family violence they have suffered. It would also assist applicants to identify certain types of behaviour as family violence, such as sexual assault or psychological or emotional abuse. Information of this kind is particularly important for victims who are making an application for a protection order without the assistance of lawyers or the police.

18.85 Application forms in different jurisdictions take varying approaches. For example, some forms set out a list of conduct that the applicant can tick if relevant; others set out the definition of violence before asking the applicant to provide details of incidents of family violence. The Commissions do not suggest that it is necessary for all forms to be identical, but recommend that all application forms provide some guidance to applicants about the kinds of conduct that constitute family violence.

**Recommendation 18–1** State and territory courts should ensure that application forms for protection orders include information about the kinds of conduct that constitute family violence.

80 J Wangmann, *Submission FV 170*, 25 June 2010.

81 Ibid.

82 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

83 Confidential, *Submission FV 164*, 25 June 2010.

### ***Affidavit evidence in protection order proceedings***

18.86 Protection order proceedings heard in state and territory courts differ in how evidence of family violence is given, with differing emphases on written and oral evidence. Courts may seek sworn evidence from the victim—such as oral testimony when making an interim protection order *ex parte*, or both oral and written evidence when making a final protection order—and other evidence of family violence, for example, through police reports or medical records.

18.87 In some jurisdictions, the application form completed by a person seeking a protection order must be sworn or affirmed. For example, s 43 of the *Family Violence Protection Act 2008* (Vic) requires that an application for a protection order made by a police officer must be made on oath or certified by the police officer, while an application made by a person other than a police officer must be ‘made on oath or by affidavit’. To this end, the final paragraph of the information form to be completed by a person seeking a protection order is headed ‘Affidavit’ and, by signing, the applicant swears or affirms that ‘the contents of my application are true and correct to the best of my knowledge’.<sup>84</sup> Application forms in Queensland and Tasmania take a similar approach.<sup>85</sup>

18.88 The *Restraining Orders Act 1997* (WA) takes a different approach and gives the applicant the option of providing evidence by affidavit in support of the application where orders are sought *ex parte*.<sup>86</sup> There is a pro-forma affidavit, which asks the applicant to describe the incident, injuries suffered, and how the behaviour of the respondent made the applicant feel. The affidavit also seeks information about orders and proceedings in other courts, and sets out the orders sought.

18.89 Similarly, in the Northern Territory, the application form includes a note, recommending that the applicant file a statutory declaration setting out the facts and circumstances which establish a domestic relationship, the basis for the application and future expectations.<sup>87</sup>

18.90 In other jurisdictions, there is no requirement that an application be supported by an affidavit. For example, in NSW, South Australia and the ACT, the court has discretion to accept affidavit evidence in certain circumstances, generally where the applicant is not able to give oral evidence to the court during a hearing.<sup>88</sup>

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84 Magistrates’ Court of Victoria, *Information for Application for an Intervention Order* (2009) <[www.magistratescourt.vic.gov.au](http://www.magistratescourt.vic.gov.au)> at 2 February 2010.

85 Magistrates Court of Queensland, *Protection Order Application* <[www.communityservices.qld.gov.au/violenceprevention/legislation/dom-violence-orders.html](http://www.communityservices.qld.gov.au/violenceprevention/legislation/dom-violence-orders.html)> at 9 February 2010; *Justices Rules 2003* (Tas) r 54L; Magistrates Court of Tasmania, *Application for a Family Violence Order* <[www.magistratescourt.tas.gov.au/divisions/family\\_violence/forms](http://www.magistratescourt.tas.gov.au/divisions/family_violence/forms)> at 29 March 2010.

86 *Restraining Orders Act 1997* (WA) s 28.

87 Northern Territory Magistrates Courts, *Application for Domestic Violence Order* <[www.nt.gov.au/justice/ntmc/forms\\_fees.shtml](http://www.nt.gov.au/justice/ntmc/forms_fees.shtml)> at 29 March 2010.

88 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 22 (interim orders only); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 21(6) (interim orders only); *Domestic Violence and Protection Orders Regulation 2009* (ACT) reg 23.

18.91 In the Consultation Paper, the Commissions asked whether it would be beneficial for state and territory family violence legislation to:

- require that applications for protection orders be sworn or affirmed; or
- give applicants for protection orders the opportunity of providing affidavit evidence in support of their application.<sup>89</sup>

18.92 The Commissions also asked whether a standard form of affidavit would be of assistance to victims of family violence.<sup>90</sup>

### ***Submissions and consultations***

#### ***Applications to be sworn or affirmed***

18.93 A number of stakeholders were in support of applications being sworn or affirmed.<sup>91</sup> The Peninsula Community Legal Centre observed that ‘this is not an onerous burden for an applicant and ensures that the importance of the application and the resulting order, if made, is respected’.<sup>92</sup>

18.94 The Local Court NSW also supported the requirement that applications be sworn or affirmed and stated that:

The removal of this requirement from the current application procedure has created uncertainty as to how ex parte orders should be made and the evidentiary value that can be attached to unsworn or non-affirmed statements in ex parte proceedings.<sup>93</sup>

18.95 Women’s Legal Services NSW noted that applications in NSW are currently unsworn and many magistrates will not make ex parte or interim orders without sworn oral evidence from the victim. It submitted that sworn applications may reduce the need for victims to retell their story in the witness box in preliminary proceedings.<sup>94</sup>

18.96 The Law Council considered that applications that are sworn or affirmed mean that the information in the application is of greater evidentiary value:

In the event that information contained in applications for family violence orders from state proceedings is to be used in family law proceedings then it can only be of value if sworn or affirmed. The requirement ... that information must be on oath or sworn, allows such information to be used as evidence of the truth of the allegations in family law proceedings. If such information is only in unsworn form then it has less evidentiary value, more as evidence of any prior inconsistent statement by the applicant, rather than potential positive evidence of the matters alleged.<sup>95</sup>

89 Consultation Paper, Question 10–4.

90 Ibid, Question 10–5.

91 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010.

92 Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

93 Local Court of NSW, *Submission FV 101*, 4 June 2010.

94 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

95 Law Council of Australia, *Submission FV 180*, 25 June 2010.

18.97 The Women's Legal Service Victoria, while supporting the principle of improving the evidentiary value of application form information, cautioned against 'making the process too onerous and/or time consuming when the crucial focus is immediate and/or urgent protection' and stated that the 'right balance between expediency and increased evidentiary value will have to be struck'.<sup>96</sup>

18.98 A number of stakeholders did not support a requirement that applications for protection orders be sworn or affirmed.<sup>97</sup> Legal Aid NSW and the Law Society NSW submitted that:

People should be able to apply for a protection order as inexpensively as possible. If the application needs to be sworn, self-represented applicants who have an application cobbled together by a registrar, or police applicants where the application is rushed, may be significantly disadvantaged.<sup>98</sup>

#### *Opportunity to provide affidavit evidence*

18.99 A number of stakeholders preferred that applicants be given an opportunity to provide affidavit evidence if they wished, rather than be required to swear or affirm applications.<sup>99</sup> The Women's Domestic Violence Court Advocacy Service Network submitted that affidavits 'provide applicants with a means to outline the issues in dispute, provide a historical outline of the violence they have experienced, and assist in providing clarity where applications have been poorly drafted'. The Network stated that, given women are often required to 'give a statement when in a highly emotive state at the scene of the incident, the provision of further affidavit evidence at a later date provides the victim with the opportunity to provide further and more accurate information'.<sup>100</sup>

18.100 A confidential submission noted that applications in the Northern Territory are accompanied by an affidavit or statutory declaration and that this approach seems to be working well, with registry staff support.<sup>101</sup>

18.101 The Magistrates' Court and Children's Court of Victoria stated that views are divided as to whether or not the applicant should be given the opportunity to provide additional affidavit evidence in support of the application:

Some say that there should be an opportunity for an affidavit at the preliminary stage partly because this could be used to support family law proceedings. Others suggest

96 Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

97 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

98 Legal Aid NSW, *Submission FV 219*, 1 July 2010. Also Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

99 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

100 Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010. Also Legal Aid NSW, *Submission FV 219*, 1 July 2010.

101 Confidential, *Submission FV 164*, 25 June 2010.

that use of affidavits early in proceedings without prior legal advice can create difficulties for both parties and perhaps polarize parties. However, this is more relevant in family law rather than family violence related issues. Those with this view consider their use should be limited to later stages of the proceeding with specific directions from a magistrate as to the issues which should be addressed in the affidavit.<sup>102</sup>

18.102 The Queensland Law Society expressed a similar view, noting that, in Queensland, there is nothing to prevent applicants executing affidavits in support of their applications and that if the application is contested and the parties are legally represented, judicial officers will often direct affidavits to be filed prior to a final hearing.<sup>103</sup> However, concern was expressed that requiring affidavit evidence at the commencement of proceedings could deny access to justice and increase the administrative burden on police.<sup>104</sup>

18.103 The Aboriginal Family Violence Prevention and Legal Service Victoria expressed concerns about the implications of providing written evidence in protection order proceedings where family law proceedings are pending:

There may ... be difficulties where an affidavit is prepared for family violence proceedings in urgent circumstances and in accordance with a pro forma—and where a subsequent and more time considered family law affidavit contains different information. This may lead to adverse conclusions about a victim's credibility. It may not be wise to use an affidavit in protection order proceedings if subsequent family law proceedings are likely. It may also be preferable not to put details on an affidavit in the Family Court prior to the [protection] order hearing so as not to expose the applicant to cross examination about that material.<sup>105</sup>

18.104 A number of stakeholders supported providing applicants the opportunity to present affidavit evidence in support of their application, but emphasised the need for legal and non-legal support.<sup>106</sup> For example, the National Abuse Free Contact Campaign submitted that:

This is a time when women are at their most vulnerable and often traumatized by their experiences of violence and abuse. Providing support will only aid in them being able to provide clear evidence to the court, thus allowing a just response to their experiences of violence.<sup>107</sup>

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102 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

103 Queensland Law Society, *Submission FV 178*, 25 June 2010.

104 *Ibid.*

105 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

106 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 69*, 2 June 2010.

107 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

18.105 Women's Legal Service Victoria submitted that providing affidavit evidence may be too time consuming, especially where there are language barriers and other issues such as mental health or substance abuse.<sup>108</sup> Women's Legal Services NSW highlighted the legal costs involved in providing affidavit evidence, and noted that providing such evidence does not remove the need to give oral evidence and be cross-examined at hearing.<sup>109</sup>

#### ***Standard form of affidavit***

18.106 Some stakeholders considered that a standard form of affidavit could be of assistance to victims of family violence.<sup>110</sup> The Magistrates' Court and Children's Court of Victoria noted that 'using the same or consistently worded forms in all state and federal spheres would assist in harmonising the legislative frameworks and most importantly the understanding of the parties'.<sup>111</sup>

18.107 Other stakeholders submitted that a standard form of affidavit for family violence applicants would not be appropriate.<sup>112</sup>

Family violence comes in many ways, shapes and forms, and to provide victims with a 'tick-a-box' affidavit may send them a message that if their situation does not fall neatly into the options provided, then they have not experienced family violence as defined by the legislation and the form they are required to fill out. Victims need to be able to tell their own story how they see fit.<sup>113</sup>

18.108 Similarly, the Law Council noted that the 'danger of a standard form affidavit although potentially user-friendly, is that it by definition standardizes cases'. In this context, 'no two family violence cases are the same and the evidence required in support of any application ought not be treated in that way'.<sup>114</sup>

18.109 The Law Council suggested that affidavit forms could instead include a brief explanation of what constitutes the conduct which may be complained of under the legislation, which may assist applicants in completing the affidavit to support their application.<sup>115</sup>

#### ***Commissions' views***

18.110 An aspiration of this Inquiry is to improve the quality of evidence relating to family violence in protection order proceedings. Improving evidence of family violence not only benefits victims in obtaining a protection order, but also maximises

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108 Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

109 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

110 Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

111 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

112 Law Council of Australia, *Submission FV 180*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

113 Confidential, *Submission FV 183*, 25 June 2010.

114 Law Council of Australia, *Submission FV 180*, 25 June 2010.

115 Ibid.

the potential for the use of such evidence in federal family courts, in the event of family law proceedings.

18.111 Requiring applicants to swear or affirm their written evidence is likely to cause them to reflect more fully on the accuracy and veracity of their statements, particularly because there are offences for making false statements. The act of swearing or affirming a written statement is analogous to giving oral testimony in court—which is required to be sworn or affirmed. Swearing or affirming written evidence is a key way to improve the quality of evidence before state and territory courts, and its consequent usefulness in any related federal family court proceedings. For example, if a protection order is made by consent, the value of supporting evidence is reduced when it is unsworn or unaffirmed—particularly in pending or concurrent family law proceedings.<sup>116</sup>

18.112 Sworn or affirmed written evidence also provides state and territory courts with an account of the facts on which an application for a protection order is based, and may facilitate the making of ex parte and interim orders. Written evidence generally has a number of advantages over oral evidence, as it allows applicants to present information about family violence clearly; and may be less intimidating for victims than giving oral evidence. Further, respondents may be more likely to consent to protection orders where the basis of the application is set out in writing, as discussed below.

18.113 However, application forms for protection orders generally seek a range of information—not all of which is directed to establishing the basis for the application. For example, application forms, to varying degrees, seek information about the existence of orders in other jurisdictions—including parenting orders and children’s court orders—and relevant pending or current proceedings. They may also require an applicant to indicate which conditions are sought in the protection order. Therefore, it is unnecessary and undesirable to require applicants to swear or affirm the entire application form.

18.114 It is unnecessary because, to the extent that the information sought in application forms is irrelevant to the factual basis for the application, it does little to improve the evidence of family violence. In addition, to the extent that the application forms seek information that is not solely within the knowledge of the applicant—for example, the existence of orders or proceedings—there may be other mechanisms available to the court to obtain this information.<sup>117</sup> It is undesirable because it may cause applicants—for example, due to a lack of understanding of the legal system—to give incorrect or incomplete information about the existence of orders or proceedings in other jurisdictions, exposing them to penalties for making false statements.

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116 If a protection order is ultimately made by consent, the only evidence before the court may be that given to obtain an interim order and that may be oral evidence, which a respondent has not heard.

117 See Ch 30 which discusses information sharing and the establishment of a national register. See also Rec 16–11.

18.115 However, the Commissions consider that it is important that applicants swear or affirm the facts and circumstances that form the basis of their application for a protection order for the reasons set out above—principally improving the quality of evidence in protection order proceedings. Applicants are uniquely situated to give evidence about their personal experiences and the fear that has led them to seek a protection order. The Commissions, therefore, recommend that application forms should require that persons seeking protection swear or affirm a statement incorporated in, or attached to, the application form. However, the Commissions do not consider that it is necessary for this procedural requirement to be placed in state and territory family violence legislation. The Commissions consider that there should be some flexibility for courts to accept applications which do not comply with procedural requirements—especially when the person seeking protection is vulnerable.

18.116 The Commissions acknowledge that requiring applicants to swear or affirm their statements supporting their application for protection orders may increase legal costs and disadvantage unrepresented and vulnerable parties. However, the Commissions consider that these concerns are addressed, in part, by other recommendations made in this Report, including: the provision of culturally appropriate victim support services, and enhanced support for victims in high risk and vulnerable groups;<sup>118</sup> and the establishment of specialist family violence courts,<sup>119</sup> which include victim support—both legal and non-legal.<sup>120</sup>

18.117 Where a police officer makes an application on behalf of a victim of family violence, the Commissions consider that the application form should require the police officer to certify the form—although the victim should retain the option of providing a sworn or affirmed statement. Police certification may have particular relevance where the victim is a child, young person, vulnerable or otherwise unable to comply with the requirement.

**Recommendation 18–2** Application forms for protection orders under state and territory family violence legislation should require that applicants swear or affirm a statement incorporated in, or attached to, the application form, setting out the basis of the application. Where the applicant is a police officer, the application form should require the police officer to certify the form.

### **Oral evidence**

18.118 Giving oral evidence of personal details and traumatic events of family violence can be intimidating for victims, particularly in the presence of the person alleged to have used family violence or in a public courtroom. There are concerns that such fears about giving evidence mean that victims of family violence may not seek protection orders.

118 Rec 29–3.

119 Rec 20–1.

120 Rec 20–3. See also Rec 20–4.

18.119 For example, the Central Australian Aboriginal Family Legal Unit submitted that the Northern Territory requirements for protection order applicants to give oral evidence are ‘the most significant factor preventing applicants from proceeding to hearing in contested applications, despite the need for safety to be prioritised’.<sup>121</sup>

18.120 Written evidence may obviate the need for a hearing as, once the respondent has been provided with details of the complaint and supporting statements or affidavits, this can result in consent orders, saving precious court time. Further, the same material may be relied on in other proceedings, if necessary.

18.121 However, there are also some advantages in giving oral evidence, including that it may be quicker and easier for applicants than making a written statement or affidavit.<sup>122</sup> State and territory courts have also adopted a number of strategies to improve the experience of victims of family violence in protection order proceedings in view of the potential for intimidation in the face-to-face context noted above. These include the use of closed courts; closed circuit television (CCTV) and other technologies; and prohibitions on cross-examination by the respondent. This section briefly considers the desirability of adopting any of these strategies more broadly.<sup>123</sup>

#### ***Closed or open court proceedings***

18.122 Principles of open justice generally require that court proceedings should be open to the public. Accordingly, most family violence legislation contains an express or implied presumption that protection order proceedings will be held in open court. However, legislation in most jurisdictions permits or requires the court to be closed in certain circumstances, which differ across Australian jurisdictions.<sup>124</sup> For example, in protection order proceedings:

- in NSW, where a child is a person seeking protection or is a witness, the court must be closed unless the court directs otherwise;<sup>125</sup>
- in Victoria, the court may be closed, or certain people excluded, if the court considers it necessary to do so to prevent an affected family member, protected person or witness from being caused undue distress or embarrassment;<sup>126</sup>
- in Western Australia, the court must be closed if the applicant wants the first hearing of the application to be held in the absence of the respondent;<sup>127</sup>

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121 The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010.

122 Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010.

123 Aspects of some of these issues are also discussed in relation to sexual assault proceedings in Part G.

124 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 58; *Family Violence Protection Act 2008* (Vic) s 68; *Restraining Orders Act 1997* (WA) ss 26–27; *Family Violence Act 2004* (Tas) s 31(1); *Domestic Violence and Protection Orders Regulation 2009* (ACT) reg 13; *Domestic and Family Violence Act 2007* (NT) s 106. The *Intervention Orders (Prevention of Abuse) Act 2009* (SA) does not address this issue.

125 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 41.

126 *Family Violence Protection Act 2008* (Vic) s 68.

127 *Restraining Orders Act 1997* (WA) s 27.

- in the ACT, the court can order that proceedings be closed if it is in the public interest or the interests of justice to do so;<sup>128</sup> and
- in the Northern Territory, the court must be closed if the only person seeking protection is a child, or when a vulnerable witness gives evidence, unless the court directs otherwise.<sup>129</sup>

18.123 In Queensland, in contrast, legislation provides that a court hearing an application for a protection order ‘is not to be open to the public’; but ‘may open the proceedings or part of the proceedings to the public or specified persons’.<sup>130</sup>

18.124 In its review of family violence laws, the VLRC observed that protection order proceedings in closed court may ‘significantly reduce the stress of having unidentified people hearing intimate details about the parties’ family circumstances’.<sup>131</sup> On the other hand, it is important to ensure that ‘courts do not reinforce the view that family violence is a private matter’ and that ‘the system is open to public scrutiny’.<sup>132</sup> The VLRC recommended that a magistrate should have discretion to order that the court be closed for protection order proceedings, and for criminal prosecutions involving acts of family violence.<sup>133</sup>

#### ***Using CCTV in giving evidence***

18.125 Some jurisdictions provide ‘alternative’ or ‘special’ arrangements for the giving of evidence by defined categories of witness. These regimes provide a range of measures dealing with the giving of contemporaneous evidence by closed circuit television (CCTV) or video-links or the use of screening to restrict contact between parties.<sup>134</sup>

18.126 As discussed in Chapter 19, such measures are most commonly used in relation to the evidence of child witnesses or complainants in sexual assault proceedings. However, in some jurisdictions, such vulnerable witness protections extend to applicants in protection order proceedings.

18.127 For example, in Victoria, a court may direct that ‘alternative arrangements be made for a proceeding in respect of a family violence intervention order’ by, for example, permitting the use of CCTV; using screens to remove the respondent from a party’s or witness’ direct line of vision; and permitting the presence of a person providing emotional support while a party or witness gives evidence.<sup>135</sup>

18.128 In New South Wales, alternative arrangements for complainants giving evidence in sexual offence proceedings apply (with any necessary modifications) to the

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128 *Domestic Violence and Protection Orders Regulation 2009* (ACT) regs 14, 15.

129 *Domestic and Family Violence Act 2007* (NT) s 106.

130 *Domestic and Family Violence Protection Act 1989* (Qld) s 81.

131 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [11.18].

132 *Ibid.*

133 *Ibid.*, Rec 142.

134 For example, *Criminal Procedure Act 1986* (NSW) s 294B; *Criminal Procedure Act 2009* (Vic) s 13.

135 *Family Violence Protection Act 2008* (Vic) s 69.

giving of evidence in apprehended violence order proceedings,<sup>136</sup> but only if the ‘defendant in the proceedings is a person who is charged with a prescribed sexual offence’ and ‘the protected person is the alleged victim of the offence’.<sup>137</sup>

#### **Cross-examination by a person who has allegedly used violence**

18.129 Many parties to protection order proceedings represent themselves, including persons seeking protection and persons alleged to have used violence. Unless legislation provides otherwise, a person who is not represented by legal counsel may have a right to cross-examine witnesses. This can be problematic where the respondent is unrepresented and cross-examines the person seeking protection. As noted in a submission to the VLRC in its review of family violence laws in Victoria in 2006:

I have experienced [personal cross-examination by the respondent] firsthand, and can say that to be cross-examined by the respondent and to have to cross-examine the respondent myself, is not a position I would wish on anyone. I was unprepared, overwhelmed and scared of the prospect of having to look at this man, little less have to talk to him and ask/answer questions.<sup>138</sup>

18.130 The VLRC recommended that a person against whom allegations of violence have been made should not be able to cross-examine the person seeking protection, any family members of the parties, or any other person the court declares to be a ‘protected witness’ in protection order proceedings.<sup>139</sup> This recommendation was implemented in the *Family Violence Protection Act 2008* (Vic).<sup>140</sup>

18.131 There are also restrictions, in family violence legislation in Western Australia, South Australia and the Northern Territory, on personal cross-examination by those alleged to have used violence.<sup>141</sup> In these jurisdictions, the unrepresented party may submit his or her questions to the court, which the court or an authorised person will then ask the witness. Under the Victorian legislation, a court must adjourn proceedings to provide the party with a reasonable opportunity to obtain legal representation for the purpose of cross-examination.<sup>142</sup> If he or she does not obtain legal representation after being given a reasonable opportunity to do so, the court must order Victoria Legal Aid to offer legal representation for that purpose. Victoria Legal Aid is required to comply with this order.<sup>143</sup>

#### **Submissions and consultations**

18.132 In the Consultation Paper, the Commissions asked whether the provisions in state and territory family violence legislation that allow the court to hear protection

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136 Within the meaning of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW).

137 *Criminal Procedure Act 1986* (NSW) s 294B(1A).

138 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [11.27].

139 *Ibid*, Rec 143.

140 *Family Violence Protection Act 2008* (Vic) s 70.

141 *Restraining Orders Act 1997* (WA) s 44C; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 29(4); *Domestic and Family Violence Act 2007* (NT) s 114.

142 *Family Violence Protection Act 2008* (Vic) s 70.

143 *Ibid* s 71.

order proceedings in closed court are effective in protecting vulnerable applicants and witnesses.<sup>144</sup>

18.133 The Commissions also proposed that state and territory family violence legislation should prohibit a person who has allegedly used family violence from personally cross-examining, in protection order proceedings, a person against whom he or she has allegedly used family violence. The proposal stated that any person conducting such cross-examination should be a legal practitioner representing the interests of the person who has allegedly used family violence.<sup>145</sup>

#### ***Open or closed court?***

18.134 A number of stakeholders considered that current provisions that allow courts to hear protection order proceedings in closed courts were effective.<sup>146</sup> The Magistrates' Court and the Children's Court of Victoria considered that the decision about whether a court should be closed should be at the discretion of the judicial officer. Open courts were said to be important in protection order proceedings:

Open courts enable other parties to see and understand the nature of the proceedings and how the procedure works before they have to give evidence or participate in the proceedings in other ways. Open courts also facilitate community education about family violence and court processes.<sup>147</sup>

18.135 Some stakeholders expressed the view that provisions allowing closed courts were not always effective in protecting vulnerable applicants and witnesses. For example, victims may still be subject to aggressive cross-examination or verbal abuse in the court room by legal counsel and the respondent.<sup>148</sup> The Department of Premier and Cabinet (Tas) stated that, while Tasmanian legislation allows for closed courts in family violence matters, the judiciary are reluctant to use the provisions in many cases.<sup>149</sup>

18.136 National Legal Aid commented that the Queensland requirement that protection order proceedings generally be held in closed court is appropriate and works well.<sup>150</sup> The Queensland Law Society agreed that this provision has proved effective, but noted that the administration of it varies from court to court. The Queensland Law Society stated that it would not be appropriate to exclude support workers from the court.<sup>151</sup> However, Women's Legal Service Queensland observed that current practice does allow for a court assistance or other support person to be present.<sup>152</sup>

144 Consultation Paper, Questions 10–7, 10–8.

145 Ibid, Proposal 10–4.

146 Queensland Law Society, *Submission FV 178*, 25 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

147 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

148 C Pragnell, *Submission FV 70*, 2 June 2010.

149 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

150 National Legal Aid, *Submission FV 232*, 15 July 2010.

151 Queensland Law Society, *Submission FV 178*, 25 June 2010.

152 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

18.137 Women's Legal Services Australia noted as a general observation, that variations between state and territories, and within particular jurisdictions, make it difficult to gauge the effectiveness of the strategies that have been put in place for vulnerable applicants and witnesses:

In particular in rural and remote areas it is highly questionable as to whether victims of family violence are able to obtain the protections provided to vulnerable applicants and witnesses. For example, in the APY lands applications for protection orders are often heard in open court and sometimes the victim is only sitting two or three spaces away from the defendant.<sup>153</sup>

18.138 In relation to the use of CCTV and other alternative arrangements for the giving of evidence, a number of stakeholders suggested that provisions applying to sexual offence proceedings should be extended to cover protection order proceedings.<sup>154</sup> For example, Women's Legal Service Victoria stated that:

The operation of a closed or open court and victims being able to remain in a remote room for the duration of their time in court is of great assistance to clients who are very relieved such a service exists, especially where they are in grave fear of the offender.<sup>155</sup>

#### ***Restrictions on cross-examination***

18.139 A number of stakeholders supported the Commissions' proposal to prohibit personal cross-examination in protection order proceedings by a person who has allegedly used family violence.<sup>156</sup> Stakeholders expressed concern about the possible use of court processes to harass victims of family violence,<sup>157</sup> and submitted that some victims would rather not go through with getting a protection order, than be cross-

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153 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010.

154 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

155 Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

156 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; A Cannon, *Submission FV 137*, 23 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

157 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

examined in this way, in what may amount to ‘another form of psychological abuse inflicted on the victim by the perpetrator’.<sup>158</sup>

18.140 It was observed that, while ‘the questioning of vulnerable witnesses by unrepresented accused in sexual offence trials is widely recognised as unacceptable’, applications for protection orders are ‘no different in the relevant dynamics, and, may in fact involve sexual offences, making such court processes a direct comparison’.<sup>159</sup>

18.141 A number of stakeholders were concerned about the implications for the provision of legal aid of the Commissions’ proposal that only a legal representative be permitted to cross-examine the applicant;<sup>160</sup> or suggested that legal representation should not be mandatory.<sup>161</sup> Others supported the Victorian model, under which legal aid must be provided.<sup>162</sup>

#### *Commissions’ views*

18.142 In considering judicial discretion to close courts during protection order proceedings the overarching principle of open justice needs to be balanced against the purposes of the protection order regime—providing safety and protection for victims of family violence.

18.143 Where open court proceedings inhibit a victim of family violence or another witness from giving evidence, inadequate or incomplete evidence may be adduced, with repercussions for the victim, the particular proceedings and flow-on effects for related family law proceedings.

18.144 On the other hand, conducting proceedings in open court ensures that the system is open to public scrutiny, may reinforce the obligation on all witnesses to tell the truth and ensures family violence does not remain relegated to the private realm.

18.145 There is some variation in the provisions in state and territory family violence legislation regarding the power to close the court. While the grounds vary, judicial officers hearing protection order proceedings in most states and territories have a discretion to close courts. In Queensland, the starting point is that the court will be closed, unless the court orders otherwise.

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158 Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192*, 25 June 2010.

159 Confidential, *Submission FV 164*, 25 June 2010. National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010 expressed a similar view.

160 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Australian Government Attorney-General’s Department, *Submission FV 166*, 25 June 2010.

161 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

162 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

18.146 The Commissions consider the Queensland approach, on its face, as more protective of the interests of applicants in protection order proceedings and likely to lead to more hearings in closed court. However, there is currently insufficient information to compare how state and territory procedures operate in practice. In any case, there are good reasons why some protection order proceedings should be conducted in open court. Given that stakeholders have stated that existing provisions appear to be operating satisfactorily, the Commissions make no recommendation for reform.

18.147 There are good arguments, however, for extending ‘alternative’ or ‘special’ arrangements for the giving of evidence by vulnerable witnesses to witnesses who are victims of family violence, including in protection order proceedings. For example, stakeholders suggested that the relevant provisions of the *Criminal Procedure Act 1986* (NSW)<sup>163</sup> should be amended so that victims of family violence are afforded the same protection as victims of sexual assault when giving evidence in court.<sup>164</sup>

18.148 The Standing Committee of Attorneys-General (SCAG) is examining vulnerable witness protections through the SCAG National Working Group on Evidence. The Working Group is expected to consider aspects of ‘alternative’ or ‘special’ arrangements for the giving of evidence.<sup>165</sup> The Terms of Reference instruct the ALRC, in undertaking this inquiry, to be ‘careful not to duplicate ... the work being undertaken through SCAG on the harmonisation of uniform evidence laws, in particular the development of model ... vulnerable witness protections’. The Commissions suggest that this aspect of vulnerable witness protection should be considered by the Working Group.

18.149 The Commissions recognise concerns about allowing a person who has allegedly used family violence to personally cross-examine a victim of that violence. This provides an opportunity for a person to misuse legal proceedings and exert power and control over the victim of his or her family violence. Considering the nature and dynamics of family violence, this may significantly inhibit the ability of a victim, or another witness, to provide truthful and complete evidence in protection order proceedings.

18.150 State and territory family violence legislation should prohibit a person, who has allegedly used family violence, from personally cross-examining a person against whom he or she is alleged to have used family violence. Rather, if cross-examination is allowed, an unrepresented respondent should be permitted to examine the applicant through a person appointed by the court to ask questions on behalf of the respondent. This is consistent with the Commissions’ recommendations about cross-examination by unrepresented defendants in sexual assault proceedings.<sup>166</sup>

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163 *Criminal Procedure Act 1986* (NSW) s 294B.

164 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Apprehended Violence Legal Issues Coordinating Committee, *Submission FV 228*, 12 July 2010.

165 Australian Government Attorney-General’s Department, *Submission FV 166*, 25 June 2010.

166 See Rec 28–5.

**Recommendation 18–3** State and territory family violence legislation should prohibit the respondent in protection order proceedings from personally cross-examining any person against whom the respondent is alleged to have used family violence.

## Outcomes of protection order proceedings

18.151 The final section of this chapter considers three outcomes of protection order proceedings that may be particularly problematic where parties are also engaged, or likely to be engaged, in family law proceedings. These are where:

- a person seeking a protection order agrees to withdraw the application on the basis of undertakings given by the respondent to the court;
- a protection order is made by consent; and
- the respondent to an existing protection order makes a ‘cross application’ for a protection order against the person who sought the original order, resulting in mutual orders.

18.152 This section also considers provisions in state and territory family violence legislation which address the misuse of protection order proceedings—in particular, provisions to prevent vexatious litigation.

### Undertakings

18.153 A person seeking a protection order may agree to withdraw his or her application on the basis that the person against whom the protection order is sought (the respondent) provides an undertaking. An undertaking is a promise to the court that a person will do, or refrain from doing, certain things. Usually, the undertaking will include the same types of conditions and prohibitions which could have been included in the protection order had it been issued. Undertakings may either be given orally by the respondent or the respondent’s lawyer, or given in writing and signed. It is also possible for both the applicant and respondent to give undertakings to the court.

18.154 Some stakeholders expressed the view that undertakings perform an important role in protection order proceedings. For example, the Gosnells Community Legal Centre submitted that undertakings:

provide an opportunity for the parties to negotiate and resolve the matter without the need for a trial, which generally speaking is something which the victims are anxious of and keen to avoid. It also is of a benefit to the perpetrator, as it is not an order of the court; however they are still held accountable for their actions.<sup>167</sup>

18.155 However, stakeholders also expressed a number of concerns about the use of undertakings in protection order proceedings.

<sup>167</sup> Gosnells Community Legal Centre Inc, *Submission FV 56*, 31 May 2010. See also Confidential, *Submission FV 164*, 25 June 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

18.156 First, unlike breach of a protection order, breach of an undertaking is not a criminal offence and cannot be enforced.<sup>168</sup> Agreeing to an undertaking instead of pursuing an application for a protection order may, therefore, compromise the protection and safety of a victim of family violence.<sup>169</sup> For this reason, some stakeholders disagreed in principle with the idea that undertakings should be used.<sup>170</sup> Stakeholders noted that victims of family violence who have accepted an undertaking often return to court to seek a protection order because the undertaking has been breached.<sup>171</sup> In such cases, both the undertaking and the breach may be used as evidence in support of an application for a protection order.<sup>172</sup>

18.157 Secondly, there is a concern that victims of family violence may be pressured into withdrawing an application for a protection order and accepting an undertaking,<sup>173</sup> particularly where that party is unrepresented.<sup>174</sup>

18.158 Finally, the *Initiating Application (Family Law)* form, which must be completed by a person wishing to commence proceedings in a federal family court, asks if there are any existing undertakings to a court about family violence issues concerning any of the parties or children in the application.<sup>175</sup> There is, however, no obligation on parties to inform a court exercising jurisdiction under the *Family Law Act* about undertakings in relation to family violence, nor is the existence of an undertaking a specified factor to be considered when determining the best interests of a child. A number of stakeholders expressed the view that while information about undertakings is sometimes included in affidavits, federal family courts give them little weight because undertakings are not orders of a court.<sup>176</sup>

#### **Submissions and consultations**

18.159 In the Consultation Paper, the Commissions suggested measures to ensure that the applicant and respondent are both advised of the nature and effect of

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168 Confidential, *Submission FV 69*, 2 June 2010.

169 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

170 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 190*, 25 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

171 See, eg, Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Gosnells Community Legal Centre Inc, *Submission FV 56*, 31 May 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

172 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010. See also Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

173 See, eg, Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; The Central Australian Aboriginal Family Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010.

174 Confidential, *Submission FV 190*, 25 June 2010.

175 Family Court of Australia, *Initiating Application (Family Law)* <[www.familycourt.gov.au/](http://www.familycourt.gov.au/)> at 9 February 2010, pt F.

176 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

undertakings. The Commissions proposed that, before accepting an undertaking, a state or territory court should be satisfied that:

- the applicant understands the implications of withdrawing the application and relying instead on undertakings to the court by the respondent; and
- the respondent understands that, in accepting an undertaking rather than pursuing an application for a protection order, the applicant is not precluded from making a further application if the respondent does not honour the undertaking, or the applicant continues to be at risk of family violence.<sup>177</sup>

18.160 The Commissions also proposed that an undertaking should be given in writing, rather than orally to the court.<sup>178</sup> This would allow both parties to keep a copy of the undertaking, reducing the potential for ambiguity or confusion about the scope or content of the undertaking.

18.161 Stakeholders recognised that, in many cases, undertakings perform an important role in protection order proceedings. Most stakeholders agreed with the Commissions' proposals to ensure both parties are advised of the nature and effect of undertakings.<sup>179</sup>

18.162 A number of stakeholders emphasised the importance of ensuring that parties, particularly unrepresented parties, understand the implications of giving and accepting an undertaking.<sup>180</sup> For example, Legal Aid NSW and the Women's Domestic Violence Court Advocacy Service Network commented:

If undertakings are proposed all parties should be properly and appropriately informed of the limitations of undertakings compared to protection orders and the lack of consequences of any breach. Specifically, the court should reinforce to the applicant

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177 Consultation Paper, Proposal 10–2.

178 Ibid, Proposal 10–2.

179 WESNET—The Women's Services Network, *Submission FV 217*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; A Harland, *Submission FV 80*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

180 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

that they have a right to seek a protection order rather than accepting an undertaking.<sup>181</sup>

18.163 Some stakeholders submitted that family violence legislation should be amended to require judicial officers to explain the effect of undertakings and to require undertakings to be in writing.<sup>182</sup> The Queensland Law Society supported this proposal, provided judicial discretion to refuse to accept an undertaking was maintained. It suggested information about how to deal appropriately with undertakings could be included in judicial bench books, rather than formalising the process for undertakings in legislation.<sup>183</sup>

18.164 Other stakeholders suggested that the provision of legal and non-legal support services at court would help parties understand undertakings.<sup>184</sup> Domestic Violence Victoria and others submitted that:

Providing information to an applicant about the implications of a decision to accept an undertaking is critical and is best provided by appropriate support at court. However, clear written material can also assist applicants (and non-legal support workers) to understand the impact of accepting an undertaking.<sup>185</sup>

18.165 Two stakeholders suggested that there should be a standard form for written undertakings, which sets out information about undertakings and includes a space for parties to sign to acknowledge that they understand the effect of the undertaking.<sup>186</sup> The Magistrates' Court and Children's Court of Victoria explained that:

The Courts have developed a form of written undertaking which identifies that an undertaking is not the same as an intervention order and cannot be enforced by police. This has been operating for many years and has improved the community's understanding of the limited value of undertakings.<sup>187</sup>

18.166 A number of stakeholders emphasised the need to ensure that undertakings are only offered and accepted in appropriate cases—that is, where there is a low possibility of a later breach of the undertaking. They emphasised that, where there is a pattern of family violence, an undertaking may not be appropriate and the victim should receive support to seek a protection order.<sup>188</sup>

181 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

182 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

183 Queensland Law Society, *Submission FV 178*, 25 June 2010.

184 Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 71*, 1 June 2010.

185 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

186 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Confidential, *Submission FV 183*, 25 June 2010.

187 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

188 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010.

18.167 Finally, stakeholders in the Northern Territory emphasised the usefulness of undertakings in protecting victims of family violence. In particular, respondents often fear that a protection order will result in the loss of their gun licence, making them more likely to oppose a protection order, and more willing to agree to undertakings.<sup>189</sup>

#### *Commissions' views*

18.168 Undertakings given in protection order proceedings may form part of the factual circumstances and evidence of family violence that should be considered by the family court. In Chapter 17, the Commissions recommend that the *Family Law Act* should be amended to require a court to consider any family violence—including evidence given, or findings made, in relevant protection order proceedings—when determining what is in the best interests of the child.<sup>190</sup> This requirement would include evidence that undertakings about family violence were given to a court in protection order proceedings. The weight to be given to an undertaking in such cases would be determined by the federal family court in all the circumstances of the case.

18.169 The Commissions recognise that a victim of family violence may wish to avoid a contest in court and may therefore agree to withdraw his or her application for a protection order on the basis that the respondent gives an undertaking not to engage in family violence or other proscribed conduct. In such cases, the Commissions consider that it is essential that both parties understand the effect of the undertaking. In particular, it is important that the parties understand that breach of an undertaking is not a criminal offence and cannot be enforced by police. Further, the respondent should also understand that, in accepting an undertaking rather than pursuing an application for a protection order, the applicant is not precluded from making a further application if the respondent does not honour the undertaking, or the applicant continues to be at risk of family violence.

18.170 In the Commissions' view, the most effective way to ensure that parties are advised of these matters is to require that undertakings be given in writing on a standard form. The form should clearly set out the effect of an undertaking and require both the applicant and the respondent to state that they agree to the specific undertaking and acknowledge the nature and effect of an undertaking to the court.

18.171 Requiring that the undertaking be given in writing, rather than orally to the court, also means that both parties can have a copy of the undertaking which reduces the potential for ambiguity or confusion about the scope or content of the undertaking. A requirement that undertakings be given in writing also facilitates consideration of the undertaking by federal family courts, in that it can easily be attached to an application or affidavit given in family law proceedings.

18.172 The Commissions do not consider it strictly necessary for this requirement to be set out in family violence legislation in each state and territory. The objectives could also be achieved by amendments to court rules, practice notes or bench books, or by

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189 Domestic Violence Legal Service, *Consultation*, Darwin, 26 May 2010.  
190 Rec 17–1.

providing a standard form of written undertaking to parties and their legal representatives.

18.173 Stakeholders have expressed concerns that undertakings are only accepted by courts in appropriate circumstances—such as where there is an isolated incidence of family violence, or a low possibility that the undertaking will be breached—and where there is no undue pressure or intimidation by the respondent. In addition to ensuring that parties have access to appropriate legal advice and support, education and training for judicial officers about the nature of family violence and the appropriate use of undertakings to the court in family violence matters<sup>191</sup> would help address this concern.

**Recommendation 18–4** State and territory courts should require that undertakings by a person against whom a protection order is sought should be in writing on a standard form. The form should require each party to sign an acknowledgment that he or she understands that:

- (a) breach of an undertaking is not a criminal offence nor can it be otherwise enforced;
- (b) the court's acceptance of an undertaking does not preclude further action by the applicant to address family violence; and
- (c) evidence of breach of an undertaking may be used in later proceedings.

### Protection orders made by consent

18.174 All state and territory family violence legislation includes provisions that allow a court to make a final protection order where the applicant and the respondent consent to the order.<sup>192</sup> These provisions generally provide that:

- if the order is made by consent, the court is not required to make any findings as to whether the grounds for making the order are satisfied—for example, that there has been a particular act of family violence; and
- a court can make an order on the basis that the respondent disputes some or all of the allegations made in the application—that is, ‘without admissions’.<sup>193</sup>

18.175 It is important to note, however, that a court is not obliged to make a protection order simply because the parties have consented to that order—for example,

<sup>191</sup> Including through the family violence bench book recommended in Ch 31.

<sup>192</sup> Generally, only a court may make a final protection order by consent. The exception is *Domestic and Family Violence Act 2007* (NT) s 38, which allows a court or clerk to make a final order.

<sup>193</sup> *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 78; *Family Violence Protection Act 2008* (Vic) s 78; *Restraining Orders Act 1997* (WA) s 43(2); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 23(3); *Family Violence Act 2004* (Tas) s 22; *Domestic Violence and Protection Orders Act 2008* (ACT) s 43; *Domestic and Family Violence Act 2007* (NT) s 38. There are some variations across the jurisdictions. In particular, *Restraining Orders Act 1997* (WA) s 43(3) specifies that ‘consent does not constitute an admission by the respondent of all or any of the matters alleged in the application’.

a court may refuse to make an order if it believes that the order may pose a risk to the safety of one of the parties or a child.<sup>194</sup>

18.176 Stakeholders expressed particular concerns about the interaction between protection orders made by consent and federal family law proceedings. As discussed above, s 60CC(3)(k) of the *Family Law Act* requires a federal family court, when determining what is in the best interests of a child, to consider any protection order that applies to the child or a member of the child's family, but only if the protection order is a final order or its making was contested.

18.177 Where a final protection order is made by consent, it will fall within the kinds of protection orders that may be considered by a federal family court under s 60CC of the *Family Law Act*. While the Explanatory Memorandum to the 2006 amendments, which introduced the provision, stated that the intention of the provision was 'to ensure that the court does not take account of uncontested' protection orders,<sup>195</sup> the words of s 60CC(3)(k)—which direct a court to consider a protection order if 'the order is a final order; or the making of the order was contested by a person'—arguably suggest otherwise as a consent order is a final order. However, it has been suggested that protection orders made by consent, particularly consent without admissions, may be understandably seen to have less weight when it comes to proving allegations of family violence in family law proceedings.<sup>196</sup>

18.178 A number of factors contribute to the fact that a large percentage of protection orders are made by consent, and commonly by consent without admission of liability.

18.179 By consenting to a protection order, both parties may avoid having to attend a contested hearing before a magistrate, often on another day, and ensure that an order is in place to protect the person from family violence within a short period of time.<sup>197</sup> This benefits the parties as well as the court, as matters are resolved quickly and without the need for further hearings.

18.180 Further, by making a protection order by consent without admissions, the respondent can consent to the protection order being in place without admitting to any of the allegations made against him or her. This protects the respondent's legal rights with respect to other legal proceedings, both criminal and civil, in which he or she may be involved. Sometimes the respondent may consent without admissions to a protection

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194 In Victoria, this discretion is set out in legislation: *Family Violence Protection Act 2008* (Vic) s 78(5). Additionally, even where the parties consent, the decision to make an order is a matter for judicial discretion. See for example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 78.

195 Explanatory Memorandum, Family Law Amendment (Shared Parental Responsibility) Bill 2005 (Cth), [67].

196 L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies, app E; see also R Hunter, *Domestic Violence Law Reform and Women's Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (2008), 98.

197 However, in some jurisdictions even where the parties consent, before making an order the court may conduct a hearing in relation to the application/s. See for example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 78 and *Family Violence Protection Act 2008* (Vic) s 78.

order in circumstances where there are no potential legal proceedings. One stakeholder noted that:

Situations arise where defendants do not agree with the facts as portrayed by the applicant, but are happy to stay away. In this case, accepting the terms of the restraining order, while making a public statement that they are not guilty of any of the behaviours justifying it, is a happy compromise for both parties.<sup>198</sup>

18.181 Similar considerations may inform a decision to consent to a protection order in a situation where protection orders are made against both parties as the result of a cross-application.

18.182 In addition to the limited evidentiary value such orders have in family law proceedings, there are some drawbacks to the practice of making consent orders without admissions. In particular, the Commissions have heard throughout this Inquiry that an applicant for a protection order may rarely be given an opportunity to oppose the order being made without admissions. This means that the applicant loses the opportunity to put detailed evidence before the court and for the court to make findings of family violence. Professor Rosemary Hunter has noted that this means there are few findings by the courts that allegations of family violence are true. In her view, this ‘lack of institutional affirmation of women’s stories of abuse’ reinforces notions that women invent or exaggerate allegations of family violence and use the legal system for collateral purposes.<sup>199</sup>

18.183 Hunter also expressed concerns about courts relying on consent in the context of family violence which is characterised by the exercise of power and control by one partner over the other.<sup>200</sup> The consent of the applicant is particularly relevant where the person against whom the order is to be made seeks to vary the terms of the order. In such circumstances, courts should not assume that the parties have equal negotiating power, or that intimidation or threats will not influence the consent given by a victim of family violence.

#### ***Submissions and consultations***

18.184 In the Consultation Paper, the Commissions proposed several options to improve the scrutiny and quality of the processes by which protection orders are made by consent. The Commissions proposed that state and territory family violence legislation should place an obligation on judicial officers, when making orders by consent, to ensure that:

- the notation on protection orders and court files specifically states that the order is made by consent ‘without admission as to criminal liability of the allegations in the application for the protection order’;

198 Confidential, *Submission FV 164*, 25 June 2010.

199 R Hunter, *Domestic Violence Law Reform and Women’s Experience in Court: The Implementation of Feminist Reforms in Civil Proceedings* (2008), 97.

200 Ibid, 95.

- the applicant has an opportunity to oppose an order being made by consent without admissions;
- the order gives attention to the safety of victims and, if appropriate, requires that a written safety plan accompanies the order; and
- the parties are aware of the practical consequences of consenting to a protection order without admission of liability.<sup>201</sup>

18.185 While some submissions expressed support for the proposal in general,<sup>202</sup> a number of stakeholders commented separately on specific aspects of the proposal.

***'By consent and without admission' notation***

18.186 A number of stakeholders supported the proposal that the notation on protection orders specifically state that the order is made by consent 'without admission as to criminal liability of the allegations in the application for the protection order'.<sup>203</sup> For example, Women's Legal Service Victoria submitted that:

Even [in] instances where a person has been apprehended by police due to very serious injury to the victim, the offender usually resolves the matter by consent without admissions. In almost all instances, orders are made by consent without admissions and the Magistrate will not probe further. It is our view that such orders should instead be made by consent without admissions as to criminal liability. That way, it is clear to future judicial officers in other jurisdictions that that the offender is not denying the fact of family violence but is seeking to protect himself from criminal liability.<sup>204</sup>

18.187 However, the Magistrates' Court and Children's Court of Victoria noted that respondents may also be liable for civil compensation and, as such, the 'without admissions' notation cannot be limited to criminal proceedings.<sup>205</sup> Similarly, protection orders made by consent without admissions are made in a range of circumstances other than where there are potential criminal charges.<sup>206</sup>

201 Consultation Paper, Proposal 10–1.

202 National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010; Confidential, *Submission FV 105*, 6 June 2010; A Harland, *Submission FV 80*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

203 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

204 Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

205 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

206 Confidential, *Submission FV 164*, 25 June 2010.

***Opportunity to oppose the order being made by consent***

18.188 Some stakeholders emphasised the importance of victims having an opportunity to oppose a protection order being made by consent without admissions, and submitted that an applicant may have strong evidence of family violence and should be given the opportunity to present it to the court. These stakeholders supported the view that a federal family court, when considering parenting orders, should look behind the protection order to the factual circumstances of family violence, rather than be limited by concerns about whether the order was made by consent or consent without admissions.<sup>207</sup>

18.189 The Local Court of NSW submitted that parties may still bring some matters before the court, even where the order is made by consent. It noted that NSW family violence legislation allows a court to make orders by consent,

while still enabling the court to conduct a hearing as to the particulars of the application if required in the interests of justice. A situation that often arises is where a defendant consents to the making of an order, but there is some disagreement as to the appropriate conditions.<sup>208</sup>

18.190 A number of stakeholders expressed concerns about providing applicants with an opportunity to oppose the protection order being made by consent. In particular, some stakeholders identified practical and resource implications of greater judicial scrutiny in magistrate's courts. For example, the Law Society of NSW submitted:

An order made by consent without admissions is one means of getting a quick and acceptable result for the parties and the courts. To be able to set such matters down for hearing will test the resources of the courts, increase delays for litigants and hence potentially increase tensions in family situations. The object of reducing family violence would not be served by this proposal.<sup>209</sup>

18.191 While the Magistrates' Court and Children's Court of Victoria also recognised the considerable resource implications associated with the proposal, the Courts accepted that applicants should be allowed this option.<sup>210</sup> The Aboriginal Family Violence Prevention and Legal Service Victoria noted that, in practice, it would be difficult to get legal aid funding to contest a protection order on this basis.<sup>211</sup>

18.192 In addition, the Department of Premier and Cabinet (Tas) considered that the proposal was 'problematic' because 'the benefit of requiring the State courts to have the hearing when the factual determination is really something wanted in another

207 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

208 Local Court of NSW, *Submission FV 101*, 4 June 2010.

209 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

210 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

211 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

proceeding may be seen as a cost-shifting exercise'.<sup>212</sup> Stakeholders also queried whether it would be warranted to spend additional court time hearing opposition to orders where immediate safety concerns are being met by the orders.<sup>213</sup>

#### ***Ensuring the order gives attention to the safety of the victim***

18.193 While supporting the need to ensure that the protection order adequately protects the applicant from the risk of family violence, some stakeholders queried the role of a safety plan in consent orders. A number of stakeholders submitted that, because the conditions in the protection order are designed to protect the applicant's safety, a separate safety plan is unnecessary.<sup>214</sup> Others considered that while there may be value in a safety plan, its preparation may delay the process of issuing a protection order.<sup>215</sup>

18.194 The Magistrates' Court and Children's Court of Victoria noted that 'many safety plans will not be effective if their contents are known to the respondent' and considered that it may be more appropriate to enable the court to direct the preparation of a safety plan without a requirement for the plan to accompany an order.<sup>216</sup>

18.195 The Shoalcoast Community Legal Centre questioned whether a judicial officer should be involved in the preparation of a safety plan and submitted it may be a task better performed by a support service with properly trained staff on the basis that it would require extensive case management and training to work with a victim to determine the complexities of a safety plan.<sup>217</sup>

#### ***Explanation of the consequences of consent without admissions***

18.196 A number of stakeholders stated that there is value in requiring judicial officers to explain to the parties the practical consequences of consent without admission of liability.<sup>218</sup> The Queensland Law Society submitted that it is particularly important for judicial officers to explain the practical consequences of consenting to a protection order without admission of liability to an unrepresented party. It noted that judicial officers and magistrates as well as police prosecutors regularly explain the consequences of consenting to protection orders to respondents.<sup>219</sup>

18.197 The Local Court NSW noted that s 76 of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW) requires judicial officers to explain the effect and

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212 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

213 Ibid; National Legal Aid, *Submission FV 232*, 15 July 2010.

214 See, eg, Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010, Local Court of NSW, *Submission FV 101*, 4 June 2010.

215 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

216 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

217 Shoalcoast Community Legal Centre, *Submission FV 141*, 24 June 2010.

218 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

219 Queensland Law Society, *Submission FV 178*, 25 June 2010.

consequences of the protection order and the rights of the parties to the defendant and the protected person when making the order.<sup>220</sup> It added that:

In determining how a matter is to proceed, it is also commonplace for magistrates to explain the option of consenting without admission to the parties. However, the main shortcoming with these measures is that a defendant or protected person may not be in attendance when an order is made, with the consequences that magistrates are not able to ensure that the parties are informed of the matters set out in s 76.<sup>221</sup>

18.198 Conversely, Anita Brunacci submitted that advice in relation to the practical consequences of ‘without admissions’ orders is not the place of the court and could be seen as a matter for the provision of legal advice.<sup>222</sup>

#### ***Other implications of the proposal***

18.199 Some stakeholders noted that consent orders are an important option for victims of family violence and that care should be taken not to compromise the accessibility and effectiveness of consent orders. For example, the Local Court NSW noted the possible consequences of making protection orders by consent without admission, including the potential impact upon family law proceedings, but considered, on balance, that:

the making of orders by consent without admission can be beneficial to both parties. Having regard to the often volatile nature of protection order proceedings, being able to make an order by consent without admission results in a reduction of contested applications and whilst enabling conditions to be imposed for the protection of the protected person.<sup>223</sup>

18.200 Brunacci submitted that the most important aspect of state and territory family violence legislation is obtaining protection for victims of family violence:

The prevailing principles of state family violence legislation are the protection of victims of family violence or those with fear of future violence stemming from a change in a significant relationship. The option of orders made ‘without admissions’ allows for the principle of the legislation to be exercised without undue strain on the court system.<sup>224</sup>

18.201 Another stakeholder noted that it may be more difficult to get parties to agree to consent orders if those orders can be used to imply the presence of violent behaviour for the purposes of family law matters.<sup>225</sup> An approach that focuses on family court processes, such as screening for family violence, as recommended by the Chisholm Review, was preferred—rather than burdening the protection order regime:

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220 This is the case in most jurisdictions. See, eg, *Family Violence Protection Act 2008* (Vic) ss 57, 96; *Domestic and Family Violence Protection Act 1989* (Qld) ss 14A, 50; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 17; *Restraining Orders Act 1997* (WA) s 8; *Domestic Violence and Protection Orders Act 2008* (ACT) ss 84, 85; *Domestic and Family Violence Act 2007* (NT) s 89.

221 Local Court of NSW, *Submission FV 101*, 4 June 2010.

222 A Brunacci, *Submission FV 97*, 4 June 2010.

223 Local Court of NSW, *Submission FV 101*, 4 June 2010.

224 A Brunacci, *Submission FV 97*, 4 June 2010.

225 Confidential, *Submission FV 164*, 25 June 2010.

The process for obtaining [protection orders] occurs in a chaotic and crowded courtroom, often with a huge list and limited time. [Protection orders] are a simple and expedient process to ensure individuals receive the protection they need quickly, simply and inexpensively. It would be a mistake to burden this process with too much complexity, or to give its outcomes far reaching ramifications beyond the issue at hand.<sup>226</sup>

### ***Commissions' views***

18.202 In the Commissions' view, the ability to make protection orders by consent is important to the effective operation of state and territory family violence regimes and to facilitate access to legal responses to family violence. In many instances, a consent order can be obtained to protect applicants from the risk of family violence without the need for a formal contested hearing. This avoids the stress and costs associated with court hearings, while achieving the key purpose of family violence legislation—the protection of persons from family violence.

18.203 It is not necessary or appropriate to add procedural steps to the protection order process solely in order to improve the evidentiary value of protection orders in subsequent family law proceedings and other recommendations have been made in this regard. A protection order made by consent remains a court order. Many people who seek a protection order will never need to consider family law proceedings—either because they are not in a married or in a de facto relationship with the person who has used violence or because issues that require resolution by family courts do not arise.

18.204 The Commissions consider that it is preferable to amend the *Family Law Act* to address concerns that protection orders made by consent, and consent without admissions, are not appropriately considered by federal family courts when making parenting orders. In Chapter 17, the Commissions recommend amendments to the *Family Law Act* so that, when determining what is in the best interests of a child, federal family courts in considering any protection order that applies to the child or member of the child's family should focus on the factual circumstances of family violence behind that order—the evidence of family violence given, or findings made, in relevant family violence protection order proceedings.<sup>227</sup> Clarifying the *Family Law Act* in this way will address the perception that consent orders are irrelevant to determining the best interests of the child, and focus attention instead on the evidence of family violence behind the protection order.

18.205 Further, while some of the options proposed in the Consultation Paper were supported, none were without problems. In particular, the Commissions do not consider that it is appropriate or feasible to limit the 'without admissions' to criminal liability notation, because respondents should also be able to contest allegations in civil proceedings.

18.206 Providing an opportunity for applicants to oppose the making of the order by consent also risks protection order proceedings being used for purposes other than to

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226 Ibid.

227 Rec 17–1.

secure the safety of victims of family violence. If the parties cannot agree that an order should be made, or upon what conditions, or there is a concern that the parties cannot give free and informed consent to the order, the court will need to determine the matter. For example, if there is a concern that the conditions in the order are not adequate to protect the applicant from the risk of family violence, the matter may need to proceed to a hearing. Requiring courts to determine whether there has been family violence or if there is a risk of family violence in circumstances where such findings are not required would have significant resource implications and place a heavy burden on state and territory courts, and the parties to protection order proceedings themselves.

18.207 Finally, while there are benefits in requiring courts to advise parties of the effect and consequences of a consent order, family violence legislation in most states and territories already requires courts to explain the nature and effect of the protection order to the parties. In light of the amendments to the *Family Law Act* recommended in Chapter 17, the Commissions do not consider that it is necessary for judicial officers in state and territory courts to comment on the possible effect of making a protection order by consent on concurrent or pending family law proceedings.

### Cross applications and mutual protection orders

18.208 A cross application is an application for a protection order made by the respondent to a current application against the person seeking the original protection order. While cross applications may be brought in legitimate circumstances—for example where both parties have engaged in violent conduct and there is a risk that the same or other family violence will be repeated—there is a concern that cross applications are often brought as a tactic or bargaining tool in existing protection order proceedings or anticipated family law matters, rather than because a person feels at risk of family violence.<sup>228</sup>

18.209 Cross applications brought in such circumstances raise a number of issues with respect to the safety of a victim of family violence and the inappropriate use of legal proceedings. In some cases, a cross application can be used to coerce or pressure a victim of family violence into withdrawing his or her original application.<sup>229</sup>

18.210 In other cases, a cross application may pressure the victim of family violence into consenting to mutual protection orders—that is, where the court makes protection orders that restrict the behaviour of both parties. Mutual orders have been criticised on the basis that they do not promote responsibility and accountability for those who use family violence and are difficult for police to enforce.<sup>230</sup>

18.211 In order to address some of these concerns, the VLRC, in its review of family violence laws, stated that legislation should limit the ability to make mutual

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228 J Wangmann, “She Said …” “He said …” : Cross Applications in NSW Apprehended Domestic Violence Order Proceedings’, *Thesis*, University of Sydney, 2009, 232–239; Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [8.81].

229 J Wangmann, “She Said …” “He said …” : Cross Applications in NSW Apprehended Domestic Violence Order Proceedings’, *Thesis*, University of Sydney, 2009, 233.

230 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [8.91].

protection orders by consent. It also recommended that mutual protection orders should not be made unless the court is satisfied that there are sufficient grounds for making orders against each party on the basis that each party has committed family violence.<sup>231</sup> Similarly, in the Consultation Paper, the Commissions proposed that state and territory family violence legislation should provide that mutual protection orders may only be made by a court where it is satisfied of the grounds for making a protection order against each party.<sup>232</sup>

### ***Submissions and consultations***

18.212 In response to the Consultation Paper proposal, many stakeholders agreed that state and territory family violence legislation should provide that mutual protection orders should only be made where the court is satisfied that there are grounds for making a protection order against each party.<sup>233</sup>

18.213 In supporting the proposal, Legal Aid NSW noted that:

Too often mutual protection orders are offered as a resolution to the matter at court to appease the defendant without considering the merit of their application. Our experience is that defendants often rely on cross-applications to further harass and threaten the victim and pressure them into withdrawing the initial application.<sup>234</sup>

18.214 The Aboriginal Family Violence Prevention and Legal Service Victoria also supported the proposal, on the basis that:

To resolve applications victims may consent to mutual orders which then tends to minimise the family violence which was the subject of the initial application and which allows ongoing controlling behaviour by the perpetrator.<sup>235</sup>

18.215 Professor Julie Stubbs submitted that it is especially important to ensure that parties are aware of the practical consequences of consenting to protection orders where such orders are made against both parties as a result of cross applications:

231 Ibid, Rec 88.

232 Consultation Paper, Proposal 10–5.

233 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Inner City Legal Centre and The Safe Relationships Project, *Submission FV 192*, 25 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; A Harland, *Submission FV 80*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

234 Legal Aid NSW, *Submission FV 219*, 1 July 2010. Also Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

235 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

It is a concern that in some circumstances the person who appears most in need of protection consents to having an order made against them in order to also achieve an order against the other party, without full understanding of the ramifications of this (eg criminal charges on breach and how the existence of an order might be construed in family law proceedings).<sup>236</sup>

18.216 Stubbs considered, however, that the proposal may simply restate the existing legal position. She suggested that other measures, such as education and training for judicial officers, police, lawyers and court staff may also be required.<sup>237</sup>

18.217 Women's Legal Services NSW did not support the proposal, submitting that:

Each application should be considered on its merits and any variety of outcomes are possible upon evidence being heard. Courts are already required to be satisfied that there are grounds for making a protection order against a party, in the context of mutual and individual protection orders. The criteria for mutual or cross protection orders should be, and are, the same as for an individual protection order.<sup>238</sup>

18.218 Wangmann noted that the most concerning problem with cross applications was not so much the making of mutual orders, but rather that cross applications pressured victims of family violence to withdraw their applications entirely. She noted that her study of cross applications in NSW courts found that when cross applications were heard separately (usually because of a time gap between the applications) it generally resulted in only one person obtaining a protection order while the other person was unsuccessful. In contrast, when applications were heard together there appeared to be an approach that dealt with them as a 'pair' resulting in the same outcome (mutual withdrawal or mutual protection orders).<sup>239</sup> Wangmann submitted that:

there needs to be some direction to examining each claim separately and considering separate outcomes. This does not necessarily mean separate listing (which can be very resource intensive for cases that may be contesting the same incident), but a direction to consider the separate and individual nature of each claim.<sup>240</sup>

18.219 This idea was reflected in submissions that noted that it would assist if courts were better able to identify the 'primary aggressor'.<sup>241</sup>

### ***Commissions' views***

18.220 While cross applications can be made for legitimate reasons, the concerns expressed by stakeholders about the misuse of cross applications suggest that some reforms are required. The Commissions consider that safeguards are necessary to prevent the misuse of cross applications for protection orders where cross applications

236 J Stubbs, *Submission FV 186*, 25 June 2010.

237 Ibid.

238 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

239 J Wangmann, *Submission FV 170*, 25 June 2010; J Wangmann, "She Said ..." "He said ..." : Cross Applications in NSW Apprehended Domestic Violence Order Proceedings', *Thesis*, University of Sydney, 2009, 231.

240 J Wangmann, *Submission FV 170*, 25 June 2010.

241 Confidential, *Submission FV 190*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

are made for tactical reasons—for example, to pressure the original applicant into withdrawing that application, to agree to mutual protection orders, or to affect family law proceedings.

18.221 The Commissions agree with the approach recommended by the VLRC to place restrictions on making mutual protection orders by consent, requiring cross applications to be considered by a court, and that mutual protection orders be made only where the court is satisfied that there are sufficient grounds for making a protection order against each party. This approach would mean that the court considers the claims made in each application separately and on its merits, identifying and responding to the individual requests for protection.

18.222 While this recommendation does not directly address the situation where a cross application made without grounds pressures a victim of family violence to withdraw his or her application altogether, consideration of abuse of the legal system is discussed below in relation to vexatious proceedings.

**Recommendation 18–5** State and territory family violence legislation should provide that:

- (a) mutual protection orders should not be made by consent; and
- (b) a court may only make mutual protection orders where it is satisfied that there are grounds for making a protection order against each party.

## Vexatious proceedings

18.223 Vexatious proceedings are legal proceedings brought or continued without reasonable grounds or for wrongful purposes—such as to harass or annoy the other party, or to cause delay or detriment.

18.224 Vexatious litigation may arise in a number of ways in protection order proceedings. For example, repeated applications for a protection order may be made against the same person based on the same or similar allegations and by the respondent to vary or revoke a protection order. Cross applications for protection orders may also be made without legal grounds.

18.225 While such applications may not, in themselves, be vexatious, where they are repeated or made without legal grounds, concerns arise that people who have committed family violence may use the legal system to further harass, control and abuse the victim.<sup>242</sup>

### *Vexatious applications for protection orders*

18.226 Courts can deal with vexatious litigation using a range of provisions in family violence legislation, other legislation or rules of court that deal with vexatious

<sup>242</sup> See, eg, Law Reform Committee—Parliament of Victoria, *Inquiry into Vexatious Litigants* (2008), 59; B Paxton, ‘Domestic Violence and Abuse of Process’ (2003) 17(1) *Australian Family Lawyer* 7, 7.

court proceedings. While legislation differs across jurisdictions, it generally allows courts to dismiss vexatious applications<sup>243</sup> and award costs against a person who has brought a vexatious application.<sup>244</sup>

18.227 Family violence legislation in New South Wales and South Australia allows a court to dismiss an application on the grounds that it is frivolous, vexatious, without substance or has no reasonable prospect of success.<sup>245</sup> In other jurisdictions, court rules generally allow courts to stay or dismiss vexatious applications.<sup>246</sup>

18.228 While dismissing the application and awarding costs may deal with a particular vexatious application, these measures do not prevent a person making further vexatious applications that harass the other party and abuse court processes. As a result, legislation in some jurisdictions allows a court to declare a particular person to be a vexatious litigant, with the effect that that person may not commence new proceedings without leave of the court.

18.229 The *Family Violence Protection Act 2008* (Vic) is the only state or territory family violence legislation that permits the court to make orders with respect to vexatious litigants. The Act allows the Attorney-General, a person against whom the applications have been made, or a person with leave of the court, to apply for an order declaring a person to be a vexatious litigant.<sup>247</sup> The Chief Magistrate, Deputy Chief Magistrate or the President of the Children's Court may make such an order, if satisfied that the person has 'habitually, persistently and without reasonable ground instituted proceedings under this Act against the same person'.<sup>248</sup> A person declared to be a vexatious litigant cannot make an application for an order, cross application, variation, revocation or extension of an order, without leave of the court. The Act also includes provisions to allow a person who has been declared a vexatious litigant to appeal that decision.<sup>249</sup>

18.230 In Queensland and Western Australia, the relevant magistrates' courts have a general power to prohibit a person from commencing certain proceedings without leave

243 Family violence legislation in NSW and SA allows a court to dismiss an application on the grounds that it is frivolous, vexatious, without substance or has no reasonable prospect of success: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 53; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 21(3)(b). In other jurisdictions, rules of court generally allow courts to stay or dismiss vexatious applications: see, eg, *Magistrates Court Civil Procedure Rules 2009* (Vic) rr 9A.01, 9A.02; *Uniform Civil Procedure Rules 2005* (Qld) r 389A; *Court Procedure Rules 2006* (ACT) r 1147.

244 Family violence legislation in all jurisdictions except SA allows a court to make a costs order against a person who has made a vexatious application: *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 99(3); *Family Violence Protection Act 2008* (Vic) s 154; *Domestic and Family Violence Protection Act 1989* (Qld) s 61; *Restraining Orders Act 1997* (WA) s 69; *Family Violence Act 2004* (Tas) s 34; *Domestic Violence and Protection Orders Act 2008* (ACT) s 117; *Domestic and Family Violence Act 2007* (NT) s 91. In SA, the relevant provisions are contained in the *Summary Procedure Act 1921* (SA) s 189.

245 See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 53; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 21(3)(b).

246 See, eg, *Magistrates Court Civil Procedure Rules 2009* (Vic) rr 9A.01, 9A.02; *Uniform Civil Procedure Rules 2005* (Qld) r 389A; *Court Procedure Rules 2006* (ACT) r 1147.

247 *Family Violence Protection Act 2008* (Vic) s 189.

248 *Ibid* s 193(1).

249 *Ibid* s 195.

of the court.<sup>250</sup> In other states and territories, rules of court or legislation governing vexatious proceedings permit only supreme courts to declare a person to be a vexatious litigant, or to require that a person seek leave before commencing further legal proceedings.<sup>251</sup>

#### ***Applications to vary or revoke protection orders***

18.231 In addition to concerns about vexatious applications, there are also concerns that some respondents make repeated applications to vary or revoke a protection order as a way to harass or intimidate a person who has obtained a protection order against him or her. State and territory family violence legislation contains differing procedures to vary or revoke a protection order, depending on whether the order was issued by a court or by police. This section is concerned only with protection orders made by a court.

18.232 State and territory family violence legislation generally provides that a court may vary or revoke a protection order. The most common ground for doing so is where the court is satisfied that there has been a change in circumstances since the original order was made.<sup>252</sup>

18.233 In South Australia, legislation specifically provides that the court has the power to dismiss an application to revoke or vary a protection order, without receiving evidence or submissions from the protected person, if the application is frivolous or vexatious.<sup>253</sup>

18.234 Family violence legislation in Victoria, Western Australia and the Northern Territory requires a respondent to seek leave of the court before making an application to vary or revoke a protection order.<sup>254</sup> The Victorian legislation implemented a recommendation made in the VLRC's review of family violence laws, which considered that the requirement to seek leave was

a necessary safeguard against court processes being used as a form of further abuse. It will ensure that a protected person only needs to attend court to defend the application where the respondent has demonstrated to a magistrate that there may be grounds for granting the application.<sup>255</sup>

18.235 When seeking to vary or revoke a protection order under the *Family Violence Act 2004* (Tas), both the original applicant and the respondent are required to seek leave in relation to protection orders made by a court, as opposed to police-issued

250 *Uniform Civil Procedure Rules 2005* (Qld) s 389A; *Vexatious Proceedings Restriction Act 2002* (WA) s 4.

251 *Vexatious Proceedings Act 2008* (NSW) s 8 (this Act also confers power on the Land and Environment Court and Industrial Court); *Supreme Court Civil Procedure Act 1932* (Tas) s 194G; *Supreme Court Act 1933* (ACT) s 67A; *Vexatious Proceedings Act 2006* (NT) s 7.

252 See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 73(3); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 26(4)(b); *Domestic Violence and Protection Orders Act 2008* (ACT) s 59(2)(a)(i) (interim orders only).

253 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 26(4)(a).

254 *Family Violence Protection Act 2008* (Vic) s 109; *Restraining Orders Act 1997* (WA) s 46; *Domestic and Family Violence Act 2007* (NT) s 48(3).

255 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), [10.42].

protection orders.<sup>256</sup> There are no similar requirements in other family violence legislation.

### **Submissions and consultations**

18.236 In the Consultation Paper, the Commissions considered several measures to address the problem of vexatious litigation in protection order proceedings. The Commissions asked whether state and territory family violence legislation should allow a court to:

- make an order that a person who has made two or more vexatious applications for a protection order against the same person may not make a further application without the leave of the court; or
- dismiss a vexatious application for a protection order at a preliminary hearing before a respondent is served with that application.<sup>257</sup>

18.237 The Commissions proposed that state and territory family violence legislation should require a respondent to a protection order to seek leave from the court before making an application to vary or revoke the protection order.<sup>258</sup>

### **Vexatious applications for protection orders**

18.238 Some stakeholders submitted that vexatious litigation in protection order proceedings was rare, and, when it arose, that courts have adequate powers to appropriately manage vexatious litigation.<sup>259</sup> For example, South Australian Magistrate Andrew Cannon submitted that:

I am not aware that vexatious applications for protection orders are a systemic problem in this State. The police are the complainant in these matters in this State and that seems to act [as] a protection against general abuse. Where abuse occurs the present system can manage that appropriately.<sup>260</sup>

18.239 Wangmann and Stubbs cautioned that care was required when considering vexatious litigation in the context of protection order proceedings. Wangmann identified two key concerns in dealing with vexatious litigants. First, she noted the difficulty involved in identifying what might be a vexatious application:

While a number of applications are clearly vexatious (this is evident from the type of, or absence of, grounds to seek a protection order) many are not so clearly identifiable. Many applications do, on their face, raise allegations about acts or behaviours that would be captured by the various legislative schemes—the question is whether these acts or behaviours on their own should warrant a family violence response in the form of a protection order?<sup>261</sup>

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256 *Family Violence Act 2004* (Tas) s 20(2). Provisions relating to police-issued protection orders are contained in s 14(9)–(10).

257 Consultation Paper, Question 10–9.

258 *Ibid*, Proposal 10–6.

259 A Cannon, *Submission FV 137*, 23 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010.

260 A Cannon, *Submission FV 137*, 23 June 2010.

261 J Wangmann, *Submission FV 170*, 25 June 2010.

18.240 Secondly, Wangmann submitted that multiple applications alone do not mean that the litigation is vexatious. For example, some applicants withdraw multiple applications for protection orders before they proceed with an application to finalisation.<sup>262</sup> Similarly, Stubbs noted that some complainants may need to make repeated applications over time, due to breach or a change of circumstances. She cautioned that:

There is a risk that if this is not handled well it could have little effect on people bringing non-meritorious applications, but may deter complainants from seeking necessary variations, or new orders on the expiry of previous orders, which might then be characterised by the other party as vexatious.<sup>263</sup>

18.241 Some stakeholders supported the idea that courts should be empowered to make an order that a person who has made two or more vexatious applications for a protection order against the same person should require leave for any further application.<sup>264</sup> The Peninsula Community Legal Centre, for example, submitted that:

This enables some protection for people who may be forced to defend repeated and unreasonable applications for protection orders and prevents abuse of the system pertaining to protection orders.<sup>265</sup>

18.242 In addition to allowing courts to make a declaration that a person is a vexatious litigant, the Magistrates' Court and Children's Court of Victoria submitted that:

a provision requiring a court to grant leave for applications that are made subsequent to the refusal of an application against the same person is appropriate without the need to refer to those applications as 'vexatious'. If leave is not granted, the application should be struck out.<sup>266</sup>

18.243 Some stakeholders also supported permitting a court to dismiss a vexatious application for a protection order at a preliminary hearing before a respondent is served with that application.<sup>267</sup> The Queensland Law Society noted that it is 'not unusual for a Queensland magistrate to dismiss a vexatious application at a mention, rather than at a hearing where the application, on its face, is clearly an abuse of process'.<sup>268</sup>

<sup>262</sup> Ibid. Wangmann noted that there are many reasons why a victim of family violence might withdraw an application—including accepting an undertaking to the court, a desire to continue the relationship, or because of threats made by the respondent. See also Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

<sup>263</sup> J Stubbs, *Submission FV 186*, 25 June 2010.

<sup>264</sup> Legal Aid NSW, *Submission FV 219*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

<sup>265</sup> Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010.

<sup>266</sup> Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

<sup>267</sup> Legal Aid NSW, *Submission FV 219*, 1 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010.

<sup>268</sup> Queensland Law Society, *Submission FV 178*, 25 June 2010.

18.244 Finally, a number of stakeholders also expressed the view that some applicants make vexatious applications for protection orders in order to gain a strategic advantage in family law matters.<sup>269</sup>

#### ***Applications to revoke or vary a protection order***

18.245 A number of stakeholders agreed that state and territory family violence legislation should require a respondent to a protection order to seek leave from the court before making an application to vary or revoke the protection order.<sup>270</sup>

18.246 Some stakeholders raised concerns about the proposal. Women's Legal Service Queensland expressed concern, for example, about the implications of the proposal where the applicant for a protection order is a serial abuser of litigation and a victim of family violence is the respondent.<sup>271</sup> Others opposed the proposal on the basis that a respondent should have access to a judicial determination.<sup>272</sup>

[T]here are many occasions in which applications for revocation or variation brought by the respondents ought to be legitimately heard in court and that there ought not be barriers to the bringing of those applications.<sup>273</sup>

18.247 There were also concerns that the proposal may give rise to difficulties in varying protection orders which may in turn result in parties breaching the order rather than seeking variation.<sup>274</sup>

#### ***Commissions' views***

18.248 The Commissions recognise the issues and difficulties raised by vexatious litigation in the context of family violence. In addition to traditional concerns about the

269 P Maloney, *Submission FV 230*, 31 May 2010; Shared Parenting Council of Australia, *Submission FV 206*, 28 June 2010; Non-Custodial Parents Party (Equal Parenting), *Submission FV 55*, 1 June 2010; E McGuire, *Submission FV 53*, 28 May 2010. See also P Parkinson, J Cashmore and J Single, *Post-Separation Conflict and The Use of Family Violence Orders* (2009).

270 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

271 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

272 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

273 Queensland Law Society, *Submission FV 178*, 25 June 2010. The Queensland Law Society considered that making a costs order against a person who makes an improper application may be a more appropriate measure to deter vexatious litigation.

274 J Stubbs, *Submission FV 186*, 25 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

impact on public resources, vexatious applications in protection order proceedings may operate as a means to harass or intimidate victims of family violence.

18.249 In light of the dynamics of family violence, it may also be difficult to identify what is a vexatious application or who is a vexatious litigant—for example, where multiple applications are made by a person who may be a victim of long term family violence.

18.250 Some stakeholders indicated that vexatious litigation in protection order proceedings is uncommon; but others disagreed. There has been scant research into the nature and incidence of vexatious litigation in protection order proceedings. Clearly, however, where vexatious litigation occurs, courts should be empowered to adequately manage the problem.

#### ***Vexatious applications for protection orders***

18.251 There is a need to ensure that courts are able to protect people from having to defend unreasonable and repeated protection order applications. However, care needs to be taken when considering proposals which may restrict or deter people who have experienced family violence from seeking a protection order. This is particularly so when, for example, a victim may need to make multiple applications for a protection order; or where applications do not engage the legal definition of family violence or provide sufficient evidence, but are not vexatious.

18.252 The Inquiry received little information to suggest that the current range of provisions across jurisdictions is inadequate to deal with vexatious litigation. Accordingly, the Commissions do not make recommendations with respect to vexatious applications for protection orders. However, this is an area which warrants ongoing monitoring. The Victorian family violence legislation, which contains comprehensive provisions to deal with vexatious applications and litigants, may serve as a useful model if problems are shown to exist.

#### ***Applications to revoke or vary a protection order***

18.253 There is clearly merit in ensuring that a variation or revocation of a protection order is only sought by the respondent where there are reasonable grounds to do so—such as a change in the circumstances since the original order was made—which would help protect victims of family violence against vexatious applications.

18.254 However, introducing additional procedural hurdles, such as requiring that a respondent seek leave from the court, may make the process of varying or revoking protection orders less accessible. If it is too difficult to vary or revoke a protection order, this may result in breach and has the potential to undermine the effectiveness of the protection order regime.

18.255 In the Commissions' view, provisions which require a respondent to seek the leave of the court may inappropriately limit a respondent's access to the court

system without it being established he or she has, for example, ‘demonstrably abused court processes in the past’.<sup>275</sup>

18.256 The Commissions note that a range of recommendations made in this Report—including in relation to definitions of family violence and to facilitate additional education, training and specialisation—may assist in ensuring that judicial officers better understand the nature and dynamics of family violence; and are better equipped to identify and deal with vexatious litigation in protection order proceedings.

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275 This is the stated rationale for vexatious litigant provisions in Victorian family violence legislation: Explanatory Memorandum, Family Violence Protection Bill 2008 (Vic).



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**Part E**

**Child Protection**

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# **19. The Intersection of Child Protection and Family Laws**

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## **Contents**

Introduction	891
Interconnectedness of family violence and child abuse	892
What is child abuse and neglect?	892
Family violence and child abuse and neglect	894
Legal intervention in child protection	896
Development of state intervention	896
Child protection interventions and procedures	897
The impact of multiple jurisdictions and services	898
Exacerbating factors	900
Previous and current reviews	902
The relationship between family law and child protection law	903
Family courts and their relationship with child protection agencies	905
The legal relationship	906
The challenges of working together	908
Gaps in the system and proposals for closing them	911
The power of children's courts to make parenting orders	917
Overlapping concerns	917
Children's court or family court?	918
Proposals for closing the gap	921
Families in both courts—duplication of proceedings	928

## **Introduction**

19.1 Cases that involve child protection issues commonly have contact with more than one court. There may be proceedings in criminal courts, children's courts and family courts. The child and family may also have contact with numerous agencies, such as child protection agencies, police, health workers and others. It is the legal intersections that are the main focus of this chapter, but agencies such as child protection departments play a key role in legal interventions.

19.2 This part of the Report, Part E, focuses on child protection; in particular on issues that arise where child protection law intersects with family law and criminal law. This chapter examines the intersection of child protection and family laws. The following chapter, Chapter 20, examines the intersections of child protection legislation with criminal law.

19.3 The Terms of Reference engage issues of child protection and safety on a number of levels. The first term of reference focuses on the interaction in practice of a range of laws including child protection laws and the *Family Law Act 1975* (Cth), and child protection laws and relevant federal, state and territory criminal laws. The second term of reference focuses on sexual assault in the family violence context and the impact of inconsistent interpretation or application of laws, including rules of evidence, on victims of such violence. As noted in Chapter 1, in the case of children, the issue of sexual assault potentially brings together all the areas of law under consideration in this Inquiry. Sexual assault is considered in Part G of this Report.

19.4 In this chapter the issue of child protection is first defined and the relationship between child abuse and neglect and family violence is explored. The chapter outlines the development of child protection law and sets out the processes that occur when concerns about the safety of a child are raised.

## **Interconnectedness of family violence and child abuse**

### **What is child abuse and neglect?**

19.5 There is no consistent definition of child abuse within Australia that is used in all jurisdictions and by all professions work with children and families. Holzer and Bromfield give a useful definition of the broad concept of child abuse or maltreatment:

Maltreatment refers to non-accidental behaviour towards another person, which is outside the norms of conduct and entails a substantial risk of causing physical or emotional harm. Behaviours may be intentional or unintentional and include acts of omission and commission. Specifically abuse refers to acts of commission and neglect to acts of omission.<sup>1</sup>

19.6 These authors note that, in practice, the terms ‘child abuse’ and ‘child neglect’ are used more frequently than the term ‘child maltreatment’.

19.7 A range of behaviours are generally included in child maltreatment. These include physical abuse, sexual abuse, emotional maltreatment (including psychological abuse) and neglect. Exposure of children to family violence is also a form of abuse and is now recognised as such in some legislation. More often, it is included in the category of emotional maltreatment,<sup>2</sup> but in some jurisdictions, exposure to family violence is a

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1 P Holzer and L Bromfield, *National Child Protection Clearinghouse Resource Sheet No 12: Australian Legal Definitions—When is a Child in Need of Protection?* (2010), prepared for the Australian Institute of Family Studies, 1.

2 For example, in NSW, a child or young person is at risk of significant harm if they are living in a household where there have been incidents of domestic violence and, as a consequence, the child or young person is at risk of serious physical or psychological harm: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23(1)(d). See also *Children and Young People Act 2008* (ACT) s 342. For a discussion of the different definitions in state and territory child protection laws of when a child is considered to be in need of care and protection, see P Holzer and L Bromfield, *National Child Protection Clearinghouse Resource Sheet No 12: Australian Legal Definitions—When is a Child in Need of Protection?* (2010), prepared for the Australian Institute of Family Studies.

category of abuse or harm in its own right.<sup>3</sup> Evidence also suggests that children often experience more than one of the subtypes of abuse or maltreatment.<sup>4</sup>

19.8 The legal definition of child abuse, and the threshold that triggers a reporting duty or allows intervention to protect children, is different across jurisdictions. All jurisdictions substantiate situations where children have experienced significant harm from abuse and neglect through the actions of parents. Some jurisdictions also substantiate on the basis of the occurrence of an incident of abuse or neglect, independent of whether the child was harmed, and others substantiate on the basis of the child being at risk of harm occurring.<sup>5</sup>

19.9 As Dr Leah Bromfield and Prue Holzer note, whilst there are some areas of consistency, the thresholds vary depending on the extent of harm, or risk of harm, that is required (such as whether harm must be of a ‘serious’ or ‘significant’ nature) and whether the definition focuses on the *actions* of the abuser, or the *consequences* of the actions.<sup>6</sup> For example, in South Australia a person should make a report to the relevant child protection authority when they ‘suspect on reasonable grounds that a child has been or is being abused or neglected’, whereas in NSW a person ‘who has reasonable grounds to suspect that a child or young person is ... at risk of significant harm’ may make a report to the child protection agency.<sup>7</sup>

19.10 Each year the Australian Institute of Health and Welfare (AIHW) undertakes a comprehensive review of state and territory child protection and support services.<sup>8</sup> In the 2008–09 reporting period, the AIHW found that the number of children subject to a notification of child abuse or neglect, the number under care and protection orders and the number in out-of-home care all increased, and that Indigenous children were over-represented in all areas.<sup>9</sup> In particular, the AIHW reported that there were 339,454 child protection notifications recorded nationally in 2008–09, which was an increase of almost 7% from the number of notifications recorded in 2007–08 (317,526 notifications), and a 34% increase on the number of notifications recorded in 2004–05 (252,831 notifications).<sup>10</sup> The number of children in out-of-home care across Australia has doubled over the last decade—from 15,674 children in 1998–99 to 31,166 children in 2008–09.<sup>11</sup>

3 *Children, Young Persons and Their Families Act 1997* (Tas) s 4(ba); *Care and Protection of Children Act 2007* (NT) s 15(2).

4 R Price-Robertson and L Bromfield, *National Child Protection Clearinghouse Resource Sheet No 6: What is Child Abuse and Neglect?* (2009), prepared for the Australian Institute of Family Studies, 2.

5 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, 3.

6 P Holzer and L Bromfield, *National Child Protection Clearinghouse Resource Sheet No 12: Australian Legal Definitions—When is a Child in Need of Protection?* (2010), prepared for the Australian Institute of Family Studies, 1.

7 *Children’s Protection Act 1993* (SA) s 11; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 24.

8 The 2008–09 report is the 13th annual report.

9 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, vii.

10 Ibid, 12–13.

11 Ibid, 16.

19.11 A report published in 2010 by the NSW Department of Human Services, shows that 26.7% of all children in NSW under 18 years were ‘known to DOCS’ in June 2009—an increase of almost 7% since 2005.<sup>12</sup> The most frequently reported group were children aged under 12 months, including unborn children. High rates were also recorded for preschool aged children. The lowest reporting rates were for children aged over 14 years.<sup>13</sup>

19.12 Few reports made to child protection authorities are substantiated following an initial investigation. Of the 339,454 reports made across Australia in 2008–09, the AIHW found that 54,621 reports—or about 16%—were substantiated, which was a small decrease of 1% from the previous year.<sup>14</sup> However, the rates of substantiation vary between the states and territories, and this partly reflects the different policies and approaches of individual jurisdictions to child protection matters.<sup>15</sup>

### **Family violence and child abuse and neglect**

19.13 Studies suggest that between 12% and 23% of Australian children are exposed to family violence,<sup>16</sup> but some research suggests the figure may be higher. For example, research conducted by the Victorian Department of Human Services found that over half of all child protection notifications that were investigated and subsequently substantiated in 2001–02 involved family violence.<sup>17</sup> This reflects international research, which has put the figure for co-occurrence at between 30% and 50%.<sup>18</sup>

19.14 Children who live in families where there is intimate partner violence experience a number of negative outcomes, including post-traumatic stress disorder, depression, poor school performance, and higher rates of aggressive behaviour.<sup>19</sup> Dr Lesley Laing notes that research is emerging that shows children’s safety is especially compromised in situations where there is both family violence and child abuse.<sup>20</sup> Children in such situations are at increased risk of developing health and

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12 A Zhou, *Estimate of NSW Children Involved in the Child Welfare System* (2010), prepared for the Department of Community Services (NSW). See also National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), especially 16–21.

13 A Zhou, *Estimate of NSW Children Involved in the Child Welfare System* (2010), prepared for the Department of Community Services (NSW), 3.

14 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, 13.

15 Ibid, 16.

16 R Price-Robertson, L Bromfield and S Vassallo, *The Prevalence of Child Abuse and Neglect* (2010), prepared for the Australian Institute of Family Studies, 4.

17 P Holzer and L Bromfield, *NCPASS Comparability of Child Protection Data: Project Report* (2008), prepared for the National Child Protection Clearinghouse, 19–20.

18 T Brown and R Alexander, *Child Abuse and Family Law: Understanding the Issues Facing Human Service and Legal Professionals* (2007), 101.

19 C Goddard and G Bedi, ‘Intimate Partner Violence and Child Abuse: A Child-Centred Perspective’ (2010) 19 *Child Abuse Review* 6.

20 Australian Domestic & Family Violence Clearinghouse, *Domestic Violence in the Context of Child Abuse and Neglect* (2003), 2. See also National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), especially 40–42.

behavioural problems. These effects are likely to be more severe than for those exposed to only one of these forms of abuse, and can be played out in a number of ways:

the same perpetrator may be abusing both mother and children, probably the most common scenario; the children may be injured when ‘caught in the crossfire’ during incidents of adult domestic violence; children may experience neglect because of the impact of the violence, controlling behaviours and abuse on women’s physical and mental health; or children may be abused by a mother who is herself being abused.<sup>21</sup>

19.15 Family violence has also been shown to be a common factor among children who are victims of fatal assaults. The NSW Child Death Review Team notes that for children who died as a result of fatal assault in 2008, domestic violence was among the list of most common factors experienced on an ongoing basis prior to their death.<sup>22</sup>

19.16 Child abuse is an element of family violence and family violence may be an important factor in child neglect. For the victims, it is therefore difficult to separate these experiences. In this chapter the term ‘child abuse’ is used to refer to acts of commission. However, the focus of this Inquiry is on family violence. The interlocking nature of family violence, child abuse and child neglect and the emotional harm to children of violence against a person who is caring for them, means that definitional precision in the use of these terms is not always possible.

19.17 Statistics of prevalence are also hard to disentangle because of variances in state and territory practices for recording notifications of child abuse.<sup>23</sup> In particular, some states and territories record exposure to family violence as a separate and distinct form of child abuse, whereas others include these cases within the category of emotional abuse and, consequently, notifications of exposure to family violence are not necessarily separately captured.

19.18 Further, family violence towards a parent may affect the ability of the victim to parent effectively. As a solicitor with the Central Australian Aboriginal Family Legal Unit commented in a submission to this Inquiry:

How can you separate violence towards a spouse from parenting issues without acknowledging the impact of violence on parenting?<sup>24</sup>

19.19 Children and families are entering the child protection system with increasingly complex family circumstances.<sup>25</sup> In its submission to the Inquiry, the Children’s Court of NSW noted that, in its experience, where family violence is evident in care and protection matters that come before it, it is rarely a ‘stand-alone’ issue. In most care

21 Australian Domestic & Family Violence Clearinghouse, *Domestic Violence in the Context of Child Abuse and Neglect* (2003), 1–2.

22 NSW Child Death Review Team, *Annual Report 2008*, 120.

23 P Holzer and L Bromfield, *NCPASS Comparability of Child Protection Data: Project Report* (2008), prepared for the National Child Protection Clearinghouse, ch 11.

24 The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010.

25 P Holzer and L Bromfield, *NCPASS Comparability of Child Protection Data: Project Report* (2008), prepared for the National Child Protection Clearinghouse, 19–20.

and protection cases involving domestic violence, the Court stated, mental health problems and parental substance abuse are frequently related issues.<sup>26</sup>

## **Legal intervention in child protection**

19.20 This section of the chapter considers the development of state intervention in relation to children in need of care and protection, from the *parens patriae* jurisdiction to legislative schemes involving the establishment of specialist children's courts and, among other things, defining thresholds for state intervention. The chapter also considers the procedure for triggering state intervention, the impact of multiple jurisdictions and services, and factors that can exacerbate the tensions present in the legal system due to the differing objectives and purposes of child protection and family law.

### **Development of state intervention**

19.21 The earliest legal interventions in relation to children in need of care and protection used the *parens patriae* jurisdiction. This jurisdiction to make orders and give directions in relation to the welfare of children was inherited from the Court of Chancery in England by the Supreme Courts of each state and territory.<sup>27</sup> However, beginning in the mid-19th century, state and territory governments legislated to secure the welfare of children by defining the circumstances in which children needed to be protected from neglect or abuse, and the ways in which young people might be treated as criminals.<sup>28</sup>

19.22 Developments in child protection legislation were often motivated by revelations of cases of severe abuse or neglect, which spurred child welfare activists in the late 1800s and early 1900s to form rights and advocacy bodies, including societies for the prevention of cruelty to children.<sup>29</sup>

19.23 Starting with South Australia in 1890 and including all states by 1918, dedicated children's courts were established throughout Australia.<sup>30</sup> Children's courts had two principal functions: child care and protection; and exclusive jurisdiction with respect to child offenders. They were required to sit separately, either in specially designated premises, or by arranging for segregated court time, when other business was not being transacted.<sup>31</sup> By the 1970s all states and territories had introduced legislation to protect

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26 Children's Court of New South Wales, *Submission FV 237*, 22 July 2010. See also the discussion of compounding factors in Ch 1.

27 A Dickey, *Family Law* (5th ed, 2007), 287. For a fuller discussion of the historical background, see A Dickey, *Family Law* (4th ed, 2002), 389.

28 G Monahan and L Young (eds), *Children and the Law in Australia* (2008), at [1.11] trace the ten principal Acts passed in Victoria over 90 years, from 1864 to 1933.

29 B Mathews, 'Protecting Children from Abuse and Neglect' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 204, [10.5].

30 Seymour details the legislation establishing the first children's courts: J Seymour, *Dealing with Young Offenders* (1988), 76–87.

31 Ibid, 83.

children.<sup>32</sup> The evolution of the child protection system has included numerous reviews of child protection services.<sup>33</sup>

19.24 A recurring theme concerns when it is appropriate for the state to intervene and the appropriate role of child protection services:

According to a public health model of disease prevention, tertiary services are one platform in a well functioning service system. The public health model is comprised of three service platforms: primary services, secondary services, and tertiary services. This model can also be used in a child protection context. Primary services provide services for all children (eg, education and health). Secondary services are targeted at families at higher risk or in need of additional support. Tertiary child protection services are a last resort, and the least desirable option for families or the state. Families that require a tertiary response to ensure the safety of their children form the ‘tip of the iceberg’. Consequently, the primary and secondary service domains are larger than the tertiary domain representing the need for more services in these areas.<sup>34</sup>

19.25 The legal system will become involved through child protection legislation and criminal law in relation to the ‘tertiary domain’. However family courts make decisions in relation to children from all domains.

### Child protection interventions and procedures

19.26 As noted above, each state and territory has its own system of child protection laws and supporting agencies. These laws are invoked by the state when parents are determined to be insufficiently protective of a child. In each jurisdiction there are thresholds for intervention by child protection authorities to protect children and to assist parents and families.<sup>35</sup> The 2008–09 report on child protection in Australia by the AIHW reported that while ‘the processes used to protect children are broadly similar’,<sup>36</sup> there are ‘significant differences’ in how jurisdictions deal with and report child protection issues.<sup>37</sup> Keeping in mind such differences, a broad description of the way in which child protection agencies engage with families is set out below.

32 The current legislation is: *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Children, Youth and Families Act 2005* (Vic); *Child Protection Act 1999* (Qld); *Children and Community Services Act 2004* (WA); *Children’s Protection Act 1993* (SA); *Children, Young Persons and Their Families Act 1997* (Tas); *Children and Young People Act 2008* (ACT); *Care and Protection of Children Act 2007* (NT).

33 See J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008); Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007); Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009). The Victorian Law Reform Commission has also recently submitted to the Attorney-General a review of Victoria’s child protection legislative arrangements.

34 L Bromfield and P Holzer, *Protecting Australian Children* (2008), 4.

35 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, ch 1. See also B Mathews, ‘Protecting Children from Abuse and Neglect’ in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 204.

36 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, 1.

37 Ibid, 1. Appendix 4 of the report provides extracts from the relevant legislation of the ‘in need of care and protection’ threshold.

19.27 Child protection intervention is triggered first by a report of concern to a child protection or support service. Reports could come from community members, professionals, organisations, the child, parents or relatives, and may relate to abuse and neglect or ‘broader family concerns such as economic problems or social isolation’.<sup>38</sup> Reports are then assessed against the relevant criteria and classified either as a family support issue or warranting a child protection intervention.

19.28 An investigation involves an assessment of the degree of harm or risk of harm for the child and will either be ‘substantiated’ or ‘not substantiated’ and the assessment questions may differ according to the relevant jurisdiction.

19.29 The relevant child protection agency may apply to the court in each jurisdiction for a care and protection order, but such action is usually taken ‘only as a last resort in situations where the child protection agency believes that continued involvement with the child is warranted’.<sup>39</sup> Although the law may affect all of the steps in the process, an application to a children’s court is only contemplated at the end of a series of interventions and decisions and in relation to only a small percentage of cases.

19.30 Some notifications may also give rise to prosecutions, as considered in Chapter 20. The police and director of public prosecutions in the relevant jurisdiction may be involved in making an assessment of whether a matter should proceed further down the criminal justice pathway. If not, the matter falls back within the overall umbrella of child protection concerns.

19.31 At the same time as care proceedings are being contemplated or dealt with in state and territory children’s courts, there may also be applications in federal family courts for parenting orders. Criminal proceedings in relation to the same experiences of violence or abuse may also be pursued in state criminal courts. Related applications for protection orders may also be made, generally in state magistrates’ courts. Child protection cases may therefore potentially present themselves in three different jurisdictions.

### **The impact of multiple jurisdictions and services**

19.32 That families may be involved in proceedings in more than one jurisdiction is a recurring theme of the interactions under review in this Inquiry. The need to go to multiple courts increases the possibility of inconsistent orders, and the possibility that people will drop out of the system without the protections they need, thus putting them at risk of further violence and abuse. It also increases costs and stress on families at a very difficult time. Children in particular may find the uncertainty and delay difficult to handle. One nine year-old child said:

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38        Ibid, 2.  
39        Ibid.

I felt worried that mum was going to go back and forth and back and forth and it wasn't going to stop ... [I felt] freaked out, I couldn't get to sleep, I had nightmares, I was crying a lot ... [It was just all] horrible and frightening.<sup>40</sup>

19.33 Repeated contact with different parts of the legal and service systems may also require women and children who are the targets of violence to have to tell their story repeatedly. A 13 year-old described this problem as follows:

[The assessment session] was frustrating. Because every time it was banging your head against a brick wall. You always go back to the way it was. Like we were stuck there. Like another person wants to see it again ... we had already done that ... We had to go through it all again, which is crap.<sup>41</sup>

19.34 As explained in Chapter 2, there is a division of jurisdiction in Australia between states and territories as administrators of the public domains of criminal and child protection laws, and the federal family courts as adjudicators of private law disputes. Inadequate communication, coordination or information sharing between courts and child protection agencies has been identified as a critical problem.<sup>42</sup>

19.35 The tensions between different parts of the system have been attributed to the different cultures and histories of the different parts of the system. In the United Kingdom, Professor Marianne Hester refers to the three 'planets' of domestic violence, child protection and parenting orders:

Domestic violence work in the UK (and many other countries) has been influenced by feminist understanding of domestic violence as gender based, and tends to see the problem as (mainly) male perpetrators impacting on (mainly) female victims or survivors. The work of child protection services in the UK has a very different history to that of domestic violence, with the family, and in particular 'dysfunctional' families, as central to the problem. Within this approach the focus is on the child and her or his main carer, usually the mother. These structural factors, with domestic violence and child protection work on different 'planets', have made it especially difficult to integrate practice, and have resulted in child protection work where there is a tendency to see mothers as failing to protect their children rather than as the victims of domestic violence, and where violent male perpetrators are often ignored. These difficulties are made even more complex where both child protection and arrangements for child visitation post separation of the parents intersect. Within the context of divorce proceedings, mothers must be perceived as proactively encouraging child contact and must *not* be attempting to 'aggressively protect' their children from the direct or indirect abuse of a violent father. The child protection and child visitation/contact planets thus create further contradictions for mothers and children: there may be an expectation that mothers should protect their children, but at the same time, formally constituted arrangements for visitation may be implemented that do not

40 A Hay, 'Child Protection and the Family Court of Western Australia: The Experiences of Children and Protective Parents' (Paper presented at Child Sexual Abuse: Justice Response or Alternative Resolution Conference, Adelaide, 1-2 May 2003), 11.

41 Ibid, 10.

42 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 60.

adequately take into account that in some instances mothers and/or children may experience further abuse.<sup>43</sup>

19.36 An Australian study, conducted by Drs Heather Douglas and Tamara Walsh of the University of Queensland, argues that the competing discourses of child protection and family violence create difficult dilemmas for women.<sup>44</sup> They argue that there is:

- the ‘interpersonal conflict’ misunderstanding—failing to recognise the particular dynamics associated with family violence, with ‘ramifications for the way in which child protection workers respond to abused mothers and their children’;<sup>45</sup>
- the ‘protective parent’ dilemma—if a mother is not perceived as acting protectively, she may be seen as ‘part of the reason for the dangerous environment’ and the removal of children from her care becomes more likely;<sup>46</sup>
- ‘the mother is to blame’ phenomenon—the focus of child protection authorities is on the woman and her capacity to protect the children, and not on the father’s ‘capacity to cease using violent or abusive behaviour’;<sup>47</sup> and
- the ‘leave’ ultimatum—move to ‘accommodation away from the domestic violence perpetrator and continue to care for the children, or stay with their abuser and lose the children’.<sup>48</sup>

19.37 It is apparent from the discussion above that the fragmented nature of the system for dealing with child protection and family violence can create difficult problems for the families who must use the system. The system may make sense to those who work within it, but those who use it can find it confusing and intimidating.

### **Exacerbating factors**

19.38 The tensions present in the legal system may be mediated or exacerbated for some women by their identities, histories or experiences. For example, the Commissions have heard of the particular difficulties that arise for women with intellectual disabilities in accessing services and asserting their capacity to parent.<sup>49</sup>

19.39 Indigenous women are likely to approach the legal system with particular concerns arising from the history of the ‘stolen generation’ and the fear of their children being taken from them:

For many Aboriginal people, the intervention of child protection services is a common experience that often goes back several generations. Recently it was reported that

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43 M Hester, ‘Commentary on H Douglas and T Walsh, “Mothers, Domestic Violence and Child Protection”’ (2010) 16 *Violence Against Women* 516, 517.

44 H Douglas and T Walsh, ‘Mothers, Domestic Violence and Child Protection’ (2010) 16 *Violence Against Women* 489.

45 Ibid, 492.

46 Ibid, 492–3.

47 Ibid, 493–5.

48 Ibid, 496–7. This is described by the authors as a ‘binary ultimatum to stay or leave’, which, without significant support, ‘misunderstands the complexity of many mothers’ situations’: 499.

49 S Seymour, *Australian Law Reform Commission Family Violence Inquiry—Case Studies Contribution*, 2 January 2010, 4.

child protection workers in Australia have begun removing the fifth generation of Aboriginal children from their parents, meaning that some Aboriginal families have an eighty year history of child protection intervention. ... Many scholars have observed that as a result of the intersecting factors of poverty, race and gender, Aboriginal women, and women who are recent immigrants, are particularly disadvantaged and discriminated against in their engagements with institutional processes.<sup>50</sup>

19.40 Migrant women report that they find using courts difficult. Their lack of knowledge of the Australian legal and cultural system, in addition to any language barriers, adds to the difficulties:

In my country I was studying. My family are educated ... all of them. But here, I knew nothing ... how to catch a bus, how to pay a bill ... and I knew no-one else. And he used my ignorance as my chains.<sup>51</sup>

19.41 They are likely to find going to court an intimidating experience:

[F]inally, with the help of different agencies, I went to the court, and I got a restraining order. It was probably as frightening as it was being in my marriage.<sup>52</sup>

19.42 They may also find the child protection system in Australia mystifying:

I did not understand why this happened. My husband, he beats me, and now my children are gone. Why did this happen. No one told me.<sup>53</sup>

19.43 Such experiences were also strongly echoed in submissions made to this Inquiry.<sup>54</sup>

50 H Douglas and T Walsh, 'Mothers, Domestic Violence and Child Protection' (2010) 16 *Violence Against Women* 489, 500 (citations omitted).

51 Women's Council for Domestic and Family Violence Services (WA), *HURT Project: The Shame of Domestic and Family Violence in Australia* <<http://www.hurt.net.au>> at 30 July 2010.

52 Ibid.

53 M Dimopoulos, *Protection Applications in the Children's Court: Report of Consultations with New and Emerging Communities* (2010) prepared by MyriaD Consultants for the Victorian Law Reform Commission, 23. See also National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 30–35.

54 For example, in relation to Indigenous women: Women's Legal Service Brisbane, *Submission FV 223*, 2 July 2010; North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Shoalcoast Community Legal Centre, *Submission FV 141*, 24 June 2010. In relation to women with disability: Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women With Disabilities Australia, *Submission FV 143*, 24 June 2010; Women Working Alongside Women with Intellectual and Learning Disabilities Sexual Violence Prevention Association, *Submission FV 140*, 24 June 2010; Disability Services Commission (WA), *Submission FV 138*, 23 June 2010; J Fletcher, *Submission FV 01*, 27 July 2009. In relation to immigrant women: Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women's Legal Service Brisbane, *Submission FV 223*, 2 July 2010; Women's House Shelta, *Submission FV 139*, 23 June 2010; Migrant Women's Emergency Support Service trading as Immigrant Women's Support Service, *Submission FV 61*, 1 June 2010; Confidential, *Submission FV 48*, 22 May 2010; P Easteal, *Submission FV 39*, 14 May 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 18*, 13 January 2010; Confidential, *Submission FV 15*, 11 November 2009. Similar concerns were raised in relation to lesbian, bisexual, transgender or intersex women: ACON, *Submission FV 119*,

## Previous and current reviews

19.44 The need for review of the intersections of child protection laws, family laws and criminal laws is apparent from the discussion above. This Report is by no means the only review of these problems. The interactions between the family law and child protection systems have been addressed by the Family Law Council in 2002<sup>55</sup> and in 2009;<sup>56</sup> by the ALRC and the then Human Rights and Equal Opportunity Commission (HREOC) in the report, *Seen and Heard: Priority for Children in the Legal Process* (ALRC Report 84);<sup>57</sup> and by Professor Richard Chisholm's *Family Courts Violence Review* (Chisholm Review).<sup>58</sup>

19.45 Reviews of specific state and territory child protection systems have also raised practical interaction issues in the context of evaluating the functions of child protection agencies.<sup>59</sup> The problems have also been identified and discussed by government committees,<sup>60</sup> in academic articles and studies<sup>61</sup> and in judicial decisions.<sup>62</sup> Both the Council of Australian Governments and the Standing Committee of Attorneys-General (SCAG) are also considering issues relating to child protection, and improvements that can be made at a national level to the way government agencies and courts deal with these issues.<sup>63</sup>

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15 June 2010; Centacare Safer Families Support Service, *Submission FV 118*, 15 June 2010; Same Sex Domestic Violence Interagency, *Submission FV 116*, 10 June 2010; Inner City Legal Centre—Safe Relationships Project, *Submission FV 17*, 13 January 2010.

55 Family Law Council, *Family Law and Child Protection: Final Report* (2002).

56 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009).

57 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), ch 15.

58 R Chisholm, *Family Courts Violence Review* (2009).

59 For example, Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009); J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008).

60 Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (2001), 75; House of Representatives Standing Committee on Family and Community Affairs—Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003).

61 See, eg, F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38; T Brown, M Frederico, L Hewitt and R Sheehan, *Problems and Solutions in the Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia* (1998); J Seymour, 'The Role of the Family Court of Australia in Child Welfare Matters' (1992) 21 *Federal Law Review* 1.

62 See, eg, *Re Karen* (1995) 19 Fam LR 528.

63 Council of Australian Governments, *Protecting Children is Everyone's Business: A National Framework for Protecting Australia's Children 2009–2020* (2009); R McClelland (Attorney-General), *Family Violence in Focus Conference [Opening Address]*, (2009) <[www.attorneygeneral.gov.au](http://www.attorneygeneral.gov.au)> at 31 July 2010. The VLRC is currently reviewing child protection applications in the Family Division of the Children's Court; Victorian Law Reform Commission, *Review of Victoria's Child Protection Legislative Arrangements: Information Paper* (2010).

## The relationship between family law and child protection law

19.46 The *Family Law Act* and state and territory child protection legislation both enable courts to make orders regulating and displacing parental responsibility for children. The *Family Law Act* is generally invoked when there is a dispute between parents. However, any person who is concerned with the wellbeing of a child can apply for a parenting order under the *Family Law Act*.<sup>64</sup> A parenting order made by a court under pt VII of the *Family Law Act* can stipulate the content of the parties' parental responsibilities to a very broad extent,<sup>65</sup> and typically determines where the child will live and how much time he or she will spend with each parent.

19.47 It is common for child protection concerns to be raised in an application under the *Family Law Act*. In 2007, a study of 300 court files involving parenting disputes from three registries of the Family Court and the Federal Magistrates Court revealed that allegations of child abuse were raised in between 19% to 50% of all cases: and more than half of the cases in the sample involved allegations of family violence, many at the severe end of the spectrum.<sup>66</sup>

19.48 While child protection concerns may arise in parenting matters in federal family courts, child protection proceedings are usually brought under state and territory laws and determine whether a child is in need of care or protection. They are almost always initiated by a child protection agency.<sup>67</sup> A range of care and protection orders may be made, allocating parental responsibility for a child, including determining where a child will live and who can have contact with that child. Orders that can be made include:

- orders giving parental responsibility and care to the relevant minister or child protection department;
- orders giving parental responsibility and care to relatives or other appropriate people;
- orders giving shared parental responsibility to the parents and the minister or child protection agency;

64 *Family Law Act 1975* (Cth) s 65C. See also *KAM & MJR* [1998] FamCA, in which Justice Burr found that any person may file an application for a parenting order, but to be granted such an order the person must demonstrate a 'concern with' the care, welfare and development of the child. The required degree of that nexus depends on the facts of the case.

65 A Dickey, *Family Law* (5th ed, 2007), 257.

66 L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies. The variance between the figures for allegations of abuse arises because the study examined two samples, general litigants and judicial determinations in both the Federal Magistrates Court and the Family Court of Australia. The largest figure, 50%, relates to judicially determined matters in the Family Court of Australia.

67 In the ACT, someone other than the chief executive may apply for a protection order with the leave of the Court: *Children and Young People Act 2008* (ACT) s 425. Protection applications in Victoria may be made by the Secretary, or by a member of the police force: *Children, Youth and Families Act 2005* (Vic) ss 181, 240(1), 240(3), 243.

- orders for supervision by the department, with or without undertakings;
- undertakings or recognisances by parents or children, with no further supervision; and
- orders in relation to contact arrangements.<sup>68</sup>

19.49 The same families could be involved in both child protection and family law proceedings and there could be conflicting orders. Section 109 of the *Australian Constitution* provides that when a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the state law shall, to the extent of the inconsistency, be invalid. However, as noted in Chapter 2, in the case of child protection legislation, the federal *Family Law Act* defers to orders under state legislation because the Commonwealth parliament does not have legislative competence in relation to such matters. Section 69ZK(1) of the *Family Law Act* provides that a court having jurisdiction under the Act must not make any order under the Act (other than a child maintenance order) in relation to a child who is under the care of a person pursuant to a state or territory child welfare law,<sup>69</sup> unless:

- (a) the order is expressed to come into effect when the child ceases to be under care; or
- (b) the order is made in proceedings relating to the child in respect of whom the written consent of a child welfare officer of the relevant state or territory has been obtained.

19.50 A ‘child welfare law’ is any law of a state or territory that relates to the incarceration of a child for a criminal offence,<sup>70</sup> as well as any law listed in sch 5 of the *Family Law Regulations 1984* (Cth). Schedule 5 sets out 38 state and territory laws, including those dealing with child protection.<sup>71</sup> Because the circumstances of children and families are highly likely to change over time, the usual course is for the family courts not to make an order of the kind referred to in s 67ZK(1)(a) but to terminate or adjourn any proceedings of federal family courts for the period of the child’s care under child protection laws.<sup>72</sup> Section 69ZK(2) confirms that state and territory courts may make child protection orders, including where a parenting order is in place under

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68 These orders may not be available in all jurisdictions, and some may be differently named: Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, 88–91.

69 The child must be under care, not simply the subject of ‘concern’ or ‘known’ to the relevant child protection agency: *R v Lambert* (1980) 146 CLR 447.

70 *Family Law Act 1975* (Cth) s 4; *Family Law Regulations 1984* (Cth) reg 12B(1).

71 It appears that some relevant legislation from a number of jurisdictions has not been prescribed as required by *Family Law Act 1975* (Cth) s 4; *Family Law Regulations 1984* (Cth) reg 12B(2), sch 5. See also *Acts Interpretation Act 1901* (Cth) s 10. The Commissions note that as at 30 July 2010, the list of prescribed laws incorrectly prescribes: (item 6) *Children and Young Persons Act 1989* (Vic), rather than the *Children, Youth and Families Act 2005* (Vic); (item 28) *Community Welfare Act 1983* (NT), rather than the *Care and Protection of Children Act 2007* (NT); (item 32) *Children and Young People Act 1999* (ACT), rather than the *Children and Young People Act 2008* (ACT).

72 R Chisholm, *The Child Protection–Family Law Interface* (2009), 25.

the *Family Law Act*, and, in such cases, the child protection order prevails over the *Family Law Act* order so long as it is in force.<sup>73</sup>

19.51 However these provisions only define the relationship between orders of children's courts and family courts. Other difficulties arise in practice. When proceedings are commenced, it is not always possible for child protection workers, family members or lawyers to predict which is the most appropriate court to make the decision about whom a child should live with and spend time with. Proceedings in children's courts are almost always instigated by child protection agencies, whereas proceedings in family courts are instigated by a parent, or another person concerned with the wellbeing of a child. Some cases involving child abuse may therefore commence in a family court—a court that does not have the capacity to investigate child abuse and may not have the power to make the order that is needed. Some cases may commence in a children's court, but after investigation and intervention by a child protection agency and a decision that the state does not need to intervene, there remains a need to determine which parent a child should live with, and whether he or she should spend time with the other parent. Some children may be the subject of proceedings in both courts.

19.52 There are three main issues that arise from this jurisdictional tangle:

- family courts and their relationship with child protection agencies;
- the power of children's courts to make parenting orders; and
- the problem of duplication of proceedings, with families in both courts.

## **Family courts and their relationship with child protection agencies**

19.53 Proceedings may commence in the family courts, and allegations of family violence, including abuse of a child, or neglect of a child, may be made in those proceedings. While most family law disputes are resolved by negotiation or family dispute resolution (FDR), a significant number of those cases that go on to be tried in the family courts raise child protection concerns.<sup>74</sup> However, whilst children's courts rely on state child protection agencies to investigate allegations of child abuse and neglect, family courts do not have a mechanism to investigate allegations of child abuse. They rely upon the parties, independent children's lawyers, family consultants and state child protection agencies to provide them with information to make a decision about children who are at risk. The relationship between family courts and state agencies in this regard has not always been mutually satisfying. Further, it has sometimes appeared to a judicial officer in a family court that the only available option

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73 In Western Australia and South Australia, the provision in s 69ZK(1) enabling a child welfare officer to give consent to proceedings is inoperative until a relevant proclamation is made under s 69ZF: see A Dickey, *Family Law* (5th ed, 2007), 276.

74 L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies, vii.

for a child is to give parental rights to a state child protection agency, although there is no clear statutory power to do so.<sup>75</sup>

19.54 In this section, the legal relationship between family courts and child protection agencies will be considered, followed by a summary of the challenges of working together and an identification of some of the gaps in the system and proposals for closing them.

### **The legal relationship**

19.55 Family courts have obligations—discussed below—to inform child protection agencies about allegations of child abuse made in the context of family law proceedings. For evidence about that abuse and its impact on the children, they rely on a number of sources. One source is obviously the parties, but they are often engaged in allegations and counter-allegations or denials about violence. Information from independent sources, such as child protection agencies, independent children’s lawyers, and family consultants is of particular importance.

19.56 A child protection agency may already have relevant information on its own file, such as reports, risk assessments or expert reports. In other cases the agency may only have a record of notification of suspected abuse, but no other information. For example, it may have taken no action in relation to that notification because the notification does not reveal abuse at a level to justify the allocation of resources for a response. In other cases the issue of abuse may be raised for the first time in a family court so that the child protection agency has no record of the child.

19.57 The legal relationship between child protection agencies and family courts is provided for in the *Family Law Act*, which contains two provisions obliging family courts to notify child protection agencies of child abuse in certain circumstances. First, s 67Z provides that if a ‘Notice of Child Abuse or Family Violence’ (Form 4) is filed, the Registry Manager of the court must ‘as soon as practicable, notify a prescribed child welfare authority’.<sup>76</sup> Secondly, under s 67ZA(2) where an officer or professional in a family court has reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.<sup>77</sup> Section 67ZA(3) provides that a person may—rather than must—notify the relevant child protection agency where the person has reasonable grounds for suspecting that a child has been ill treated, or is at risk of being ill treated; or has been exposed, or subjected, or is at risk of being exposed or subjected, to behaviour which

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75 The case of *Ray v Males* [2009] FamCA holds that the court does have such a power. That case has been appealed and the judgment is reserved at the time of writing. The case is discussed further below.

76 *Family Law Act 1975* (Cth) s 67Z(3). ‘Registry Manager’ is defined in s 67Z(4) to mean: (a) in relation to the Family Court—the Registry Manager of the Registry of the Court; and (b) in relation to the Family Court of Western Australia—the Principal Registrar, a Registrar or a Deputy Registrar, of the court; and (c) in relation to any other court—the principal officer of that court’. Chisholm notes that this requires notification ‘whether or not there is plausible supporting evidence’: R Chisholm, *The Child Protection–Family Law Interface* (2009), 23.

77 *Family Law Act 1975* (Cth) s 67ZA(2). Section 67ZA(1) sets out the list of relevant court staff and professionals affected by the obligation.

psychologically harms the child.<sup>78</sup> The Chisholm Review suggested that, while notifications by the court are mandatory under s 67Z, the effect of a notice under that section appears to have less weight than notifications by professionals under s 67ZA of the *Family Law Act* when it comes to a child protection agency deciding whether to investigate an allegation.<sup>79</sup>

19.58 There are provisions in the *Family Law Act* that allow family courts to obtain information from child protection agencies. A family court can make an order under s 69ZW in child-related proceedings requiring a prescribed state or territory agency to provide the court with documents or information, including notifications of suspected abuse, assessments and reports. Family courts can also acquire documents by issuing subpoenas under pt 15.3 of the *Family Law Rules*. For further discussion about these information-sharing provisions, see Chapter 30.

19.59 The *Family Law Act* also contains provisions concerning parties who intervene in proceedings. Section 92 sets out the general rule that, apart from proceedings for divorce or validity of marriage, ‘any person may apply for leave to intervene’.<sup>80</sup> Sections 91B and 92A specifically address intervention where child maltreatment concerns arise. By virtue of s 92A, a prescribed welfare authority is entitled to intervene in proceedings where it is alleged that a child has been abused or is at risk of being abused. Section 91B enables a family court to request intervention by a child protection officer in a matter involving a child’s welfare. An officer who agrees to intervene is deemed to be a party to the proceedings. An officer may also decline to intervene.<sup>81</sup> The combined effect of these provisions is that a child protection agency is entitled to intervene where child abuse, or a risk of it, is alleged; may request to intervene; or be requested to intervene. In all cases, once a child protection agency intervenes, it is, ‘unless the court otherwise orders, to be taken to be a party to the proceedings with all the rights, duties and liabilities of a party’.<sup>82</sup> This includes potential liability for costs orders.

19.60 There is no express power in the *Family Law Act* for the courts to compel a child protection agency to intervene. However, in *Ray v Males*,<sup>83</sup> Benjamin J concluded that the court can allocate parental responsibility to a child protection agency even if that agency does not consent, and where it proposes to do so, it has the power to join the agency as a party to the proceedings.

19.61 In that case allegations of abuse were made in relation to two children. Benjamin J was concerned that no parent or other person would be found to be a viable parent for one or both of the children. The Secretary of the Department of Health and Human Services, Tasmania, had been invited—under s 91B—to join the proceedings, but had declined to intervene. Further, the Department did not consent to accept

78 Ibid s 67ZA(3). If the relevant person is aware that the authority has previously been notified about the abuse or risk in either case, the person need not notify, but may still do so: s 67ZA(4).

79 R Chisholm, *The Child Protection–Family Law Interface* (2009), 23.

80 *Family Law Act 1975* (Cth) s 92(1).

81 Ibid s 91B(2).

82 Ibid s 92A(3).

83 *Ray v Males* [2009] FamCA.

parental responsibility in relation to the children. Benjamin J considered whether or not he had the power to join the Secretary and whether or not he had the power to make parenting or other orders that would bind the Secretary. He found that it was within the scope of his powers to join a party and that he had the power to make an order imposing parental responsibility on the Secretary when, in his view, there were no other alternatives.

19.62 This decision has been appealed to the Full Court of the Family Court and, at the time of writing, judgment is reserved. If the first instance decision in this case is upheld on appeal, it may be that family courts will, in future, join child protection agencies in cases where they are concerned that there will be no viable parent and they wish to allocate parental rights to the child protection agency.

### **The challenges of working together**

19.63 There are a number of concerns about the operation in practice of the provisions outlined above. Family courts may not be satisfied with the response of child protection agencies to notifications of child abuse by the courts or invitations to participate as witnesses or parties in family law proceedings. For example, in 2009 in *Denny & Purdy*, Burr J commented that requests for information or for the relevant department to intervene were frequently met with refusal.<sup>84</sup> In *Ray v Males*,<sup>85</sup> noted above, a request was made by a family court under s 91B for the child protection agency to intervene, but the agency decided that it did not wish to do so, despite the concern of the judge that there may be no viable parent.

19.64 To ameliorate these problems, family courts, child protection agencies and other agencies have developed agreed, coordinated responses to child protection cases that seek to ensure the court has the evidence it needs to make decisions. For example, the ‘Magellan’ case management program applies to serious cases of child abuse in the Family Court of Australia. It relies on non-statutory regulation, such as case management rules and memorandums of understanding (MOU), which create agreed ways of collaborating in serious child abuse cases. Formal and informal agreements about information sharing may also result in arrangements between courts and child protection agencies, designed to ensure that courts have evidence they need from child protection agencies. These information sharing issues are discussed further in Chapter 30.

19.65 Despite such initiatives, it appears that some problems remain. Important to an understanding of these problems are the different cultural and legislative frameworks within which family courts and child protection agencies work, and which drive different responses to child abuse.

19.66 These differences were the subject of comment in the Wood Inquiry into child protection services in NSW.<sup>86</sup> Whilst a family court might notify the relevant child

84      *Denny & Purdy* [2009] FamCA, [34].

85      *Ray v Males* [2009] FamCA (discussed further below).

86      J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), 548–549.

protection agency of allegations of child abuse and anticipate that the agency will investigate and be prepared to provide information and evidence for the court, there are a number of valid reasons why that agency may not take the steps the court desires.

19.67 First, the report may not be judged sufficiently serious to justify intervention. Under the *Family Law Act*, the threshold for making a notification is a suspicion, based on reasonable grounds, that the child to whom the proceedings relate has been abused or is at risk of being abused.<sup>87</sup> Under child protection legislation, the standard is generally higher—for example, in NSW it is risk of significant harm.<sup>88</sup> There may therefore be different legal and cultural practices and understandings about the appropriate threshold for intervention between family courts and child protection agencies.

19.68 In consultations during this Inquiry, judicial officers and staff in family courts demonstrated a very strong commitment to protecting children in child abuse cases—cases they described as the worst and most difficult cases they deal with. Consultations with child protection agencies, children’s courts and practitioners experienced in both jurisdictions provided a different perspective in which family court cases are not the most difficult cases. There is often some capacity to protect the child if appropriate orders are made: there may be a viable carer and/or some resources of money, stability or emotional capacity to parent. The most difficult and most deserving of cases are those in the children’s courts which are brought because the child protection agency believes that the capacity to keep the child safe is not present in the family.

19.69 Cases such as *Ray v Males*, where there is a concern that there is no viable or protective parent, would appear to be better dealt with, from start to finish, in a children’s court, because it is that court which has the power to allocate parental responsibility to a child protection agency. The responsibility for taking action in a children’s court lies with a child protection agency. The first possible reason why the agency does not intervene and apply to the children’s court is likely to be that there is a difference of perspective between the family court and the child protection agency about the risk to the child and the viability and safety of other options for the child’s care.

87 *Family Law Act 1975* (Cth) s 67ZA(2). Section 67ZA(3) permits (but does not mandate) notification where a person suspects, on reasonable grounds, ill treatment or exposure to behaviour which would cause psychological harm. Section 67Z requires notification where a party raises an allegation of abuse.

88 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 30(b): a child will only be at risk of significant harm if current concerns exist for the safety, welfare or wellbeing of the child (s 23). In the ACT, emotional abuse will only constitute ‘abuse’ under the Act if it has caused or will cause significant harm to a child’s wellbeing or development: *Children and Young People Act 2008* (ACT) s 342. In Victoria, a child is in need of protection if the child has suffered or is likely to suffer significant harm from physical or sexual abuse, or suffer significant damage to their emotional or intellectual development as a result of emotional or psychological harm: *Children, Youth and Families Act 2005* (Vic) s 162. In the Northern Territory, a child is in need of care and protection if the child has suffered or is likely to suffer harm. Harm is an act, omission or circumstance causing a significant detrimental effect on a child’s wellbeing: *Care and Protection of Children Act 2007* (NT) ss 15, 20. In Western Australia, a child is in need of protection if the child has suffered or is likely to suffer harm as a result of abuse. Harm means a detrimental effect of a significant nature on a child’s wellbeing: *Children and Community Services Act 2004* (WA) s 28.

19.70 Secondly, a child protection agency may choose not to act because the information provided by the person who notifies the abuse may not disclose sufficient reason to believe the child is at risk of the alleged abuse. For example, while the notifier (often the other parent) may have a belief to that effect, the evidence to support that belief may be insufficient, or a notification may be made without foundation for vexatious purposes.

19.71 Thirdly, the reported concern may relate to events some time in the past, or the child may currently be in a situation where he or she is no longer exposed to the risk disclosed in the report. Child protection legislation generally focuses on current concerns that might justify the involvement of child protection agencies. Thus historic matters, which might be relevant to family law proceedings, may not be sufficient to attract the intervention of the child protection system.

19.72 Fourthly, the child protection agency may decide that the family court is the most appropriate venue. If there is a viable carer and the child is in his or her care, the child is safe from the perspective of the child protection agency. In these circumstances it may be that a child protection agency will prioritise deployment of resources to children who are not safe.

19.73 In consultations the Commissions were also told that child protection authorities may sometimes resist involvement in family courts because, if they were to respond to all requests from the court for information, investigations and participation in family court cases, they would have a flow of work over which they have no control and for which they are not funded. This could divert them from priorities and undermine other work.

19.74 The Commissions were also told that child protection agencies may decline to provide information or to intervene because their involvement with the family has been limited and they have nothing of use on file. Given that NSW Community Services has recently reported that 27% of all children under 18 years were known to the agency,<sup>89</sup> it is hardly surprising that all cases are not exhaustively investigated and that the file in some cases contains very little.

19.75 However, the net effect of these dynamics is that, in some locations at least, family courts expect a response that they do not get from child protection agencies. Family courts need information to assist them in making decisions about children's safety in cases where there have been allegations of child abuse. They have no investigatory arm through which they can acquire independent evidence. They want the information from child protection agencies, but the agency does not always respond in the way that the court wishes.

19.76 In consultations during this Inquiry it became apparent that the investigatory gap was worse in some locations than in others. Some courts and child protection agencies reported that they had negotiated a relationship that worked well, and meant that family

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<sup>89</sup> A Zhou, *Estimate of NSW Children Involved in the Child Welfare System* (2010), prepared for the Department of Community Services (NSW).

courts had access to child protection information in the possession of state agencies. In other places continuing difficulties were reported. Regional differences were also reported in research by Fiona Kelly and Dr Belinda Fehlberg which showed that difficulties in communication between courts and the child protection agency apparent in Victoria were not present in the ACT.<sup>90</sup> In the ACT, the level of communication between child protection authorities and the court was relatively high, with the child protection agency volunteering information to the court; responding to requests from the court for information; monitoring and supervising cases in response to orders of the Family Court.<sup>91</sup>

### Gaps in the system and proposals for closing them

19.77 The first gap between the family courts and the child protection system is what might be called the ‘investigatory gap’—caused by the fact that the family courts have no investigatory arm to provide them with independent investigations in cases where child abuse is raised as an issue. The children who are vulnerable in this gap are those who:

- are the subject of family law proceedings involving allegations of child abuse;
- state child protection authorities decide not to assist; or
- are not included in a program such as the Magellan case management program for cases involving serious child abuse.

19.78 For these children, there are allegations of abuse but there may be no agency to conduct an independent investigation of the allegations and to present evidence to the family courts.

19.79 The second gap in the system, which might be called the ‘jurisdictional gap’, arises where a case involving allegations of child abuse is in the family courts and the court wishes to make an order giving parental responsibility to the child protection agency because the judge considers that there is no other viable option for that child.

19.80 One method of dealing with the investigatory gap has been to use agreements, MOUs and other regulatory practices that regulate how cases involving child protection issues in the family court will be managed. In 1997 the ALRC and HREOC approached concerns about the intersection of child protection and family law in the context of optimism that the problem could largely be solved by a cross-vesting scheme.<sup>92</sup> As noted in Chapter 2, the cross-vesting of state jurisdiction in federal courts failed.<sup>93</sup> However the Commissions also recommended that protocols for inter-agency cooperation between the family courts, child protection agencies and children’s courts

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90 F Kelly and B Fehlberg, ‘Australia’s Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection’ (2002) 16 *International Journal of Law, Policy and the Family* 38, 60.

91 Ibid, 61–62.

92 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997).

93 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

should be developed and that referrals to state child protection agencies from the courts should be recorded and tracked.<sup>94</sup>

19.81 The most prominent case management system that relies on agreed methods of working is the Magellan program, concerning serious cases of child abuse in the Family Court of Australia.<sup>95</sup> Magellan has narrowed the gap by providing for agreed ways in which child protection agencies will work with the family courts in child abuse cases. But it has not closed the gap: it does not operate in all regions of Australia or in the Federal Magistrates Court. The expansion of Magellan and other options for collaborative practice are discussed further in Chapter 29.

19.82 A different approach to the investigatory gap was taken in 2002 by the Family Law Council, which recommended that the federal government should establish a federal ‘Child Protection Service’ that would, amongst other things, investigate child protection concerns and provide information arising from such investigations to courts exercising jurisdiction under the *Family Law Act*.<sup>96</sup> The recommendation would have provided a dedicated risk assessment and investigatory resource for federal family courts, as an alternative to, and in the absence of, information from state and territory child protection agencies. However, this recommendation has not been adopted.

19.83 The jurisdictional gap—that the federal family courts cannot make orders under child protection legislation—has also attracted attention. It has been proposed that the states refer their powers in relation to child protection, so that federal family courts may be given the power to make child protection orders. In 2009 the Family Law Council recommended that:

The Attorney General as a member of SCAG address the referral of powers to federal family courts so that in determining a parenting application federal family courts have concurrent jurisdiction with that of State Courts to deal with all matters in relation to children including where relevant family violence, child protection and parenting orders.<sup>97</sup>

19.84 In Chapter 17 the Commissions discuss the limits on the ‘concurrent jurisdiction’ that can be achieved, within the constraints of the *Australian Constitution*, namely, that the result of any such referral is to confer on the Australian Parliament power to make federal laws in the areas covered by the referral. It cannot give federal family courts direct jurisdiction *under* state child protection, or other, legislation—this was the flaw in the cross-vesting scheme, as discussed in Chapter 2.

19.85 A referral of power could cover all child protection matters, enabling the Australian Government to expand the power of federal family courts in respect of child welfare matters so that it mirrors the jurisdiction of children’s court. It could be of a

<sup>94</sup> Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), Rec 124.

<sup>95</sup> T Brown, R Sheehan, M Frederico and L Hewitt, *Resolving Family Violence to Children: An Evaluation of Project Magellan* (2001).

<sup>96</sup> Family Law Council, *Family Law and Child Protection: Final Report* (2002), Recs 2, 3.

<sup>97</sup> Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Rec 7.

more limited nature, dealing specifically with the problem arising in *Ray v Males* and referring only the power to make an order in relation to child protection in situations where there is no viable and protective parent or other carer and the judicial officer wishes to make an order in favour of the child protection agency.

19.86 In discussing the jurisdictional gap, the Consultation Paper canvassed the Family Law Council proposal, asking if there is any role for a referral of legislative power to the Commonwealth in relation to child protection matters. If that question was answered in the affirmative, the Commissions asked what should such a referral cover.<sup>98</sup>

### **Submissions and consultations**

#### **Investigatory gap**

19.87 Stakeholders expressed strong concern in relation to the first gap, that is, the absence of investigatory resources in family court cases involving allegations of child abuse. Stakeholders argued for the need for an investigatory capacity to be provided to family courts, by greater involvement of child protection agencies in family courts or by other means.

19.88 There was also support for family courts having the power to compel the involvement of child protection agencies in cases where there are child protection concerns, and for family courts having the power to join the child protection agency as a party. The two submissions that referred to the forthcoming decision in the appeal in *Ray v Males*, supported change to the provisions of the *Family Law Act* for the family courts to be able to compel the involvement of child protection agencies.<sup>99</sup>

19.89 There was also strong support for child protection agencies to play a much greater role in family court proceedings. This support came from many different perspectives—from individuals, from non-government organisations working with victims of violence, from lawyers and from other professional groups and agencies.<sup>100</sup> The submission of the Australian Association of Social Workers provides an example of a typical response:

The AASW recommends that child protection agencies have a greater role within family law proceedings. The existing provisions of s 91B and s 92A of the *Family*

98 Consultation Paper, Question 14–5.

99 National Legal Aid, *Submission FV 232*, 15 July 2010; Queensland Government, *Submission FV 229*, 14 July 2010.

100 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Office of the Child Safety Commissioner, *Submission FV 215*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates' Court of Australia, *Submission FV 168*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 96*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

*Law Act* need to be re-examined to ensure that they provide the appropriate mechanisms for the involvement of child protection agencies. Reports from child protection agencies where there have been reports of abuse or neglect need to inform decisions made within the family law proceedings to provide the best possible outcome for children.<sup>101</sup>

19.90 A number of submissions drew attention to the resource difficulties faced by child protection agencies. The Department of Human Services (NSW), for example, suggested that it could provide investigatory services to the family courts, but this would need to be on a fee for service basis.<sup>102</sup> The National Abuse Free Contact Campaign and the National Council of Single Mothers and their Children submitted that a specialist section within child protection agencies should be developed to do family court based work and that these sections could be funded federally.<sup>103</sup>

19.91 Stakeholders reported that in locations with a smaller population, informal working relationships develop and communication, collaboration and sharing of resources are more likely. In regions where liaison between the court and the child protection agency was reportedly good, court staff and others in the system attributed this to the existence or building of good relationships between agencies, facilitated by structures and individuals who knew both cultures and systems, could translate between them, and who were trusted by people in both. Having good people in key positions was seen as crucial to making cooperative relationships work well.<sup>104</sup>

### ***Jurisdictional gap***

19.92 In relation to the jurisdictional gap, two submissions supported the idea of giving family courts the full range of state and territory child welfare powers.<sup>105</sup> Two other submissions thought that this issue was complex and would need further careful consideration.<sup>106</sup> There was, however, some support for a partial reference of powers to give family courts the ability to exercise child welfare in those limited number of cases, such as *Ray and Males*, where there is no viable and protective carer available.<sup>107</sup>

### ***Commissions' views***

19.93 The Commissions are disinclined to repeat the recommendation of the Family Law Council that a federal child protection service be established. It received very limited support in consultations and submissions.<sup>108</sup> Moreover, state child protection

101 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010.

102 Department of Human Services (NSW), *Submission FV 181*, 25 June 2010.

103 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

104 For example, Family Court Brisbane, *Consultation FVC 97*, Brisbane, 20 April 2010.

105 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

106 Queensland Government, *Submission FV 229*, 14 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

107 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Department of Human Services (NSW), *Submission FV 181*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

108 Department of Human Services (NSW), *Submission FV 181*, 25 June 2010.

agencies have existing expertise and infrastructure in child protection matters. They are also the agencies likely to be working with the child and the family if there are continuing concerns about the safety of children after any hearing in a family court. Establishing a federal agency could create another gap in the system, between a federal agency that provides child protection investigatory services for family courts, and the state agency responsible for working with the family in the longer term.

19.94 The Commissions also note that in some locations there does not appear to be an ongoing problem of collaboration between courts and child protection agencies and the relationship appears to be working to the satisfaction of both. Further, the Magellan program was negotiated between the Court and relevant agencies and appears to have worked very successfully and to have saved resources.<sup>109</sup> In the view of the Commissions, it is highly desirable that the provision of child protection investigatory services in matters before the family courts is dealt with by negotiation, collaboration and agreement (see Chapter 29).

19.95 However, the Commissions are also concerned that the problems outlined above have been identified for many years, that recommendations to deal with them have been made in numerous ways and that, in some locations at least, no solution has been found. The Commissions note the strength of support from stakeholders that this issue be dealt with effectively. In the interests of the children concerned, these problems should not be allowed to persist.

19.96 The Commissions are of the view that investigatory services in family court cases should be provided by state child protection agencies. Further, there is strength in the proposal of the National Abuse Free Contact Campaign and the National Council of Single Mothers and their Children that there should be a specialist section in state child protection agencies to undertake this work. This arrangement would have several advantages including:

- drawing on existing child protection expertise;
- providing a dedicated service responsive to the particular needs of family courts;
- developing expertise within child protection agencies in the needs of family courts;
- providing a resource of people familiar with both systems who can ‘translate’ between the systems and educate participants in both systems; and
- providing a service that is not in competition with resources that need to be devoted to state child protection matters.

19.97 The funding of this service should be negotiated by federal, state and territory governments. Its scope and costs will doubtless vary according to local conditions and existing agreements and practices in relation to these cases. It will be difficult to

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<sup>109</sup> T Brown, R Sheehan, M Frederico and L Hewitt, *Resolving Family Violence to Children: An Evaluation of Project Magellan* (2001).

determine how funding should be divided between state and federal work, but the difficulty of the task does not remove the pressing need to do it. This Inquiry has provided further evidence, if it were needed, of the persistent problems and confirms the need for action to be taken to rectify the situation.

19.98 In relation to the jurisdictional gap, given the responses from stakeholders, the Commissions are disinclined to recommend a general reference of child welfare powers to family courts. However, a limited reference of powers to enable the courts to make orders giving parental rights and duties to a child protection agency where there is no other viable and protective carer for a child is supported. A power to join a state child protection agency in this very limited class of cases is also recommended.

19.99 Despite support from submissions, the Commissions are presently disinclined to recommend that federal family courts should have a general power to join a state child protection agency as a party. Many of the supportive submissions responded to the general question of whether federal family courts should have additional powers to ensure that intervention by the child protection system occurs when necessary in the interest of the safety of children. Thus the responses to this question seemed to reflect a more general concern that child protection agencies should play a greater role in family court cases, without necessarily exploring the consequences of compelling state agencies to be a party in family court cases.

19.100 It would be an exceptional step for a court to join an agency as a party against its will. There would be significant cost implications for child protection agencies, in staff time, representation in hearings and possible adverse costs orders. It is also arguable that joining the agency as a party would not achieve a great deal in many cases. Any documents in the possession of the agency can already be accessed through subpoena. The reason for joining the agency as a party in *Ray v Males* was because the court contemplated making an order that the agency have parental rights and duties. In most cases it would appear that what family courts need from child protection agencies is not that they be a party in the case, but information and investigation of child abuse allegations. The more important question is how that information and those investigations are to be provided.

**Recommendation 19–1** Federal, state and territory governments should, as a matter of priority, make arrangements for child protection agencies to provide investigatory and reporting services to family courts in cases involving children’s safety. Where such services are not already provided by agreement, urgent consideration should be given to establishing specialist sections within child protection agencies to provide those services.

**Recommendation 19–2** State governments should refer powers to enable the Australian Government to make laws allowing family courts to confer parental rights and duties on a child protection agency in cases where there is no other viable and protective carer. Family courts should have the power to join a child protection agency as a party in this limited class of cases.

## The power of children's courts to make parenting orders

19.101 Some cases start in the child protection context, but are later referred to family courts. A child protection agency may investigate reported abuse or neglect and, during the course of that investigation, identify a viable and protective carer for the child. This may happen before or after proceedings are commenced in a children's court. If proceedings in the children's court have commenced, in some jurisdictions they will be withdrawn and the carer will be advised to go to a family court for a parenting order. In some cases, orders will be made in the children's court that do not include the continued involvement of the child protection agency in the life of the child. In these cases, children's court orders may be registered in the family courts.

19.102 This section of the chapter begins by identifying the overlapping concerns of the courts in relation to parenting issues and then considers the expansion of the power of the children's court, in limited cases, to make parenting orders.

### Overlapping concerns

19.103 The fact that there is federal family law jurisdiction and state child protection legislation and that both deal with issues of who a child shall live with, who the child shall spend time with, and protection of that child, also creates difficulties where the issue of child abuse is raised first in the state context. For example, rather than raising an allegation of child abuse in family court proceedings, a parent or another person may first notify a child protection agency that they have concerns about the child's safety. That agency will investigate, and if it concludes that the child is in need of care and protection, it will commence proceedings in a children's court. Although there are some exceptions, generally it is a child protection agency that must commence such proceedings.<sup>110</sup>

19.104 The question of whether the case should be in the children's court or a family court may arise at three different stages. First, during the agency's investigation, but before it has commenced proceedings in a children's court, the agency may identify a viable and protective carer for the child and refer the carer to a family court. Secondly, the child protection agency may already have commenced proceedings in a children's court and it may identify a viable and protective carer. It may then withdraw its application in the children's court and advise that carer to make an application for a parenting order in a family court.

19.105 Thirdly, after a hearing in a children's court, it may become apparent that, although the child protection matters are resolved, there is still a dispute, for example between parents who cannot agree who the child shall live with and who it shall spend time with. Orders of a children's court may not include the continued involvement of a child protection agency, but may instead regulate the parents' involvement with a

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110 In the ACT, someone other than the chief executive may apply for a protection order with the leave of the Court: *Children and Young People Act 2008* (ACT) s 425. Protection applications in Victoria may be made by the Secretary, or by a member of the police force: *Children, Youth and Families Act 2005* (Vic) ss 181, 240(1), 240(3), 243.

child. For example, courts in some states can make orders under the child protection legislation in relation to who may have contact with a child, and the conditions of that contact. In other states, courts are only able to make orders prohibiting contact by certain parties—they are unable to establish a contact regime.<sup>111</sup> When the children's court makes orders regulating parental contact these orders can be registered in the family courts.<sup>112</sup>

### **Children's court or family court?**

19.106 In a family violence context, an illustration of the issues is provided by the example of children regarded as being at serious risk from family violence. A report is made to a child protection agency and that agency concludes that the mother may be a viable carer if the violent father is excluded from the home and from contact with the mother and children. The mother may be advised by the child protection agency to go to a family court for a parenting order. A parenting order in a family court may be desirable for the agency because, if the children are with a viable and protective carer, the conditions for a care order (that the child is in need of care and protection) no longer apply. Further, if these children are now considered safe, the agency's resources need to be used to protect other children who are at risk.

19.107 The mother may also prefer an order from the family court rather than the continuing involvement of the child protection agency in her life and that of her children. However, there may be problems involved in referring these cases to the family courts, especially if the applicant does not receive support from the child protection agency in making the application.

19.108 First, the viable carer may not take action in the family courts, so that there may be no enforceable order securing the safety of the children, either under the *Family Law Act* or under state and territory family violence legislation. In the example above, if the mother does not secure the arrangements in relation to the children with an order and the father takes them or fails to return them after spending time with them, she will have no order on which to rely and the children may be at risk.

19.109 Secondly, in the family court, the applicant may have difficulty in securing the order that was envisaged by the agency as being safe and protective for the children. The applicant may have difficulty marshalling evidence of violence and abuse. Providing evidence of violence to a standard sufficient to satisfy family courts

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111 In NSW, Victoria, Western Australia, South Australia, Tasmania and the ACT, the court can make orders in relation to contact when it makes other orders relating to the care of the child: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s79(2)(b); *Children, Youth and Families Act 2005* (Vic) s 283(1)(e); *Children and Community Services Act 2004* (WA) s 63(1); *Children's Protection Act 1993* (SA) s 38(1)(f); *Children, Young Persons and Their Families Act 1997* (Tas) s 42(4)(e); *Children and Young People Act 2008* (ACT) s 464(2)(a). In Queensland and the Northern Territory, the court may only prohibit contact: *Child Protection Act 1999* (Qld) s 61(b); *Care and Protection of Children Act 2007* (NT) s 123(2).

112 *Family Law Act 1975* (Cth) ss 70C, 70D and 70E provide for this registration. The effect of registering an order is that it has the same force and effect as a family court order under pt VII of the Act.

may be difficult and is rarely attempted, except in the most severe of cases.<sup>113</sup> Further, where cases involving child protection concerns are transferred to the family courts, it may be that the applicant wishes to, or has been advised to, seek an order excluding or strictly limiting contact with a violent parent. As noted in the Chisholm Review, certain provisions of the *Family Law Act* may impede the extent to which the court is informed about any history or risk of family violence. In particular, concerns have been raised about s 60CC(3)(c)—the ‘friendly parent’ provision—and s 117AB, that provides for costs orders if the court is satisfied that a party to proceedings knowingly made a false allegation or statement in the proceedings.<sup>114</sup> Thus the outcome may not be the one envisaged by the child protection agency that sent the applicant to the family courts and it may be one that puts the children at risk.

19.110 Evidence of these problems is provided from several sources. In 2002, the Family Law Council argued that there will be some cases where it is appropriate to leave it to a viable carer to seek orders in a family court, for example where all that is needed is to formalise an agreed arrangement. However, in other cases it will be ‘an abrogation of the public responsibility to ensure that children are protected’, because

a parent may find it very difficult to take responsibility for presenting a case to court. There may be language problems, problems understanding the legal system, or problems receiving or maintaining legal aid. Victims of domestic violence or other abuse may find it very difficult to take responsibility for a legal battle with the perpetrator when they remain fearful of the former partner’s propensity for violence. For these reasons, if the child can be adequately protected through orders made under the Family Law Act, then in some cases it may be very important for child protection authorities to take the lead in presenting the case for orders which will protect a child.<sup>115</sup>

19.111 Empirical research and scholarly commentary also provides evidence of the problem. An evaluation of the Magellan program in 2001 noted that cases were being shifted from children’s courts to family courts at the instigation of child protection agencies.<sup>116</sup> It was noted there that cases that had been in the children’s court were disproportionately represented in the cases that went the full length of proceedings in the Family Court in the Magellan program and were the most expensive in terms of the costs of representation of the children.<sup>117</sup>

19.112 In Kelly and Fehlberg’s 2002 study of child protection cases in the Victorian Children’s Court, it was revealed that the Department of Human Services sought to withdraw its Children’s Court application in 80 out of 113 cases because a viable carer had been identified and that carer had obtained, applied for, or was willing to apply for

113 See, eg, A Rees, *Consultation FVC NSWLRC 7*, Melbourne, 16 June 2010. See also L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies.

114 R Chisholm, *Family Courts Violence Review* (2009), [3.2], Rec 3.5. See also Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Rec 13.

115 Family Law Council, *Family Law and Child Protection: Final Report* (2002), 77.

116 T Brown, R Sheehan, M Frederico and L Hewitt, *Resolving Family Violence to Children: An Evaluation of Project Magellan* (2001).

117 Ibid, 38.

family court orders.<sup>118</sup> In some cases, family court orders were not obtained. However, 62 of these cases were tracked in the family court. Family court orders in favour of the identified viable carer were obtained in 56 of the tracked cases but, in 6 cases, the orders were not in favour of the identified viable carer. In one case, the agency identified the father as the viable carer and referred the family to the family court, but had no further involvement. The children were placed in the care of their mother, from whom the child protection agency had twice removed them and whose situation had not changed significantly.<sup>119</sup>

19.113 In this study, the Department of Human Services very rarely played any role in the family court proceedings to which they referred carers, appearing in only six of the 62 tracked cases. The researchers identified some cases involving serious violence and high levels of concern about children's safety where children were left without orders.

19.114 In Kelly and Fehlberg's study, the Victorian Department of Human Services recommended that carers apply for family court orders because such orders would provide stability for the children. While orders of children's courts, including orders about whom a child is to live with, may be of limited duration, parenting orders under the *Family Law Act* may remain in force until the child is 18.<sup>120</sup> Unfortunately, stability was not necessarily an outcome for the children in the family courts. Kelly and Fehlberg identified a number of cases where there were repeated applications and orders.<sup>121</sup> In their sample, the actions of child protection agencies in referring viable carers to the family courts did not always achieve the aims of an enforceable order, an order in favour of a parent identified by the agency as a viable parent and a stable situation for the child.

19.115 Professor Thea Brown and Dr Renata Alexander have also commented that referring viable carers in child protection cases to a family court is not always effective and that there are conflicts and gaps in the systems.<sup>122</sup>

19.116 Evidence of this problem also came from consultations and submissions. One participant in the ALRC's Family Violence Online Forum provided an illustration of this dilemma:

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118 F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38, 47. The same tendencies were also found by Brown et al in another study: T Brown, M Frederico, L Hewitt and R Sheehan, *Problems and Solutions in the Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia* (1998).

119 F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38, 49.

120 *Family Law Act 1975* (Cth) s 65H. The Children's Court of Victoria, when making a protection order, may only grant custody to a third party for a period of less than 12 months: *Children, Youth and Families Act 2005* (Vic) s 283(1)(d).

121 F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38, 50.

122 T Brown and R Alexander, *Child Abuse and Family Law: Understanding the Issues Facing Human Service and Legal Professionals* (2007).

For instance, the [child protection department] get contacted in relation to the safety of a child due to family violence allegations etc. They advise the mother to take out an intervention order excluding the father from the home or they will have no choice but to remove the child from her care. The mother then takes out an intervention order excluding the father. The department then make an assessment that their involvement is not warranted in the case as they deem the mother to be acting protectively.

The problem ... arises when an application is made in the family court jurisdiction by the father to spend time with the children.

At the Family or Federal Magistrates Court, the mother explains why she is seeking that the father have no contact or supervised contact with the children. She says she was advised by [the child protection department] to restrict contact. [The child protection department] however have not provided any written evidence of this advice, except to advise the court that they have no reason to be involved where the mother is acting protectively.

The mother is then left in court by herself, without [the child protection department] providing support to the mother's position. The mother then has to explain why she is acting as an 'unfriendly parent' (as per the *Family Law Act*) by not facilitating contact.<sup>123</sup>

### Proposals for closing the gap

19.117 A number of proposals have already been made in relation to the problems identified above. These proposals are reviewed before the responses from stakeholders are considered. The first proposal is for child protection agencies to stay engaged with more parents when they advise them to apply to the family court. The second is that the jurisdiction of the children's courts be extended to allow them to make orders under the *Family Law Act*, so that where cases are commenced in the children's courts and it becomes evident that a parenting order under the *Family Law Act* is more appropriate, that court can make such an order.

#### *Change of practice of child protection agencies*

19.118 Greater support for parents with family violence and child protection concerns who litigate in family courts may be achieved by a change of practice by child protection agencies, in favour of staying engaged with more families at an appropriate level. In some cases, no further intervention will be required because the desired orders are achieved by consent. In other cases the intervention required will be limited to providing a letter detailing the nature of the advice given to the applicant by the child protection department. In others it may involve voluntary provision of documentation (rather than reliance on subpoena or s 69ZW of the *Family Law Act*), the provision of practical support during FDR and/or litigation, or involvement in the case through intervention under s 92A of the *Family Law Act*. Kelly and Fehlberg describe this type of intervention in their study of cases in the ACT—albeit in relation to a small sample.<sup>124</sup>

123 Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers.

124 F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38.

19.119 The consequences of providing this support would place a greater responsibility on child protection agencies. However the consequences of not providing it would appear to be that some children are placed at risk. If the recommendation above, of specialist units within child protection services dealing with family law work, is accepted, these units could be a resource for litigants referred to the family courts by the agency, as well as for the court in requesting investigation of child abuse. This may ameliorate the burden on state child protection departments.

19.120 Further, it may be that the required support for some clients does not need to be provided by a child protection agency, but could be provided, for example, by a domestic violence court support worker, parenting support, counselling support or other services.

#### ***Expanding jurisdiction of children's courts***

19.121 The second proposal to close this gap in the system involves giving children's courts powers to make orders under the *Family Law Act* so that those courts could make a parenting order in an appropriate case rather than referring the parent to a family court. In ALRC Report 84, the ALRC and HREOC considered that, in principle, there is no procedural reason for this limitation on the jurisdiction of state and territory children's courts and recommended the vesting of federal jurisdiction under s 69J of the *Family Law Act* in children's courts.<sup>125</sup> In its report on *Family Law and Child Protection*, the Family Law Council recommended that 'the Family Law Act should be amended to allow Children's and Youth Courts to make consent orders regarding residence and contact in certain circumstances'.<sup>126</sup>

19.122 While children's courts in some states can make orders under the relevant child protection legislation in relation to who may have contact with a child, and the conditions of that contact, in other states, courts are only able to make orders prohibiting contact by certain parties—they are unable to establish a contact regime.<sup>127</sup>

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125 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), Rec 122. This proposal was repeated by the VLRC—Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 77 stated that the *Child, Youth and Families Bill 2005* should be amended to declare the Children's Court a court of summary jurisdiction, so the court can exercise powers under the *Family Law Act* to make, vary, discharge or alter a family law child contact order. See also *Children, Young Persons and Their Families Act 1997* (Tas) s 48(2); *Children and Young People Act 2008* (ACT) ss 17(1)(f), 456(4)(c).

126 Family Law Council, *Family Law and Child Protection: Final Report* (2002), 82, Rec 10.

127 In NSW, Victoria, Western Australia, South Australia, Tasmania and the ACT, the court can make orders in relation to contact when it makes other orders relating to the care of the child: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 79(2)(b); *Children, Youth and Families Act 2005* (Vic) s 283(1)(e); *Children and Community Services Act 2004* (WA) s 63(1); *Children's Protection Act 1993* (SA) s 38(1)(f); *Children, Young Persons and Their Families Act 1997* (Tas) s 42(4)(e); *Children and Young People Act 2008* (ACT) s 464(2)(a). In Queensland and the Northern Territory, the court may only prohibit contact: *Child Protection Act 1999* (Qld) s 61(b); *Care and Protection of Children Act 2007* (NT) s 123(2).

19.123 Each state and territory court of summary jurisdiction is vested with jurisdiction under pt VII of the *Family Law Act*.<sup>128</sup> Magistrates are able to exercise federal family law jurisdiction under s 69J of the *Family Law Act*, but children's court magistrates are not able to do so—because s 69J confers powers on ‘each court of summary jurisdiction’, and it appears to be generally accepted that children’s courts are not courts of summary jurisdiction.<sup>129</sup> However, where magistrates sit in both children’s courts and the general jurisdiction of the magistrates court, it would appear that while the judicial officer has no jurisdiction to make orders under the *Family Law Act* when sitting in the children’s court, the same judicial officer does have the power to do so when sitting in the magistrates court.

19.124 In the Consultation Paper, the Commissions asked whether children’s courts should be given more powers to ensure orders are made in the best interests of children that deal with parental contact issues and, if so, what those powers should be.<sup>130</sup> The Commissions also asked whether the *Family Law Act* should be amended to extend the jurisdiction that state and territory courts already have under pt VII to make orders for a parent to spend time with a child.<sup>131</sup>

### ***Submissions and consultations***

#### ***Involvement of child protection agencies***

19.125 There was overwhelming support from stakeholders for child protection agencies to be more involved in family court proceedings.<sup>132</sup> For example, the Law Society of NSW stated that ‘child protection agencies should intervene in Family Courts more often as they have a useful and relevant role to play’.<sup>133</sup> The Office of the

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128 Other than proceedings for granting leave for adoption proceedings: *Family Law Act 1975* (Cth) s 69J(1). But note that much of what is given under s 69J is taken away by s 69N which requires the transfer to family courts of contested proceedings, except with the consent of the parties.

129 Family Law Council, *Family Law and Child Protection: Final Report* (2002), 82; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), [15.50]. There may be room for debate about this issue, which will depend on interpretation of particular state legislation. However, leaving such issues aside, it appears to be the accepted practice that children’s courts refer cases to a family court rather than exercising jurisdiction under the *Family Law Act*.

130 Consultation Paper, Question 14–1.

131 Consultation Paper, Question 14–2.

132 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Office of the Child Safety Commissioner, *Submission FV 215*, 30 June 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Solomums Australia for Family Equity, *Submission FV 200*, 28 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; Confidential, *Submission FV 109*, 8 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010.

133 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

Child Safety Commissioner in Victoria also submitted that child protection agencies should be required to play a much more active role in family law proceedings and ‘it is critical that kinship carers are not abandoned by child protection when cases go across the state or territory and federal systems’.<sup>134</sup>

19.126 Stakeholders also raised concerns that child protection agencies were passing on matters to family courts, sometimes with adverse consequences. For example, the National Peak Body for Safety and Protection of Parents and Children argued that child protection agencies avoided involvement in family court cases ‘handballing this to family courts ... so the children and vulnerable mums are falling through the cracks in the system’.<sup>135</sup>

#### ***Expanding power of children’s courts***

19.127 With respect to the question whether children’s courts should be given power to make parenting decisions under the *Family Law Act*, many submissions responding to this question did so in a general way by supporting the idea that one court should deal with all child protection cases. For example, the Aboriginal Family Violence Prevention and Legal Service submitted that:

the current two court system for dealing with children’s matters is clumsy, confusing for families and can lead to inconsistent outcomes when two jurisdictions take different approaches.<sup>136</sup>

19.128 The Magistrates’ Court and Children’s Court of Victoria observed that:

When dealing with a family and determining issues affecting that family, the capacity to exercise all jurisdictions is sensible and avoids inconsistent responses from different courts on the same facts. The child’s best interests should be the focus not the appropriateness of a particular jurisdiction.<sup>137</sup>

19.129 Submissions also mentioned the problems of the lack of coordination between the two systems and the need for improved integration to provide a holistic approach, consistent with the ‘one court’ principle. One submission also argued specifically for ‘a more seamless approach’.<sup>138</sup>

19.130 However, a number of concerns were raised in relation to increasing the jurisdiction of children’s courts to deal with *Family Law Act* matters. The first was the complexity of the task that would be faced by magistrates called upon to make orders under both child protection and family law. Cases involving child protection issues, including family violence, are complex cases. The Chief Justice of the Family Court and the Chief Federal Magistrate submitted that courts exercising jurisdiction under both state or territory child protection legislation and under the *Family Law Act* would

134 Office of the Child Safety Commissioner, *Submission FV 215*, 30 June 2010.

135 National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010.

136 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010. See also The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

137 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

138 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

be dealing with legislation which contains ‘many significant and fundamental differences’.<sup>139</sup> Children’s court judicial officers may be full time specialists but, more frequently, they also sit in the very broad general jurisdiction of magistrates courts. Adding *Family Law Act* proceedings to the list of matters to which they must attend would add significantly to their tasks.<sup>140</sup>

19.131 The concern noted above, that magistrates courts presently have jurisdiction under the *Family Law Act* but rarely exercise it, was also mentioned in submissions, although specialist family violence courts were named as an exception.<sup>141</sup> It was suggested that the reluctance of magistrates to use their powers may be based on a feeling that they do not have the requisite expertise.<sup>142</sup> Concerns of this nature led the Chief Justice of the Family Court and the Chief Federal Magistrate to suggest that:

In child protection proceedings where contact between parents arises as an incidental matter it is difficult to see an objection in principle to this being determined in a state child protection court. Once a child protection issue has been determined however, the state court’s jurisdiction in what is otherwise a federal family law issue should cease.<sup>143</sup>

19.132 The importance of specialised courts, both for children’s cases<sup>144</sup> and for family law matters,<sup>145</sup> and the need for training for judicial officers who do this work was argued by a number of submissions.<sup>146</sup> The Magistrates’ Court and the Children’s Court of Victoria agreed that there will be a need for training, but emphasised that Victoria has learned from the benefits of specialised courts dealing with family violence cases.<sup>147</sup>

19.133 A further concern was that children’s courts are presently operating over capacity. Adding another jurisdiction to their workload would require additional resources.<sup>148</sup>

139 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

140 Ibid; Berry Street Inc, *Submission FV 163*, 25 June 2010; N Ross, *Submission FV 129*, 21 June 2010.

141 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

142 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010.

143 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

144 Ibid; N Ross, *Submission FV 129*, 21 June 2010.

145 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Department of Human Services (NSW), *Submission FV 181*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

146 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Office of the Child Safety Commissioner, *Submission FV 215*, 30 June 2010.

147 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

148 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; N Ross, *Submission FV 129*, 21 June 2010.

19.134 Along with strong support for one court to deal with children's matters and the need for a more seamless system, there was also much support for further consideration and investigation of this proposal before action is taken.<sup>149</sup> The Queensland Government, for example, argued that this option would require some fundamental changes to accommodate significant differences between the two systems.<sup>150</sup> One example of a practical issue is that children's courts are closed courts, whereas family courts are not.<sup>151</sup> National Legal Aid suggested that the pilot scheme proposed in Western Australia to integrate family law and child protection cases in the state family court could be used as a pilot for the extension of the jurisdiction of the children's courts in other states.<sup>152</sup>

#### *Commissions' views*

##### *Involvement of child protection agencies*

19.135 The Commissions acknowledge the powerful case for child protection services having more involvement in family court proceedings where they investigate allegations of child abuse and refer carers to family courts for orders. There will be cases where a simple referral is all that is required and the applicant has the capacity to secure the orders needed. However, this is clearly not sufficient to provide effective protection for all families and some children appear to be endangered by this gap in the system. Therefore, where a child protection agency investigates child abuse, locates a viable and protective carer, and refers that carer to a family court for parenting orders, the agency should, in appropriate cases, provide written information to a family court about its advice and the reasons for it, provide reports and other evidence as appropriate and/or intervene in the proceedings.

19.136 If the recommendation of the Commissions for a specialist service within child protection agencies for family court cases is accepted, it may be appropriate that this service could also provide support for such litigants. Alternatively it may be that what is required in some cases is not support from a child protection agency but from a court support service that would facilitate the referral and access to other supports.

##### *Expanding power of children's courts*

19.137 ALRC Report 84 criticised legal processes which required a child's persistent and multiple engagement with the legal system as being contrary to the

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149 National Legal Aid, *Submission FV 232*, 15 July 2010; Queensland Government, *Submission FV 229*, 14 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

150 Queensland Government, *Submission FV 229*, 14 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

151 N Ross, *Submission FV 129*, 21 June 2010.

152 National Legal Aid, *Submission FV 232*, 15 July 2010.

child's best interests.<sup>153</sup> It is also at odds with the goal of seamlessness that the Commissions have identified as a principal aim of this Inquiry.<sup>154</sup> The Commissions' view is that, wherever possible, matters involving children should be dealt with in one court—or as seamlessly as the legal and support frameworks can achieve in any given case.

19.138 This was also the outcome recommended by the Family Law Council in 2002 as part of its 'one court principle'—that is, that state and territory courts should have a broad power to make residence and contact orders under the *Family Law Act* in child protection proceedings so that one court can deal with all substantive matters and ensure the child's best interests and welfare are addressed.<sup>155</sup>

19.139 The best interests of children and those who care for them is clearly served by being able to have all issues dealt with by one court. It is those children and their families who pay the price for the failure to imagine a better and undivided system, and to implement it. The Commissions therefore recommend that, when a matter is before a children's court, such court should have the same powers to make decisions under the *Family Law Act* as do magistrates courts. This should include the expanded powers recommended in Chapter 16.

19.140 Expanding the jurisdiction of children's courts in this way would have the advantage that, where a case commences in a children's court but raises parenting issues, a court apprised of the child protection concerns and having evidence from a child protection authority would be able to decide if it were more appropriate for a decision to be made under child protection legislation, or under the *Family Law Act*. It would have jurisdiction to make both types of orders.

19.141 The Commissions acknowledge, however, that there are arguments against giving children's courts powers under the *Family Law Act*. For example, while magistrates courts presently have the power to make orders under pt VII of the *Family Law Act*, they appear to be disinclined to use those powers. As noted in Chapter 16, this may be because:

- magistrates may not be familiar with their powers under the *Family Law Act*;
- legal representatives may also not be familiar with those powers and may not request that they be used or argue effectively for their use;
- decisions under pt VII of the *Family Law Act* are complex decisions and there may be concerns about falling into appealable error; and
- magistrates courts have limited time available in busy court lists—making these decisions would be an added burden.

153 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), ch 15.

154 See Ch 3.

155 Family Law Council, *Family Law and Child Protection: Final Report* (2002), 85–86, Rec 12.

19.142 Similar considerations may well be relevant to children's courts making decisions under the *Family Law Act* and it is therefore important that, accompanying any expansion of jurisdiction, the necessary resources are committed for children's courts to be confident in exercising these powers.

19.143 Further, FDR is often used to resolve family disputes and its availability may be limited in children's courts. However, there is a developing use of FDR in child protection cases (see Chapter 23). Further, FDR services are community based, rather than court based, and can be accessed by litigants with parenting issues who commence in children's courts. Hence the Commissions consider that this is not a powerful argument against expanding children's court jurisdiction.

19.144 However, the Commissions are also cognisant of the complexity of making the proposed changes, involving, as they do, a shift in decision making about parenting in some cases of child abuse to children's courts. Issues of resources, training and concerning the fundamental differences in the perspectives of children's and family courts and in the legislation under which they act, were some of the reservations expressed by stakeholders.

19.145 The Commissions therefore suggest that the work proposed in Western Australia, involving integration of family law and child protection issues, be used as an instructive pilot, to identify the benefits and challenges of this change in more detail and to inform future developments in other states and territories.

**Recommendation 19–3** Where a child protection agency investigates child abuse, locates a viable and protective carer and refers that carer to a family court to apply for a parenting order, the agency should, in appropriate cases:

- (a) provide written information to a family court about the reasons for the referral;
- (b) provide reports and other evidence; or
- (c) intervene in the proceedings.

**Recommendation 19–4** The *Family Law Act 1975* (Cth) should be amended to give children's courts the same powers as magistrates courts.

## Families in both courts—duplication of proceedings

19.146 The possibility that proceedings will be duplicated also arises in child protection cases. For example, proceedings may be commenced in a children's court by a child protection agency but, whilst those proceedings are in train, a parent who wishes to spend time with her or his children, will make an application to a family court for an order. While orders of family courts defer to those of children's courts, both the parties and the court may nevertheless expend considerable time and effort dealing with the same family and the same facts. Children who are mired in these parallel proceedings may be subjected to stress, uncertainty and perhaps repeated contact with courts and other agencies in two jurisdictions.

19.147 In most states and territories, the relevant child protection authorities and family courts have entered into protocols that assist in coordinating cases that may be in family courts or children's courts.<sup>156</sup>

19.148 This problem has received repeated judicial and academic attention and criticism.<sup>157</sup> In 1995, the Hon Alistair Nicholson CJ (as he then was) said in *Re Karen*:

It is all too common for departments in the states and territories and this court to be proceeding along parallel, but divergent tracks in relation to issues of children's welfare.<sup>158</sup>

19.149 The ALRC and HREOC noted the same problem in their joint report in 1997.<sup>159</sup>

19.150 The Family Law Council observed in 2002 that there is a 'need for state and territory government to reach agreement with the Commonwealth at the highest levels to ... avoid unnecessary duplication of effort and confusion of orders'.<sup>160</sup> Again, in 2009, the Council noted that many families are involved in proceedings in more than one jurisdiction, with increased likelihood that inconsistent orders may be made, people will be put at risk, and will suffer added strain.<sup>161</sup>

19.151 The research by Kelly and Fehlberg in 2002, noted above, provides empirical evidence of cases where proceedings were on foot in both courts at the same time with very little communication between the two courts.<sup>162</sup> In one case, despite the provisions of s 69ZK(1) discussed above, conflicting orders were made in the children's court and the family court on the same day.<sup>163</sup> Communication did take place in some cases, but Kelly and Fehlberg concluded that whether or not this happened seemed to be a function of which social worker was allocated to the case.<sup>164</sup> They also noted in their sample some very complex cases involving long term litigation in both courts, where the availability of two jurisdictions to the parties appeared to have offered them two opportunities to argue their cases to the full, 'accentuating the emotional harm to the children'.<sup>165</sup>

<sup>156</sup> Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), 38. Most of these protocols are not publicly available.

<sup>157</sup> See, eg, *Re Karen* (1995) 19 Fam LR 528; F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38; T Brown, M Frederico, L Hewitt and R Sheehan, *Problems and Solutions in the Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia* (1998); J Seymour, 'The Role of the Family Court of Australia in Child Welfare Matters' (1992) 21 *Federal Law Review* 1.

<sup>158</sup> *Re Karen* (1995) 19 Fam LR 528, 556.

<sup>159</sup> Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), [15.11]–[15.13].

<sup>160</sup> Family Law Council, *Family Law and Child Protection: Final Report* (2002), 91.

<sup>161</sup> Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 60.

<sup>162</sup> F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38.

<sup>163</sup> *Ibid*, 55.

<sup>164</sup> *Ibid*, 56.

<sup>165</sup> *Ibid*, 56.

19.152 Professor Thea Brown and her co-researchers evaluating the Magellan program also found cases involving duplication of proceedings in both courts.<sup>166</sup> She asked why there were cases that involved a final hearing in two different courts, why there was duplication of time, effort and funding, and what impact the duplication has on the children involved.<sup>167</sup> In half of the cases reviewed, families were involved in other legal proceedings. Although some of this duplication may be unavoidable, it caused delays and stress to the children who were involved in multiple legal proceedings.<sup>168</sup> It is likely that some duplication of proceedings relates to cases that are particularly complex and difficult to manage. Nevertheless, one of the lessons of the Magellan program appears to be that if multiple and complex problems are dealt with in one court, there will be discernible benefits to the parties, the children and in reducing costs.<sup>169</sup>

#### ***Submissions and consultations***

19.153 Although few stakeholders referred specifically to duplication of proceedings as an issue, the focus of many submissions was the more general point that there should be only one court dealing with these issues. For example, the Victorian Office of the Child Safety Commissioner referred to the importance of reducing duplication, and removing the need for attendance at multiple courts and repeated court appearances.<sup>170</sup> UnitingCare Children, Young People and Families submitted that there should be consistency in the MOUs and protocols between family courts and child protection agencies, with cross-jurisdictional training in interpretation of these protocols.<sup>171</sup>

#### ***Commissions' views***

19.154 The Commissions have a continuing concern that the existing protocols and MOUs that govern the relationship between family courts, children's courts and child protection agencies may not be operating effectively and that the impact on children will be detrimental. The recommendations made above for increased involvement of child protection agencies in family courts and for children's courts to exercise jurisdiction under the *Family Law Act* may resolve some of the problems of duplication. In addition to these measures, family courts and children's courts should review their protocols and practices for communicating about cases in both courts and improve that communication so that duplication does not occur.

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166 T Brown, R Sheehan, M Frederico and L Hewitt, *Resolving Family Violence to Children: An Evaluation of Project Magellan* (2001).

167 Ibid, 38.

168 Ibid, 47.

169 Ibid.

170 Office of the Child Safety Commissioner, *Submission FV 215*, 30 June 2010.

171 UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010.

**Recommendation 19–5** Federal, state and territory governments should ensure the immediate and regular review of protocols between family courts, children’s courts and child protection agencies for the exchange of information to avoid duplication in the hearing of cases, and that a decision is made as early as possible about the appropriate court.



# **20. Family Violence, Child Protection and the Criminal Law**

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## **Contents**

Introduction	933
Criminal offences relating to child protection	935
Specific offences	936
The location of offence provisions	938
The form of the offence provisions	941
Penalties for offences under child protection laws	941
Information sharing between child protection agencies and the police	944
Confidentiality of reporters	944
Deciding whether to prosecute	950
Mandatory reporting of children’s exposure to family violence	955
Protection orders and children—the current legal framework	960
Magistrates courts	960
Children’s courts	962
Commissions’ views	968
Child protection and juvenile justice	973
Commissions’ views	978

## **Introduction**

20.1 The interaction of state and territory child protection laws with a range of other state and territory laws is one of the areas under consideration in this Inquiry.<sup>1</sup> This chapter focuses on the intersections between child protection law, the criminal law and the law relating to family violence protection orders, and considers ways to address gaps between child protection and criminal laws to improve the protections for children whose safety is threatened in situations involving family violence.

20.2 As noted in Chapter 4, the various laws under consideration reflect different purposes. Child protection laws operate within a child welfare paradigm, the main purpose of which is to provide measures to assist and support children and young people who are in need of care and protection.<sup>2</sup> A consistent theme across all child protection laws—and one which is shared with the family law jurisdiction, considered in Chapter 19—is that the welfare and best interests of the child are the paramount

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<sup>1</sup> See Ch 1.  
<sup>2</sup> See Ch 19.

consideration.<sup>3</sup> In a child welfare context, central to determining the best interests of a child is the importance of preserving the integrity of the family unit and promoting a child's positive relationships with his or her family by offering support and assistance to the family. Consistent with this philosophy is the obligation on the state to limit its intervention in the relationship between a child and parent to that which is necessary to secure the safety and wellbeing of the child.<sup>4</sup>

20.3 The purposes of family violence legislation in the states and territories are expressed in various ways, a common theme of which is ensuring, facilitating or maximising the safety and protection of persons, including children, who fear or experience family violence or are exposed to it. The protection of children is central to both child protection laws and family violence protection orders.

20.4 Criminal laws, however, have different purposes, focusing upon the maintenance of social order and defining the fundamental requirements for a person's treatment of others. Central to the concept of criminality are the notion of individual culpability and the criminal intention for one's actions.<sup>5</sup> Where family law disputes are regarded as 'private' disputes, concerning litigation between individual litigants, criminal law is 'public' because it is the state which is responsible for the investigation and prosecution of offences. Common to both the criminal law and child protection law is the central role played by the state.

20.5 The recommendations made in this chapter reflect the context of the different purposes that each legislative regime serves. The chapter begins with an examination of specific offences of child abuse and neglect contained in child protection legislation and the criminal law, which in large part reflect the grounds upon which a legislative child protection intervention is triggered. This is followed by a discussion of specific issues relating to information sharing between the two central agencies responsible for executing the state's child protection and prosecution functions—the child protection agency and the police. The Commissions make recommendations aimed at facilitating greater information sharing and cooperation between these two agencies to ensure a more coordinated and effective response to child abuse and neglect. The specific issues considered include: permitting otherwise confidential information to be shared with law enforcement agencies in limited circumstances; fostering the involvement of the child protection agency in decisions to prosecute; and promoting more constructive and effective reporting practices by police. The chapter also discusses—and makes recommendations in relation to—the powers of children's courts to make family violence protection orders, and their capacity to refer concerns for the safety of

<sup>3</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(a); *Children, Youth and Families Act 2005* (Vic) s 10(1); *Child Protection Act 1999* (Qld) s 5(1); *Children and Community Services Act 2004* (WA) s 7; *Children's Protection Act 1993* (SA) s 4(1); *Children, Young Persons and Their Families Act 1997* (Tas) s 8(2)(a); *Children and Young People Act 2008* (ACT) s 11; *Care and Protection of Children Act 2007* (NT) s 9.

<sup>4</sup> See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9(2)(c); *Children, Youth and Families Act 2005* (Vic) s 10(3)(a). See also Chs 4, 19.

<sup>5</sup> Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia*, Report 95 (2002), [2.9]. See also Ch 4.

children and young people, that arise in the course of proceedings, to child protection agencies for investigation and report.

### Criminal offences relating to child protection

20.6 Parents, caregivers and those with parental responsibility have a duty, at law, to provide children in their care with the ‘necessities of life’, which includes providing financial support, food, clothing, accommodation, healthcare and access to education.<sup>6</sup> The duty normally extends to children up to the age of 16 years, but may apply to older children in some circumstances, for example, where the child has a disability. Parents and caregivers also have a duty to protect children in their care from harm, including harm that is caused as a result of abuse or neglect.

20.7 The failure of those with parental responsibility to provide for the basic needs of children in their care, or to protect them from harm as a result of abuse or neglect, may constitute an offence under general criminal law or under child protection laws, thus exposing the parent or caregiver to criminal proceedings and the consequences of a criminal conviction.

20.8 As noted in Chapter 19, child abuse and neglect are often closely linked to family violence. An offender may be abusing both a parent and children; exposure to incidents of family violence between adults may be a risk to the child’s health and safety; or violence may interfere with a person’s capacity to be an effective parent.

20.9 Serious cases of child abuse and neglect, causing permanent or fatal injury to a child, are usually dealt with under the general criminal law as an offence of violence—for example, assault or manslaughter. Sexual abuse is also dealt with under the criminal laws of each state and territory which create a number of sexual offences against children.<sup>7</sup> Sexual offences are dealt with in Part G of this Report, which also considers the difficulties of collecting forensic evidence and the provision of better support to victims in order to reduce rates of attrition. This section will not deal in detail with the application of these general offences.

20.10 The criminal law also creates a number of specific offences relating to child neglect and abuse. The creation of specific offences recognises that the criminal law has an important role to play in child abuse and neglect, on the basis that a function of the criminal justice system is to define acceptable standards of behaviour. Prosecution of an offender when those standards are breached sends a clear message to the community, denounces abusive or neglectful conduct, punishes the offender and acts as both a specific and general deterrent, to prevent the offender and others from committing or recommitting the same offence. The importance of the criminal law in

<sup>6</sup> See, eg, *Crimes Act 1900* (NSW) s 43A(2); *Criminal Code* (Qld) s 364; *Criminal Law Consolidation Act 1935* (SA) s 30; *Criminal Code* (Tas) ss 144, 145; *Criminal Code* (NT) s 183. Parents also have a primary duty to house, educate and provide for their children under the *Child Support (Assessment) Act 1989* (Cth) s 3.

<sup>7</sup> See, eg, *Crimes Act 1900* (NSW) ss 66A–66D; *Crimes Act 1958* (Vic) ss 45–49A; *Criminal Code* (Qld) ss 210, 215; *Criminal Code* (WA) s 320–322; *Criminal Law Consolidation Act 1935* (SA) ss 49, 58; *Criminal Code* (Tas) ss 124–125A; *Criminal Code* (NT) s 127.

labelling child abuse and neglect as unacceptable and a violation of children's rights was emphasised in a number of submissions to this Inquiry.<sup>8</sup>

20.11 In the Consultation Paper, the Commissions identified three issues in relation to provisions dealing with offences against children: whether the offence provisions are more appropriately placed in child protection statutes or in the general criminal laws of the states and territories;<sup>9</sup> whether the way in which the offence provisions are currently drafted—which varies across all the jurisdictions—creates practical difficulties for law enforcement agencies, such that it affects decisions to bring prosecutions;<sup>10</sup> and whether the penalties prescribed for these offences are appropriate.<sup>11</sup>

20.12 The offences under each set of laws will be considered first, followed by a consideration of submissions and consultations with respect to these three issues.

## Specific offences

### *Offences under child protection legislation*

20.13 In four jurisdictions, there are child abuse and neglect offences in child protection legislation. In Western Australia, a person with the care and control of a child must not do an act, or fail to do an act, knowing (or recklessly disregarding) that the conduct may cause significant harm to a child from abuse (physical, sexual, emotional or psychological) or neglect.<sup>12</sup> The relevant legislation defines 'neglect' to include the failure by the child's parents to provide adequate care or effective medical, therapeutic or remedial treatment for the child.<sup>13</sup> The penalty is imprisonment for up to 10 years.

20.14 In Victoria and Tasmania, it is an offence for a person who has a duty of care to a child to take, or fail to take, action that has either resulted in harm to the child, or has the potential to cause harm.<sup>14</sup> The maximum penalty ranges, respectively, from 12 months imprisonment to two years.

20.15 NSW child protection law makes it an offence for *any* person—not just one who has care of a child—to do an act intentionally that causes or appears likely to cause injury or harm to a child or young person.<sup>15</sup> It is also an offence for a person who has care of a child or young person to fail to provide the child or young person with

8 Queensland Government, *Submission FV 229*, 14 July 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; Confidential, *Submission FV 82*, 2 June 2010.

9 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 13–2.

10 Ibid, Questions 13–1, 13–3.

11 Ibid, Question 13–4.

12 *Children and Community Services Act 2004* (WA) s 101. 'Harm' is defined as any detrimental effect of a significant nature on the child's wellbeing: s 28(1).

13 Ibid s 28(1).

14 *Children, Youth and Families Act 2005* (Vic) s 493; *Children, Young Persons and Their Families Act 1997* (Tas) s 91(1).

15 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 227.

adequate and proper food, nursing, clothing, medical aid or accommodation.<sup>16</sup> Both these offences attract a maximum monetary penalty of 200 penalty units, the value of which is currently \$22,000.<sup>17</sup>

20.16 A number of child protection laws also make it an offence for a person who has care and control of a child to leave a child unattended and unsupervised either in a motor vehicle,<sup>18</sup> or more generally.<sup>19</sup> In NSW, the offence is framed more broadly to apply to any person, not only one who has care and control of a child.<sup>20</sup> Again, the penalties for these offences vary substantially across the jurisdictions—from a monetary penalty in NSW to a term of up to five years' imprisonment in Western Australia.<sup>21</sup>

20.17 Other offences contained in child protection legislation include removing a child or young person from the care of a person who has protection and care responsibility under the relevant Act,<sup>22</sup> and offences concerning tattooing, branding and body piercing.<sup>23</sup>

#### ***Offences under general criminal legislation***

20.18 In four jurisdictions—Queensland, South Australia, the ACT and the Northern Territory—offences relating to child abuse and neglect are contained in general criminal laws. The criminal statutes of NSW and Tasmania also contain more serious offences relating to the abuse and neglect of children.

20.19 Under the criminal legislation of NSW, Queensland, Western Australia, South Australia, Tasmania, the ACT and the Northern Territory, it is an offence for a person with parental responsibility to fail to provide a child—generally defined as a child under the age of 16 years—under his or her care with the ‘necessities of life’—generally defined as the provision of accommodation, food, clothing and access to healthcare, and education.<sup>24</sup> In NSW, the maximum penalty is imprisonment for five years; in the ACT, it is two years. In Queensland, South Australia and Tasmania, maximum penalties of three years imprisonment apply where the neglect endangers the child’s health.

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16 Ibid s 228.

17 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 17.

18 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 231; *Children and Community Services Act 2004* (WA) s 102.

19 *Children, Youth and Families Act 2005* (Vic) s 494; *Children, Young Persons and Their Families Act 1997* (Tas) s 92.

20 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 231.

21 *Children and Community Services Act 2004* (WA) s 102. The penalty for a summary conviction is three years imprisonment and a fine of \$36,000.

22 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 229; *Children, Youth and Families Act 2005* (Vic) s 496.

23 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 230–230A; *Children and Community Services Act 2004* (WA) s 103.

24 *Crimes Act 1900* (NSW) s 43A; *Criminal Code Act 1899* (Qld) ss 177, 286; *Criminal Law Consolidation Act 1935* (SA) s 30; *Criminal Code* (WA) s 263; *Criminal Code* (Tas) ss 144–152; *Crimes Act 1900* (ACT) s 39; *Criminal Code* (NT) ss 149, 183.

20.20 In Queensland, it is an offence for any person who has the care and control of a child to cause harm to a child aged below 16 years by reason of failing to provide for the child, deserting the child or leaving the child without means of support.<sup>25</sup> In a number of jurisdictions it is also a crime to abandon or expose a child where that act endangers the life of the child or may cause serious injury, although the provisions vary in terms of the age of the child.<sup>26</sup> In the Northern Territory, for instance, the offence relates to a child aged under two years, while in NSW and Queensland, the offence applies to a child aged under seven years. These offences attract maximum penalties ranging from five to seven years imprisonment, some depending on the age of the child.

20.21 There is some variation among the elements of the offence provisions in the criminal laws of the states and territories. Most require the prosecution to prove either an intentional or reckless act or omission and that the child has suffered, or was placed at risk of suffering, a high degree of harm such as serious injury or danger of death. Section 43A of the *Crimes Act 1900* (NSW), for instance, provides that a person with parental responsibility for a child who intentionally or recklessly fails to provide the child with the ‘necessities of life’ is guilty of an offence if the failure causes a danger of death or serious injury to the child.<sup>27</sup> By contrast, under s 30 of the *Criminal Law Consolidation Act 1935* (SA)—which applies not only to children but to vulnerable adults—the prosecution must show failure to provide food, clothing or accommodation, but it does not require the prosecution to prove risk of harm.<sup>28</sup>

### **The location of offence provisions**

20.22 The question of whether offences against children for abuse and neglect should be contained in child protection legislation or in criminal laws attracted substantial, but quite diverse, comment. A number of stakeholders argued that the offences ought to be located in general criminal laws as this would clearly label the behaviour as a violation of children’s rights and a crime, thus sending a clear message to the community that such behaviour is unacceptable.<sup>29</sup> Some submissions expressed the view that violence against any person should be an offence under general criminal law,<sup>30</sup> and that the law

25        *Criminal Code Act 1899 (Qld)* s 364. In Tasmania, it is an offence to ill-treat a child aged below 14 years: *Children, Young Persons and Their Families Act 1997* (Tas) s 178.

26        *Crimes Act 1900 (NSW)* s 43; *Criminal Code (Qld)* s 326; *Criminal Code (NT)* s 184. See also, *Criminal Code (WA)*, which makes it an offence for a parent (who is able to maintain a child) to desert a child under the age of 16 years: s 344.

27        See, eg, *Crimes Act 1900* (NSW) s 43A inserted by *Crimes Amendment (Child Neglect) Act 2004* (NSW). This is distinct from the similar offence in s 228 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) which does not require the prosecution to prove that the failure by a person with parental responsibility to provide adequate care and support to the child has caused harm.

28        *Criminal Law Consolidation Act 1935* (SA) s 30.

29        National Legal Aid, *Submission FV 232*, 15 July 2010; Queensland Government, *Submission FV 229*, 14 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 109*, 8 June 2010; Confidential, *Submission FV 71*, 1 June 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010.

30        Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 109*, 8 June 2010.

should not treat acts of abuse and neglect against children any less seriously than it treats such acts committed against adults.<sup>31</sup>

20.23 National Legal Aid and Professor Julie Stubbs supported locating the offence provisions in general criminal laws on the basis that the offences may be more useful there, given that similar offences in child protection legislation were rarely, if ever, prosecuted.<sup>32</sup> The Queensland Government also took this position, arguing that the primary purpose of child protection legislation is to work with families in order to promote the safety of children in the least intrusive way to meet the child's needs. It said that, while the two systems work in parallel with each other, a child protection response is not, nor should it be, contingent on securing a conviction. The Queensland Government submission noted that its criminal legislation provides for a wide range of specific and general offences against children.<sup>33</sup>

20.24 In contrast, a number of other submissions, including the Magistrates' Court and the Children's Court of Victoria and the Department of Premier and Cabinet (Tas) submitted that offences against children for abuse and neglect should be retained in child protection legislation because of its child-focused approach.<sup>34</sup> As one stakeholder commented:

We need a dedicated legislation and legal system that focuses on children and young people as the priority, with personnel who are trained and understand the needs of children and young people, and concepts of harm and the detrimental effect this has on children. I would be very concerned if the focus was on criminal laws, as these do not have a particular focus on children, and this is needed, to ensure their rights and needs are prioritised. I believe that moving this to criminal law would be a significant step backwards in achieving children's rights to safety and protection from harm.<sup>35</sup>

20.25 Another group of stakeholders was of the view that offences of abuse and neglect of children should be contained in both criminal laws and in child protection laws, depending on the degree of abuse or neglect.<sup>36</sup> One stakeholder submitted that offences against children for abuse and neglect have a place in both general criminal legislation and child protection legislation. It suggested that the legislation should draw a clear link between abuse and neglect of children and domestic and family violence. The onus should be on holding the person who commits acts of violence accountable for the abuse and neglect of children in cases where there was evidence of domestic and family violence, rather than blaming the non-abusive parent—usually the mother—

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31 Berry Street Inc, *Submission FV 163*, 25 June 2010.

32 National Legal Aid, *Submission FV 232*, 15 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010.

33 Queensland Government, *Submission FV 229*, 14 July 2010.

34 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; F Hardy, *Submission FV 126*, 16 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

35 F Hardy, *Submission FV 126*, 16 June 2010.

36 Wurringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010.

for failing to protect the child.<sup>37</sup> This was a persistent criticism of the response of the child protection sector to family violence.

#### ***Commissions' views***

20.26 The major advantage of locating the offence provisions in child protection legislation, rather than in criminal laws, is that decisions as to whether to bring proceedings are subject to a consideration of the objects and principles of the legislation. These make the best interests of children the paramount consideration. It also facilitates the involvement of child welfare experts in harm assessments, and in decisions to investigate and prosecute alleged offences, therefore ensuring appropriate protective responses. On the other hand, locating offence provisions in a criminal statute clearly marks the behaviour as serious, outside the confines of acceptable behaviour and criminal in nature.

20.27 As discussed previously, there is a fundamental distinction between criminal law, on the one hand, and civil law—child protection and family violence legislation—on the other hand. The former looks to past behaviour, with a focus on punishment of the offender and retribution for the victim, while child protection and family violence legislation are forward-looking. Their common and principal objective is to protect and secure the future welfare of those who are at risk of harm caused by family violence—typically by imposing conditions that regulate the behaviour and movements of those who have committed family violence.

20.28 This complex interrelationship between criminal and care and protection issues lends support to the Commissions' view that the strongest approach to decisions about how to deal with offences against children involves co-operative relationships between key agencies that bring different interests, skills and responsibilities to the process. For example, in NSW, Joint Investigation Response Teams—made up of community services caseworkers, the police and health professionals—undertake joint investigation of child protection matters. In the Northern Territory, the Child Abuse Taskforce also includes Indigenous representatives and other agencies as required in their joint investigations. These and other inter-agency cooperative arrangements are discussed in more detail in Chapter 29.

20.29 The Commissions note the various approaches taken by different states and territories, and acknowledge the diversity of views and responses on the location of these offence provisions and the force of arguments on both sides. The appropriate response to the fact that there are strong arguments in favour of locating the offence provisions in criminal law and in child protection legislation may be to place them in both, and to make a decision about which legislation to use depending on factors such as the nature and severity of the offence. However, the Commissions conclude, on the basis of the submissions received, that there is not sufficient weight of evidence to justify making a specific recommendation.

### The form of the offence provisions

20.30 Few submissions addressed the question in the Consultation Paper about the way the offence provisions are currently drafted.<sup>38</sup> The Magistrates' Court and the Children's Court of Victoria commented that there may be cause for a review of the offence provisions if the requirement to prove intention was deterring prosecutors from bringing prosecutions.<sup>39</sup> The Courts submitted that Victorian courts have not dealt with offences of child abuse or neglect under s 493 of the *Children, Youth and Families Act 2005* (Vic), although five people were sentenced for leaving a child without supervision or care in 2007–08. However, it also noted that circumstances giving rise to the charge were more likely to be dealt with by way of referral to the child protection agency where the emphasis is on the need to ensure future safety of the child:

Usually the best interests of a child will be served by maintaining a relationship with the child's parent. This suggests a need to prioritise protection over prosecution in all but the most serious cases.<sup>40</sup>

20.31 The Commissioner for Children (Tas) also noted that prosecutions had rarely, if ever, been brought for child abuse or neglect under s 91 of the Tasmanian child protection legislation, attributing this largely to the difficulty faced by a prosecutor to secure a conviction. The Commissioner noted that the provision 'may well be there for educational impact rather than as a prosecutorial tool'.<sup>41</sup>

### Commissions' views

20.32 The low number of submissions raising this as an issue of concern suggests that the way the offence provisions are framed was not a pressing issue for the safety of children. Low levels of prosecution were indicated in two submissions, but may be the result of a number of factors. Any concerns about particular offence provisions may be best dealt with by individual jurisdictions. The Commissions do not, therefore, make any recommendation in relation to the form of the offence provisions.

### Penalties for offences under child protection laws

20.33 In the Consultation Paper, the Commissions asked what range of penalties ought to be available for offences under child protection legislation.<sup>42</sup> The Commissions considered whether, where a prosecution is brought under child protection legislation, alternative penalties should be available to the court other than imprisonment or a court-imposed fine. Such penalties may include community service orders or conditional bonds that might, for example, impose conditions requiring offenders to participate in offender rehabilitation programs designed to address risk factors

38 Consultation Paper, Question 13–2. Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Commissioner for Children (Tas), *Submission FV 62*, 1 June 2010.

39 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

40 *Ibid.*

41 Commissioner for Children (Tas), *Submission FV 62*, 1 June 2010.

42 Consultation Paper, Question 13–4.

associated with the offender's conduct, such as alcohol and substance abuse. They may therefore be more likely to produce an effective outcome, in terms of rehabilitation, retribution and deterrence, than the imposition of a court fine.

20.34 A range of community-based, non-custodial sentencing options are widely available in all Australian jurisdictions, generally as an alternative to a sentence of imprisonment,<sup>43</sup> although in some jurisdictions, such as Victoria, they are also available as an alternative to a fine.<sup>44</sup> These include options such as community service orders, and orders that require participation in programs designed to address offending behaviour.

20.35 In all jurisdictions where imprisonment is a possible sanction for child abuse and neglect offences—that is, in all jurisdictions except NSW—the normal sentencing alternatives to prison would be available under the jurisdictions' sentencing laws.

20.36 A particular issue arises in NSW, where the only sentencing option available to a court for a child abuse or neglect offence under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) is to impose a fine<sup>45</sup> or give a bond under s 10 of the *Crimes (Sentencing Procedure) Act 1999* (NSW). Such a bond allows the court to discharge an offender without conviction on conditions that may include a requirement that the offender participates in a treatment or rehabilitation program.<sup>46</sup> The Commissions note that imprisonment was a penalty under the previous NSW child welfare legislation,<sup>47</sup> and this would have allowed access to a wider range of community-based sentences. The 2008 *Report of the Special Commission of Inquiry into Child Protection Services* (Wood Inquiry) declined to reinstate imprisonment as a penalty for abuse and neglect offences in the NSW legislation on the basis that it was not in the best interests of the child, particularly in the case of a parent offender, because to do so would be likely to exacerbate underlying risk factors.<sup>48</sup>

43 See, eg, *Crimes (Sentencing Procedure) Act 1999* (NSW) s 8.

44 *Sentencing Act 1991* (Vic) s 36. See also Judicial College of Victoria, *Victorian Sentencing Manual* (2009), [14.2].

45 The maximum penalty under the *Children and Young Persons (Care and Protection) Act 1998* (NSW) is 200 penalty units.

46 *Crimes (Sentencing Procedure) Act 1999* (NSW) s 10(1) provides that, where a court finds a person guilty of an offence, the court may make an order: dismissing the charge, discharging the offender on condition that the person enter into a good behavior bond for up to 2 years, or discharging the offender on condition that the offender agrees to participate in an 'intervention program', where the court is satisfied under s 10(2A) that such an order would reduce the likelihood of the person committing further offences by promoting the treatment or rehabilitation of the person.

47 *Child Protection Act 1987* (NSW), repealed.

48 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.96].

### ***Submissions and consultations***

20.37 A number of stakeholders submitted that a full range of penalties should be available for offences against children contained in child protection laws, up to, and including, imprisonment.<sup>49</sup>

20.38 The Magistrates' Court and the Children's Court of Victoria submitted that the focus should be on ensuring that the sentencing court has the flexibility to craft orders that reflect the circumstances of each particular case.<sup>50</sup> It noted that, in Victoria, the court is able to apply a full range of penalties—including penalties to advance rehabilitation such as community-based orders—and can take into account the wide range of scenarios that might fall within the legislation, the ongoing role of an offender as a parent and the best interests of the child affected by the abuse or neglect.

20.39 The availability of community-based orders to divert offenders to relevant programs aimed at addressing associated issues, such as family violence or drug and alcohol abuse, was widely supported.<sup>51</sup> However, a concern was expressed that these need to be linguistically and culturally appropriate and offenders need to be supported so that they understand clearly what the orders require; how to comply with them; and the consequences of breaching them.<sup>52</sup> The Victorian Aboriginal Legal Service Co-operative Ltd cited the Wulgunggo Ngalu Learning Place as an example of a culturally-appropriate place for Aboriginal and Torres Strait Islander men who are undertaking community-based orders. The program aims to help these men successfully complete their orders while teaching life skills to reduce the likelihood of return to offending behaviour.<sup>53</sup>

20.40 Another significant concern was that community-based orders are not widely available outside metropolitan areas. The unavailability of programs in rural and remote areas hampers judicial officers in sentencing. It results in some people being sentenced to imprisonment, and fails to offer rehabilitation or other therapeutic interventions that might address underlying problems.<sup>54</sup>

### ***Commissions' views***

20.41 It would appear that the only state in which there are limited sentencing options available in relation to abuse and neglect offences under child protection legislation is NSW, where imprisonment was removed as a sentencing option in 1998, when the new

49 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

50 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

51 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

52 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

53 Ibid.

54 J Stubbs, *Submission FV 186*, 25 June 2010.

child protection legislation was introduced. However, as discussed above, NSW courts do have some capacity under the *Crimes (Sentencing Procedure) Act 1999* to impose a bond on an offender, where it considers a bond appropriate. Furthermore, where there is enough evidence, the police also have the option to bring proceedings under the criminal law, where a wider range of sentencing options are available to the court. For these reasons, and in view of the conclusions reached by the Wood Inquiry,<sup>55</sup> as noted above, the Commissions make no recommendation.

## **Information sharing between child protection agencies and the police**

20.42 The investigation, and prosecution, by law enforcement agencies of serious offences alleged to have been committed against a child or young person may be hampered by laws that do not clearly permit relevant information to be shared with the police. Consequently, the ability of the criminal justice system to protect the safety not only of the alleged victim but also of other children and young people may be compromised.

### **Confidentiality of reporters**

20.43 Child protection laws across Australia make it an offence for a person to disclose the identity of a person who makes a report to a child protection agency, or to disclose information contained in a report from which the reporter's identity could be revealed, except to the extent that disclosure is made in the course of performing official duties under the legislation, or where the reporter has consented.<sup>56</sup> In some jurisdictions, the circumstances in which relevant information that is otherwise confidential may be shared has been broadened. These provisions are examined below.

20.44 Child protection legislation also generally precludes information which would reveal the identity of the reporter from being admissible in court proceedings, unless the court is satisfied that the information is of critical importance to the proceedings, and that failure to allow it to be tendered as evidence would prejudice the proper administration of justice.<sup>57</sup>

20.45 In the context of a possible criminal prosecution, the concern is that these provisions may prevent the disclosure to police of information that might assist in a prosecution.

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55 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.96].

56 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1); *Children, Youth and Families Act 2005* (Vic) ss 41, 129–130, 190; *Child Protection Act 1999* (Qld) s 186–188; *Children and Community Services Act 2004* (WA) ss 23, 124F, 141, 240–1; *Children's Protection Act 1993* (SA) ss 13, 52L; *Children, Young Persons and Their Families Act 1997* (Tas) ss 16, 103; *Children and Young People Act 2008* (ACT) ss 846, 868–871; *Care and Protection of Children Act 2007* (NT) s 27(2) 150, 195, 221.

57 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(2); *Children and Community Services Act 2004* (WA) s 240(4); *Care and Protection of Children Act 2007* (NT) s 27(2). See also Ch 30.

20.46 Where child protection workers and police officers are working together as part of an integrated joint response team, such as Queensland's Suspected Child Abuse and Neglect Team (SCAN) or Western Australia's ChildFirst Assessment and Interview Team, collaborative arrangements between police and child protection agencies are generally governed by agreement.<sup>58</sup>

20.47 However, it seems that there may be some confusion in practice when the matter falls outside the brief of a joint inter-agency team. In a recent inquiry into child protection services in Victoria, the Victorian Ombudsman found that child protection workers were confused about what information they could, and could not, share. One misapprehension was that child protection workers could not disclose the identity of reporters to Victoria Police when investigating allegations of physical or sexual abuse against children.<sup>59</sup> This is despite an express provision in the Victorian legislation that allows a protective intervener—defined as the Secretary of the child protection agency or a member of the police force—to share information, including the identity of a reporter, with another protective intervener or to a person in connection with a court proceeding, including proceedings in the Family Court.<sup>60</sup>

20.48 Recent amendments to the *Children and Young People (Care and Protection) Act 1998* (NSW), implementing recommendations made by the Wood Inquiry,<sup>61</sup> were designed to avoid this uncertainty. The NSW legislation now provides that information from which a reporter's identity may be revealed can be shared with a law enforcement agency in clearly defined circumstances. Those circumstances are:

- where the information is disclosed in connection with the investigation of a serious offence alleged to have been committed against a child or young person; and
- where the disclosure is necessary to safeguard or promote the safety, welfare and wellbeing of any child or young person;<sup>62</sup> and, as an added safeguard,
- where a senior law enforcement officer certifies that obtaining the reporter's consent may prejudice the investigation, or where the person or body making the disclosure certifies in writing that it is impractical to obtain the consent of the reporter.<sup>63</sup>

58 But note, the Queensland SCAN unit is established and governed under the *Child Protection Act 1999* (Qld) to investigate serious allegations of child abuse and neglect. The role and responsibilities of SCAN members and the relevant information sharing protocols are outlined in sections 159I–159L of the *Child Protection Act 1999* (Qld). For information on inter-agency teams in other jurisdictions, see Ch 29.

59 Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009), [78]–[79].

60 *Children, Youth and Families Act 2005* (Vic) s 209.

61 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [24.173].

62 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(4A).

63 Ibid s 29(4B). The Act also requires the reporter to be advised of the fact that his or her identity has been disclosed, or that the contents of their report have been disclosed, except in certain circumstances: s 29(4C).

20.49 Child protection legislation in Western Australia was also amended in 2008 to broaden the circumstances in which identifying information about a reporter can be disclosed. Among the circumstances listed, the *Children and Community Services Act 2004* (WA) provides that identifying information can be disclosed to, or by, a police officer for the purpose of, or in connection with, an investigation of a suspected offence, or for the conduct of a prosecution of an offence, relating to the child.<sup>64</sup> The provision is narrower than the NSW provision as it is confined to the investigation and prosecution of an offence alleged to have been committed against the child who is the subject of the report.

### ***Consultation Paper***

20.50 In the Consultation Paper the Commissions proposed that state and territory child welfare laws be amended to permit the disclosure of the identity of the reporter, and of information contained in the report from which the reporter's identity could be revealed, to a law enforcement agency of any Australian jurisdiction in particular circumstances. Using the NSW legislation as a model, the Commissions suggested that a person be permitted to disclose the identity of a reporter, or the contents of a report from which the identity of the reporter may be revealed where:

- the information is disclosed in connection with an investigation of a serious offence alleged to have been committed against a child or young person; and
- the disclosure is necessary to protect a child or young person.<sup>65</sup>

20.51 Wherever possible or practical, the Commissions proposed three safeguards:

- that the reporter's consent always be sought first as a matter of best practice;
- the legislation should require a senior law enforcement officer to certify in writing beforehand that obtaining consent would prejudice the investigation of the offence, or that obtaining consent is impractical; and
- the person who disclosed the identity of the reporter should notify the reporter of that fact unless to do so would prejudice the investigation concerned.<sup>66</sup>

20.52 The purpose of the proposal was to remove any uncertainty that exists about what information may be provided to a law enforcement agency, and thus remove any impediment to an effective criminal justice response.

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<sup>64</sup> *Children and Community Services Act 2004* (WA) ss 124F (2)(c), 240(2)(iii).

<sup>65</sup> Consultation Paper, Proposals 13–1 to 13–4.

<sup>66</sup> Ibid, Proposals 13–2, 13–4.

### **Submissions and consultations**

20.53 The Commissions received numerous submissions on these proposals, the majority of which supported the proposals to the extent that individual jurisdictions did not already allow protected information to be shared with a law enforcement agency.<sup>67</sup>

20.54 The governments of Tasmania and Queensland both submitted that the current exceptions in their legislation adequately permit disclosure to the police of otherwise confidential information because disclosure is made in the performance of official functions under the legislation, and is therefore ‘authorised by law’.<sup>68</sup> If there is any doubt that this is the case, the Queensland Government noted that the confidentiality of information relating to the reporter may be overridden by a court order where a court considers it appropriate. It argued, therefore, that the current provisions adequately enable information sharing between the police and relevant agencies in the child protection sector. The Queensland Government also submitted that disclosing the reporter’s details to police for situations *not connected* with the investigation of an offence had the potential to compromise the effectiveness of the legislation by deterring people from reporting their suspicions.<sup>69</sup>

20.55 The principal concern of those stakeholders that were opposed to the proposals was that paring back the protections given to reporters would deter people from reporting suspected cases of child neglect and abuse.<sup>70</sup> While many acknowledged—and agreed with—the purpose of the proposal, there was a concern that the measure would discourage people from making reports to child protection agencies because of fear of repercussions or retribution from their family or their community if it became known that they had made the report. This may be of particular concern in small or regional communities.

20.56 A number of stakeholders also highlighted the need for child protection agencies to take into account the safety of the reporter before disclosing confidential information to a law enforcement agency, particularly where issues of family violence were evident or suspected.<sup>71</sup>

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67 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

68 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Queensland Government, *Submission FV 229*, 14 July 2010. See also *Child Protection Act 1999* (Qld) s 186(2).

69 Queensland Government, *Submission FV 229*, 14 July 2010.

70 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010.

71 National Legal Aid, *Submission FV 232*, 15 July 2010; Confidential, *Submission FV 184*, 25 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

20.57 The Victorian Aboriginal Legal Service Co-operative Ltd submitted that, in the majority of cases, information that would be most relevant in a criminal investigation rests in the *content* of the report, and not necessarily its source, although there may be instances when the credibility of the source may also need to be tested. It advocated for some protections for reporters to be maintained.<sup>72</sup>

#### *Commissions' views*

20.58 As abuse and neglect of children often occurs in the privacy of the home, it is essential that people in our communities—particularly professionals who see children in the course of their everyday work—report their concerns to child protection agencies. To encourage people to make reports, child protection laws contain a suite of protections for reporters. These include provisions that protect reporters' identities and that protect them from civil actions in defamation or breaches of professional standards when reports are made in good faith. Mandatory reporting provisions in state and territory laws also impose a duty on certain people to report safety concerns about children to relevant agencies.<sup>73</sup>

20.59 For this reason, the Commissions consider that the confidentiality provisions applying to reporters should only be overridden in exceptional circumstances. Even when these exceptional circumstances exist, the reporter's consent should always be sought first, wherever possible and practical.

20.60 In the Commissions' view, those exceptional circumstances must include where the information is sought by a law enforcement agency in connection with the investigation of a serious offence alleged to have been committed against a child. This is to ensure that an effective criminal justice response is activated to protect not only the child who is the victim of the alleged offence, but of other children whose safety may also be at risk.

20.61 A number of child welfare laws contain limited provisions that allow information to be shared between people in the course of performing official functions under the legislation. However, the Commissions are not persuaded that these provisions are always sufficiently clear to permit disclosure of otherwise confidential information about a reporter to a law enforcement agency for the purpose of investigating an alleged criminal offence against a child. Uncertainty about the law causes people working in the sector to adopt a risk-averse approach,<sup>74</sup> refusing to disclose potentially crucial information because of fear of breaching privacy or secrecy laws. This may, in turn, hinder a proper and timely investigation by the police of serious offences alleged to have been committed against a child, and may subsequently

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72 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

73 See *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23, 27; *Children, Youth and Families Act 2005* (Vic) ss 162, 184; *Education (General Provisions) Act 2006* (Qld) ss 365–366; *Public Health Act 2005* (Qld) ss 158, 191; *Children and Community Services Act 2004* (WA) ss 3, 124B; *Children's Protection Act 1993* (SA) ss 6, 10–11; *Children, Young Persons and Their Families Act 1997* (Tas) ss 3, 4, 14; *Children and Young People Act 2008* (ACT) ss 342, 356; *Care and Protection of Children Act 2007* (NT) ss 13–16, 26.

74 Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009), [78]–[79].

affect the ability to prosecute the offences. In this regard, the Commissions note that some jurisdictions—including NSW and Western Australia—have amended their laws to make it clear that information about a reporter may be disclosed to the police for the purpose of an investigation of a serious offence in relation to a child.

20.62 To the extent that it is not already clearly provided for in individual jurisdictions, the Commissions recommend that state and territory child protection legislation be amended, based on the NSW legislation, to authorise a person to disclose the identity of a reporter, or information contained in a report from which the reporter's identity may be revealed, to a law enforcement agency where:

- the information is disclosed in connection with the investigation of a serious offence alleged to have been committed against a child or young person; and
- the disclosure is necessary for the purpose of safeguarding or promoting the safety, welfare and wellbeing of any child or young person, whether or not the victim of the alleged offence.

20.63 The Commissions also recommend that disclosure only be authorised where the person or body that discloses to a law enforcement agency the identity of the reporter certifies beforehand that seeking the reporter's consent is impractical, or a senior police officer certifies that this would prejudice the investigation. If such information is disclosed, the reporter should be advised of that fact as soon as practicable, unless to do so would prejudice the investigation.

20.64 The legislation should also define a law enforcement agency broadly to include federal, state and territory police in order to allow information to be shared across state and territory borders.

20.65 The Commissions' recommendations are limited to the purpose of investigating the commission of an alleged serious offence against a child or young person, and where there is a concern for the safety of a child or young person. They are intended to ensure that legislative provisions do not prevent the sharing of information in circumstances where there is a risk to the safety of a child or young person. The recommendations are consistent with the broad recommendations, in Chapter 30, that family violence and child protection legislation should clearly set out which agencies and organisations may use and disclose information and in what circumstances. This will provide clarity for those being asked to disclose the information, and ensure that any disclosure is consistent with child protection legislation, and with relevant privacy and secrecy legislation, as the disclosure is 'authorised by law'.<sup>75</sup>

20.66 As with a number of recommendations made in this Report, these recommended legislative amendments must be supported by providing appropriate training to people working in the child protection sector, in both government and non-government agencies, to enhance their understanding of the amendments and implement

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75 Privacy legislation and the exception for disclosure that is 'required or authorised by law' is discussed in Ch 30.

appropriate arrangements to ensure the laws operate as intended.<sup>76</sup> Chapter 31 acknowledges the importance of ongoing education and training programs.

20.67 The Commissions' recommendations accord with the overarching objective of this Inquiry—to address gaps in service provision that have arisen in practice where governing legislative frameworks intersect—in order to improve safety outcomes for women and children who are victims of family violence and abuse.

**Recommendation 20–1** State and territory child protection legislation should authorise a person to disclose to a law enforcement agency—including federal, state and territory police—the identity of a reporter, or the contents of a report from which the reporter's identity may be revealed, where:

- (a) the disclosure is in connection with the investigation of a serious offence alleged to have been committed against a child or young person; and
- (b) the disclosure is necessary to safeguard or promote the safety, welfare and wellbeing of any child or young person, whether or not the child or young person is the victim of the alleged offence.

The information should only be disclosed where:

- (a) the information is requested by a senior law enforcement officer, who has certified in writing beforehand that obtaining the reporter's consent would prejudice the investigation of the serious offence concerned; or
- (b) the agency that discloses the identity of the reporter has certified in writing that it is impractical to obtain the consent.

Where information is disclosed, the person who discloses the identity of the reporter, or the contents of a report from which the identity of a reporter may be revealed, should notify the reporter as soon as practicable of this fact, unless to do so would prejudice the investigation.

### **Deciding whether to prosecute**

20.68 The decision whether to commence a prosecution of offences committed against children is a significant aspect of the criminal justice process. In the majority of cases, the decision whether to prosecute rests with the police.<sup>77</sup> However in the case of serious indictable offences, where a child has suffered significant physical or sexual assault, or has been killed, it is a matter for the state or territory director of public prosecutions.

20.69 Although prosecutorial policy varies across the jurisdictions, prosecutorial discretion is guided by two principal criteria: first, whether there is sufficient reliable

<sup>76</sup> Supported by the National Legal Aid, *Submission FV 232*, 15 July 2010.

<sup>77</sup> The police are generally responsible for prosecuting all summary matters in a local or magistrates court, except where the charge relates to child sexual assault or a matter involving a police officer.

evidence to support a conviction (the ‘*prima facie* test’); and secondly, whether it is in the public interest to bring a prosecution.<sup>78</sup>

20.70 In relation to the first criterion, a number of factors are relevant in assessing whether there is enough evidence to support a conviction, including the availability, competence and reliability of witnesses, and the availability of any lines of defence to the defendant.

20.71 Once the prosecutor is satisfied that there is sufficient evidence to justify making a decision to prosecute, or to continue a prosecution, the second key consideration is whether or not it is in the public interest to pursue the prosecution.<sup>79</sup> There is a long list of non-exhaustive factors that may be taken into account when determining this issue, including:

- the seriousness of the offence;
- any aggravating or mitigating factors;
- the age, intelligence and mental health of the offender, the victim and any witnesses;
- the degree of culpability of the alleged offender;
- whether or not the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive; and
- the prevalence of the offence and the need for general deterrence.<sup>80</sup>

78 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cl 2.4–2.5; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 4(2); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.1.3; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 4(i); Office of the Director of Public Prosecutions (SA), *Prosecution Policy*, 3; Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 24; Office of the Director of Public Prosecutions (Tas), *Prosecution Guidelines*; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.3; Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 2.1. See also Ch 26.

79 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cl 2.8; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 4(3); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.1.6; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 4(ii); Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 23; Office of the Director of Public Prosecutions (SA), *Prosecution Policy*, 4; Office of the Director of Public Prosecutions (Tas), *Prosecution Guidelines*; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.5; Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 2.1. Note that the guidelines for Queensland, Western Australia and the Northern Territory somewhat conflate the two tests, in that the question of whether a prosecution is in the public interest is informed by inquiring into whether there is a reasonable prospect of conviction. Nevertheless, notwithstanding the order of the inquiry, the considerations which inform the exercise of the prosecutor’s discretion are substantially similar across the jurisdictions.

80 See, eg, Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 4(3). See also Ch 26.

20.72 In matters concerning the abuse or neglect of children, a decision to bring a prosecution against a parent can have a devastating impact on the family. This issue was considered by the ALRC in its 1981 report, *Child Welfare*, where the ALRC recommended that:

Prosecutions should therefore be initiated only after careful deliberation. The police should be encouraged to consult representatives of welfare agencies before a decision to prosecute is taken. Further, when a prosecution has been initiated, procedures should be introduced which will facilitate the withdrawal of the proceedings when this is desirable.<sup>81</sup>

20.73 When matters are referred to a joint or inter-agency team, the decision as to whether to initiate proceedings against a person may be made by the police in consultation with the child protection agency, or at least communicated to the child protection caseworker involved, as directed under policy and procedure manuals.

20.74 In Queensland, unless a matter is urgent, the police are statutorily required to consult with the child protection agency before investigating an offence against a child whom a police officer knows or suspects is a child in need of care and protection, or before initiating proceedings.<sup>82</sup> The intention of the provision is to ensure that police and the child protection agency agree on the best strategy to proceed with an investigation and to determine whether initiating proceedings would be in the child's best interests. In Victoria and Tasmania, a requirement exists for police to consult the child protection agency before bringing a prosecution but only in relation to offences contained in the child protection legislation.<sup>83</sup> These provisions recognise that the child protection agency has an interest in decisions to initiate proceedings against a parent, where such action may conflict with the agency's work with the family to address the underlying risk factors that have given rise to the abuse or neglect.

20.75 In the Consultation Paper, the Commissions sought feedback about the need for, or appropriateness of, statutorily requiring the police to consult with the relevant child protection agency before commencing an investigation or bringing proceedings in respect of an alleged offence against a child whom the police considered to be in need of care and protection.<sup>84</sup>

### ***Submissions and consultations***

20.76 All stakeholders who addressed this issue all agreed that cooperation between the police and the child protection agency was critical in responding appropriately and effectively to allegations that a child had been abused or neglected, and for improving outcomes for children and their families.<sup>85</sup> The relationship between the police and the

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81 Australian Law Reform Commission, *Child Welfare*, Report 18 (1981), xxii.

82 *Child Protection Act 1999* (Qld) s 248B.

83 *Children, Youth and Families Act 2005* (Vic) ss 493(2), 494(2); *Children, Young Persons and Their Families Act 1997* (Tas) ss 91(2), 92(2)(b).

84 Consultation Paper, Question 13–9.

85 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

child protection agency was considered to be central to more consistent and better coordinated responses to child abuse and neglect. As one organisation, Berry Street Inc, commented:

Whilst legislative reform is part of the way forward any legislative reform is only as good as the practice reform that follows. The key here is not legal changes. The main issue is the culture of the relationship between child protection, the police and non-government services which are often the third ‘player’ with the most direct relationship with a family and insight into the circumstances confronting children.

It is important to understand how the professionals, service and agencies view each other. An example of this may be that if the police have an assumption that [the] child protection [agency] is not assisting them with their work but rather making their work more difficult they will be less [likely] to investigate an alleged offence against a child where the child is suspected of being in need of care and protection. Thus children at risk can receive a different level of intervention not based on the level of risk but the working relationship between police and child protection.<sup>86</sup>

20.77 In particular, it was considered appropriate and desirable for police to consult with child protection experts when assessing harm or risk of harm to children and young people.<sup>87</sup> One stakeholder said that consultation between the police and child protection agencies concerning the investigation of alleged offences against children should be encouraged within child protection laws as a means of assisting police when exercising their prosecutorial discretion.<sup>88</sup> Similarly, National Legal Aid submitted that child protection authorities should have collaborative working arrangements with the police to ensure that offenders are prosecuted in appropriate cases.<sup>89</sup>

20.78 A number of submissions noted that, in many states and territories, the relationship between the police and the child protection agency was governed by inter-agency protocols or guidelines, which emphasised consultation and cooperation between the agencies. The general consensus was that these non-legislative cooperative arrangements were working well in practice, and that legislative change was only desirable if administrative arrangements were not operating effectively.<sup>90</sup>

20.79 The Queensland Government submitted that the statutory requirement in s 248B of the *Child Protection Act 1999* (Qld) applies only where the child is not already known to the child protection agency. Where the child is known to the Department of Child Safety, the Queensland Government stated that there are processes already in place—namely, the inter-agency SCAN teams—to ensure that the Department is aware of any police involvement with the child, and to facilitate cooperation between the two agencies.<sup>91</sup>

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86 Berry Street Inc, *Submission FV 163*, 25 June 2010.

87 F Hardy, *Submission FV 126*, 16 June 2010.

88 Confidential, *Submission FV 184*, 25 June 2010.

89 National Legal Aid, *Submission FV 232*, 15 July 2010.

90 Ibid; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010.

91 Queensland Government, *Submission FV 229*, 14 July 2010.

20.80 There was a concern expressed in some submissions that imposing a legislative requirement on the police to consult with the child protection agency may interfere with the duty of the police to investigate all suspicions of criminal activity,<sup>92</sup> or may delay appropriate action being taken to protect the child who was the subject of the allegations.<sup>93</sup>

20.81 The Department of Premier and Cabinet (Tas) advocated against statutorily requiring the police to consult with the child protection agency on the grounds that, as mandatory reporters, the police were nevertheless required to report a child in respect of whom it had care concerns to the child protection agency. It stated that existing protocols between the child protection agency and the police provide mechanisms for determining what action should be taken which both protects the child and ensures police are able to investigate and prosecute alleged crimes effectively and efficiently.<sup>94</sup>

#### *Commissions' views*

20.82 A key recommendation of this Inquiry is the promotion and fostering of integrated responses in order to improve outcomes for children and their families, and to make the legal response as seamless as possible in the relevant circumstances.<sup>95</sup> Inter-agency collaboration is an essential feature of integrated responses.<sup>96</sup>

20.83 Collaboration between the police and the child protection agency—together with other relevant agencies—is central to ensuring an appropriate and effective criminal justice and child protection response to allegations of child abuse and neglect, particularly where they arise in the context of family violence. This inter-agency collaboration depends on a shared understanding of the nature and dynamics of family violence both within and across each jurisdiction,<sup>97</sup> which must be reflected in the protocols and guidelines that govern the cooperative arrangements.<sup>98</sup>

20.84 The benefits of closer collaboration are many: police can draw on the expertise of child protection caseworkers to make harm, or risk of harm, assessments; and can acquire a better understanding of the impact on the child and the child's family of a likely prosecution, and a likely sentence on conviction. This will ensure that all relevant factors are properly considered by the police when exercising their discretion to prosecute, so that prosecutions are initiated only in appropriate cases.

20.85 Where a matter is the subject of a joint inter-agency response, the Commissions note that consultation between the police and the child protection agency is generally covered by the terms of the inter-agency agreement that governs those arrangements. The two agencies are jointly involved in the investigation of child abuse or neglect allegations, therefore reducing trauma on the victim by having to repeat their story, and

92 Confidential, *Submission FV 162*, 25 June 2010. See also Confidential, *Submission FV 109*, 8 June 2010; Confidential, *Submission FV 82*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

93 Confidential, *Submission FV 109*, 8 June 2010.

94 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

95 Recommendation 29–2.

96 See Ch 29.

97 See Part B.

98 Recommendation 29–1.

are required to coordinate the services they provide to the child and non-offending family members. Responses received in submissions and consultations indicated that, where joint inter-agency response teams are involved, these administrative arrangements appear to be working effectively in practice to ensure consultation between the police and the child protection agency.

20.86 There may be a gap in service integration and cooperation if a matter being investigated by the police is not referred to joint investigation—for example, if it does not meet the relevant criteria for referral to the joint investigation unit. However, the Commissions note that where the police are investigating alleged offences of abuse or neglect of a child, as mandatory reporters they must make a report about the child to the relevant child protection authority. Even if a matter is not allocated to a joint inter-agency team, it is probable that the police will consult with the child protection agency in reporting their concerns for the child.

20.87 The issue is whether consultation should be statutorily required, or whether it should be facilitated through the use of administrative mechanisms. The Commissions consider that the key to fostering good working relationships between the police and the child protection agency is more likely to be achieved by building trust and by promoting cultural change both within and across the agencies, rather than by legislative compulsion. As the Commissions conclude in Chapter 29, the success of integrated responses relies to a large extent on strong and visionary leadership, shared principles and objectives, clear inter-agency arrangements, and an ongoing and responsive relationship between the parties. All of these elements can be put in place without a legislative basis. Accordingly, the Commissions recommend that state and territory law enforcement, child protection—and other relevant agencies—should develop a framework for consultation about law enforcement responses when allegations of abuse or neglect of a child, for whom there are care and protection concerns, are being investigated by the police.

**Recommendation 20–2** State and territory law enforcement, child protection and other relevant agencies should, where necessary, develop protocols that provide for consultation about law enforcement responses when allegations of abuse or neglect of a child for whom the police have care and protection concerns are being investigated by the police.

### Mandatory reporting of children's exposure to family violence

20.88 As discussed in Chapter 19, there is a substantial body of research that demonstrates the co-occurrence of child abuse and family violence, and the impact that exposure to family violence has on the long-term health and welfare of children. Consequently, children's exposure to family violence is now acknowledged in all state and territory child welfare legislation as either a distinct category of child abuse or as a ground in itself triggering a child protection intervention.

20.89 Together with the introduction and expansion of mandatory reporting laws, the recognition of harm caused to children by their exposure to family violence is believed

to have contributed to the substantial increase in the number of reports received by child protection agencies over the last five years, from 137,938 in 2001–2002 to 339,454 in 2008–2009.<sup>99</sup> Family violence is one of the most common reasons given for reports to child protection agencies;<sup>100</sup> and a large number of reports—in which family violence was a primary concern—are made by police.<sup>101</sup>

20.90 A number of researchers and commentators have questioned whether the formal recognition of the impact of family violence on children in the child protection context has improved services for women and children living with violence.<sup>102</sup> This is said to be due, in part, to the flood of reports that have overloaded a sector that is already strained due to the constant pressure of inadequate resourcing. As Dr Dorothy Scott has argued, this combination of factors has resulted in resources being spent unproductively, reports being investigated too superficially and closed prematurely, caseworkers not being assigned, and critically, children and families missing out on support and education services that they require.<sup>103</sup>

20.91 These problems appear to be magnified by laws and policies in some states and territories that require police officers to notify the child protection agency every time they respond to an incident of family violence where children are present or ordinarily resident in the home but not there at the time.<sup>104</sup>

20.92 In the Wood Inquiry, for example, it was found that a similar NSW Police policy was inconsistent with the legislative reporting provisions which, at the time, required reports to be made where, as a result of being exposed to incidents of domestic violence, the child or young person was at risk of ‘serious physical or psychological harm’.<sup>105</sup>

20.93 Although unintentional, the evidence suggests that legislative reporting requirements or policy directives that require police officers to make a report following every incident of family violence where a child is present or ordinarily resident in the home is counter-productive.

20.94 Two consequences may flow from mandatory notifications: the first is that it may discourage women from reporting family violence or breaches of family violence protection orders because of the fear that their children will be removed from them.<sup>106</sup>

99 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, 12–13. See also L Bromfield and P Holzer, *A National Approach for Child Protection: Project Report* (2008), prepared for the National Child Protection Clearinghouse.

100 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*.

101 Ibid.

102 C Humphreys, ‘Problems in the System of Mandatory Reporting of Children Living with Domestic Violence’ (2008) 14 *Journal of Family Studies* 228.

103 D Scott, ‘Towards a Public Health Model of Child Protection in Australia’ (2006) 1 *Communities, Children and Families Australia* 9, 11. See also, Consultation Paper, [13.85].

104 The Commissions understand that this is the current practice in Tasmania and Queensland, but note that it is presently under review in Queensland: Queensland Government, *Submission FV 229*, 14 July 2010.

105 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [17.159]; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23(d), since amended.

106 C Humphreys, ‘Problems in the System of Mandatory Reporting of Children Living with Domestic Violence’ (2008) 14 *Journal of Family Studies* 228, 232; L Laing, ‘No Way to Live’: Women’s

This fear is particularly acute for Indigenous women, as a recent study of Indigenous communities in Queensland by Professor Chris Cunneen illustrated:

The reason I haven't reported is my kids, my babies. I'm worried about them being taken. I had four children. Because police are brought to a house where there is violence, the kids get taken straight away. The Stolen Generation I reckon is coming back. ...

I think the extra dimension for Indigenous women which is onerous is Child Safety. All of these veiled threats that if you do this you will lose the kids ... That sort of dynamic was driving people underground and they weren't reporting because they knew Child Safety would get involved.<sup>107</sup>

20.95 Cunneen found that many people, including police officers themselves, questioned the usefulness of mandatory reporting by police where a child is present (or usually resident) at the scene of a domestic violence incident.<sup>108</sup> The report concluded that 'a more sensible policy would provide for better use of police discretion on this issue'.<sup>109</sup> The Queensland Government is presently undertaking a review of its child protection law and practice, and this is one of the primary issues under examination.<sup>110</sup>

20.96 The second consequence that may flow from mandatory notifications is that, because most reports of family violence from police incidents do not reach the threshold for an investigation by the child protection agency, the matter is closed and no support services are provided to the families and children.<sup>111</sup>

### ***Submissions and consultations***

20.97 In the Consultation Paper the Commissions asked about the circumstances in which it would be appropriate for police to make child protection notifications when responding to incidents of family violence.<sup>112</sup>

20.98 A number of submissions, particularly from child protection advocates, argued that it was appropriate for police to make a report to the child protection agency in every case where children were exposed to family violence, or its aftermath.<sup>113</sup> They noted that children are not mere witnesses to family violence, but can be seriously affected by it. Failure to report children who are exposed to family violence runs the risk that they will be exposed to greater harm if the conflict escalates, both in terms of

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*Experiences of Negotiating the Family Law System in the Context of Domestic Violence: Interim Report* (2009), 7; H Douglas and T Walsh, 'Mothers, Domestic Violence and Child Protection' (2010) 16 *Violence Against Women* 489, 499–502.

107 C Cunneen, *Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities* (2009), [6.2.4]. See also Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

108 C Cunneen, *Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities* (2009), 104.

109 Ibid, 124.

110 Queensland Government, *Submission FV 229*, 14 July 2010.

111 C Humphreys, *Submission FV 131*, 21 June 2010.

112 Consultation Paper, Question 13–6.

113 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 109*, 8 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 88*, 2 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010.

potentially being ‘caught in the crossfire’ or in terms of their long term health and wellbeing.

20.99 However, one person observed that, despite the requirement to make a report in all family violence matters in Queensland, the policy was not always consistently applied:

... some police will refer all cases, no matter where the child was, others will make a decision that a baby in the house was not affected by the violence and so not make a decision. A[nd] importantly, the referrals are overwhelming the system and often what happens is that a number of ‘occurrence reports’ [are] completed by Police, these can be up to two weeks old, are faxed to Child Safety, and these can often sit there for some time before Child Safety has the opportunity to read through them. My understanding is that any urgent case is called through, nevertheless, there have been situations where a case that Child Safety identified as being concerning, and had they known at the time, would have taken direct action, however, no action was taken because the report was not read for some time.<sup>114</sup>

20.100 While not disputing the importance of reporting concerns for the safety of children exposed to family violence, many other submissions felt that better results could be achieved in terms of improving the safety outcomes for children and their non-offending families by allowing police more discretion in their reporting practices, and providing alternative pathways for referral.<sup>115</sup> As one submission commented:

... there needs to be a rethinking of how we respond to these cases. Police need a few referral pathways, one is to child protection authorities, the second, which could occur in tandem, is to a domestic and family violence service/family support service to work with the family to help address the issues. The difficulty is that currently, if Child Safety in Queensland decides not to investigate because the case does not meet the threshold for intervention, nothing is actually done to support this family.

Key to this is having a well developed risk assessment framework and training and education for police to enable them to more accurately assess harm to children as a result of domestic violence. Ideally, a specialist child protection worker role attached [to] Police could be involved in undertaking such assessments.<sup>116</sup>

20.101 Professor Cathy Humphreys submitted that a policy of reporting every single incident of family violence where a child is present is an ‘ineffective, and potentially unethical and damaging route which closes down help-seeking rather than protecting children’.<sup>117</sup> She suggested that the statutory route should be reserved for children where there is ‘evidence of physical and sexual abuse or where there is evidence of cumulative harm through repeated incidents’ and children are at risk of significant harm, noting that:

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114 F Hardy, *Submission FV 126*, 16 June 2010.

115 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

116 F Hardy, *Submission FV 126*, 16 June 2010.

117 C Humphreys, *Submission FV 131*, 21 June 2010.

This is not to suggest that children do not need protection and support, but rather that the statutory route has proven to be ineffective in ensuring the protection of large numbers of children notified from police domestic violence incidents. A community services route is needed for children living with domestic violence.<sup>118</sup>

20.102 The Magistrates' Court and the Children's Court of Victoria observed that, under the Code of Practice for the Investigation of Family Violence, Victoria Police are advised that the threshold for child protection intervention is higher than the standard required to apply for a family violence protection order. Accordingly, the Code directs the police to consider whether to apply for a family violence intervention order on behalf of a child in order to secure their protection in cases where the child protection agency has deemed that its threshold for action is not met. The Courts further submitted that it is likely that work has and could be done to allow police to make a relatively sophisticated risk assessment of a child exposed to family violence and that the risk assessment could guide decision making about notification to the child protection agency and applications for family violence protection orders.<sup>119</sup> In Victoria, the police, courts and family violence service providers now use a Common Risk Assessment Framework, which is reported to be improving consistency in risk assessment.<sup>120</sup>

#### *Commissions' views*

20.103 The Commissions note that a number of Australian jurisdictions have responded to the large increase in numbers of notifications to child protection agencies by refining their assessment and decision-making tools to better identify those cases that require a statutory child protection response. A key feature of these new systems is the introduction of a dual track system whereby reports to the child protection agency are only made where a reporter believes on reasonable grounds that a child is at risk of 'significant harm'. Concerns for children that fall below this threshold may be made to regional or community intake centres for assessment and referral to appropriate family support and therapeutic services. Child protection agencies are then able to focus on cases where the concerns warrant a full risk of harm assessment and are likely to lead to some form of intervention to protect the child from harm.

20.104 Where the risk is less severe, and statutory intervention is not justified, a range of new approaches have been created that allow more flexible responses to address concerns about a child's welfare. These new approaches address the needs of those families who find themselves in what Dr Leah Bromfield and Prue Holzer describe as the 'nexus between risk and need',<sup>121</sup>—that is, those families who could benefit from some form of intervention, but who fall below the threshold for statutory child protection involvement. These new approaches have been augmented by improvements to risk assessment processes to ensure consistency in decision-making and better integration of child protection services and family support agencies. The

118 Ibid.

119 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

120 See Ch 18.

121 L Bromfield and P Holzer, *A National Approach for Child Protection: Project Report* (2008), prepared for the National Child Protection Clearinghouse.

Commissions note, however, that the dual track system will only operate effectively if adequate resources are deployed in this ‘less urgent’ stream.

20.105 The Commissions note that the practice of requiring police to make automatic reports to the child protection agency in every case where children are exposed to family violence has been discontinued in most states and territories and is presently under review in Queensland, where the policy is still in place. In the Commissions’ view, when responding to incidents of family violence, it is vital that police use a common risk assessment framework, and retain their discretion to refer appropriate matters to the relevant child protection authority.<sup>122</sup>

## **Protection orders and children—the current legal framework**

20.106 In practice, family violence protection orders for the protection of children are usually obtained in a magistrates court. Most commonly, children are named as protected persons on applications for family violence orders made to protect a parent, although they may also be sought directly in the child’s own right. In some jurisdictions, family violence protection orders may also be obtained in children’s courts in particular circumstances. These powers are considered below.

### **Magistrates courts**

20.107 Under state and territory family violence legislation, family violence protection orders made in favour of an adult can, and often do, name children or young people as a protected person where they are affected by the same or similar circumstances.<sup>123</sup> In Victoria, for example, a court may, on application or on its own initiative, include the child as a protected person in a family violence intervention order—where the child’s need for protection is substantially the same as that of the affected family member—or make a separate final family violence intervention order for the child as a protected person.<sup>124</sup> In NSW, the court *must* also name the protected person’s children where they are living with the person and exposed to the family violence.<sup>125</sup>

20.108 In most states and territories, applications for a family violence protection order can also be brought by, or on behalf of, a child or young person in their own right.<sup>126</sup> An application may be brought by a police officer,<sup>127</sup> a parent or any other

122 See Ch 18.

123 See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 38(2); *Family Violence Protection Act 2008* (Vic) s 4(7); *Restraining Orders Act 1997* (WA) s 11B; *Domestic Violence and Protection Orders Act 2008* (ACT) s 19. See Ch 5 on definitions of family violence.

124 *Family Violence Protection Act 2008* (Vic) s 77(2).

125 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 38(2).

126 See, eg, *Family Violence Protection Act 2008* (Vic) s 45(d); *Restraining Orders Act 1997* (WA) s 25; *Family Violence Act 2004* (Tas) s 15(2)(c); *Domestic Violence and Protection Orders Act 2008* (ACT) s 19(3). In Victoria, a child aged over 14 years may make an application for a family violence intervention order himself or herself provided the court grants leave: *Family Violence Protection Act 2008* (Vic) s 45(d)(iii). See also *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 48(6); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 20(2)(A); *Domestic and Family Violence Act 2007* (NT) s 28. In Queensland, a domestic violence order may only be made for the protection of a child in his or her own right if a spousal relationship, intimate personal relationship or informal carer relationship exists between the child and the respondent: *Domestic and Family Violence Protection Act 1989* (Qld) s 12D(2).

person with the consent of the parent.<sup>128</sup> This may include a child protection caseworker.<sup>129</sup> However, in NSW, only a police officer may make an application for an apprehended violence order where the person to be protected is a child aged under 16 years.<sup>130</sup> In Tasmania, a copy of an application for a family violence protection order that is brought by, or on behalf of a child, must be given to the Secretary of the government agency responsible for administering the state's child protection legislation.<sup>131</sup>

20.109 In the Northern Territory, applications for a family violence protection order for the protection of a child must be brought by the police or a child welfare officer where the health and wellbeing of a child is at risk because of domestic violence.<sup>132</sup>

20.110 In NSW, a police officer investigating a family violence matter must apply for a protection order if he or she suspects that a family violence offence or a child abuse-related offence has been or is likely to be committed against the person for whose protection the order would be made.<sup>133</sup> Furthermore, where the person who needs protection is a child under 16 years, *only* a police officer may apply for a family violence protection order,<sup>134</sup> or for a variation or revocation of an existing apprehended violence order.<sup>135</sup> These measures are intended to ensure that the child's best interests are prioritised above the interests of the child's parent or carer, by removing the potential for a defendant to put pressure on the applicant to bring an application to vary the order, where that may reduce the protection afforded to the child. In contrast, other jurisdictions permit applications to vary or revoke an order to be brought by the protected person or the respondent, and notice must be given to all parties including police applicants.<sup>136</sup>

20.111 Some jurisdictions require<sup>137</sup> or permit<sup>138</sup> a court exercising jurisdiction under family violence legislation to make a family violence protection order against a

127 In most jurisdictions, police are empowered to apply for a protection order or to assist a victim to make an application. See, eg, *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 20(1)(a); *Family Violence Act 2004* (Tas) s 15(2)(a); *Domestic Violence and Protection Orders Act 2008* (ACT) s 18(2); *Domestic and Family Violence Act 2007* (NT) s 28(1)(c). See also Ch 9.

128 See, eg, *Family Violence Protection Act 2008* (Vic) s 45; *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 20; *Domestic and Family Violence Act 2007* (NT) s 28.

129 Note, in Western Australia, the legislation expressly permits a child welfare officer to bring an application for a restraining order on behalf of a child: *Restraining Orders Act 1997* (WA) s 25(2)(a). See also *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 20(1)(d).

130 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) ss 48(3). Young people aged between 16 and 18 years can make their own applications: 48(6).

131 *Family Violence Act 2004* (Tas) s 15(3).

132 *Domestic and Family Violence Act 2007* (NT) s 29.

133 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 49. A police officer must apply for a family violence protection order for a child if he or she suspects that an offence under s 227 of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) has recently been or is being committed, or is likely to be committed, against the child for whose protection the order would be made: s 49(1)(b).

134 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 48(3).

135 Ibid s 72(3). A child is defined in s 3 as a person under 16 years.

136 See, eg, *Family Violence Protection Act 2008* (Vic) s 108; *Domestic Violence and Protection Orders Act 2008* (ACT) ss 59, 60; *Family Violence Act 2004* (Tas) s 20.

137 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 39. See also Ch 11.

138 *Domestic and Family Violence Protection Act 1989* (Qld) s 30; *Domestic and Family Violence Act 2007* (NT) s 45(1).

defendant who pleads guilty to, or is convicted of, a domestic violence offence, even where no application has been made for one. In NSW, an interim family violence protection order must also be made before a plea of guilty or a finding of guilt, when a person is charged with a serious offence.<sup>139</sup>

20.112 Applications for family violence protection orders are generally heard in a magistrates court, except where the respondent is aged under 18 years, in which case, the application may—or, in some jurisdictions, must<sup>140</sup>—be made in the children’s court.<sup>141</sup>

### **Children’s courts**

20.113 As discussed in Chapter 19, the children’s courts of all states and territories have existing powers under child welfare laws to hear a range of applications and make a variety of orders in relation to the care and protection of a child or young person.<sup>142</sup> Some of these orders are very similar to family violence protection orders, such as orders excluding a person from a child’s residence, or limiting a person’s contact with a child.<sup>143</sup> The Children’s Court of New South Wales, for example, may make an order under s 90A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), prohibiting a person from doing anything that a parent could do in carrying out their parental responsibility. However, unlike a family violence protection order, this order may only be made against a person who has parental responsibility for the child; and it is unenforceable.

20.114 Children’s courts in some jurisdictions may also make family violence protection orders, although the situations in which these orders may be made varies across jurisdictions. For example, in Tasmania, proceedings for a family violence protection order may be transferred to the children’s court where this is considered appropriate.<sup>144</sup> In South Australia, the *Intervention Orders (Prevention of Abuse) Act*

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139     *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 40. A serious offence is defined to include the stalking/intimidation offence under s 13 of the Act, as well as attempted murder and ‘domestic violence offences’ (other than murder or manslaughter): s 40(5). See also Ch 11.

140     Ibid; *Restraining Orders Act 1997* (WA) s 25(3)(a). Section 20 of the *Children’s Court of Western Australia Act 1988* (WA) provides that the Court has exclusive jurisdiction to hear and determine all applications under the *Restraining Orders Act 1997* (WA) with respect to a child.

141     See, eg, *Family Violence Protection Act 2008* (Vic) s 146(2); *Domestic and Family Violence Protection Act 1989* (Qld) ss 16, 30; *Family Violence Act 2004* (Tas) s 31. In Queensland, a court cannot make a domestic violence protection order against, or in favour of, a person aged under 18 years unless the person is in a spousal or intimate relationship with the person seeking or needing protection: *Domestic and Family Violence Protection Act 1989* (Qld) s 12D(2). Children and young people under 18 cannot apply for a protection order against a parent as this is considered a child protection issue and should be dealt with under the *Child Protection Act 1999* (Qld). Nor can parents apply for domestic violence orders against their children who are under 18 years.

142     In most states and the ACT, applications for care and protection orders are made to the Children’s Court by the relevant child protection agency. In South Australia, applications are made to the Youth Court, and in the Northern Territory, they are made to the Family Matters Court.

143     See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 90A; *Children, Youth and Families Act 2005* (Vic) s 515; *Children’s Protection Act 1993* (SA) s 38(1)(e).

144     *Family Violence Act 2004* (Tas) s 31.

2009 (SA)—which has been assented to but is not yet commenced—confers jurisdiction on both the Magistrates Court and on the Youth Court.<sup>145</sup>

20.115 In Queensland and the Northern Territory, family violence law confers jurisdiction on every ‘Magistrates Court and magistrate’ or court of summary jurisdiction, and on every other court—including a children’s court—where a person before it pleads, or is found, guilty of an offence involving domestic violence orders.<sup>146</sup>

20.116 As noted above, the children’s courts of NSW and Western Australia have exclusive jurisdiction to make family violence protection orders *against* a child or young person.<sup>147</sup> However, the Western Australian Children’s Court may also make a restraining order to *protect* a child, during care proceedings, either on its own initiative or on application by a party to proceedings, or by a parent or child welfare agency on behalf of a child.<sup>148</sup>

20.117 Similarly, the ACT Children’s Court has express jurisdiction under family violence law to make a family violence protection order for the protection of a child against a parent or other person but only where there are care proceedings before it and the court believes it is necessary to protect the child from psychological abuse arising from the child’s exposure to family violence.<sup>149</sup> Provided these conditions are present, the court can make the order either on its own motion or on application by a party to the proceedings—which would include the child protection agency.<sup>150</sup>

20.118 By contrast, the Family Division of the Children’s Court of Victoria has broad jurisdiction to hear applications for family violence protection orders under the *Family Violence Protection Act 2008* (Vic) and the *Stalking Intervention Orders Act 2008* (Vic) where *either* party is under the age of 18 years.<sup>151</sup> No other proceedings need to be before the court for these applications to be made.

20.119 Moreover, the Victorian Children’s Court is empowered to make a family violence intervention order for or between adults where the order relates to the same or similar circumstances as those affecting the child or young person.<sup>152</sup>

20.120 This amendment followed a recommendation of the Victorian Law Reform Commission (VLRC) in its 2006 report, *Review of Family Violence Laws*. The VLRC noted that it was undesirable for family violence protection applications involving a

145 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) sch 1 cl 35. The Act repeals the *Domestic Violence Act 1994* (SA). See Ch 1.

146 *Domestic and Family Violence Protection Act 1989* (Qld) s 38(1); *Domestic and Family Violence Act 2007* (NT) ss 4, 45(1).

147 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 91(b); *Restraining Orders Act 1997* (WA) s 25(3).

148 *Restraining Orders Act 1997* (WA) s 63.

149 *Domestic Violence and Protection Orders Act 2008* (ACT) s 17; *Children and Young People Act 2008* (ACT) ss 458–460.

150 *Children and Young People Act 2008* (ACT) ss 459(3), 460(2).

151 *Family Violence Protection Act 2008* (Vic) ss 42, 146.

152 Ibid s 147(3). For the purposes of s 147, a ‘related application’ is defined as an application for an order on the grounds of the same or similar circumstances, and includes an application to vary, revoke or extend an order. A ‘related order’ is defined as an order made on the grounds of the same or similar circumstances.

child and an adult—for example, the child’s mother—to be ‘split’ and consequently heard in separate courts. At the time of its review, the Children’s Court of Victoria could only hear an application for protection where the respondent or the person in need of protection was under 18 years. The Children’s Court could not make an order protecting an adult from an adult respondent, even if the Court had made an order against the same respondent for the protection of the child. In these cases, adult applicants were directed to take their matter to the Magistrates’ Court, potentially leaving them without a protection order in the short term.<sup>153</sup> The VLRC recommended that the Children’s Court have jurisdiction over adult-adult applications that include a child on the application.<sup>154</sup> In consequence, any affected family member may now apply for a family violence protection order at the Children’s Court or the Magistrates Court in Victoria.<sup>155</sup>

#### ***Relationship between family violence protection orders and child protection orders***

20.121 Where families are, or have been, engaged in proceedings under both family violence legislation and under child welfare laws, there is a risk that inconsistent orders may be made, which may potentially compromise the safety of victims of family violence. Alternatively, as the Children’s Court of New South Wales submitted, a court may be prevented from making a care and protection order it considers is in the best interests of the child because of an existing, yet inconsistent family violence protection order.<sup>156</sup> For example, the Court said that it had been stymied, in the past, from making an order restoring a child to his or her family because there was an existing family violence protection order against an adult family member, and it had no power to vary or revoke the family violence protection order in the absence of a police application to do so.

20.122 Although family violence protection orders generally prevail over child protection orders in Victoria and South Australia,<sup>157</sup> each of those states’ children’s courts has power to vary or revoke a family violence protection order to resolve any inconsistency between the order and an order that is proposed under the relevant child protection legislation.<sup>158</sup> The difference between them is that the South Australian court can only do so on application, while the Victorian court has own motion powers to vary or revoke a family violence protection order, subject to serving notice on all the parties and providing each an opportunity to be heard.

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153 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), 255–258.

154 Ibid, Rec 76.

155 *Family Violence Protection Act 2008* (Vic) ss 42, 146–147.

156 Children’s Court of New South Wales, *Submission FV 237*, 22 July 2010.

157 *Family Violence Protection Act 2008* (Vic) s 173(1); *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 16(2).

158 *Family Violence Protection Act 2008* (Vic) s 173. Furthermore, if a court makes a family violence protection order that is or may be inconsistent with an order under child welfare law, it must advise the child protection agency: s 173(3). See also *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 16(2).

**Consultation Paper**

20.123 In the Consultation Paper the Commissions sought comments on the desirability of expanding the jurisdiction of all Australian children's courts to make family violence protection orders:

- in favour of a child who is the subject of care proceedings before it, where the court considers a protection order necessary to protect the child from harm arising from the child's exposure to family violence;<sup>159</sup>
- to protect other children or siblings of the child who is the subject of care proceedings before it, where the court is satisfied that the children are affected by the same facts as alleged;<sup>160</sup> and
- both on its own initiative and on application to the court.<sup>161</sup>

20.124 Two additional, and related, issues were raised in the course of the Commissions' consultations, as noted above. First, whether children's courts should also be able to make family violence protection orders for and between adults, where a related matter involving a child or young person was being heard in the children's court, as is the case in Victoria.<sup>162</sup> Secondly, whether children's courts should have powers to vary or revoke a family violence protection order in situations where, for example, they are prevented from making a care and protection order because of an existing, but inconsistent, family violence protection order.<sup>163</sup>

**Submissions and consultations**

20.125 A majority of stakeholders—including the Children's Court of New South Wales and the Magistrates' Court and the Children's Court of Victoria—supported a conferral of powers on all Australian children's courts to make family violence protection orders for the protection of a child who is the subject of care proceedings before it where the grounds for making a family violence protection order are established.<sup>164</sup>

<sup>159</sup> Consultation Paper, Question 13–11.

<sup>160</sup> *Ibid*, Question 13–12.

<sup>161</sup> *Ibid*, Question 13–12.

<sup>162</sup> *Family Violence Protection Act 2008* (Vic) s 147(3).

<sup>163</sup> Children's Court of New South Wales, *Submission FV 237*, 22 July 2010.

<sup>164</sup> *Ibid*; Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010; Confidential, *Submission FV 109*, 8 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

20.126 One stakeholder observed that the safety and protection of children from harm and exposure to family violence should be ‘a key priority within the children’s court’ and, on this basis, gave its support.<sup>165</sup> Women’s Legal Service Queensland also supported expanded jurisdiction, but stated that issues of family violence should be considered well before the matter was in the children’s court and be an integral part of any coordinated service response to the child and the family.<sup>166</sup>

20.127 The Legal Aid NSW agreed that children’s courts should be empowered to make family violence protection orders on the basis that:

Protection orders can be used to maintain the child in the home but remove the perpetrator of violence. The Court will arguably be more inclined to allow a child to remain in the home if there is a criminal sanction available in the event of the breach. It also means that the onus will not be on the victim to seek out a protection order to protect themselves and the children in circumstances where they may not have the capacity or resilience to do so. Further, it makes the victim less likely to suffer recriminations for initiating a protection order and means that parallel proceedings will not have to be conducted in the Local Court and Children’s Court, which only adds further pressure to the victim.<sup>167</sup>

20.128 Other stakeholders, while supportive, warned that care needed to be exercised because of the potential to use family violence protection orders against both parties where there are cross-allegations, given the criminal consequences for a breach.<sup>168</sup> Stubbs submitted that the phrase ‘exposure to family violence’ may render the non-offending parent subject to a protection order for failing to protect their child from such exposure. She suggested that the intent of the power should be made clear—namely, that it is the offending party who should be the subject of any protection order—and attention needs to be given to how best to avoid orders being made against both parties, other than in exceptional circumstances.<sup>169</sup>

20.129 The Queensland Government dissented, but noted that the issue was under consideration in the present review of its child protection services.<sup>170</sup> The Department of Human Services (NSW) also did not support a general power being given to the children’s court to make family violence protection orders. It argued that the present power under s 90A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW) was adequate to restrain those with parental responsibility from doing an act that may put the child or young person at risk of harm. However, it did agree that s 90A could be expanded to ‘broaden the range of matters which can be addressed’.<sup>171</sup> While the Department did not elaborate further, the Children’s Court of New South Wales suggested that s 90A should be expanded to enable it to make a prohibition

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165 Confidential, *Submission FV 184*, 25 June 2010.

166 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

167 Legal Aid NSW, *Submission FV 219*, 1 July 2010. See also National Legal Aid, *Submission FV 232*, 15 July 2010.

168 J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010.

169 J Stubbs, *Submission FV 186*, 25 June 2010.

170 Queensland Government, *Submission FV 229*, 14 July 2010.

171 Department of Human Services (NSW), *Submission FV 181*, 25 June 2010.

order against any person—regardless of whether or not they were exercising parental responsibility—and that the orders be made enforceable.<sup>172</sup>

20.130 Submissions in this Inquiry generally agreed that, where the court found evidence to support making a family violence protection order in favour of the child before it in its care jurisdiction, the evidence may also support the making of an order to protect other children or siblings living in the home. It was agreed that where there was evidence to support the making of the order, a children's court should be able to make a family violence protection order for the protection of a child even where the child was not a party to the care proceedings, either on application or on its own motion.<sup>173</sup>

20.131 The Wirringa Baiya Aboriginal Women's Legal Centre submitted that the definition of 'sibling' should be refined, in view of the fact that

in Aboriginal families there are often children of similar ages residing in the same household, sometimes in the care of an aunt, grandparent or other family member. We agree that if the court considers such an order necessary for the protection of a child it should have the capacity to make such an order for siblings, but this should be a discretionary power used to protect children from real risks of family and family violence, not simply a blanket policy that will apply across the board.<sup>174</sup>

20.132 While the issue of expansion of the power of children's courts to make orders between adults was not directly canvassed in the Consultation Paper, it was brought to the Commissions' attention by the Magistrates' Court and the Children's Court of Victoria during consultations. The Victorian magistrates welcomed the amendment in Victoria and suggested it could be adopted in other jurisdictions to improve outcomes for children and their families all around Australia.

20.133 Several stakeholders supported giving children's courts own motion powers to make family violence protection orders, including the Women's Legal Service Queensland,<sup>175</sup> National Legal Aid<sup>176</sup> and the Magistrates' Court and the Children's Court of Victoria.<sup>177</sup> The reasons given in support included that it:

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172 Children's Court of New South Wales, *Submission FV 237*, 22 July 2010.

173 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Department of Human Services (NSW), *Submission FV 181*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010; Confidential, *Submission FV 109*, 8 June 2010; Confidential, *Submission FV 81*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

174 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

175 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

176 National Legal Aid, *Submission FV 232*, 15 July 2010.

177 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010. See also Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

- removes the onus on the victim of family violence to seek a protection order to protect him or herself and the children in circumstances where he or she may not have the capacity or resilience to do so; and
- makes the victim less likely to suffer recriminations for initiating an application for a protection order.

20.134 However, a small number of submissions expressed the view that family violence protection orders should only be made on application to the court, either by or on behalf of the person seeking protection, or by an advocate of the child.<sup>178</sup> The Department of Human Services (NSW) submitted that giving the children's court powers to make protection orders on its own motion would, first, compromise the court's judicial dispute resolution functions and, secondly, give the court an inappropriate oversight function for child protection. The Department's view was that the court should only resolve disputes before it.<sup>179</sup>

20.135 There was also support for giving children's courts the power to make an order varying or revoking a family violence protection order—for example, where the court wishes to make an order restoring a child or young person to his or her family but is prevented from doing so because of an existing family violence protection order against another member of the family. In these circumstances, the Children's Court of New South Wales submitted that it should have power to vary or revoke an existing family violence protection order, either on application by a party or on its own motion. This would enable it to finalise both the care proceedings and the family violence protection order proceedings at the same time:

The conferral of such a power on the Children's Court will save the family members the confusion and anxiety associated with being required to go to another court (in NSW, the Local Court) to have the AVO proceedings finalised.<sup>180</sup>

20.136 Where applications for family violence protection orders for the protection of children and young people are sought in the children's court, the Children's Court of New South Wales argued that domestic violence support services should be available, as they are available to adult applicants in the local courts. The Court submitted that this would improve access to courts and make court processes less intimidating for children and young people.<sup>181</sup>

### **Commissions' views**

#### ***Jurisdiction of children's courts***

20.137 A number of state and territory family violence laws already confer jurisdiction on children's courts to make family violence protection orders, although the powers conferred on some state and territory children's courts are more limited than others.

<sup>178</sup> Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 81*, 2 June 2010.

<sup>179</sup> Department of Human Services (NSW), *Submission FV 181*, 25 June 2010.

<sup>180</sup> Children's Court of New South Wales, *Submission FV 237*, 22 July 2010.

<sup>181</sup> *Ibid.*

20.138 In the Commissions' view, all Australian children's courts should have clear jurisdiction under family violence legislation to hear and determine applications for family violence protection orders where the person affected by the family violence, or to be protected, or against whom the order is sought, is under 18 years. However, the jurisdiction should only be enlivened where there are proceedings in the court involving the child or young person, or a member of the child's or young person's family. In this regard, the Commissions note that a recent review of family violence legislation in Western Australia has similarly recommended that family violence restraining orders for the protection of children should be able to be taken out in that state's children's court.<sup>182</sup>

20.139 Expanding the jurisdiction of children's courts to make family violence protection orders is consistent with the 'one court' principle referred to in Chapter 3. That is, the Commissions' overarching policy objective that, to the maximum extent possible, families who enter the legal system should be able to apply for, and be granted the orders they need by the court with which they first engage to address their safety concerns. Gaps in the system create the possibility that required protection will not be obtained, or obtained expeditiously. Such orders would be a significant adjunct to the orders presently available under child protection legislation to ensure the safety of the child and the child's non-offending parent.

20.140 Jurisdiction to make family violence protection orders also fits squarely within the expertise of children's court magistrates. Family violence issues are part of the core work of children's courts. Many children's courts magistrates are also likely to have experience in exercising jurisdiction under family violence legislation in their capacity as local court magistrates. Across Australia, children's court magistrates are generally drawn from the pool of magistrates, and are often assigned to the children's court for long periods of time.<sup>183</sup>

20.141 In reality, the need to exercise this jurisdiction in the care division of a children's court may be infrequent. Family violence protection orders are likely to be sought by police in the magistrates court as soon as the police suspect that a child or young person is being harmed, or is at risk of being harmed as a result of family violence. By the time proceedings are brought in the children's court, a number of child protection interventions are likely to have already occurred, and a family violence protection order may have already been obtained. If the Commissions' recommendations in Chapter 32 are accepted, applications for these orders may well have been considered and dealt with in a specialist family violence court context. However, there may be times when the need for family violence protection orders arises later, in children's court proceedings, where the court considers that family violence protection orders appropriately form part of the outcome.

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182 Department of the Attorney General (WA), *A Review of Part 2 Division 3A of the Restraining Orders Act 1997* (2008), 48–50, Rec 13. But note the review recommends the jurisdiction should be enlivened regardless of whether or not there are care proceedings before the court.

183 See also Ch 31 for a discussion of judicial education in relation to family violence.

20.142 The Commissions have considered carefully the concerns expressed in submissions and those raised in the Wood Inquiry in NSW, where similar issues arose.<sup>184</sup> However, after Australia-wide consultations, the Commissions take the view that, as long as family violence protection orders are linked to child protection proceedings, neither the courts' role nor the role of child protection agencies is compromised. The availability of family violence protection orders simply gives the court another—and in some jurisdictions—a more effective mechanism to protect children from harm.

20.143 The benefits of the enhanced jurisdiction are significant. It creates a more seamless system for victims of family violence—including children—to allow them to access as many orders and services as possible in the court in which the family is first involved; removes the need for the child and the family to have to navigate multiple courts; reduces the need for victims of family violence to have to repeat their stories and, consequently, reduces the likelihood that people will drop out of the system without the protections they need.

#### ***Scope of the orders***

20.144 As recommended above, the Commissions consider that all state and territory children's courts should be able to make family violence protection orders where:

- the application involves a child or young person;
- proceedings relating to the child or young person are before the court; and
- the court is satisfied that the legislative grounds for making the order are met.

20.145 Furthermore, the Commissions recommend that children's courts should be empowered to make family violence protection orders in favour of siblings of the child or young person who is the subject of proceedings, or other children or young people within the same household, who are affected by the same or similar circumstances. 'Siblings' should be defined broadly to take into consideration wider concepts of kin in Indigenous cultures.

20.146 Additionally, where they have jurisdiction as recommended above, children's courts should also have power to make a family violence protection order for the protection of an adult where the order is based on the same or similar circumstances as those affecting the child or young person. For instance, a court may be directed to make an order for the protection of a child against an adult, and in the course of proceedings, forms the view that, based on the same circumstances, a related order is justified for the protection of the protective parent, or an adult sibling.

20.147 This recommendation is modelled on s 147 of the *Family Violence Protection Act 2008* (Vic), where the power has proved practical and useful. In the Commissions' view, it is undesirable for a family to have to go to two courts to obtain protection from the same person who has committed family violence, especially when

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184 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [11.282]–[11.283].

making a separate application may leave a gap in protection. Protection orders in a family violence context will often be made for the protection of a parent or other carer with whom the child is living. The impact on a child of violence against a parent or other carer—in terms of that person’s capacity to be an effective parent—has been noted consistently throughout this Inquiry. A family violence protection order in favour of a protective parent will, essentially, also safeguard the protection of the child.

#### ***Revocation and variation***

20.148 The Commissions further recommend that children’s courts should be empowered to make orders for the variation or revocation of an existing family violence protection order, to the extent that it is necessary to do so in order to permit the court to make an order under child protection law. A children’s court should be able to exercise this power either on application, or on its own motion. Where it exercises its own motion powers, the court should be required to serve notice on all the parties to the order and give each an opportunity to be heard. These measures will provide appropriate safeguards to ensure that family violence protection orders are not varied or revoked where doing so would compromise the safety of persons protected by the order.

#### ***Applications for orders and own motion powers***

20.149 The Commissions are aware, in making these recommendations, that there will be many important procedural issues that will need to be resolved, and that the issues raised are likely to vary depending on the legislative context of each state and territory. The procedures for seeking protective orders may need to be adapted to the situation in the children’s court and may not be the same as those applying in the general courts. They should be consistent with:

- the principles underlying family violence legislation;
- the need to ensure the safety of the child or young person; and
- any special characteristics and procedures of children’s courts.

20.150 In NSW, for example, the requirement that only police can bring family violence protection order applications for the protection of a child may need to be reviewed given some concerns about the appropriateness of police appearing in care proceedings in the children’s court. In other jurisdictions, applications may be made by a parent, or another person on behalf of the child, including a child welfare officer—or on the court’s own motion. Expanding the class of people who may bring an application for a family violence protection order on behalf of a person needing protection may help close gaps for children and parents.

20.151 The Commissions further recommend that children’s courts should be empowered to make family violence protection orders on their own motion. This has a number of advantages, including removing the onus on the victim who may be reluctant to bring an application because they may fear retribution. The capacity of the court to make an own motion power may also be expedient in situations where the victim has not had legal advice. It may also address concerns about the appropriateness

of police or child welfare officers bringing the application in certain cases. In an adversarial system it is a significant step to give own motion powers to a court, allowing it to make an order in the absence of an application before it from any party to the proceedings. Child protection presents one of the strongest cases for such a power. Indeed, courts have long exercised *parens patriae* powers to protect vulnerable children and, while what is proposed here is a statutory power, it arises from the same motivation and obligation to protect.<sup>185</sup> The Commissions note that several jurisdictions already confer own motion powers on courts under family violence legislation.

#### ***Relationship to other courts***

20.152 In Chapter 32, the Commissions recommend the establishment (or further development) of specialist family violence divisions in all Australian magistrates courts. As discussed in that chapter, practical arrangements will need to be put in place to ensure that specialist family violence courts and children's courts work well together. The Commissions agree with the suggestion of the Children's Court of NSW in its submission to the Inquiry,<sup>186</sup> that the courts should establish appropriate referral arrangements and support mechanisms to help victims navigate between the two courts. The role of a dedicated liaison officer appears to be desirable in this regard.

20.153 The Commissions consider below the need for regular opportunities for ongoing family violence education and training.<sup>187</sup> The Commissions also emphasise the importance of information sharing arrangements between the courts. In Chapter 30, for example, the Commissions recommend that both family violence protection orders and child protection orders are included in the national database to ensure that all courts are aware of existing orders made in relation to a particular family.<sup>188</sup>

**Recommendation 20–3** State and territory family violence legislation should confer jurisdiction on children's courts to hear and determine applications for family violence protection orders where:

- (a) the person affected by family violence, sought to be protected, or against whom the order is sought, is a child or young person; and
- (b) proceedings related to that child or young person are before the court; and
- (c) the court is satisfied that the grounds for making the order are met.

<sup>185</sup> See discussion in Ch 4.

<sup>186</sup> Children's Court of New South Wales, *Submission FV 237*, 22 July 2010

<sup>187</sup> See Ch 31.

<sup>188</sup> Rec 30–18.

**Recommendation 20–4** Where a children’s court has jurisdiction to hear a family violence protection order application (see Rec 20–3), the court should also be able to make a family violence protection order in favour of siblings of the child or young person who is the subject of proceedings, or other children or young people within the same household, who are affected by the same or similar circumstances.

**Recommendation 20–5** Where a children’s court has jurisdiction to hear a family violence protection order application (see Rec 20–3), the court should also have jurisdiction to make a family violence protection order for the protection of an adult, where the adult is affected by the same or similar circumstances.

**Recommendation 20–6** Where a children’s court has jurisdiction to hear a family violence protection order application (see Rec 20–3), the court should also have power to vary or revoke a family violence protection order on the application of a party to the order, or on its own motion.

## Child protection and juvenile justice

20.154 There is a strong correlation between juvenile participation in crime and rates of reported neglect or abuse,<sup>189</sup> and, in particular, between juvenile involvement in criminal activity and neglectful parenting.<sup>190</sup> Research indicates that an offending child or young person is likely to have a history of abuse or neglect,<sup>191</sup> and to have been in out-of-home care.<sup>192</sup> In Victoria, a study of young people sentenced to imprisonment by the children’s court over a period of eight months in 2001 found that 88% had been subject to an average of 4.6 notifications to the child protection agency. Almost one-third had been the subject of six or more notifications, and 86% had been in out-of-home care. Over half of these had had five or more care placements.<sup>193</sup>

20.155 Young offenders aged between 10 and 17 years are usually dealt with by the juvenile or youth justice system, where detention is considered a last resort and the emphasis is on diversion and rehabilitation in order to break offending cycles.<sup>194</sup> However, the special problems that many young people face when applying for bail tend to undermine these principles.

189 D Weatherburn and B Lind, *Social and Economic Stress, Child Neglect and Juvenile Delinquency* (1997).

190 P Salmelainen, *Child Neglect: Its Causes and its Role in Delinquency*, Crime and Justice Bulletin: Contemporary Issues in Crime and Justice, 33 (1996), 3–4.

191 D Weatherburn and B Lind, *Social and Economic Stress, Child Neglect and Juvenile Delinquency* (1997), 47–48.

192 D Kenny and others, *NSW Young People on Community Orders Health Survey 2003–2006: Key Findings Report* (2006), 11 cited in J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.2].

193 Department of Human Services (Vic), *An Integrated Strategy for Child Protection and Placement Services* (2002), 52–53.

194 Compare *Children (Criminal Proceedings) Act 1987* (NSW) ss 17–18, which excludes serious indictable offences from being determined in the Children’s Court of New South Wales.

20.156 A central issue in juvenile justice policy today is the large and increasing numbers of children and young people being held in detention on remand rather than released on bail. The Australian Institute of Criminology has found that, across all states and territories, about 50% of young people in detention (at any one point in time) were on remand awaiting trial or sentencing in 2002, and that this had increased to almost 60% in 2007.<sup>195</sup>

20.157 One of the most significant factors associated with young people being remanded in custody is the lack of available and appropriate accommodation for young people.<sup>196</sup> Despite its reluctance to do so, a court is often forced to remand a young person in detention rather than release him or her on bail if, because of family violence or other factors, the young person has no safe or stable home to go to, or if there is no appropriate adult guardian to provide supervision and support for the young person to meet their bail requirements. Where courts do release a young person on bail, this is often on condition that the young person ‘reside as directed by the [child protection agency]’. However, as the child protection agency is not obliged to find accommodation for the child or young person except where it has parental responsibility,<sup>197</sup> many young people fail to meet this condition, and end up in detention.

20.158 The detention of children and young people on remand, where bail would otherwise have been granted, has a disproportionate impact on homeless young people. One of the main triggers of youth homelessness is family breakdown caused, among other things, by family violence, mental health issues and neglect.<sup>198</sup>

20.159 Specialist children’s courts deal with both criminal and care matters in relation to juveniles, so that there might be thought to be few gaps in the system affecting these children. However, issues often arise where a young person appears as a defendant in the court’s criminal jurisdiction. While the personal circumstances of the young person may suggest that there are child protection concerns in relation to the young person, such as the fact that the young person is unable to go home, the court cannot compel the child protection agency to find suitable accommodation for a young person for whom it has no parental responsibility. The court has no other option but to remand the young person in detention, until trial—even where imprisonment is an unlikely outcome. The problem seems to lie in the bifurcation of administrative responsibility for child protection and juvenile justice. It was observed in the Wood Inquiry that:

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195 N Taylor, *Juveniles in Detention in Australia, 1981–2007* (2009), prepared for the Australian Institute of Criminology, 39.

196 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.8]; M Dumbach, ‘Homes for Homeless Children’ (2007) 32(3) *Alternative Law Journal* 170.

197 *Minister for Community Services v Children’s Court of NSW* (2005) 62 NSWLR 419 referred to in J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.15].

198 National Youth Commission, *Australia’s Homeless Youth: A Report of the National Youth Commission Inquiry into Youth Homelessness* (2008), 85.

Coming within the juvenile justice or criminal justice system should not exclude a young offender from long-term services from [child protection agency] and other human service agencies. Nor should a shortage of refuges or other forms of accommodation result in young people who cannot live safely with their families, being remanded in custody unnecessarily, pending trial.<sup>199</sup>

### **Consultation Paper**

20.160 In the Consultation Paper, the Commissions proposed that one way to raise safety concerns about young people presenting in the youth justice system was to empower children's courts to refer their care and protection concerns for the child or young person to the child protection agency for investigation, and to require the agency to report back to the court with the outcomes of its investigation.<sup>200</sup>

20.161 The proposal was based on provisions contained in the *Children, Youth and Families Act 2005* (Vic) which give the Children's Court of Victoria power to refer a matter to the child protection agency for investigation when it believes that grounds exist for the making of a protection order or a therapeutic order in relation to a child or young person appearing as a defendant before it.<sup>201</sup> Under s 350, the child protection agency is obliged to investigate any such matter referred to it by the Children's Court, and must provide a report of its investigation of the matter to the court within 21 days of the referral.<sup>202</sup> The report must set out the outcomes of the investigation specifying, in particular, whether the child protection agency has made an application for a protection order or a therapeutic treatment order in relation to the child or if the investigation reveals that such action is not warranted.

20.162 In the Consultation Paper, the Commissions also proposed that a similar power should be extended to children's courts in their care jurisdiction. The suggestion was that the court should be able to refer its concerns for the safety of other children or siblings of the child who is the subject of the care proceedings to the child protection agency for investigation, and for the child protection agency to report back to the court within an agreed timeframe.<sup>203</sup>

### **Submissions and consultations**

20.163 The majority of submissions that commented on these proposals were supportive.<sup>204</sup> In relation to the first proposal, the Magistrates' Court and the Children's

199 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.83].

200 Consultation Paper, Proposals 13–6, 13–7.

201 *Children, Youth and Families Act 2005* (Vic) s 349.

202 Ibid s 350(1).

203 Consultation Paper, Proposal 13–8.

204 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

Court of Victoria stated that the Victorian provisions introduced in 2005 were particularly important for young offenders. A formal referral by the Criminal Division to the child protection agency provides an alternative pathway to direct children and young people to participate in treatment programs, where certain conditions are met, without the need to rely on a criminal prosecution.<sup>205</sup> However, during consultations some concerns were expressed about their operation in practice. It was suggested that referrals are regularly met with a response from the child protection agency saying that further investigation is not warranted.

20.164 Some stakeholders, including Legal Aid NSW, noted that, mostly due to resource constraints and funding priorities, child protection agencies were frequently unresponsive to risk of harm notifications for adolescents who came to attention as a result of offending behaviour. This leaves the children's court in a difficult situation where it cannot release a young person on bail or a bond because there is no appropriate adult in the family to take charge of the young person.<sup>206</sup>

20.165 National Legal Aid submitted that a major systems failure is the 'gap in proper remedial and support services for young people.' It submitted that clear guidelines need to be developed between the agencies responsible for juvenile justice and child protection authorities in relation to accommodation placements and family reunification options for young people who are defendants and who require bail.<sup>207</sup> It said that this was particularly important in cases where children have become homeless as a result of parents making applications for family violence protection orders against them.

20.166 The Children's Court of New South Wales also strongly supported the proposals.<sup>208</sup> It noted that its criminal division often deals with young people who have no stable accommodation or who lack adequate parental supervision, and who are consequently easily led into criminal offending. It submitted that because of the lack of any power to require the child protection agency to report back to the court when the court refers these young people to the agency for investigation,

the Court will not be aware of whether or not any action has been taken and may only be informed that Community Services has not intervened or taken any action when the young person again appears before the Court.<sup>209</sup>

205 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

206 Legal Aid NSW, *Submission FV 219*, 1 July 2010. See also N Ross, *Submission FV 129*, 21 June 2010.

207 National Legal Aid, *Submission FV 232*, 15 July 2010.

208 The Children's Court of New South Wales has previously advocated for such a power, not only in relation to children and young people who appear before it in its criminal division, but also in respect of those who are the subject of care proceedings in its care division, or of other children or young people who are mentioned in these proceedings: see J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.76]; New South Wales Law Reform Commission, *Young Offenders*, Report 104 (2005), [8.140].

209 Children's Court of New South Wales, *Submission FV 237*, 22 July 2010.

20.167 Consequently, magistrates become reluctant to make reports to the agency, even when special reporting arrangements have been established with the relevant child protection agency.<sup>210</sup>

20.168 In contrast, the Queensland Government did not consider legislative reform necessary as Queensland courts have ‘unfettered capacity’ to refer matters to the child protection agency when they have concerns for the safety of children, whether these concerns arise in its care or criminal divisions. In criminal proceedings, it noted that the court can liaise with the youth justice case worker who, in turn, liaises directly with the Department of Child Safety.<sup>211</sup>

20.169 Similarly, the Department of Human Services (NSW) also considered that legislative reform was not strictly necessary in NSW as court officers—including judges and magistrates—are mandatory reporters under child protection legislation and should therefore be making such reports routinely. However, the Department was open to support a conferral of powers on the Criminal Division of the Children’s Court to refer certain matters to the child protection agency for investigation, subject to further consideration of a number of factors, including how the provisions were operating in Victoria, and proper funding being made available. In relation to the imposition of therapeutic orders, the Department noted that further consultation with other relevant juvenile justice and health agencies would be required.<sup>212</sup>

20.170 A number of stakeholders, including the Children’s Court of New South Wales, also supported the proposal to confer a similar power on the court in its care jurisdiction to refer safety concerns for a child, who was not the subject of proceedings before the court, to the child protection agency for investigation and report back.<sup>213</sup>

20.171 Opposing the proposal, both the Queensland Government and the Department of Human Services (NSW) observed that it was unlikely that a court exercising care jurisdiction would be aware of a risk to a child which came to light during care proceedings for another child, without the child protection agency also being aware. Both organisations noted that as a matter of practice, when investigating a report about a child, the child protection agency would identify any risks posed to other children including siblings, and would seek appropriate orders in respect of each child individually.<sup>214</sup> The Queensland Government commented that it was important for the

210 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.75].

211 Queensland Government, *Submission FV 229*, 14 July 2010.

212 Department of Human Services (NSW), *Submission FV 181*, 25 June 2010.

213 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

214 Queensland Government, *Submission FV 229*, 14 July 2010; Department of Human Services (NSW), *Submission FV 181*, 25 June 2010.

‘court and the child protection agency to maintain mutual respect and confidence’ and accordingly it should not be for the court to make a child protection order in respect of a sibling whom the agency does not consider is in need of care and protection.<sup>215</sup>

20.172 In addition, the Department of Human Services (NSW) reiterated its view that a formal power of referral was, in any case, unnecessary, as court officers were mandatory reporters under NSW child protection legislation and were therefore obliged to make a report to the child protection agency where they suspected that a child was at risk of significant harm. However, the Department acknowledged that there may be value in providing a clear pathway for the court to report suspicions of abuse or neglect of children, not otherwise before it, to the child protection agency in the same way that Family Court judges and federal magistrates can. Noting the provisions of the *Family Law Act 1975*, the Department observed:

The Family Court for example has a well established process for notifying children at risk of abuse under section 67ZA. The obligation is not limited to children who are the subject of proceedings. While it does not specifically refer to judges and magistrates, they would in NSW be covered by the provisions of section 27 of the Care Act and there may be value in specifically including judicial officers.

20.173 However, the Department did not support giving the court power to require the child protection agency to report back to it within a specified time period. It argued that this would give the children’s court an inappropriate general oversight role and would impose a costs burden on the agency with no ‘discernible benefit for the child or young person who is the subject of the report’.<sup>216</sup>

20.174 According to the Department of Premier and Cabinet (Tas), the key to addressing the issues raised lies in the establishment of effective relationships between the courts and the child protection agency:

Effective relationships between the Family Court, Children’s Court and Child Protection are essential in ensuring the safety and wellbeing of children. If in the course of hearing a matter a court forms a reasonable belief that a child has been or is at risk of harm or neglect it is appropriate for Child Protection services to be notified of that concern and to provide clear, prompt feedback on any investigation of that matter back to the court in a mutually agreeable manner. Specific timelines for the provision of such feedback should be determined regionally.<sup>217</sup>

#### *Commissions’ views*

20.175 The Commissions acknowledge the serious community concerns for many young people who traverse the child protection and juvenile justice divide. The lack of suitable accommodation and other support services, and the consequent demand in custody of increasing numbers of young people, undermines established juvenile justice principles of diversion and rehabilitation. Of particular concern are young people who are homeless as a result of family dysfunction and violence.

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215 Queensland Government, *Submission FV 229*, 14 July 2010.

216 Department of Human Services (NSW), *Submission FV 181*, 25 June 2010.

217 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

20.176 This is not an issue that is easily addressed by legislative reform alone. For example, giving children's courts formal powers to refer these matters to the child protection agency for investigation, and report, may not resolve the issue if there are no specialised bail services, refuges or other forms of suitable accommodation for young people who cannot live safely with their families. Ultimately, what is required is a commitment by state and territory governments to develop and fund adequate bail support services and bail accommodation services, in both metropolitan and regional areas, to meet identified needs.<sup>218</sup>

20.177 Nonetheless, the Commissions consider that some legislative reform is desirable to provide a clear pathway for referral of concerns for the welfare or safety of children from the children's court to the relevant child protection agency.

20.178 Rather than conferring a power of referral on children's courts as proposed in the Consultation Paper, the Commissions consider that a similar outcome can be achieved by utilising existing mandatory reporting provisions in child protection legislation. However, the Commissions note that, unlike the mandatory reporting provisions applying to Family Court judges and magistrates of the Federal Magistrates Court under the *Family Law Act 1975*,<sup>219</sup> current mandatory reporting provisions in state and territory child protection laws do not specifically refer to judicial officers and court staff. Rather, they apply generally to people who work in organisations that provide health, welfare, education, law enforcement, child care or residential services to children,<sup>220</sup> thus leading to some ambiguity about whether judicial officers and court staff are mandatory reporters. To resolve any doubt, the Commissions recommend that child protection legislation be amended to provide expressly that judicial officers and court personnel are mandatory reporters and therefore have a duty to report concerns for the safety and welfare of a child or young person to the relevant child protection authority.

20.179 In addition, to address concerns by children's courts that they are not advised about the outcome of any referrals they make to child protection agencies, the Commissions recommend that state and territory child protection legislation should be amended, to the extent that it is necessary, to require the child protection agency to provide feedback to mandatory reporters.<sup>221</sup> This should include an acknowledgement that the report was received, and providing information to the reporter about the outcome of the agency's initial assessment of the report. The Commissions note that a

218 See also J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [15.22]; and New South Wales Government, *Keep Them Safe-A Shared Approach to Child Wellbeing* (2009), Ch 3.

219 *Family Law Act 1975* (Cth) s 67ZA.

220 *Children and Young Persons (Care and Protection) Act 1998* (NSW) ss 23, 27; *Children, Youth and Families Act 2005* (Vic) ss 162, 184; *Education (General Provisions) Act 2006* (Qld) ss 365–366; *Public Health Act 2005* (Qld); *Child Protection Act 1999* (Qld); *Public Health Act 2005* (Qld) ss 158, 191; *Children and Community Services Act 2004* (WA) ss 3, 124B; *Children's Protection Act 1993* (SA) ss 6, 10–11; *Children, Young Persons and Their Families Act 1997* (Tas) ss 3–4, 14; *Children and Young People Act 2008* (ACT) ss 342, 356; *Care and Protection of Children Act 2007* (NT) ss 13–16, 26.

221 See, eg. *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Child Protection Act 1999* (Qld) s 159M.

similar recommendation, since implemented in NSW, was made by the Wood Inquiry.<sup>222</sup>

**Recommendation 20–7** State and territory child protection legislation should:

- (a) specify that judicial officers and court staff are mandatory reporters; and
- (b) require child protection agencies to provide timely feedback to mandatory reporters, including an acknowledgement that the report was received and information as to the outcome of the child protection agency's initial investigation.

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<sup>222</sup> J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [6.122]–[6.1138], Rec 6.3. See also New South Wales Government, *Keep Them Safe—A Shared Approach to Child Wellbeing* (2009), Ch 3.

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## **Part F**

### **Alternative Dispute Resolution**

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# 21. Family Dispute Resolution

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## Contents

Introduction	983
Family Dispute Resolution	985
Development of family dispute resolution	986
FDR in family law legislation	987
FDR and parenting orders	987
FDR and financial disputes	988
FDR and the <i>Family Law Act</i> generally	988
Definition of family violence	989
FDR in cases involving family violence	990
Screening and risk assessment practices	998
FDR practitioners and screening	998
Screening frameworks	999
Lawyers as effective referral agents	1003
FDR practitioners and lawyers	1008
Culturally responsive FDR	1013

## Introduction

21.1 Disputes of all types are increasingly dealt with by methods of dispute resolution that do not involve a decision by a court or tribunal and instead involve different ‘alternative dispute resolution’ (ADR) models. Part F of this Report examines the use of ADR processes<sup>1</sup> in disputes involving family violence—processes that operate within or alongside family law, child protection law and family violence law, and which affect the operation of the legal frameworks that are the subject of this Inquiry.

21.2 ADR and restorative justice share common origins and philosophies as part of a move away from traditional legal processes and towards new forms of conflict resolution. However, ADR and restorative justice have developed as distinct areas of practice. ADR focuses on managing disputes in a collaborative way, whereas restorative justice is concerned with reparation and dialogue between offenders and victims.<sup>2</sup>

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1 The term ADR is used here to include family dispute resolution (FDR)—the ADR model used to resolve disputes under the *Family Law Act 1975* (Cth)—as well as ADR models used to resolve child protection matters and matters arising under family violence legislation.

2 See L McCrimmon and M Lewis, ‘The Role of ADR Processes in the Criminal Justice System: A View’ (Paper presented at Association of Law Reform Agencies for Eastern and Southern Africa, Entebbe,

21.3 The use of ADR and restorative justice is controversial in disputes involving violence and abuse.<sup>3</sup> With respect to ADR, a major concern is that processes for dispute resolution are based on negotiations between parties and consensual agreements. In the context of family violence, the power relationships between the parties may make this dangerous or produce unfair or unsafe agreements.

21.4 As discussed in Chapter 23, the Commissions consider that negotiation or mediation about violence itself is never appropriate. Having considered research findings and stakeholder comments throughout this Inquiry, the Commissions have concluded that, where there is family violence, ADR to resolve issues *other than violence* may be appropriate, depending on effective and reliable family violence screening, risk assessment and risk management. In Part F of this Report, the Commissions consider the need for reforms in legislation, policy and practice to provide for the safety of parties during ADR, and to facilitate safe and effective outcomes through ADR in disputes involving family violence.

21.5 In this chapter, the Commissions consider the use of family dispute resolution (FDR)<sup>4</sup> to resolve parenting disputes involving family violence. The Commissions examine the family law framework for FDR, with particular consideration of screening and risk assessment practices, cooperation and collaboration between FDR practitioners and lawyers, and the development of culturally responsive FDR.

21.6 In Chapter 22, the Commissions consider the disclosure of information and admissibility of evidence arising from FDR and family counselling communications. This involves balancing different considerations: agencies' and courts' need for information and evidence to protect victims or those at risk of family violence, and the need to maintain the integrity and ability of FDR and family counselling processes to secure safe outcomes for victims and those at risk in the context of family law disputes.

21.7 In Chapter 23, the Commissions consider the use of ADR processes in family violence, family law and child protection matters, and the inconsistencies in practice and outcomes arising from the gaps between these jurisdictions. In doing so, the Commissions note that legislative, policy and operational distinctions between family violence, family law and child protection issues do not always reflect the actual experience of families affected by family violence, for whom these issues often intersect. This leads the Commissions to consider the potential for ADR to overcome jurisdictional divides to offer seamless and effective resolution of intersecting issues in disputes involving family violence.

21.8 Australian governments and others have expressed strong support for greater use of ADR to resolve family law and child protection disputes.<sup>5</sup> As discussed in Part F of

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<sup>3</sup> Uganda, 6 September 2005). See also Law Reform Committee—Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009), 9–10.

<sup>4</sup> Restorative justice in relation to family violence and sexual assault is considered briefly in Ch 23.

<sup>5</sup> The term ‘family dispute resolution’—or FDR—refers to ADR as it is used to resolve disputes in accordance with the *Family Law Act 1975* (Cth). See the definition of family dispute resolution in s 10F of the Act.

<sup>5</sup> See for example, R McClelland (Attorney-General), ‘Improving Access to Justice’ (Press Release, 17 May 2010); Australian Government Attorney-General’s Department Access to Justice Taskforce, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (2009); J Wood, *Report of*

this Report, much work has been done in recent years to develop ADR processes that have the flexibility to accommodate the personal and cultural needs, concerns, values and interests of particular children and their families, as well as providing appropriate safeguards to protect victims of family violence and those at risk of family violence. In this regard, the Commissions note the funding, development, implementation and other support of important strategies and initiatives by government, dispute resolution service providers, lawyers and other professionals in the fields of family law, child protection and family violence. As Part F of this Report indicates however, there is still important work to do to improve law and practice relating to the use of ADR in cases involving family violence.

## Family Dispute Resolution

21.9 This chapter considers the role of FDR in resolving family law disputes—in particular parenting disputes—and the interaction between FDR processes under the *Family Law Act 1975* (Cth) and family violence.

21.10 The use of FDR in the context of family violence presents complex challenges. In addition to significant concern about the safety of participants engaging in FDR where family violence is present, there is concern that imbalances in power relationships between the parties may compromise the fairness of the negotiating process and result in unfair and unsafe agreements.

21.11 However, the capacity of FDR to provide flexible and accessible resolution processes to accommodate the particular needs, interests and concerns of diverse parties—especially where parties are victims or are at risk of family violence—contributes significantly to the possibility of achieving sustainable and effective outcomes.

21.12 As the Australian Institute of Family Studies (AIFS) found in its *Evaluation of the 2006 Family Law Reforms*, there is evidence that some families with family violence issues are ‘on the roundabout’ between services which provide ADR in the family law system, lawyers, courts and state-based child protection and family violence systems.<sup>6</sup> AIFS has also noted in relation to parenting arrangements, that the

evidence of poorer well-being for children whose mothers have safety concerns ... highlights the importance of identifying families where safety concerns are pertinent and assisting them to make arrangements that promote the well-being of their children'.<sup>7</sup>

21.13 The Commissions consider that the potential for FDR to expeditiously and effectively resolve parenting disputes in cases involving family violence—through practical and sustainable agreements, and with appropriate screening, risk assessment

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<sup>6</sup> *the Special Commission of Inquiry into Child Protection Services in NSW* (2008); J Hatzistergos (New South Wales Attorney General), ‘Nowra Elders to Help Aboriginal Children at Risk’ (Press Release, 22 September 2010); J Hatzistergos (New South Wales Attorney General), ‘Keynote Address’ (Paper presented at ADR Workshop of New South Wales Bar Association, Sydney, 28 August 2010).

<sup>7</sup> Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), E2. *Ibid*, E4–E5.

and risk management—may help to circumvent the development or escalation of related child protection and family violence concerns.

21.14 In this chapter, the Commissions examine the way in which the legislative, policy and operational framework for FDR addresses family violence concerns. In particular, the Commissions consider screening and risk assessment practices, referral practices, cooperation and collaboration between FDR practitioners and lawyers, and the development of culturally responsive FDR, and make recommendations to improve FDR processes, standards and practice. Such improvements in processes, standards and practice will enhance FDR's capacity to deliver sustainable and effective outcomes—and, in so doing, may assist in circumventing repeated engagement by family violence victims and those at risk with the legal system.

### **Development of family dispute resolution**

21.15 FDR is defined broadly in the *Family Law Act* as any non-judicial process where an independent FDR practitioner helps people affected, or likely to be affected, by separation or divorce, to resolve some or all of their disputes with each other.<sup>8</sup> Dispute resolution processes include mediation, conciliation and arbitration. In mediation, an impartial third party assists parties to negotiate an agreement. Conciliation is similar to mediation, except the conciliator may provide expert advice on possible legal outcomes and have an advisory role. In arbitration, an independent third party assesses the facts and determines the dispute according to law.<sup>9</sup> In practice, mediation is the key process used for Australian family disputes.<sup>10</sup> However, FDR services and agencies vary in their approaches and underlying philosophies.<sup>11</sup> In addition to family dispute resolution, many agencies also provide counselling, parenting support and other services.

21.16 When the Family Court of Australia was established in 1976, it used counselling and conciliation. Since that time, FDR has expanded and developed extensively. FDR services are now provided by courts, legal aid commissions,<sup>12</sup> community agencies and private providers. Most recently, the federal government has established a network of Family Relationships Centres (FRCs) throughout Australia that provide referral and FDR services.<sup>13</sup> Practitioners have developed increasingly sophisticated approaches

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8     *Family Law Act 1975* (Cth) s 10F.

9     Family Law Council and Law Council of Australia—Family Law Section, *Best Practice Guidelines for Lawyers Doing Family Law Work* (2004).

10    D Cooper and R Field, 'Family Dispute Resolution of Parenting Matters in Australia: An Analysis of the Notion of an Independent Practitioner' (2008) 8 *Queensland University of Technology Law and Justice Journal* 158, 159.

11    Ibid, 164–165, discusses different models of mediation.

12    Legal Aid Commissions are required to consider whether a matter can be dealt with by dispute resolution before a grant of legal aid for family law matters can be made. If a matter is considered appropriate for dispute resolution, a grant of assistance will be made for a conference where the lawyer will represent the assisted party. The conferences are chaired by trained and qualified FDR practitioners. See KPMG, *Family Dispute Resolution Services in Legal Aid Commissions: Evaluation Report* (2008), prepared for the Australian Government Attorney-General's Department, 11–12.

13    P Parkinson, 'Keeping Contact: The Role of Family Relationship Centres in Australia' (2006) 18 *Child and Family Law Quarterly* 157.

and strategies for assessing the appropriateness of FDR in differing situations, addressing power imbalances, and including children in their practices.<sup>14</sup>

21.17 FDR is presently governed by a detailed legislative framework under the *Family Law Act* and associated regulations, discussed in more detail below. Broadly speaking, the current legislative framework encourages or requires the use of FDR before court action and supports referral to FDR after an application to the court has been made. Exceptions are provided in cases of family violence and child abuse, reflecting concerns, discussed below, about the use of FDR in such contexts. Communications during the FDR process are, in general, confidential and inadmissible in subsequent court proceedings, although there are exceptions relevant to child abuse and family violence.<sup>15</sup>

## FDR in family law legislation

21.18 This section sets out the legislative provisions regulating the use of FDR in the *Family Law Act*. Different regimes apply to FDR in relation to parenting orders and financial disputes. There are also some general provisions in the *Family Law Act* that govern FDR.

### FDR and parenting orders

21.19 The 2006 reforms to the *Family Law Act* extended the use of FDR. With some exceptions, parties with a dispute about children must go to FDR before they can go to court,<sup>16</sup> and must make a genuine effort to resolve their dispute through FDR.<sup>17</sup> The exceptions to this requirement include where the parties agree and are applying to court only for a consent order.<sup>18</sup> Importantly, they also include cases where violence is an issue, such as where the court is satisfied that there has been, or there is a risk of, child abuse or family violence,<sup>19</sup> or where there are circumstances of urgency.<sup>20</sup>

21.20 If the parties do not reach agreement through FDR and do not satisfy one of the exceptions, the federal family courts can only hear parenting cases if the FDR practitioner provides a certificate relating to the parties' attendance and effort in the FDR process.<sup>21</sup> FDR practitioners may give several different types of certificates under s 60I of the *Family Law Act*, including a certificate to the effect that the person did not

14 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms: Summary Report* (2009), 94–95.

15 See further below. The confidentiality and inadmissibility of FDR communications are discussed in Ch 22.

16 *Family Law Act 1975* (Cth) s 60I.

17 Ibid s 60I(1). For a discussion of ‘genuine effort’ in s 60I, its meaning and the implications of the provision in cases of violence, see H Astor, ‘Making a “Genuine Effort” in Family Mediation: What Does It Mean?’ (2008) 22 *Australian Journal of Family Law* 102.

18 *Family Law Act 1975* (Cth) s 60I(9)(a).

19 Ibid s 60I(9)(b).

20 Ibid s 60I(9)(d). Other circumstances include: where orders are applied for in response to other applications; where there has been serious disregard of previous family law orders; where parties are unable to participate effectively in FDR; and where other circumstances specified in the regulations are satisfied. No other circumstances are presently prescribed by the regulations.

21 Ibid s 60I(7).

attend FDR because, having regard to the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (the *FDR Regulations*), the practitioner considers that ‘it would not be appropriate’ to conduct or continue FDR.<sup>22</sup>

21.21 In determining whether a dispute is appropriate for FDR, the FDR practitioner must take into account whether the ability of any party to negotiate freely is affected by a number of factors, all of which are potentially relevant to cases of violence. These include: any history of family violence among the parties; the likely safety of the parties; the equality of bargaining power among the parties; the risk that a child may suffer abuse; the emotional, psychological and physical health of the parties; or any other relevant matter.<sup>23</sup> The *FDR Regulations* also require that an FDR practitioner must be satisfied of the appropriateness of FDR in each case before providing FDR.<sup>24</sup> An FDR practitioner is also obliged to terminate FDR if the practitioner is no longer satisfied it is appropriate, or is requested to do so by a party.<sup>25</sup>

### **FDR and financial disputes**

21.22 The s 60I framework applies only to parenting orders. In relation to applications for financial disputes, the requirements are set out in the *Family Law Rules 2004* (Cth).<sup>26</sup> Consistently with s 60I, the Rules include mechanisms for removing obligations to participate in FDR in cases of family violence.

21.23 This is done in two ways. First, the Rules require compliance with pre-action procedures set out in sch 1, but there is an exception for cases of allegations of family violence or the risk of family violence or fraud.<sup>27</sup> Secondly, while the procedures in sch 1 generally require the use of FDR, the Rules set out circumstances—including allegations of family violence or cases of urgency—in which the court may accept that it was not possible or appropriate for a party to comply with the pre-action procedures.<sup>28</sup>

### **FDR and the *Family Law Act* generally**

21.24 Other provisions of the *Family Law Act* also deal with FDR, including provisions encouraging its use. Section 13C empowers the court to make orders referring parties to FDR or family counselling at any stage in proceedings, on its own

22 Ibid s 60I(8)(aa),(d). The other grounds upon which certificates may be issued are: a party did not attend FDR due to the refusal or failure of the other party (or parties) to attend: s 60I(8)(a); the parties attended FDR with the practitioner, and all parties made a genuine effort to resolve the issue or issues: s 60I(8)(b); the party attended FDR with the practitioner, but that party, or another party did not make a genuine effort to resolve the issue or issues: s 60I(8)(c).

23 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25(2).

24 Ibid reg 25(1), (4).

25 Ibid reg 29(c).

26 In May 2010, the Attorney-General of Australia announced an intention to extend the requirement to attend FDR prior to filing an application in court to property and spousal maintenance matters, as one of a range of measures consistent with the Federal Government’s *Strategic Framework for Access to Justice: R McClelland (Attorney-General), ‘Improving Access to Justice’ (Press Release, 17 May 2010)*.

27 *Family Law Rules 2004* (Cth) r 1.05.

28 Ibid sch 1, cl 1(1),(4).

initiative or on application by a party or an independent children's lawyer.<sup>29</sup> If a party does not comply with such an order, the court may make further orders as it considers appropriate following a report from an FDR practitioner or counsellor.<sup>30</sup> Section 62B obliges a court to inform parties in a parenting proceeding about FDR and family counselling services. Section 69ZQ requires a court in child-related proceedings to encourage the use of FDR, where it considers it appropriate. A requirement to attend FDR may also be imposed as a condition of a bond where parenting orders are contravened.<sup>31</sup>

### Definition of family violence

21.25 The definition of family violence in s 4 of the *Family Law Act*, and proposals to amend the definition, are discussed in detail in Chapter 6 of this Report. As discussed there, the definition is more restrictive than that used in some state or territory family violence legislation, and in practice-based material such as the *Screening and Risk Assessment Framework*,<sup>32</sup> and in the Family Court of Australia's *Family Violence Strategy*.<sup>33</sup> Concern has been expressed that the definitional differences may create problems in practice.<sup>34</sup> A KPMG evaluation of FDR practices in the legal aid sector found that screening questions tended to focus on physical forms of abuse,<sup>35</sup> and recommended enhanced screening for non-physical forms of violence.<sup>36</sup>

21.26 In the Consultation Paper, the Commissions therefore asked whether the variations between the legislative definitions and practice-based definitions in FDR have had any practical impact in FDR practices.<sup>37</sup>

21.27 The responses to this question focused on the definition of violence in the *Family Law Act*, identifying its narrowness and the requirement of reasonableness as problematic.<sup>38</sup> Very few responses linked the definition with problems in FDR practice.

29 The court is required to consider seeking the advice of a family consultant before making such an order.

30 *Family Law Act 1975* (Cth) s 13D.

31 Ibid ss 70NEC, 70NFE.

32 Australian Catholic University and Australian Government Attorney-General's Department, *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* (2008), 52, notes the definition in the *Family Law Act* and other definitions.

33 Family Court of Australia, *Family Violence Strategy* (2004–2005), 3.

34 R Kaspiew, 'Family Violence in Children's Cases under the Family Law Act 1975 (Cth): Past Practice and Future Challenges' (2008) 14 *Journal of Family Studies* 279, 287.

35 KPMG, *Family Dispute Resolution Services in Legal Aid Commissions: Evaluation Report* (2008), prepared for the Australian Government Attorney-General's Department, 36.

36 Ibid. Measures taken by the Legal Aid Commissions to address this and other concerns raised by KPMG are discussed below.

37 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 11–2, [11.61].

38 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 105*, 6 June 2010.

One submission asserted that the definition in the Family Law Act is narrow and does not include many of the dynamics of power and control. These dynamics may impact on capacity to negotiate, but not constitute violence under the Act, and the capacity of FDR to deal with such problems depends on the skill of the practitioner.<sup>39</sup> The Queensland Law Society expressed concerns that FDR practitioners sometimes excluded parties from FDR because of concerns that did not meet the definition in the Act.<sup>40</sup>

21.28 In Chapter 6, the Commissions express the view that the definition of family violence in the *Family Law Act* should expressly recognise that certain types of non-physical conduct—including economic abuse and psychological abuse—may fall within the wider definition of family violence. The Commissions recommend that family violence should be given a definition that describes the context in which acts take place, and that it should be defined as violent or threatening behaviour, or any other form of behaviour that coerces or controls a family member or causes that family member to be fearful.<sup>41</sup> The Commissions also express the view that the semi-objective test of reasonableness should be removed from the definition of family violence in the *Family Law Act* on the basis that it is inappropriate to apply a test of reasonableness to the experience of fear in determining whether conduct is violent. The Commissions do not, however, make a separate recommendation about the removal of the reasonableness test from the definition of family violence in the *Family Law Act*, as the Commissions' recommended definition does not include the test of reasonableness.

21.29 In the Commissions' view, this recommended definition will assist in educating those engaged in the family law system about the complexities and nuances of family violence. It will also deal with the concerns about the definition described above and the problems it may create in relation to FDR. Consequently, the Commissions make no further recommendation in this respect.

### **FDR in cases involving family violence**

21.30 Both practitioners and scholars have expressed concerns about using facilitative methods of FDR in cases involving family violence. The New South Wales Law Reform Commission (NSWLRC) explored these concerns in its 2005 report, *Community Justice Centres*,<sup>42</sup> where it expressed its concern ‘about mediation taking place where violence is a factor, particularly in situations involving domestic violence’.<sup>43</sup>

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39 Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

40 Queensland Law Society, *Submission FV 178*, 25 June 2010.

41 Rec 6–4. The Commissions recommend the same core definition of family violence for family violence legislation and the *Family Law Act*—see Rec 5–1.

42 New South Wales Law Reform Commission, *Community Justice Centres*, Report 106 (2005), Ch 4.

43 Ibid, [4.41].

21.31 The reasons why FDR may be inappropriate in the context of family violence include:

- safety concerns—the FDR process may place women and children in danger because the offender may use FDR as an opportunity for violence or intimidation;
- power imbalances—the sometimes extreme imbalance of power in relationships characterised by family violence undermines the fairness of the negotiating process in facilitative methods of FDR;
- mediation requires honesty, desire to settle the dispute and some capacity for compromise—perpetrators of violence are not generally capable of such behaviours in relation to the target of their violence;
- mediation places too great a burden on the woman who has been the victim of violence, and who may, for example, be afraid to be in the same room with the perpetrator; and
- FDR is a private and confidential process, with the effect that violence against women is shielded from the public eye.<sup>44</sup>

21.32 Other concerns include the difficulty of identifying violence. It has been suggested that it is very difficult for the victims of violence to reveal violence, and that those who commit violence are also unwilling to do so.<sup>45</sup> FDR may therefore take place in the absence of crucial information and there may be ongoing impacts on parties and their children.<sup>46</sup> Another issue is whether FDR is effective in situations of family violence. Some research indicates that mediation will not produce agreements or, if it does, the agreements will not be successful in many cases.<sup>47</sup>

21.33 On the other hand, there are potential benefits of using FDR in cases involving family violence. The first is that FDR may be a more accessible method of resolving family disputes, as it is arguably both cheaper and faster than going to court.<sup>48</sup> FRCs in Australia provide three hours of mediation without charge and many other services have affordable fee levels.

44 For a review of these issues see: R Field, ‘Using the Feminist Critique of Mediation to Explore ‘the Good, the Bad and the Ugly’ Implications for Women of the Introduction of Mandatory Family Dispute Resolution in Australia’ (2006) 20 *Australian Journal of Family Law* 45; H Astor, ‘Violence and Family Mediation: Policy’ (1994) 8 *Australian Journal of Family Law* 3.

45 H Astor, ‘The Weight of Silence: Talking About Violence in Family Mediation’ in M Thornton (ed) *Public and Private: Feminist Debates* (1995) 174.

46 D Kirkwood and M McKenzie, ‘Family Dispute Resolution and Family Violence in the Family Law System’ (2009) 14 *Current Family Law* 149, 150–152; M Kaye, J Stubbs and J Tolmie, ‘Domestic Violence and Child Contact Arrangements’ (2003) 17 *Australian Journal of Family Law* 93.

47 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 102; A Bailey and A Bickerdike, ‘Family Violence and Family Mediation’ (2005) Autumn *Domestic Violence and Incest Resource Centre Newsletter* 13, 13.

48 Domestic Violence and Incest Resource Centre, *Behind Closed Doors: Family Dispute Resolution and Family Violence*, Discussion Paper No 6 (2007), 22.

21.34 Secondly, if FDR is conducted by an experienced practitioner with appropriate safeguards, it may have positive outcomes for people who have experienced family violence.<sup>49</sup> Some studies of FDR have identified high rates of participant satisfaction where there are well-trained, problem-solving FDR service providers with effective intake processes.<sup>50</sup> FDR may offer the parties more involvement in resolving their dispute, and may give victims more opportunity to speak about matters which are important to them.<sup>51</sup>

21.35 Governments and service providers have devoted resources to training and development of FDR practitioners in the area of family violence. FDR practitioners must be accredited and the relevant Vocational Graduate Diploma of Family Dispute Resolution includes compulsory units dealing with violence and providing for the safety of vulnerable parties.<sup>52</sup> There has also been investment in research and policy development on FDR and violence.<sup>53</sup> As discussed below, a screening and risk assessment framework for cases involving violence and abuse has been developed.<sup>54</sup> Models of FDR are being developed that include lawyers in the process, with particular relevance to disputes involving violence.<sup>55</sup>

21.36 The risks associated with family violence in FDR processes may be managed in a number of ways. Some examples include:

- ensuring that victims are prepared for the process;<sup>56</sup>
- taking practical measures to ensure safety, such as obtaining a silent phone number;<sup>57</sup>
- taking care with client contact, for example by making written material only available at the centre and not leaving phone messages;<sup>58</sup>

49 Ibid, 23.

50 Ibid.

51 Ibid.

52 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 5. In addition, the Australian Government Attorney-General's Department noted the availability of alternative pathways to accreditation, that do not involve the vocational graduate diploma: Australian Government Attorney-General's Department, *Submission FV 166*, 25 June 2010. As reflected in Rec 21–2, the Commissions consider that high quality family violence screening and risk assessment tools should be included in all training and accreditation for family dispute resolution practitioners.

53 Keys Young, *Research/Evaluation of Family Mediation Practice and the Issue of Violence: Final Report* (1996), prepared for the Australian Government Attorney-General's Department; H Astor, *Position Paper on Mediation [prepared for the] National Committee on Violence Against Women* (1991), Office of the Status of Women.

54 Australian Catholic University and Australian Government Attorney-General's Department, *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* (2008).

55 R Field, 'A Feminist Model of Mediation That Centralises the Role of Lawyers as Advocates for Participants who are Victims of Domestic Violence' (2004) 20 *Australian Feminist Law Journal* 65.

56 Domestic Violence and Incest Resource Centre, *Behind Closed Doors: Family Dispute Resolution and Family Violence*, Discussion Paper No 6 (2007), 47.

57 Ibid, 42.

58 Keys Young, *Research/Evaluation of Family Mediation Practice and the Issue of Violence: Final Report* (1996), prepared for the Australian Government Attorney-General's Department, 39.

- minimising contact between clients on the day, by using separate waiting rooms and exits for clients, and staggered arrival and departure times;<sup>59</sup>
- allowing the presence of support persons;<sup>60</sup>
- continuously assessing clients' comfort levels and emotional state;<sup>61</sup>
- using 'shuttle' mediation, where parties sit in different rooms and the mediator 'shuttles' between them;
- co-mediation with a male and a female mediator;<sup>62</sup>
- using multiple short mediation sessions to reduce stress and the impact of contact with the perpetrator;<sup>63</sup> and
- private follow-ups with each party between sessions.<sup>64</sup>

Some of these measures may be included in a safety plan designed for the needs of an individual client.

21.37 While there is a range of views on the appropriateness of FDR in family violence contexts, a degree of consensus exists on certain matters. First, using FDR in cases involving family violence carries particular risks. Secondly, if family violence is to be dealt with in FDR processes, it must be handled by skilled and knowledgeable FDR practitioners using appropriate safeguards. Thirdly, in practice, some cases involving family violence do—and will continue to—proceed to mediation.<sup>65</sup>

21.38 The AIFS Evaluation shows that FDR is attempted more frequently in cases involving violence than in those not involving violence.<sup>66</sup> It also appears that, for some clients, the risk posed by family violence is not identified and managed effectively. The AIFS evaluation cited the following response as an example:

For me, there were not enough sessions in the process. I was so scared and intimidated by my ex-husband that I had trouble thinking clearly. As a consequence of this, I felt bulldozed into making an agreement. ... I also had to sit through a face-to-face session with my ex-husband before they'd believe that I was worried about him ... I felt that my concerns were swept aside and the focus was on my ex-husband's needs/wants.<sup>67</sup>

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59 Ibid.

60 Ibid.

61 Domestic Violence and Incest Resource Centre, *Behind Closed Doors: Family Dispute Resolution and Family Violence*, Discussion Paper No 6 (2007), 44.

62 KPMG, *Family Dispute Resolution Services in Legal Aid Commissions: Evaluation Report* (2008), prepared for the Australian Government Attorney-General's Department, 46; Domestic Violence and Incest Resource Centre, *Behind Closed Doors: Family Dispute Resolution and Family Violence*, Discussion Paper No 6 (2007), 56–57.

63 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

64 Domestic Violence and Incest Resource Centre, *Behind Closed Doors: Family Dispute Resolution and Family Violence*, Discussion Paper No 6 (2007), 56–57.

65 H Astor, 'Violence and Family Mediation: Policy' (1994) 8 *Australian Journal of Family Law* 3, 12–13.

66 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 100.

67 Cited in Ibid, 102.

21.39 In the Consultation Paper, the Commissions asked whether the provisions of the *Family Law Act* relating to FDR needed amendment to ensure that the victims of family violence are not inappropriately attempting or participating in family dispute resolution, and whether any other reforms may be necessary to ensure that the legislation operates effectively. In particular the Commissions asked if s 60I was operating appropriately.<sup>68</sup>

### ***Submissions and consultations***

21.40 Several submissions responding to this question expressed concerns that violence was not always properly identified and/or dealt with appropriately. This included failure to identify non-physical forms of abuse, and failure to advise clients about exemptions from mandatory FDR for cases involving violence.<sup>69</sup> For example, the Aboriginal Family Violence Prevention and Legal Service Victoria (AFVPLS Victoria) provided two case histories of matters where AFVPLS Victoria had concerns that violence was not properly identified or the response was not appropriate. In one of these cases there was family violence of sufficient severity for a child protection agency to have been involved. Nevertheless, prior to the intervention of AFVPLS Victoria, FDR had been deemed appropriate and the client reported that the FDR practitioner had indicated that shared parenting was appropriate. In another case of violence where there was a no-contact order in force, the FDR agency proposed child-inclusive FDR. The client was told they must proceed to FDR but not about the exemptions for cases involving violence. The AFVPLS Victoria put the FDR practitioner in touch with the child psychologist involved with the child and FDR was subsequently cancelled.<sup>70</sup>

21.41 The Magistrates' Court and the Children's Court of Victoria reported concerns expressed by some magistrates that they often see victims of violence who have agreed in mediation to contact arrangements that are not safe.<sup>71</sup> The Women's Legal Service, Queensland also expressed concern that victims of violence are not being excluded from FDR:

- many FDR practitioners lack the knowledge and skills to appropriately identify domestic violence and therefore appropriate exclude it;
- some FDR practitioners believe they can 'even out' power imbalances;

68 Consultation Paper, Question 11–1. The operation of s 60I of the *Family Law Act 1975* (Cth) is considered in Ch 22.

69 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 109*, 8 June 2010; C Humphreys, *Submission FV 04*, 23 August 2009. See also Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010, which commented that the accountability of practitioners in obtaining disclosure of family violence should also be considered.

70 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

71 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

- some FDR practitioners believe that attempting FDR may be of benefit and cannot be harmful;
- some FDR practitioners ‘know that the court will send the matter back for FDR’ even if a certificate is issued under s 60I that FDR is inappropriate;
- some victims of violence want to use FDR;
- some victims have no choice but to use FDR because they are ineligible for legal aid and do not want to represent themselves in court.<sup>72</sup>

These factors indicate the complexity of the assessments that must be made in these cases and also indicate that FDR practitioners may be under pressure from courts and clients to use FDR in cases of violence.

21.42 Another pressure referred to was the limited availability of free mediation—one stakeholder noted that the three hours of free mediation provided by Family Relationship Centres is not a realistic allocation for complex cases involving family violence.<sup>73</sup>

21.43 Notwithstanding these concerns, several submissions expressed positive views of the abilities of FDR practitioners in relation to violence. Dr Olivia Rundle, of the University of Tasmania, pointed to the difficulties faced by the victims of violence when using other methods of resolving disputes and compared them with the advantages of FDR:

FDR [practitioners] are trained specifically in working with people who have experienced family violence. They have an extensive tool-box for assessing the appropriateness of FDR in such cases and adapting their service to protect and support clients. Many service providers are government funded and subject to stringent requirements around effective risk management and audits by government departments. It is submitted that the existing structures are adequate to protect against FDR being conducted inappropriately, to the extent that is possible.<sup>74</sup>

21.44 Similarly, the submission of the Family Relationship Services Association (FRSA), the peak body for FDR and other family relationship services, detailed the extensive expertise, policies and practices developed by the FDR sector to deal with cases involving violence.<sup>75</sup> These include training, supervision of practitioners, accreditation involving knowledge of family violence, establishment of complaints processes, and development of specialist practitioners in family violence.<sup>76</sup> A submission from a ‘consumer’ provided evidence of some of these measures in practice:

It was good that I could insist on not having to be in the same room with him and that care was taken to have me come and go from the meetings while the perpetrator was supervised in another room. It was still terrifying. I was so keen to negotiate that I was

<sup>72</sup> Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

<sup>73</sup> Confidential, *Submission FV 164*, 25 June 2010.

<sup>74</sup> O Rundle, *Submission FV 50*, 27 May 2010.

<sup>75</sup> Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

<sup>76</sup> Ibid.

willing to risk a lot to do it. Now I know that he never, ever intended to negotiate and I went through hell trying to meet him half way.<sup>77</sup>

21.45 The Family Issues Committee of the NSW Law Society submitted that ‘in many respects the work done in FDR is very fine, appropriate, and producing excellent outcomes’, while also noting that there are risks and some problems remaining in this sector.<sup>78</sup>

21.46 The FRSA noted that there is considerable pressure on FDR practitioners dealing with violence, due to the rapid expansion of the network of 65 Family Relationship Centres, and the substantially expanded family and relationship services network.<sup>79</sup> The FRSA submitted that the sector is committed to improving standards through training (including a Graduate Diploma in FDR), supervision, increasing competency requirements concerning violence, and the development of expert practitioners in advisory and supervisory roles.<sup>80</sup>

21.47 With respect to the question of what legislative amendments are necessary to ensure that victims of violence are not inappropriately attempting or participating in family dispute resolution,<sup>81</sup> a small number of submissions suggested legal solutions.<sup>82</sup>

21.48 The changes suggested in submissions were overwhelmingly extra-legal.<sup>83</sup> The need for referrals to legal advice<sup>84</sup> and to specialist services for Indigenous clients in cases of family violence was raised.<sup>85</sup> Further training for FDR practitioners, and training for ongoing accreditation for all relevant professionals in the family law system was recommended in some submissions, including training about family violence dynamics and indicators, and family violence policy.<sup>86</sup> Training in how to conduct reliable and safe screening and risk assessment was also raised (screening and risk assessment is dealt with further below).<sup>87</sup> The need for collaboration between FDR

77 Confidential, *Submission FV 105*, 6 June 2010.

78 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

79 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

80 Ibid.

81 Consultation Paper, Question 11–1.

82 There was support for reform of the ‘friendly parent’ provisions of the *Family Law Act*: Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010. In addition, Women’s Legal Services, NSW supported reform of the ‘false allegations’ provisions.

83 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; O Rundle, *Submission FV 50* 27 May 2010.

84 National Legal Aid, *Submission FV 232*, 15 July 2010.

85 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

86 National Legal Aid, *Submission FV 232*, 15 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010.

87 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010.

practitioners and specialised domestic violence services in developing training and improved practice standards was also supported. The National Abuse Free Contact Campaign argued:

There is a place for the Domestic Violence sector to be actively engaged in shared skills based on fifty years of feminist theory and practice, contributing to the development of tools for an appropriate and sensitive assessment. The training of family law professionals in screening and assessment tools should ideally be from those who are drawing on years of practice in identifying the more mundane and easier to miss forms of intimidation and manipulation.<sup>88</sup>

#### ***Commissions' views***

21.49 The Commissions note that there appears to be some inconsistency in standards in the FDR sector with respect to identifying family violence, assessing suitability for FDR and other aspects of screening and referral and FDR practice. While consultations and submissions detailed many experiences of good practice and supported the value of FDR, the persistence of problems in some parts of the sector was also revealed. Clearly some services and practitioners have high standards of practice in relation to family violence, but there also appears to be room for improvement in the sector. One factor that has contributed to the variability in standards is likely to be the recent rapid development of the FDR sector. The solutions to these problems appear to lie in extra-legal measures such as improved training and accreditation, and improved screening and assessment frameworks. These issues are considered in more detail below.

21.50 Collaboration between FDR practitioners and those in the family violence sector may also pay dividends. The Commissions note that collaboration is already taking place in some FDR services. In addition, as noted elsewhere in Chapter 21, the Australian Government Attorney-General's Department has worked to support the improvement of standards in FDR practice by encouraging the collaboration of professionals in the sector. This work confronts the challenges that come when organisations work together from different perspectives on violence.<sup>89</sup> However, the Commissions also note that this Inquiry has demonstrated the many ways in which, despite the challenges, collaboration across different 'cultures' and approaches to violence is crucial to resolving many of the problems of family violence.

**Recommendation 21–1** The Australian Government Attorney-General's Department should continue to collaborate with the family dispute resolution sector to improve standards in identification and appropriate management of family violence by family dispute resolution practitioners.

<sup>88</sup> National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010.

<sup>89</sup> W Ibbs and M Rogers, 'Fasten Your Seat Belts: We're in for a Bumpy Night: The Story of Collaboration between FDR and Family Violence Organisations' (Paper presented at Family Relationship Services Association Conference Sydney, 24–26 November 2009).

## **Screening and risk assessment practices**

21.51 A key element of FDR in practice is the process of screening and risk assessment, which is designed to ensure that victims of family violence are not using FDR in inappropriate circumstances, or to identify and mitigate any risk factors where FDR may be appropriate despite family violence or other risks.<sup>90</sup> Two issues arise in relation to screening and risk assessment. The first is whether FDR practitioners are reliably and appropriately screening and assessing risks of family violence in practice. The second is whether FDR practitioners have taken on the role of ‘gatekeepers’ in the system and are performing a more general screening role in the family law system, especially by providing screening for family lawyers where litigation is contemplated. The first issue is dealt with in this section; the second is dealt with in the following section.

### **FDR practitioners and screening**

21.52 Screening and risk assessment varies across different FDR agencies. For example, the 2008 KPMG report found that a wide variety of FDR practices were evident within the legal aid sector.<sup>91</sup> The report noted that most screening questions focused on the physical aspects of family violence,<sup>92</sup> and recommended enhanced screening for non-physical forms of violence. It noted observations of FDR practitioners that screening did not always reveal violence and abuse, and that this could derail the conferencing process.<sup>93</sup> The report also identified differences in how the various legal aid commissions approached issues of family violence. Nonetheless, the report found that the vast majority of legal aid clients surveyed felt safe or very safe both during and after the conference,<sup>94</sup> and the majority of FDR practitioners agreed that there were appropriate protocols in place for family violence.<sup>95</sup>

21.53 The KPMG report made a number of recommendations to strengthen screening and intake processes, including: increasing the experience and knowledge of intake officers, lawyers, and FDR practitioners on particular matters;<sup>96</sup> using or modifying particular practices, such as interviews and screening questions;<sup>97</sup> and ensuring better preparation for the FDR process.<sup>98</sup> The report also recommended establishing protocols for delivering services to marginalised groups;<sup>99</sup> providing detailed practice guidance on the best interests of the child principle,<sup>100</sup> examining strategies for providing referral

90 Australian Catholic University and Australian Government Attorney-General’s Department, *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* (2008), 13.

91 KPMG, *Family Dispute Resolution Services in Legal Aid Commissions: Evaluation Report* (2008), prepared for the Australian Government Attorney-General’s Department.

92 Ibid, 36.

93 Ibid, 32.

94 Ibid, 46.

95 Ibid, 47.

96 Ibid, 36, 41.

97 Ibid, 36.

98 Ibid, 36, 41.

99 Ibid, 54.

100 Ibid, 41.

pathways to other support services;<sup>101</sup> and developing nationally consistent strategies for appropriately managing these issues.<sup>102</sup>

21.54 Since the KPMG report was published, legal aid commissions have revised their practice standards and risk assessment and screening tools to ensure the safety of participants in FDR. In consultations, National Legal Aid advised the Commissions that there has been extensive sharing of screening tools and risk assessment protocols and best practice methodologies between the various legal aid commissions—largely through the National Legal Aid Dispute Resolution Working Group—to facilitate the ongoing development of a nationally consistent best practice approach. National Legal Aid also noted legal aid commissions' engagement in ongoing interdisciplinary exchange of information and best practice in the handling of family violence across the wider family pathways network.<sup>103</sup>

21.55 With respect to screening for FDR, National Legal Aid advised that the dynamics of family violence, as defined broadly, are taken into account. Screening includes questions that focus on emotional or psychological abuse, intimidation, coercion and financial control. National Legal Aid noted that the legal aid sector aims to ensure that clients are able to participate in FDR safely and without disadvantage. To achieve this, legal aid commissions encourage parties to be legally represented at conferences as this assists the FDR practitioner manage the conference to protect vulnerable and disadvantaged parties.<sup>104</sup>

21.56 Further initiatives by the legal aid sector to deal with referral pathways and the development of protocols for delivery of services to CALD and Indigenous people are discussed below.<sup>105</sup>

### Screening frameworks

21.57 The Australian Government Attorney-General's Department has published a *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line (Screening and Assessment Framework)*,<sup>106</sup> which addresses many of the issues raised in the KPMG evaluation of FDR in the legal aid sector in detail. The framework is an extensive resource available on the departmental website for FDR practitioners. It includes a screening and assessment framework, referral guidelines, and indicators of family violence, child abuse and

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101 Ibid, 49.

102 Ibid.

103 National Legal Aid, *Correspondence*, 20 September 2010. Legal Aid WA has been chosen as the lead agency for the Coordinated Family Dispute Resolution Pilot in Perth (one of five pilot sites around Australia). The focus of the pilot is to enhance interdisciplinary clinical and legal support to both victims and perpetrators of family violence in appropriate matters through a coordinated FDR process.

104 Ibid.

105 Legal Aid NSW told the Commissions that, following the release of the KPMG report, it established a Best Interest Child Committee to explore issues relating to information access, services and support. In addition Legal Aid NSW is funding the training of staff to develop a more child inclusive model of FDR.

106 Australian Catholic University and Australian Government Attorney-General's Department, *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* (2008).

abduction, and risk of self-harm. It discusses issues of supervision and practice support, and provides a range of resources for practitioners, including sample questions relevant to identification of violence.

21.58 The Victorian Government has similarly produced a comprehensive screening and risk assessment framework for all service providers in family violence.<sup>107</sup> This sets out a common framework, including six components: a shared understanding of risk and family violence; standardised risk assessment; referral pathways and information sharing; risk management strategies; data collection and analysis; and quality assurance. It also includes three practice guides directed towards different levels of risk assessment processes for different categories of service providers. A common framework has advantages in terms of inter-agency trust and cooperation. The Commissions note that the Australian Government Attorney-General's Department is currently developing a national framework to support screening and assessment for family violence across the federal family law system.

21.59 In relation to the issue of screening and risk assessment, the Family Law Council considered that:

appropriate training in screening for family violence issues is essential for family dispute resolution practitioners, and those who refer matters to them. It is essential that practitioners have appropriate responses and options to offer once family violence is identified.<sup>108</sup>

21.60 The Council recommended that a consistent framework for screening and risk assessment be developed in accordance with principles adopted in the common knowledge base proposed by the Council,<sup>109</sup> and that frameworks, tools and materials be endorsed by the expert panel and reference group.<sup>110</sup>

21.61 In the Consultation Paper, the Commissions proposed that the Australian Government should promote the use of screening and risk assessment frameworks and tools for family dispute resolution practitioners through, for example, training, accreditation processes and audit and evaluations.<sup>111</sup>

### ***Submissions and consultations***

21.62 There was significant support in submissions for this proposal.<sup>112</sup> Domestic Violence Victoria, in a joint submission with other stakeholders, emphasised the

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107 Government of Victoria, *Family Violence Risk Assessment and Risk Management: Supporting an Integrated Family Violence Service System* (undated).

108 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 43.

109 Ibid.

110 Ibid, 43.

111 Consultation Paper, Proposal 11–2.

112 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Law Council of Australia,

importance of screening and assessment going beyond physical violence to explore the range of other behaviours that have the impact of intimidating, controlling and humiliating the victims of violence.<sup>113</sup> The involvement of the family violence sector in the further development of screening and assessment processes was supported and acknowledged by some submissions.<sup>114</sup> The screening and assessment tool employed by Victoria Legal Aid's Round Table Dispute Management program received particular acknowledgement as an effective tool developed in collaboration with the domestic violence sector.<sup>115</sup> The cross-sectoral collaboration between the Domestic Violence Resource Centre and Relationships Australia Victoria was also mentioned.<sup>116</sup>

21.63 Training in the use of screening and assessment tools was described in submissions as very important, as was the understanding that screening is a process rather than an event—initial screening should not provide the only point of disclosure.<sup>117</sup> The many disincentives to disclosing violence may mean that violence is only revealed, for example, after repeated inquiries or after trust in the service provider has been developed.

21.64 The development of screening and assessment tools was also described as not 'a one-off event': their continued refinement to reflect best practice is important.<sup>118</sup> One submission specifically endorsed the recommendation of the Family Law Council (referred to above) that screening and risk assessment frameworks, tools and materials

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*Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; Confidential, *Submission FV 69*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 40*, 14 May 2010; C Humphreys, *Submission FV 04*, 23 August 2009.

113 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

114 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

115 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010. The Victoria Legal Aid's Round Table Dispute Management program is discussed further, below, in the context of culturally responsive FDR. For a discussion of this collaboration and its challenges see W Ibbs and M Rogers, 'Fasten Your Seat Belts: We're in for a Bumpy Night: The Story of Collaboration between FDR and Family Violence Organisations' (Paper presented at Family Relationship Services Association Conference Sydney, 24-26 November 2009).

116 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

117 C Humphreys, *Submission FV 04*, 23 August 2009.

118 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; C Humphreys, *Submission FV 04*, 23 August 2009.

should be endorsed by an expert panel and reference group.<sup>119</sup> Professor Julie Stubbs submitted that the tools used should be empirically tested and established for use in the Australian context.<sup>120</sup> AIFS discussed the need for a reliable and validated tool to assist in the making of clinical judgments, and referred to work currently being done in Australia to produce more valid and reliable screening and risk assessment instruments for the family relationship sector. AIFS commented that commitment was required to coordinate these efforts so that a final product could be produced that would be user friendly and achieve a high level of confidence from lawyers and decision makers.<sup>121</sup>

21.65 The issue of the cultural appropriateness of screening and assessment tools and training in their use was also mentioned in submissions.<sup>122</sup> The particular barriers to disclosure of family violence for Indigenous women and women who have particular needs because of language, ethnicity, immigration status, disability are also important.<sup>123</sup>

#### ***Commissions' views***

21.66 In view of the strong support for this proposal and the content of the submissions, the Commissions recommend that the Australian Government continue to support and promote: high quality screening and risk assessment frameworks and tools for family dispute resolution practitioners; the inclusion of these tools and frameworks in training and accreditation of FDR practitioners; and their inclusion in the assessment and evaluation of FDR services and practitioners. In this regard, the Commissions note the need, as suggested by AIFS, for *coordination* of efforts to develop valid and reliable screening and risk assessment instruments.

21.67 The Commissions also commend the work of FDR services in collaborating with the family violence sector to develop screening and assessment frameworks and other tools to improve practice. In the course of this Inquiry, which is focused on the intersections of the complex systems handling family violence, the importance of, and the challenges inherent in, communication and collaboration across divergent perspectives on violence have become very clear. Collaborative practice, integrated services and the closure of the gaps in the system are predicated on this type of work,<sup>124</sup> and reflect the principles for reform identified in this Inquiry.<sup>125</sup>

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119 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

120 J Stubbs, *Submission FV 186*, 25 June 2010.

121 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

122 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; C Humphreys, *Submission FV 04*, 23 August 2009.

123 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; C Humphreys, *Submission FV 04*, 23 August 2009.

124 See further Chs 29, 30.

125 See Ch 3.

**Recommendation 21–2** The Australian Government Attorney-General’s Department should:

- (a) promote and support high quality screening and risk assessment frameworks and tools for family dispute resolution practitioners;
- (b) include these tools and frameworks in training and accreditation of family dispute resolution practitioners;
- (c) include these tools and frameworks in the assessment and evaluation of family dispute resolution services and practitioners; and
- (d) promote and support collaborative work across sectors to improve standards in the screening and assessment of family violence in family dispute resolution.

### **Lawyers as effective referral agents**

21.68 Deciding on the appropriate path for clients in cases involving family violence can be a complex task. Section 60I of the *Family Law Act*, discussed above, requires that parties in dispute must attempt FDR before they can litigate about a parenting issue in a family court. FDR practitioners must provide a certificate under s 60I(8) that the parties did, or did not, attend FDR and made a genuine effort to resolve their parenting dispute. There are exceptions in s 60I(8) for cases that are not appropriate for FDR—these exceptions include cases involving violence. Where there is violence, or a risk of violence, the parties do not need to go to FDR but may go directly to court. A certificate under s 60I(8) is not required in certain circumstances. The circumstances are set out in s 60I(9). They include an exemption where the court is satisfied that there are reasonable grounds to believe that there has been, or there is a risk of, child abuse or family violence.

21.69 The AIFS Evaluation indicated that this legislative scheme may not be working well. One of the identified problems was the way FDR practitioners are being used to issue s 60I certificates. The evaluation conducted by AIFS showed that parents who reported experiencing physical or emotional violence, were ‘much more likely to have attempted FDR’ than parents who did not report experiencing violence.<sup>126</sup> Of particular relevance is the finding that lawyers appeared to be sending victims of family violence to FDR services as a method of getting a s 60I certificate in order to allow them to proceed to the court. While FRCs did not provide certificates ‘as a matter of course’, some clients or legal advisers nonetheless saw providing certificates as the primary function of FRCs or believed a certificate should be issued as a default option.<sup>127</sup> Importantly, the AIFS survey also revealed that clients, who clearly fell within the

<sup>126</sup> Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 100. This was a finding based on a longitudinal survey of parents.

<sup>127</sup> Ibid, 5–16.

exception to FDR in the legislation were ‘not infrequently referred to the FRCs by lawyers (and to a lesser extent by courts)’.<sup>128</sup>

21.70 The AIFS evaluation concluded that the rate of issuing of certificates had likely increased, and this was ‘in part connected with an absence of triage by lawyers and other professionals’.<sup>129</sup> There is a problem if clients who are clearly exempt from FDR are, nevertheless, being referred to FDR in order to get a s 60I certificate. In the Consultation Paper the Commissions expressed the view that FDR services should not be the triage point for family violence and that all personnel in the family law system should be capable of identifying violence and dealing with it appropriately. The extent of violence in the separating and divorcing population is such that violence is likely to be core business for most professionals in the family law system. Further, any agency or professional could be the first port of call for a party who has been the target of violence, and that agency or professional needs to be able to identify, manage or refer cases appropriately.

21.71 In order to be effective practitioners, family lawyers need training on how to identify and make appropriate referrals in cases of family violence. They need to be able to identify when FDR is clearly not appropriate and an application under s 60I(9) is required. All FDR agencies are not the same, and understanding the range of available services may assist in selecting the best match for the client.<sup>130</sup> There may be cases where a lawyer is not sure whether FDR is appropriate or not, in which case referral may be the best decision so that an FDR practitioner can make a decision in the light of their knowledge of the capacity of FDR and of that service to handle cases involving violence. Appropriate screening and referral for lawyers therefore involves an understanding of family violence and also an understanding of the nature of FDR services and their practices in cases of family violence. The required knowledge and understanding is complex and is almost certainly best acquired through training and education.

21.72 The need for training of lawyers about family violence raises the question of how such training should be provided. Tertiary institutions address family violence issues in courses such as criminal law and especially in family law. However, coverage of family violence may not be sufficiently extensive or specialised to prepare lawyers for effective screening and referral in practice. Students who study family law as part of a law degree may not later practice in that area; lawyers who do practice family law may not have studied it at university.<sup>131</sup> Professional bodies also provide education in family law and family violence. Some lawyers who practice in this area are specialists and have specialist accreditation, but many do not. Family lawyers may be required to

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128 Ibid.

129 Ibid, 5–17. The evaluation noted that this may be linked to the ‘anxiety on the part of lawyers about clients making or being seen to be making deliberately false allegations’. The deterrent effect of the provisions in s 117AB, which provide for costs sanctions in cases where deliberately false allegations are made, is discussed in Ch 18.

130 H Rhoades, H Astor, A Sanson and M O’Connor, *Enhancing Inter-Professional Relationships in a Changing Family Law System: Final Report* (2008).

131 The issue of education and training in relation to family violence in tertiary institutions and by professional bodies is considered in Ch 31.

attend professional development seminars, but unless they are Independent Children's Lawyers, they are not required to have training in child development or family violence in order to practice family law.<sup>132</sup> Providing education and training in family violence appears likely to involve collaborative relationships between many organisations.

### **Submissions and consultations**

21.73 In the Consultation Paper, the Commissions proposed that Australian governments, lawyers' organisations and bodies responsible for legal education should develop ways to ensure that lawyers who practise family law are given adequate training and support in screening and assessing risks in relation to family violence.<sup>133</sup>

21.74 There was strong support for this proposal in submissions.<sup>134</sup> Some submissions were supportive of further training and support for lawyers because of negative experiences where lawyers did not respond appropriately to violence. Examples were given of cases where lawyers handled cases involving violence in ways that did not provide adequate protection for clients, including some cases involving violence of extreme seriousness.<sup>135</sup>

21.75 Suggestions about the nature of training for lawyers and its significance were also made. One submission pointed to the broader relevance of family violence training beyond family law:

Education about domestic violence needs to be included as a specific unit within the subject of Criminal law and Family Law at all universities. Further, even if a practitioner does not practise in family law, domestic violence still can have a large

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132 Ibid, 7.

133 Consultation Paper, Proposal 11–1.

134 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Family Relationship Services Australia, *Submission FV 231*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; WESNET—The Women's Services Network, *Submission FV 217*, 30 June 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 109*, 8 June 2010; T Searle, *Submission FV 108*, 2 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; A Harland, *Submission FV 80*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; O Rundle, *Submission FV 50* 27 May 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 40*, 14 May 2010.

135 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010.

impact on other areas – such as credit and debt matter, criminal matters, wills and estates.<sup>136</sup>

21.76 The Law Society of NSW pointed to the benefits of cross-sectoral training, arguing that:

Solicitors have much to learn from the social sciences. Family Counsellors and FDRPs have much to learn about the legal dynamic.<sup>137</sup>

21.77 National Legal Aid similarly advocated for training and support beyond the legal sector, and referred to the recent tender by the Attorney-General's Department for the development of a multi-disciplinary training package in relation to family violence.<sup>138</sup>

21.78 There were divergent views about the present availability of training on screening and risk assessment. The Magistrates' Court and the Children's Court of Victoria argued that there is very little education available to the private profession that would assist them to screen for family violence and assess risk.<sup>139</sup> However, the Law Society of NSW submitted that 'a considerable amount of legal education on this topic is currently available'.<sup>140</sup> The Family Law Section of the Law Council of Australia pointed to its record in the provision of training, including about family violence, and indicated its willingness to continue working with government and other agencies in this regard. The Council emphasised the importance of training in this area: 'family law is such a dynamic and constantly changing area of law that continuing professional development is an essential part of family law practice'.<sup>141</sup>

21.79 Submissions and consultations also provided further information on the dynamics of lawyer referral to FDR in cases involving family violence. Two issues were raised: first, whether lawyers refer cases to FDR in order to pass on the job of screening and assessment to FDR services; and second, whether and why lawyers send cases involving family violence to FDR in order to get a certificate under s 60I(8) rather than making an application for an exemption under s 60I(9).

21.80 In relation to the first issue, consultations provided some confirmation of the findings of the AIFS evaluation. The Commissions were told that there are other barriers to lawyers screening for violence. The first barrier is resources—a client may not have the funds to pay for an application to court for an exemption under s 60I(9), so lawyers reportedly send their clients to FDR in order that the exemption will come under s 60I(8) and be free of cost.<sup>142</sup> The second barrier mentioned was knowledge. Lawyers reportedly do not feel competent to decide if a case is exempt under s 60I(9), so they send clients to FDR because of the expertise of FDR practitioners in this area.

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136 Confidential, *Submission FV 183*, 25 June 2010.

137 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

138 National Legal Aid, *Submission FV 232*, 15 July 2010.

139 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

140 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

141 Law Council of Australia, *Submission FV 180*, 25 June 2010.

142 Confidential, *Consultation*, Darwin, 28 May 2010.

Screening for violence was described as too big an onus to place on family lawyers and beyond lawyers' knowledge base.<sup>143</sup>

21.81 A further problem identified in consultations arising from the practice of sending cases to FDR for screening and assessment, is the problem of delay. While, in some areas, a rapid response from FDR is possible, in others there is a shortage of services and the resulting delay for clients may be several months. Clients may not realise that there is an option of going straight to court.<sup>144</sup>

21.82 However, the Women's Legal Service NSW argued for the desirability of having both options—of exemption from FDR under s 60I(9) and referral to FDR for screening and a certificate under s 60I(8). The Service argued that referring a client to FDR is often a legitimate and cost effective strategy:

Both these processes need to be accessible for clients and, in many cases, seeing a family dispute resolution practitioner for the purposes of obtaining a section 60I certificate is the preferable course: it is usually less expensive; having a certificate rather than not, may have more credence with the court; and the client may have an opportunity to participate in safe family dispute resolution if appropriate to do so.<sup>145</sup>

21.83 There was also a suggestion in two submissions that the approach of courts to family violence is informing the unwillingness of lawyers to use the exemption provisions in s 60I(9). The Women's Legal Centre (ACT and Region) submitted:

The attitude of the courts in granting exemptions based upon family violence allegations needs to be clearer for practitioners. We have heard anecdotally of Registries which simply do not allow exemptions and thus lawyers need to send their client to an FDR practitioner to obtain a certificate when it was obvious from initial instructions that FDR was not suitable.<sup>146</sup>

21.84 The Women's Legal Service, Queensland asserted that some FDR practitioners accept cases involving violence because they know that the court will send the case back for FDR even if a certificate that the case is not appropriate for FDR is issued.<sup>147</sup> Further submissions mentioned the impact of the 2006 amendments to the *Family Law Act*, in particular the disinclination of lawyers to raise family violence in family courts because of the fear of costs orders or that the client alleging violence will be perceived to be an 'unfriendly parent'.<sup>148</sup> If lawyers are concerned about the response to violence from family courts they may be inclined instead to refer cases to FDR, thus putting inappropriate pressure on that sector.

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143 Confidential, *Consultation*, Canberra, 20 May 2010.

144 Ibid.

145 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

146 Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

147 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

148 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

21.85 The Commissions note that in commenting on the 2008 KPMG report, and on legal aid commissions' strategies for referral pathways to other services, National Legal Aid pointed to its development of overarching referral and information sharing protocols. National Legal Aid noted that each Legal Aid Commission has criteria for referrals with their local Family Relationship Centres, including consideration of single referral points.<sup>149</sup>

#### ***Commissions' views***

21.86 The Commissions recognise that family violence is core business for all professionals in the family law system and that all of them should have the knowledge and expertise to identify violence and manage it appropriately. This includes lawyers, who should not assign their role in screening and assessment to FDR practitioners, requiring their clients to tell and re-tell their experiences of violence and possibly involving them in increased costs and delays. Lawyers should have the requisite understanding of the nature and dynamics of family violence and of FDR to act as effective screening and referral agents.

21.87 In the Consultation Paper, the Commissions proposed that Australian governments, lawyers' organisations and bodies responsible for legal education should develop ways to ensure that lawyers who practice family law are given adequate training and support in screening and assessing risks in relation to family violence.<sup>150</sup> In view of the responses of stakeholders in consultations and submissions, discussed above, the Commissions would also include FDR practitioners in this list of organisations, given the provisions of s 60I and the significant intersections in practice of lawyers and FDR practitioners in screening and risk assessment.

21.88 The Commissions note National Legal Aid's development of referral and information sharing protocols. In the Commissions view, organisational strategies, such as the development of protocols for appropriate referral pathways to other services, may be valuable in complementing and supporting training for lawyers on effective screening and referral.

**Recommendation 21–3** The Australian Government Attorney-General's Department, family dispute resolution service providers, and legal education bodies should ensure that lawyers who practise family law are given training and support in screening and assessing risks in relation to family violence and making appropriate referrals to other services.

#### **FDR practitioners and lawyers**

21.89 The level of cooperation and collaboration between FDR practitioners and lawyers was raised as an issue in both the AIFS evaluation and the 2009 report of the

149 National Legal Aid, *Correspondence*, 20 September 2010.

150 Consultation Paper, Proposal 11–1.

Family Law Council.<sup>151</sup> The AIFS evaluation noted the potential for the aims of legal and service professionals to conflict, and supported initiatives to promote ‘responsible FDR’ between lawyers, FDR practitioners and others in the sector.<sup>152</sup>

21.90 Research by Professor Helen Rhoades and others in 2008, on inter-professional relationships between FDR practitioners and lawyers, demonstrated that although some practitioners enjoy positive professional contact, many have little collaborative contact with the other profession and there are some significant misunderstandings and tensions between the two groups.<sup>153</sup> This study found that successful collaborative relationships were marked by a number of features:

- practitioners described their relationship as a complementary services approach in which each group saw themselves and the other profession as contributing different but equally valuable complementary skills and expertise to the dispute resolution process;
- practitioners from both groups understood and respected the nature of each profession’s roles, responsibilities and ways of working with family law clients;
- practitioners had a shared expectation of the dispute resolution process and a shared understanding of the FDR program’s aims and approach to working with family law clients;
- family lawyers engaged in ‘positive’ advocacy practices;
- practitioners trusted the intake screening and referral practices of the other profession in cases involving family violence; and
- practitioners engaged respectfully with members of the other profession and extended professional courtesies, such as the provision of timely feedback about clients.<sup>154</sup>

21.91 The focus of the first element of this study was on groups with good inter-professional relationships. In these groups practitioners trusted each other to handle violence appropriately in most cases, although some reservations were still expressed by both groups about the identification and handling of violence.<sup>155</sup> However, a survey of a larger group of lawyers and FDR practitioners conducted for the same study found that there was much greater distrust of the practices of the other profession in identifying and handling cases involving violence.<sup>156</sup>

151 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), ch 5; Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 44.

152 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 110.

153 H Rhoades, H Astor, A Sanson and M O’Connor, *Enhancing Inter-Professional Relationships in a Changing Family Law System: Final Report* (2008), iv.

154 Ibid.

155 Ibid, 25–26.

156 Ibid, 44–46.

21.92 In its 2009 report, the Family Law Council suggested a number of strategies ‘to develop and enrich inter-disciplinary cooperation and collaboration, particularly between FDR practitioners and family lawyers’.<sup>157</sup> These recommendations were based on the work by Rhoades and others described above, and included:

- building opportunities for positive personal contact;
- building understanding of roles and responsibilities;
- providing lawyers and judicial officers with information about funded community based programs;
- considering ways to improve communication and feedback about clients; and
- family violence training for both professions.<sup>158</sup>

21.93 Professor Helen Rhoades and her co-researchers suggested that the Australian Government Attorney-General’s Department, family dispute resolution providers, the Family Law Section of the Law Council of Australia, and state family law associations should consider how to facilitate joint meetings of FDR practitioners and family lawyers to share information.<sup>159</sup>

21.94 The Family Law Council also recommended the expansion of Australia-wide family pathways networks to support cooperation and referrals across the family relationship and family law system.<sup>160</sup>

21.95 In the Consultation Paper, the Commissions proposed that measures should be taken to improve collaboration and cooperation between family dispute resolution practitioners and lawyers, as recommended by the Family Law Council.<sup>161</sup>

### ***Submissions and consultations***

21.96 A great majority of those that responded to this issue supported the proposal.<sup>162</sup> In a confidential submission, one legal service provider noted that there is overlap

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157 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 44–45.

158 Ibid, 45.

159 H Rhoades, H Astor, A Sanson and M O’Connor, *Enhancing Inter-Professional Relationships in a Changing Family Law System: Final Report* (2008), vii.

160 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Rec 4.

161 Consultation Paper, Proposal 11–3.

162 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; UnitingCare Children

between the two groups—that some FDR practitioners are lawyers and vice versa.<sup>163</sup> Further, legal aid FDR models, and some others, employ lawyer-mediators. In these models the parties are generally legally represented, which may be especially important for disputes where there is violence.<sup>164</sup> As noted by the Law Society of NSW:

The Legal Aid Commission of NSW has a very successful and safe model of FDR. Most of the parties attend FDR with a solicitor. The solicitors are alert to any disclosure of risk to the safety of person or property and they advise their clients accordingly. The solicitor acting for the perpetrator is also alerted to the situation and can play a very positive role by advising their client of the consequences of their behaviour. The solicitor being present also allows the FDRP to remain neutral and impartial.<sup>165</sup>

21.97 Some submissions also supported the involvement of the family violence community in developing collaborative and cooperative practices between lawyers and FDR practitioners, because of the breadth of experience of working with violence in that community.<sup>166</sup>

21.98 Most submissions, however, simply expressed strong support for the proposal that measures should be taken to improve collaboration and cooperation between FDR practitioners and lawyers, as recommended by the Family Law Council.<sup>167</sup>

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Young People and Families, *Submission FV 151*, 24 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; Confidential, *Submission FV 69*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010; National Legal Aid, *Submission FV 232*, 15 July 2010. See also O Rundle, *Submission FV 50*, 27 May 2010, who supported joint training opportunities to facilitate improved collaboration, cooperation and understanding between FDR practitioners and lawyers.

163 Confidential, *Submission FV 164*, 25 June 2010.

164 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Confidential, *Submission FV 183*, 25 June 2010.

165 Law Society of New South Wales, *Submission FV 205*, 30 June 2010. For a discussion of the role of lawyers in disputes in FDR involving violence see R Field, 'FDR and Victims of Family Violence: Ensuring a Safe Process and Outcomes' (2010) 21 *Australasian Dispute Resolution Journal* 185.

166 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

167 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; Confidential, *Submission FV 69*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

21.99 The Commissions note that in National Legal Aid's comments on the 2008 KPMG report—and in particular with respect to legal aid commissions' strategies for referral pathways to other services—National Legal Aid advised that all legal aid commissions are significant partners in developing and implementing referral pathways across the family law system. National Legal Aid commented that recent pilots and programs funded by the Australian Government Attorney-General's Department for the provision of legal assistance before, during and after FDR within Family Relationship Centres have built on these strong links.<sup>168</sup>

#### *Commissions' views*

21.100 The Commissions note that there was strong support for the proposal that measures should be taken to improve collaboration and cooperation between FDR practitioners and lawyers, as recommended by the Family Law Council. As indicated above, the Family Law Council envisaged that improvements in cooperation and collaboration might be achieved through the Australian Government Attorney-General's Department family pathways networks.<sup>169</sup> The Commissions also note the suggestion by Rhoades and others that the Attorney-General's Department, family dispute resolution providers, the Family Law Section of the Law Council of Australia, and state family law associations should consider facilitating joint meetings of FDR practitioners and family lawyers to share information.

21.101 The Commissions acknowledge the extensive record of the Australian Government Attorney-General's Department in funding and supporting the development of standards in FDR, and the work done by the Department in bringing together organisations of lawyers and FDR practitioners to work collaboratively and cooperatively.

21.102 As the Commissions indicated in the Consultation Paper, while it appears that some lawyers and FDR practitioners have good relationships, there also seems to be room to improve relationships between the two sectors. Given that FDR practitioners and lawyers are likely to be required to work together more extensively as FDR develops, the Commissions recommend that the Australian Government Attorney-General's Department should continue to take leadership in bringing together organisations of lawyers and FDR practitioners to work collaboratively and cooperatively. In the Commissions' view, such cooperation and collaboration will contribute to further improvements in FDR practice and standards.

**Recommendation 21–4** The Australian Government Attorney-General's Department should continue to provide leadership, support and coordination to improve collaboration and cooperation between family dispute resolution practitioners and lawyers.

<sup>168</sup> National Legal Aid, *Correspondence*, 20 September 2010.

<sup>169</sup> See above, and Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 47.

## Culturally responsive FDR

21.103 In the course of this Inquiry, stakeholders have commented on the particular needs and concerns of Indigenous and CALD children and families in the resolution of family law and child protection disputes involving family violence. As the Commissions discuss further in Chapter 23, non-judicial dispute resolution processes offer significant flexibility to tailor procedures and outcomes to the needs and interests of children, families and their cultures.<sup>170</sup> Consequently, agreements may be more effective and sustainable.

21.104 In some respects, however, concerns about using non-judicial dispute resolution processes in cases involving family violence may be amplified in the context of Indigenous and CALD families because of the particular difficulties relating to identifying family violence in these cases.<sup>171</sup> Researchers have highlighted some of the difficulties experienced and the reluctance felt by Indigenous and CALD women in disclosing their concerns about family violence and the safety of their children.<sup>172</sup> Significantly, the AIFS evaluation of the 2006 family law reforms indicated that professionals in the family relationship sector lacked confidence in engaging with CALD and Indigenous families.<sup>173</sup> Such a lack of confidence on the part of practitioners may also contribute to the complexity of identifying and assessing violence in Indigenous and CALD families for the purposes of FDR.

21.105 The significance of timely and reliable identification and assessment of family violence concerns is discussed above, and in Chapters 22 and 23.<sup>174</sup>

21.106 It has been suggested that FDR practitioners' awareness of not just the personal, but cultural, religious, language and structural factors that may affect the disclosure of violence, and their ability to adapt screening tools and questioning in accordingly are critical.<sup>175</sup> It has also been suggested that, in addition to reviewing screening and assessment processes, review of referral practices to ensure that these

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170 N Thoennes, 'What We Know: Findings from Dependency Mediation' (2009) 47 *Family Court Review* 1; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), [17.48].

171 General concerns about using non-judicial dispute resolution processes in cases involving family violence are discussed in this chapter, above, and in Ch 22 and Ch 23.

172 L Bartels, *Emerging Issues in Domestic/Family Violence Research*, Research Practice No 10 (2010), prepared for the Australian Institute of Criminology; Australian Human Rights Commission, *In Our Own Words: African Australians, a Review of Human Rights and Social Inclusion Issues* (2010); Successworks, *CALD Women's Project: Final Report* (2005) prepared for the Victorian Government Department for Victorian Communities; S Armstrong, *Culturally Responsive Family Dispute Resolution in Family Relationship Centres: Access and Practice* (2010) Prepared for Family Relationship Centres at Bankstown managed by CatholicCare and Parramatta managed by Anglicare. Submissions and consultations highlighting this issue include: Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; G Krayem, *Consultation*, Sydney, 22 June 2010.

173 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 54.

174 See also Ch 18.

175 S Armstrong, 'Culturally Responsive Family Dispute Resolution in Family Relationship Centres' (2009) 13 *Family Relationships Quarterly* 3, 5.

effectively identify and assess cultural contexts, preferences and needs is particularly important where violence may be present.<sup>176</sup>

21.107 More culturally responsive models of non-judicial dispute resolution are being developed to accommodate the cultural contexts, values and needs of parties involved in or affected by disputes.<sup>177</sup> As these models develop, consideration will need to be given to how the accommodation of culture is balanced with the requirements of the law, particularly in cases involving family violence:

The challenge for culturally responsive practitioners is to effectively explore with clients *whether* and *how* elements of an individual's culture may be accommodated in the FDR process. They avoid the traps of cultural relativism by being clear about the legal limits of accommodating culture, particularly where violence is present, but also understand that this assessment is a complex one. They will know when law, and procedural justice, trump culture and have the capacity to make this clear to the parties. Culturally responsive FDR [practitioners] respond effectively to the cultural dynamics of violence and of gender.<sup>178</sup>

21.108 While accommodating culture in cases involving family violence presents particular challenges, the potential for culturally responsive FDR to secure sustainable and effective outcomes in this context may also be significant. Further, culturally responsive FDR can assist FDR service providers to meet their important obligation to facilitate outcomes which observe children's right to enjoy their culture.<sup>179</sup>

21.109 In consultations following the release of the Consultation Paper, the Commissions sought comments from stakeholders about the capacity of FDR to offer processes and lead to outcomes that accommodate the needs of Indigenous and CALD families.

#### ***Submissions and consultations***

21.110 Stakeholders commented on the interaction of family violence and culture, the factors affecting disclosure of family violence and the need for culturally responsive solutions. Stakeholders also reported on initiatives to provide culturally appropriate dispute resolution processes and outcomes for Indigenous and CALD children and families.

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176 S Armstrong, *Culturally Responsive Family Dispute Resolution in Family Relationship Centres: Access and Practice* (2010) Prepared for Family Relationship Centres at Bankstown managed by CatholicCare and Parramatta managed by Anglicare, 16.

177 As described by Dr Susan Armstrong, “[c]ultural responsiveness” in the context of service provision is the active process of seeking to accommodate the service to the client’s cultural context, values and needs’: S Armstrong, ‘Culturally Responsive Family Dispute Resolution in Family Relationship Centres’ (2009) 13 *Family Relationships Quarterly* 3. The development of culturally responsive models of non-judicial dispute resolution is described by stakeholders below, and in Chapter 23.

178 S Armstrong, *Culturally Responsive Family Dispute Resolution in Family Relationship Centres: Access and Practice* (2010) Prepared for Family Relationship Centres at Bankstown managed by CatholicCare and Parramatta managed by Anglicare, 15.

179 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 30; *Family Law Act 1975* (Cth) ss 60B(2)(e), (3). On facilitating children’s right to enjoy their culture, see also S Armstrong, ‘Culturally Responsive Family Dispute Resolution in Family Relationship Centres’ (2009) 13 *Family Relationships Quarterly* 3, 6.

21.111 As noted in Chapter 22, the Aboriginal Family Violence Prevention and Legal Service Victoria (AFVPLS) commented that, for various reasons, including reluctance of Indigenous women to disclose violence, there are problems with Family Relationship Centres identifying family violence experienced by Indigenous people.<sup>180</sup> The particular need for holistic, community-based and culturally appropriate dispute resolution for Indigenous children was raised by another stakeholder.<sup>181</sup>

21.112 Legal academic and researcher, Ghena Krayem, commented on the reluctance of muslim women to disclose family violence because they feel they will be blamed for their situation and fear that if they go to the police, the response will be ‘it’s typical of your community’. In her opinion, ascribing violence to culture was overly simplistic. She related the causes of violence not to culture or religion, but to other factors that transcend culture or religion—such as isolation, dislocation, disempowerment, and alcohol abuse. Ms Krayem commented that the causes of violence might be the same, but the responses may have to be different and that holistic solutions are needed. She noted the importance of engaging communities in developing solutions, rather than simply responding on a case by case basis.<sup>182</sup>

21.113 Legal Aid NSW noted that the KPMG report identified that legal aid commissions’ responses to people from diverse backgrounds were largely ad hoc, and that there was a need for formal protocols for delivering culturally and religiously appropriate FDR services. In response, Legal Aid NSW noted that it has developed more culturally appropriate dispute resolution processes for Indigenous clients, offering cadetships to Indigenous people to be trained as FDR practitioners, and offering all Indigenous clients an Indigenous FDR practitioner. FDR traineeships have also been offered to suitably qualified candidates from diverse cultural backgrounds with extensive understanding of the cultural practices, beliefs and experiences of their community. Legal Aid NSW told the Commissions about initiatives to develop a training and professional development framework for FDR practitioners, conference organisers and family lawyers, and other measures to ensure that FDR processes are culturally appropriate. Legal Aid NSW also told the Commissions about pilots in culturally responsive ADR in child protection.<sup>183</sup>

21.114 Commenting on the work of legal aid commissions to engage CALD communities in the improvement of dispute resolution practice, National Legal Aid noted that all legal aid commissions maintain productive working relationships with CALD representative community based organisations to inform ongoing development of culturally appropriate policies and procedures. National Legal Aid described particular initiatives in this area, including the Victoria Legal Aid Roundtable Dispute

180 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010. This comment was made in relation to the value of including information about family violence on s 60I certificates: see Ch 22.

181 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010. The comments of this stakeholder are discussed in Chapter 23 in relation to ADR in child protection matters.

182 G Krayem, *Consultation*, Sydney, 22 June 2010.

183 The Nowra Care Circle pilot and the Bidura Children’s Court external court-referred mediation pilot are discussed in Ch 23. Legal Aid New South Wales, *Correspondence*, 14 July 2010; Legal Aid New South Wales, *Correspondence*, 14 July 2010.

Management program, which has included extensive consultations with CALD (particularly Arabic and African) communities in Melbourne and professional development for case managers in relation to working with interpreters and other issues relevant to these communities. National Legal Aid also referred to Legal Aid Queensland's Indigenous mediation model, which was established in partnership with the Yarrabah community, and utilises Indigenous mediators from that community. National Legal Aid also told the Commissions about the participation of Legal Aid Western Australia's Clinical Services Coordinator in a training program involving cross cultural leadership, peacemaking and mediation in the context of Indigenous culture.<sup>184</sup>

21.115 The FRSA referred to barriers to access to FDR services for CALD families, such as low awareness of services, practical difficulties with the use of interpreters and the additional resources needed to respond appropriately to the needs of families with complex needs. According to the FRSA, services working with Indigenous communities reported that such work 'requires quite a different approach to service delivery than used for mainstream client groups'. The FRSA also noted that while the Secretariat of National Aboriginal and Islander Child Care had recently received government funding to develop a comprehensive resource manual to support services to improve their cultural responsiveness to Indigenous families, funding was not provided for associated training and dissemination. The FRSA also referred to a model of dispute resolution for Indigenous families, developed by the Alice Springs Family Relationship Centre, which it believes warrants further dissemination and support. In FRSA's view, 'improving practice in this area requires more than ad hoc activities driven by highly motivated individuals'. In the FRSA's view, a more comprehensive and strategic approach to enhance culturally responsive practice in FDR and other family support programs is needed.<sup>185</sup>

21.116 The various factors which affect the identification of family violence experienced by Aboriginal and Torres Strait Islander and CALD women, including reluctance to disclose, are addressed through culturally sensitive family violence screening and risk assessment.

#### ***Commissions' views***

21.117 In the Commissions' view, FDR offers significant promise for processes that can accommodate —in so far as is appropriate, practicable and within the limits of the law—the cultural, religious and social values and practices of CALD and Indigenous communities. The Commissions note the particular value of culturally responsive FDR in promoting outcomes that observe children's right to enjoy their culture. The Commissions commend stakeholders and the Australian Government Attorney-General's Department for the work they have already done to develop culturally responsive FDR practice and service delivery for Indigenous and CALD communities.

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184 National Legal Aid, *Correspondence*, 20 September 2010.

185 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

21.118 The Commissions appreciate that the development of culturally responsive FDR practice requires considerable planning and resources, particularly for its application in cases involving family violence. In this regard, the Commissions note stakeholder concerns that culturally responsive approaches should be developed and implemented in a comprehensive, strategic and holistic way, rather than on an ad hoc basis.

21.119 The Commissions also acknowledge the complexity of identifying and assessing family violence in different cultural contexts. Existing and future initiatives to improve FDR practice and service delivery for Indigenous and CALD communities require comprehensive and strategic support to ensure that screening and risk assessment processes can reliably identify and assess family violence in different cultural contexts; to develop protocols for referrals to culturally appropriate support services;<sup>186</sup> to engage Indigenous and CALD communities in developing holistic, effective and appropriate processes and outcomes in cases involving family violence; and to build FDR practitioners' skills and confidence in working in this area. The Commissions consider, therefore, that the Australian Government should take a comprehensive and strategic approach to support culturally responsive family dispute resolution. The Commissions consider that the development of culturally responsive FDR screening and risk assessment processes is particularly important to ensure that family violence concerns are appropriately and effectively identified, assessed and managed.

**Recommendation 21–5** The Australian Government Attorney-General's Department should take a comprehensive and strategic approach to support culturally responsive family dispute resolution, including screening and risk assessment processes.

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<sup>186</sup> In this Report, the Commissions have recommended that Australian, state and territory governments prioritise the provision of, and access to culturally appropriate victim support services for victims of family violence, including enhanced support for victims in high risk and vulnerable groups: Rec 29–3.



## 22. Confidentiality and Admissibility

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### Contents

Introduction	1019
FDR and family counselling confidentiality	1022
Serious threats to life, health or safety	1023
Threats to a child's welfare	1028
Conduct which may constitute grounds for a protection order	1032
Admissibility of FDR and family counselling communications	1034
Disclosures about a child's exposure to family violence	1035
Other disclosures of family violence	1040
Application of sections 10E and 10J to state and territory courts	1042
Section 60I Certificates: information about family violence	1045

### Introduction

22.1 Under the *Family Law Act 1975* (Cth), information obtained during family dispute resolution (FDR) and family counselling<sup>1</sup> is confidential and inadmissible in court proceedings, although there are exceptions.<sup>2</sup>

22.2 The exceptions to the *confidentiality* of such communications include where the FDR practitioner or family counsellor<sup>3</sup> reasonably believes disclosure is necessary for a range of purposes relevant to family violence, including:

- protecting a child from the risk of harm;
- preventing or lessening a serious and imminent threat to the life or health of a person;
- reporting the commission, or preventing the likely commission, of an offence involving violence or a threat of violence to a person;
- preventing or lessening a serious and imminent threat to the property of a person;

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<sup>1</sup> 'Family counselling' is defined in s 10B of the *Family Law Act 1975* (Cth).

<sup>2</sup> Ibid ss 10D, 10E, 10H, 10J. Sections 10E and 10J also apply to proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a state or a territory, or by the consent of the parties).

<sup>3</sup> Family counsellors are described in Ibid s 10C.

- reporting the commission, or preventing the likely commission, of an offence involving intentional damage to property of a person or a threat of damage to property; or
- assisting an independent children's lawyer to represent a child's interests.<sup>4</sup>

22.3 The exceptions to the *inadmissibility* of such communications include admissions or disclosures that indicate child abuse or a risk of child abuse,<sup>5</sup> and information that it is necessary for an FDR practitioner to give on a s 60I certificate.<sup>6</sup> There are also obligations on FDR practitioners and family counsellors to notify child protection authorities in cases of actual or suspected child abuse.<sup>7</sup> The confidentiality and inadmissibility provisions in ss 10D, 10E, 10H and 10J of the *Family Law Act* are discussed further below.

22.4 In addition to the exceptions to the confidentiality and admissibility provisions, the *Family Law Act* allows FDR practitioners to communicate limited information to the courts, through s 60I certificates, to verify that FDR was considered to be inappropriate or was unsuccessful. The potential—and limitations—of s 60I certificates as a means of communicating information about family violence to the courts is discussed further below.

22.5 The confidentiality and inadmissibility of FDR communications are important for a number of reasons. If disputes are to be resolved effectively, there is a need for candour by the parties. Importantly, parties may opt for FDR processes precisely because they know that their communications will be protected. Parties need to be able to trust the FDR practitioner to respect their confidences, including when one party meets privately with a practitioner. If parties know that their communications will not be protected from disclosure or from use in potential subsequent litigation, they may be discouraged from speaking openly and honestly and from divulging relevant information.

22.6 On the other hand, knowing that FDR communications are confidential and inadmissible may deter parties from entering FDR as a 'fishing expedition' for information that can be used in subsequent litigation, rather than with the intention of making a genuine effort to resolve their dispute.<sup>8</sup> The absence of legal safeguards in

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<sup>4</sup> Ibid ss 10D(4), 10H(4).

<sup>5</sup> Ibid ss 10(E)(2), 10(J)(2).

<sup>6</sup> *Family Law Act 1975* (Cth) s 10J(3).

<sup>7</sup> Ibid s 67ZA(2). See also ss 67ZB and 111CV. Section 67ZA(3) of the *Family Law Act* permits (but does not require) disclosure of information by FDR practitioners and family counsellors on the grounds of reasonable suspicion of past or future risk of ill-treatment of a child and past or future risk of exposure or subjection of a child to psychologically harmful behaviour. State and territory legislation also impose obligations on FDR practitioners and family counsellors to notify child protection authorities where certain child protection concerns are raised. Mandatory reporting provisions are discussed further in Ch 20, and below.

<sup>8</sup> H Astor and C Chinkin, *Dispute Resolution in Australia* (2002), 178.

non court processes such as FDR is also relevant.<sup>9</sup> Parties disclosing information without legal advice and representation, for example, may prejudice their position.

22.7 The confidentiality and inadmissibility of family counselling communications are also important. Clients who attend counselling trust that their sensitive information will not be passed on without their consent. Disclosure of sensitive information by counsellors could detrimentally affect the counselling relationship and undermine the benefits of counselling.

22.8 The confidentiality and inadmissibility of FDR and family counselling communications do, however, limit the availability of information to the courts and other agencies dealing with matters involving family violence. Confidentiality may also inhibit the development of important collaborative relationships between different participants within the family law system. A 2009 report of the Australian Institute of Family Studies suggested that communication of disclosures made in FDR processes may allow greater coordination where matters move between different parts of the system:

Currently, much relevant information may be collected by relationship service professionals in screening and assessment processes, but this information is not transmissible between professionals in this sector and professionals in the legal sector, or between other agencies and services responsible for providing assistance. Effectively, families who move from one part of the system to the other often have to start all over again. For families already under stress as a result of family violence, safety concerns and other complex issues, this may delay resolution and compound disadvantages.<sup>10</sup>

22.9 In addition to being relevant to different participants in the family law system, communications to family counsellors and FDR practitioners may also be relevant to family violence and child protection matters being dealt with by state and territory agencies and courts exercising child protection and family violence jurisdiction. The extent to which legislative provisions facilitate the sharing of FDR and family counselling communications with state and territory courts and agencies may have important implications for the development of collaborative relationships across legal systems and jurisdictions and the ability of the responsible participants in these different areas to respond appropriately to family violence.

22.10 Previous reviews have recognised that limitations on the courts' access to information about family violence may have an impact on safety and have suggested that the Australian Government consider amending the provisions in the *Family Law Act* dealing with confidentiality, inadmissibility and s 60I certificates to ensure that information from family counselling and FDR, which is relevant to assessing risks of family violence and the making of appropriate parenting orders, is made available to

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9 M Prigoff, 'Toward Candor or Chaos: The Case of Confidentiality in Mediation' (1988) 12 *Seton Hall Legislative Journal* 1.

10 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009), 367.

the family courts.<sup>11</sup> The federal Attorney-General, the Hon Robert McClelland MP, has also asked the National Alternative Dispute Resolution Advisory Council (NADRAC) to report on legislative changes required to protect the integrity of different ADR processes. As part of its inquiry, NADRAC is considering confidentiality, and non-admissibility of FDR communications.<sup>12</sup>

22.11 In the Consultation Paper, the Commissions asked questions and made proposals for changes to the confidentiality and admissibility provisions in ss 10D, 10E, 10H, and 10J of the *Family Law Act* and to s 60I certificates to facilitate greater disclosure and information sharing by FDR practitioners and family counsellors.<sup>13</sup>

22.12 This chapter examines the balancing of different considerations: the need to make information and evidence available to relevant agencies and courts so that they can better protect victims or persons at risk of family violence, and the need to protect the confidentiality and limit the admissibility of FDR and family counselling communications so that FDR and family counselling processes are not compromised in their ability to secure better and safer outcomes for family violence victims and those at risk.

22.13 The following three sections of this chapter consider whether there should be additional exceptions in ss 10D, 10E, 10H and 10J to the confidentiality and inadmissibility of family counselling and FDR communications, and whether s 60I certificates should include additional information about family violence.

### **FDR and family counselling confidentiality**

22.14 Sections 10D and 10H of the *Family Law Act* impose confidentiality obligations on family counsellors and FDR practitioners respectively. These persons must maintain the confidentiality of all communications made to them except in limited situations. First, communications may be disclosed with the consent of the person who made the communication or, if the person is under the age of 18, with the consent of each of the child's parents or a court. Secondly, family counsellors and FDR practitioners may also disclose communications where the counsellor or practitioner reasonably believes that disclosure is necessary to:

- protect a child from the risk of physical or psychological harm;
- prevent or lessen a serious and imminent threat to the life or health of any person; or

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11 See R Chisholm, *Family Courts Violence Review* (2009) and Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009).

12 NADRAC is due to report to the Attorney-General by 30 November 2010. Given the timetable for the Commissions' Inquiry, the Commissions were not able to consider NADRAC's recommendations with respect to these matters. See R McClelland (Attorney-General), *Integrity of ADR Processes: Terms of Reference to the National Dispute Resolution Advisory Council* (2009).

13 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Proposals 10–7, 10–8, 10–9, 10–10 and Questions 10–12, 10–13, 10–14, 10–15, 10–16.

- report the commission, or prevent the likely commission, of an offence involving violence or a threat of violence to a person.<sup>14</sup>

22.15 In addition, family counsellors and FDR practitioners *must* disclose a communication if they reasonably believe that the disclosure is necessary to comply with a law of the Commonwealth or a state or territory. This includes, for example, mandatory reporting of children at risk of harm under state and territory laws.<sup>15</sup>

22.16 The confidentiality provisions in ss 10D and 10H apply to communications made to FDR practitioners and family counsellors *while* they are conducting FDR or family counselling.<sup>16</sup> The Commissions note that there may be a question as to whether screening and risk assessment undertaken for the purposes of FDR are actually a part of FDR and, therefore, whether s 10H protects the confidentiality of communications made during such screening and risk assessment.<sup>17</sup> Section 10F of the *Family Law Act* defines FDR as a process in which an FDR practitioner ‘helps people affected, or likely to be affected, by separation or divorce to resolve some or all of their disputes with each other’.

22.17 As discussed in Chapter 21, screening and risk assessment are key elements of FDR in practice. Their purpose is to ensure that victims of family violence are not using FDR in inappropriate circumstances, and to identify and mitigate any risk factors where FDR may be appropriate despite such risks. If screening and risk assessment are conducted by an FDR practitioner as part of FDR, then the confidentiality of communications made during such screening and risk assessment will be protected by s 10H. If, however, screening and risk assessment are conducted as a separate process preceding FDR, then the confidentiality of the communications will not be protected by s 10H. However, other obligations of confidentiality may arise in relation to screening and risk assessment communications in these circumstances—for example, equitable or contractual duties of confidence.

### Serious threats to life, health or safety

22.18 While ss 10D and 10H permit disclosure with respect to threats to life and health, such perceived threats must be both serious and imminent. Further, ss 10D and 10H do not expressly permit disclosures by family counsellors and FDR practitioners in situations where disclosure is intended to avert a threat to a person’s safety.

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14 In these circumstances, disclosure is permitted rather than required.

15 For more on mandatory reporting obligations in the context of child protection, see Ch 20 and D Higgins, L Bromfield, Nick Richardson, Prue Holzer and Claire Berlyn, *National Child Protection Clearinghouse Resource Sheet: Mandatory Reporting of Child Abuse and Neglect* (2010), prepared for the Australian Institute of Family Studies.

16 *Family Law Act 1975* (Cth) ss 10D(1), 10H(1).

17 Screening and risk assessment for the purposes of FDR are discussed in Ch 21.

22.19 By way of comparison, the Commissions note that safety is already included as a ground for disclosure in some laws dealing with confidentiality in other contexts.<sup>18</sup>

22.20 The *Privacy Act 1988* (Cth) sets out principles for use and disclosure of personal information in the Information Privacy Principles (IPPs), which apply to federal public sector organisations, and in the National Privacy Principles (NPPs), which apply to private sector organisations. The IPPs and the NPPs each allow personal information to be used and disclosed if it is necessary to lessen or prevent a serious and imminent threat to an individual's life or health.<sup>19</sup> The NPPs also allow use and disclosure if it is necessary to lessen or prevent:

- a serious and imminent threat to an individual's safety; or
- a serious threat to public health or public safety.

22.21 In Recommendation 25–3 of its report, *For Your Information: Australian Privacy Law and Practice* (ALRC Report 108), the ALRC recommended that a reasonable belief that use or disclosure is necessary to lessen or prevent a serious threat to a person's safety should be included as a ground for disclosure in principles governing use and disclosure of personal information in federal, state and territory privacy laws.<sup>20</sup> The ALRC also recommended that the requirement for a threat to be imminent should be removed from principles governing use and disclosure of personal information. The ALRC noted that:

[t]he current requirement that the requisite threats to an individual be imminent as well as serious sets a disproportionately high bar to the use and disclosure of personal information. This is problematic in circumstances in which there may be compelling policy reasons for the information to be used or disclosed but it is impracticable to seek consent. Agencies and organisations should be able to take preventative action to stop a threat from escalating to the point of materialisation. In order to do so, they may need to use or disclose personal information.<sup>21</sup>

22.22 In June 2010, the Government released an exposure draft of proposed new Australian Privacy Principles (APPs) as the first step in the implementation of reforms to the *Privacy Act* following the recommendations in ALRC Report 108. The proposed APPs are intended to replace the IPPs and NPPs, and to apply to both federal public sector agencies and private sector organisations.<sup>22</sup> Proposed APP 6 prohibits personal information collected for a particular purpose being disclosed for a different purpose, except in some limited circumstances. These exceptions include disclosure where it is reasonably believed that the information is necessary to lessen or prevent a serious

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18 See, eg, *Aged Care Act 1997* (Cth) s 86–2; *Customs Administration Act 1985* (Cth) s 16.

19 *Privacy Act 1988* (Cth) s 14, IPPs 10(1)(e), 11(1)(c); sch 3, NPP 2.1(e)(i).

20 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), Rec 25–3.

21 *Ibid*, [25.83], Rec 25–3.

22 *Exposure Draft: Australian Privacy Principles 2010* (Cth). See also Companion Guide *Exposure Draft Australian Privacy Principles 2010* (Cth).

threat to life, health or safety, and it is unreasonable or impracticable to obtain the affected individual's consent to the disclosure.<sup>23</sup>

22.23 In the Consultation Paper, the Commissions proposed that ss 10D(4)(b) and 10H(4)(b) of the *Family Law Act* be amended to remove the requirement for a threat to be 'imminent' and to add 'safety' to 'life or health' as a ground for disclosure. This would permit family counsellors and FDR practitioners to disclose communications where they reasonably believe that disclosure is necessary to prevent or lessen a serious threat to a person's life, health or safety.<sup>24</sup> Such amendments would also make ss 10D(4)(b) and 10H(4)(b) more consistent with the proposed APPs.

### **Submissions and consultations**

22.24 Most of the submissions responding to the Commissions' proposal supported the suggested amendments to ss 10D(4)(b) and 10H(4)(b).<sup>25</sup> The Law Society of New South Wales Dispute Resolution Committee, however, expressed a strong objection to this and the Commissions' other proposals for amendments to ss 10D and 10H. The Committee was of the view that the existing provisions for disclosure operate appropriately. The Committee noted that FDR practitioners and family counsellors are mandatory reporters with respect to risks to children, and that ss 10D and 10H clearly provide for disclosure of risks relating to family violence. According to the Committee,

23     *Exposure Draft: Australian Privacy Principles 2010* (Cth). In its first stage response to Rec 25–3 of ALRC Report 108, the Australian Government suggested that disclosure of personal information necessary to prevent or lessen a serious threat should be permitted only after consent has first been sought, where seeking consent is reasonable and practicable: Australian Government, *Enhancing National Privacy Protection—Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice* (2009). This consent element was subsequently incorporated into the draft Australian Privacy Principles.

24     Consultation Paper, Proposal 10–8.

25     National Legal Aid, *Submission FV 232*, 15 July 2010; Family Relationship Services Australia, *Submission FV 231*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010, referring to the views of the Family Issues Committee; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010. Stakeholders also expressed the view that disclosure on these grounds should be mandatory and not just permissible: Confidential, *Submission FV 96*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

there is no need to amend the legislation if family counsellors and FDR practitioners are properly trained to ensure they recognise when they should report communications indicating risk to a child or other person or property. The Committee also pointed out that the Family Court now has the benefit of family consultants to report what occurs during sessions with the family.<sup>26</sup>

22.25 With respect to the inclusion of ‘safety’ as a ground for permissible disclosure, the Australian Government Attorney-General’s Department suggested that ss 10D and 10H already permit a disclosure intended to avert a threat to a person’s safety. In this regard, the Department referred the Commissions to ss 10D(4)(a), (b) and (c) and 10H(4)(a),(b) and (c).<sup>27</sup> The Commissions note that the provisions referred to by the Attorney-General’s Department refer to ‘risk of harm’ (in relation to a child), ‘threat to the life or health of a person’, and ‘violence or a threat of violence to a person’.

22.26 As noted above, most of the submissions supported the suggested amendments to ss 10D(4)(b) and 10H(4)(b). Submissions also suggested that the impact of such disclosures on the immediate safety of women should be taken into account,<sup>28</sup> and that family counsellors and FDR practitioners should make appropriate or immediate referrals to services such as police, crisis support services and legal assistance,<sup>29</sup> and develop safety plans in conjunction with the person or persons at risk.<sup>30</sup>

22.27 Women’s Legal Services NSW, in general comments about disclosure and information sharing, also referred to the potential risk of harm to the person disclosing violence, and the importance of consent to disclosure of information.<sup>31</sup> The Office of the Privacy Commissioner (OPC) referred to the Australian Government’s position that those disclosing personal information to prevent or lessen serious threats should consider seeking consent first.<sup>32</sup> In the OPC’s view, this approach helps to ensure that

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26 The Committee also noted provisions with respect to independent legal representatives for children (ss 10D(4)(f), 10H(4)(f) and 68L of the *Family Law Act*) and commented that if a parent’s solicitor is concerned about a child, the solicitor should seek the appointment of an independent children’s lawyer under s 68L: Law Society of New South Wales, *Submission FV 205*, 30 June 2010, referring to the views of the Dispute Resolution Committee.

27 Australian Government Attorney-General’s Department, *Submission FV 166*, 25 June 2010.

28 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

29 National Legal Aid, *Submission FV 232*, 15 July 2010.

30 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010. The FRSA supported this proposal but also noted that unless disclosure was reasonably likely to result in protective action, the disclosure could inflame the situation and serve to increase rather than decrease the risk. The FRSA suggested the development of a safety plan so that any action taken does not inadvertently make the situation worse.

31 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010. It should be noted that Women’s Legal Services NSW’s comment about consent to disclosure was made in the context of comments about the discloser’s control of use of the information in family law proceedings.

32 In the Consultation Paper, the Commissions noted that in response to this recommendation, the Australian Government had agreed that requiring a serious threat to be imminent can be too restrictive. However, the Government noted some stakeholder views that the ‘imminence’ requirement operated as an important safeguard against the mishandling of personal information. The Government suggested a compromise position, which would permit the disclosure of personal information where necessary to prevent or lessen a serious—but not necessarily imminent—threat only after consent has first been sought, where seeking consent is reasonable and practicable. See *Australian Government, Enhancing National Privacy*

the affected individual maintains an appropriate degree of control over the disclosure of his or her personal information. Nevertheless, noting that it was consistent with the ALRC's recommendation in ALRC Report 108, OPC expressed support for the Commissions' proposal, and suggested that the development of guidance material may be beneficial in assisting family counsellors and FDR practitioners to determine the seriousness of a threat and to understand when disclosures may be made without consent.<sup>33</sup>

### **Commissions' views**

22.28 In the Commissions' view, there are compelling policy reasons to remove the imminence requirement in ss 10D(4)(b) and 10H(4)(b). Family violence sometimes manifests as controlling behaviour over a number of years.<sup>34</sup> The resulting threat may, therefore, be very difficult to characterise as 'imminent' even where it is 'serious'.

22.29 Safety has been described as 'the central concern of domestic violence intervention'.<sup>35</sup> The Commissions' proposal to refer expressly to 'safety' in ss 10D(4)(b) and 10H(4)(b) would make it clear that a family counsellor or FDR practitioner is permitted to disclose communications where he or she reasonably believes that disclosure is necessary to prevent or lessen a serious threat to a person's safety. The Commissions note that, in the view of the Australian Government Attorney-General's Department, ss 10D and 10H do cover safety. While it may be arguable that the particular provisions referred to already include, by implication, threats to a person's safety, the Commissions are of the view that in order to clarify and put this matter beyond doubt, 'safety' should be expressly recognised as a permissible basis for the disclosure of information.

22.30 The Commissions note that the proposed removal of the imminence requirement and the addition of threats to safety as an express ground for disclosure, is consistent with the reasoning in Recommendation 25–3 of ALRC Report 108 and with proposed developments in federal privacy law.

22.31 The Commissions are of the view that it is unnecessary to impose a statutory requirement to consider seeking consent before making a disclosure. The Commissions agree that, where reasonable and practicable, FDR practitioners and family counsellors should seek consent before making a disclosure. However, the Commissions note the OPC's comment, that '[w]here there is a serious threat to a person's life, health or safety, disclosure without consent will generally be warranted'.<sup>36</sup> FDR practitioners and family counsellors will need to have reasonable grounds for believing that the disclosure is necessary to lessen or prevent the threat, and not merely helpful,

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*Protection—Australian Government First Stage Response to the Australian Law Reform Commission Report 108 For Your Information: Australian Privacy Law and Practice (2009).*

33 Office of the Privacy Commissioner, *Submission FV 147*, 24 June 2010.

34 Access Economics, *The Cost of Domestic Violence to the Australian Economy, Part I* (2004), 3. See also, Ch 5 of this Report.

35 L Laing, *Risk Assessment in Domestic Violence* (2004), Australian Domestic & Family Violence Clearinghouse, 1.

36 This comment was made by the OPC in the context of its discussion about Proposal 10–9 of the Consultation Paper: Office of the Privacy Commissioner, *Submission FV 147*, 24 June 2010.

desirable, or convenient. Where it is possible to obtain consent, then disclosure without consent will not be necessary.

22.32 The Commissions agree with the OPC that guidance material may be beneficial in assisting family counsellors and FDR practitioners to determine the seriousness of a threat and to identify when a disclosure may be made without consent. The Commissions are mindful of concerns raised about the additional risk to victims and potential victims of family violence that may sometimes result from such disclosures. Guidance material should, in the Commissions' view, encourage family counsellors and FDR practitioners making disclosures with respect to threats to life, health, or safety to also refer family violence victims and those at risk to appropriate support services, and to work with them to develop appropriate safety plans.

**Recommendation 22–1** Sections 10D(4)(b) and 10H(4)(b) of the *Family Law Act 1975* (Cth) should be amended to permit family counsellors and family dispute resolution practitioners to disclose communications made during family counselling or family dispute resolution, where they reasonably believe that disclosure is necessary to prevent or lessen a serious threat to a person's life, health or safety.

**Recommendation 22–2** The Australian Government Attorney-General's Department, in consultation with family dispute resolution practitioners and family counsellors, should develop material to guide family dispute resolution practitioners and family counsellors in determining the seriousness of a threat to an individual's life, health or safety, and identifying when a disclosure may be made without consent. Such guidance should also encourage family dispute resolution practitioners and family counsellors to address the potential impact of disclosure on the immediate safety of those to whom the information relates, and for that purpose:

- (a) refer those at risk to appropriate support services; and
- (b) develop a safety plan, where appropriate, in conjunction with them.

### **Threats to a child's welfare**

22.33 In the Consultation Paper, the Commissions considered whether ss 10D and 10H should be amended to permit release of FDR and family counselling information to prevent or lessen a serious threat to a child's welfare.<sup>37</sup> The Commissions noted that the Community and Disability Services Ministers' Advisory Council submitted to the ALRC Inquiry into secrecy laws that, in the context of child protection, the threshold for release of information on public interest grounds should be whether the release is 'necessary to prevent or lessen a threat to health, safety or welfare of a person'.<sup>38</sup> The

<sup>37</sup> Consultation Paper, Question 10–14.

<sup>38</sup> See Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report 112 (2009), [10.102].

Council emphasised that the inclusion of ‘welfare’ was particularly relevant in child protection. The ALRC noted that the desirability and operation of these types of exceptions ‘depend on the context in which they operate’ and that there ‘may be circumstances in which it is appropriate for exceptions of this kind to cover a person’s welfare, as well as life, health or safety’.<sup>39</sup>

22.34 In addition to ss 10D and 10H, there are other provisions in the *Family Law Act* that allow disclosure of information relating to harm or potential harm to children. Section 67ZA(2) of the *Family Law Act* requires FDR practitioners and family counsellors to report child abuse—or the risk of child abuse—as defined by the *Family Law Act*.<sup>40</sup> While mandatory reporting obligations under state and territory child protection legislation are broader in scope, their application differs across jurisdictions. There are differences between jurisdictions with respect to who is obliged to report, the type and extent of the harm which gives rise to the reporting obligation, and whether the obligation applies to future risk as well as past or present instances of harm.<sup>41</sup> Section 67ZA(3) of the *Family Law Act*, which permits—but does not require—disclosure of information on the grounds of reasonable suspicion of past or future risk of ill-treatment of a child and past or future risk of exposure to or subjection of a child to psychologically harmful behaviour, applies consistently to FDR practitioners and family counsellors throughout Australia.

22.35 Section 67ZA(3) does, however, limit to *whom* information may be directly disclosed. Unlike ss 10D and 10H, s 67ZA(3) allows for disclosure to a ‘prescribed child welfare authority’ only.<sup>42</sup> Section 67ZA(3) does not provide a direct route for passing information from an FDR practitioner or family counsellor to police or to the courts.<sup>43</sup>

### **Submissions and consultations**

22.36 A number of stakeholders expressed support for an additional ground for disclosure relating to threats to a child’s welfare.<sup>44</sup> Other stakeholders, however, raised

39 Ibid, [10.107].

40 Section 67ZA(2) of the *Family Law Act* requires disclosure of reasonable suspicion of child abuse or the risk of child abuse to a ‘prescribed welfare authority’. The definition of ‘child abuse’ in s 4(1) refers to assault, including sexual assault, and involving a child in sexual activity.

41 See Ch 20.

42 Section 4(1) of the *Family Law Act* defines ‘prescribed child welfare authority specifically’ in relation to ‘abuse of a child’, but not in relation to ill-treatment or psychological harm. The *Family Law Regulations 1984* (Cth) provide no further definition of ‘prescribed child welfare authority’.

43 Information is not admissible as evidence simply because it may be disclosed to a court in accordance with ss 10D and 10H. On this point see ss 10D(6) and 10H(7).

44 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Family Relationship Services Australia, *Submission FV 231*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010, referring to the views of the Family Issues Committee; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

some concerns and queried the need for an additional ground.<sup>45</sup> Stakeholders argued that ss 10D and 10H, and particularly ss 10D(4)(a) and 10H(4)(a) (which allow for disclosure with respect to risk of physical or psychological harm to a child), adequately provide for disclosure with respect to child welfare concerns.<sup>46</sup> The OPC noted the difficulty of defining ‘welfare’ and queried what additional information would be disclosed under such an exception that could not be disclosed under the current framework for disclosure and the amended life, health and safety exception proposed by the Commissions.<sup>47</sup>

22.37 National Legal Aid expressed its reservations by referring to general concerns about extending disclosure grounds, including the complexity of issues associated with disclosure of information from family counselling and FDR, the possibility that greater disclosure would bring a wide range of risks both to the confidentiality of the FDR process and more specifically to victims of violence, and that it would not remove the need for ongoing screening. In addition, National Legal Aid generally noted the need for joint consultations with relevant stakeholders to ensure existing provisions for disclosure are understood and appropriate solutions are identified to ensure that the court can make appropriate decisions at an early stage.<sup>48</sup> The Dispute Resolution Committee of the Law Society of New South Wales commented that the legislation would not require amendment if family counsellors and FDR practitioners were properly trained to ensure that they ‘competently recognise’ when they should report disclosures of risk, especially in relation to children, and that they act on such disclosures.<sup>49</sup>

#### *Commissions’ views*

22.38 The Commissions have considered the relevance of ‘welfare’ with respect to child protection and note the existing legislative grounds for disclosure in relation to child protection concerns. In addition to ss 10D(4)(a) and 10H(4)(a), which allow for disclosure to protect a child from risk of physical or psychological harm, other provisions in the *Family Law Act* and in state and territory child protection legislation require or permit certain professionals to report concerns about harm or risk of harm to children to the relevant state and territory authorities.

45 National Legal Aid, *Submission FV 232*, 15 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010, referring to the views of the Dispute Resolution Committee; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Office of the Privacy Commissioner, *Submission FV 147*, 24 June 2010.

46 Law Society of New South Wales, *Submission FV 205*, 30 June 2010, referring to the views of the Dispute Resolution Committee; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010. Aboriginal Family Violence Prevention and Legal Service Victoria also indicated it is reluctant to support enhanced disclosure because it has concerns about the standards of FDR with respect to family violence.

47 Office of the Privacy Commissioner, *Submission FV 147*, 24 June 2010. See Rec 22–1.

48 National Legal Aid, *Submission FV 232*, 15 July 2010. The Dispute Resolution Committee of the Law Society of New South Wales also noted the need for training of family counsellors and FDR practitioners to ensure they recognise when they should disclose information relating to risks to children: Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

49 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

22.39 The Commissions have considered whether the scope for disclosure provided by the combination of relevant legislative provisions obviates the need for a specific additional ground for disclosure relating to child welfare concerns. The range covered by the relevant provisions under the *Family Law Act* includes: information relating to risk of physical harm; past or future risk of psychological harm; past or future risk of ill-treatment; child abuse or risk of child abuse; offences or potential offences involving violence; and serious and imminent threats to life or health. State and territory child protection legislation provisions relating to reporting of harm and risk of harm add to this range of provisions for disclosure.

22.40 In particular, the Commissions note that the reference in s 67ZA(3) of the *Family Law Act* to past or future risk of psychological harm or ill-treatment seems to allow for relatively broad grounds for disclosure of FDR and family counselling communications in appropriate circumstances.<sup>50</sup> Further, while s 67ZA(3) does not provide a direct route for passing information from an FDR practitioner or family counsellor to police or to the courts, disclosure by an FDR practitioner or family counsellor to a child welfare authority may result in that agency referring the matter to police for investigation or bringing the matter before a court.

22.41 In the Commissions' view, the range of information covered by the combination of relevant legislative provisions referred to above would, to a very significant degree, encompass information relating to serious threats to a child's welfare. The arguments in favour of extending the circumstances in which FDR practitioners and family counsellors disclose information relating to a child's welfare do not, on balance, outweigh the public interest in protecting the integrity and efficacy of FDR and family counselling, which are important in securing children's welfare.

22.42 The Commissions acknowledge that the multiplicity of provisions relevant to disclosure of information about actual or potential abuse, harm or ill-treatment of children spread across the *Family Law Act* and state and territory legislation may cause some confusion amongst FDR practitioners and family counsellors. The Commissions consider, therefore, that there may be value in education and training for FDR practitioners and family counsellors to ensure that these provisions are understood and appropriately acted upon.

**Recommendation 22–3** Bodies responsible for the education and training of family dispute resolution practitioners and family counsellors should develop programs to ensure that provisions in the *Family Law Act 1975* (Cth) and in state and territory child protection legislation regulating disclosure of information relating to actual or potential abuse, harm or ill-treatment of children are understood and appropriately acted on.

50 Psychological harm and ill-treatment are not defined in the *Family Law Act*.

### **Conduct which may constitute grounds for a protection order**

22.43 Another exception to the confidentiality obligations of FDR practitioners and family counsellors, provided in ss 10D(4)(c) and 10H(4)(c) of the *Family Law Act*, allows disclosure of FDR and family counselling communications to prevent the likely commission of an offence involving violence or a threat of violence to a person. In the Consultation Paper, the Commissions proposed amending ss 10D(4)(c) and 10H(4)(c) to allow family counsellors and FDR practitioners to disclose communications where they reasonably believe that disclosure is necessary to report conduct that they reasonably believe constitutes grounds for a protection order under state and territory family violence legislation.<sup>51</sup>

22.44 The clearest application of such a reform would be where police officers apply directly for, or—in those jurisdictions where they are empowered to do so—issue, protection orders. A family counsellor or FDR practitioner would have the option of reporting this information to the police. Police could then determine whether to apply for or—where empowered—issue, a protection order.<sup>52</sup>

#### ***Submissions and consultations***

22.45 Many stakeholders expressed support for this proposal.<sup>53</sup> The Family Issues Committee of the Law Society of New South Wales referred to its general comments about the effect of the *Family Law Act*'s family counselling and FDR confidentiality and admissibility provisions in shielding family violence. In the Committee's view, court orders would be less responsive to family violence if courts did not have access to information about family violence.<sup>54</sup> Others argued that this should be a mandatory, rather than permissible, ground for disclosure.<sup>55</sup> National Legal Aid was of the view

51 Consultation Paper, Proposal 10–9.

52 The role of police in applying for or issuing protection orders is considered in Ch 9.

53 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Family Issues Committee, Law Society of New South Wales, *Submission FV 205*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 82*, 2 June 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010. The Family Issues Committee of the Law Society of New South Wales expressed strong support for this proposal and referred to its general arguments in support of amendments to ss 10D, 10E, 10H ad 10J: Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

54 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

55 Confidential, *Submission FV 96*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

that, in relation to FDR, this proposal should only apply where the conduct arises during the FDR, and not to communications about past conduct.<sup>56</sup>

22.46 The OPC indicated support for this proposal, but noted that where conduct may constitute grounds for a protection order, it was likely that it would fall within the proposed exception to confidentiality for threats to life, health or safety.<sup>57</sup> The Queensland Law Society questioned the necessity for the proposed amendments and expressed the view that the existing exception for disclosure to report or prevent the commission of offences involving violence or threats of violence was adequate.<sup>58</sup>

22.47 Other submissions argued that such an exception to confidentiality allowed too much discretion,<sup>59</sup> that it could undermine the purpose of FDR<sup>60</sup> and the impartial, facilitative role of the FDR practitioner,<sup>61</sup> that parties might become reluctant to come forward with all relevant information in FDR,<sup>62</sup> and may cease to attend FDR or family counselling.<sup>63</sup>

22.48 The FRSA was of the view that this proposal was at odds with the FDR practitioner's and family counsellor's role of working with the family and building trust with parents and children at risk. The FRSA noted that FDR practitioners and family counsellors will:

inform parties at risk what action can be taken and offer to provide support but may also respect the right of the victim or potential victim to determine when and how to take protective action, rather than impose a course of action—if only to keep the victim engaged in support and working through the many emotions they may be experiencing.<sup>64</sup>

### **Commissions' views**

22.49 The existing provisions in the *Family Law Act* and in state and territory child protection legislation, discussed above, provide a number of grounds for disclosure by FDR practitioners and family counsellors of information relating to those at risk. The Commissions' recommended amendments to ss 10D(4)(b) and 10H(4)(b)—to add serious threats to safety, and remove the requirement for threats to be imminent—will add to these grounds.<sup>65</sup> The Commissions are of the view that, to a significant degree at

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56 National Legal Aid, *Submission FV 232*, 15 July 2010.

57 The OPC was of the view that, where reasonable and practicable, family counsellors and FDR practitioners should seek consent before disclosing information under this proposed exception to confidentiality: Office of the Privacy Commissioner, *Submission FV 147*, 24 June 2010.

58 Queensland Law Society, *Submission FV 178*, 25 June 2010.

59 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

60 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

61 Law Society of New South Wales, *Submission FV 205*, 30 June 2010, referring to the views of the Dispute Resolution Committee.

62 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010. Another legal service provider indicated general reservations about any amendments ‘which compromise mediation processes as a safe and confidential space where everything can be frankly discussed and all relevant information put on the table without fear of repercussions’: Confidential, *Submission FV 164*, 25 June 2010.

63 Queensland Law Society, *Submission FV 178*, 25 June 2010.

64 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

65 Rec 22–1.

least, disclosures about conduct that may constitute grounds for a protection order are already authorised under these provisions.

22.50 The Commissions have considered whether there is a need to permit disclosures for the purpose of reporting conduct which may constitute grounds for a protection order, but which would not fall within the provisions discussed above. In this respect, the Commissions are mindful of the concerns raised about the potential for disclosures to increase, rather than decrease, risks. Where conduct might constitute grounds for a protection order, but would not fall within the provisions for disclosure discussed above, the Commissions are of the view that the risk of inflaming the situation and potentially placing victims of family violence in greater danger by disclosing communications about such conduct, is not warranted. In such cases, the arguments in favour of amending ss 10D(4)(c) and 10H(4)(c) in order to permit FDR practitioners and family counsellors to report conduct reasonably believed to constitute grounds for a protection order do not outweigh the importance of protecting the integrity and the efficacy of FDR and family counselling, which are also important in securing outcomes that protect family violence victims and those at risk of family violence.

22.51 The Commissions consider, therefore, that there is no need for amendments to ss 10D(4)(c) and 10H(4)(c) in order to permit FDR practitioners and family counsellors to disclose communications for the purpose of reporting conduct reasonably believed to constitute grounds for a protection order. The Commissions consider, however, that FDR practitioners and family counsellors have an important role to play in advising family violence victims and those at risk of family violence about appropriate support services. They should also develop a risk management strategy, to ensure safety in FDR and counselling processes. In this respect, the Commissions note the comment of the FRSA, that FDR practitioners and family counsellors do inform parties they consider to be ‘at risk’ of options available to them, and offer to provide support.

## **Admissibility of FDR and family counselling communications**

22.52 Even where a family counsellor or FDR practitioner is permitted to disclose a communication, it may not be admissible as evidence in court proceedings. Pursuant to ss 10E and 10J of the *Family Law Act*, evidence of anything said, or any admission made, by or in the company of a family counsellor or FDR practitioner is inadmissible ‘in any court (whether or not exercising federal jurisdiction)’ or ‘in any proceedings before a person authorised to hear evidence (whether the person is authorised by a law of the Commonwealth, a state or a territory, or by the consent of the parties)’. There are exceptions where:

- an admission by an adult indicates that a child under 18 has been abused or is at risk of abuse; or
- a disclosure by a child under 18 that indicates that the child has been abused or is at risk of abuse.<sup>66</sup>

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66 *Family Law Act 1975* (Cth) ss 10E(2), 10J(2). In addition, s 10J(3) provides that the limited information provided on s 60I certificates is admissible.

### Disclosures about a child's exposure to family violence

22.53 Disclosures made to FDR practitioners and to family counsellors about a child's exposure to family violence are, in accordance with ss 10E and 10J, inadmissible. In its 2009 report, the Family Law Council briefly considered the prohibition on the admissibility of such communications in the general context of disclosure of family violence in family law proceedings. The Council noted that it is 'possible that a party to proceedings involving a child does not disclose that he or she and/or the subject children are being, or have been exposed to serious family violence',<sup>67</sup> and recommended an amendment to s 10E of the Act to allow disclosures about a child's exposure to family violence to be admitted into evidence.<sup>68</sup> In the Consultation Paper, the Commissions proposed that ss 10E and 10J be amended to enable such disclosures made to family counsellors and FDR practitioners to be admitted into evidence.<sup>69</sup>

#### Submissions and consultations

22.54 A number of submissions expressed support for the Commissions' proposal to make disclosures regarding children's exposure to family violence admissible.<sup>70</sup> The Queensland Law Society and Dr Olivia Rundle were of the view that the amendment should be made subject to the current restriction on admissibility in ss 10E and 10J—that is, admissions or disclosures of children's exposure to family violence should be admissible, unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.<sup>71</sup> The National Peak

67 Ibid; Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Rec 9, [8.2.2].

68 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Rec 9, [8.2.1]. In discussion on this point the Family Law Council referred to disclosures that had been made to FDR practitioners, however the Council's recommendation was for amendment to s 10E, which relates to communications to family counsellors. Admissibility of communications to FDR practitioners is dealt with in s 10J. The Council's reasoning, however, appears capable of applying to both ss 10E and 10J.

69 Consultation Paper, Proposal 10–10.

70 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010, referring to the views of the Family Issues Committee; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010 (this stakeholder was of the view that the proposed amendment should be extended to all victims, not just children); Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Hunter Women's Centre, *Submission FV 79*, 1 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

71 Queensland Law Society, *Submission FV 178*, 25 June 2010; O Rundle, *Submission FV 50* 27 May 2010.

Body for Safety and Protection of Parents and Children supported admissibility of such disclosures ‘with discretion’, and noted the danger of false allegations.<sup>72</sup>

22.55 Submissions noted that exposure to family violence is detrimental to children, in the same way as direct experience of family violence or child abuse.<sup>73</sup> The Family Issues Committee of the Law Society of New South Wales also argued that if the relevant evidence is not available, a court’s ability to put in place appropriate parenting arrangements will be constrained; the limitations on admissibility in ss 10E and 10J will, in some cases, shield family violence, and so may contribute to exposing children to risk.<sup>74</sup>

22.56 Stakeholders also commented on the effect of requiring disclosures related to family violence to be repeated in subsequent litigation.<sup>75</sup> The Magistrates’ Court and the Children’s Court of Victoria stated that it is not appropriate to duplicate the taking of evidence about family violence and to require multiple disclosures before action is taken.<sup>76</sup> In their submission to this Inquiry, the Chief Justice of the Family Court of Australia and the Chief Federal Magistrate referred to the Family Court’s Child Responsive Program (CRP),<sup>77</sup> which they described as a non-privileged court-based FDR model, and commented that, in the Family Court’s experience, participants in the CRP had not been reluctant to raise issues or make disclosures because these could be communicated to a judicial officer. They stated that the Family Court’s family consultants had advised that parties appreciate the opportunity to ‘tell their story’ in the knowledge that the process won’t have to be repeated should their dispute proceed to trial.<sup>78</sup>

22.57 Other stakeholders suggested that the proposal should be more limited. The FRSA was of the view that the proposal should be limited ‘to avoid rendering inadmissibility ineffective in the context of a very broad definition of family violence’. It was noted that while it is not uncommon for children to witness conflict between separating parents, there can be considerable variation in the context, severity and

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72 National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010.

73 Law Society of New South Wales, *Submission FV 205*, 30 June 2010, referring to the views of the Family Issues Committee; O Rundle, *Submission FV 50* 27 May 2010.

74 Law Society of New South Wales, *Submission FV 205*, 30 June 2010, referring to the views of the Family Issues Committee.

75 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Confidential, *Submission FV 96*, 2 June 2010.

76 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

77 Under the CRP, cases involving children’s matters are allocated family consultants, who meet the parents (or carers) and children. Family consultants help parents focus on the children’s needs, and assist the Court and parents to achieve the best outcomes for children. As part of the CRP, family consultants undertake a comprehensive screening process; each party is asked specific questions about family violence, including questions about the frequency, pattern and type of violence and about children’s exposure to violence. Any communications and any admissions made at CRP meetings are admissible in any court proceedings under the *Family Law Act*: Australian Government Attorney-General’s Department, *Towards a National Blueprint for the Family Law System* (2009).

78 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

potential impact of such conflict. Family Relationship Services Australia (FRSA) considered that one-off occurrences, such as verbal abuse, related to separation conflict between two otherwise non-violent parents, would not warrant an extension of admissibility.<sup>79</sup>

22.58 Professor Julie Stubbs commented that if this proposal is adopted, it should be limited to matters in which family violence is having, or is likely to have, a detrimental effect on a child. Professor Stubbs noted that child protection authorities sometimes use exposure to family violence in ways that may undermine parents who are, themselves, the victims of family violence. In such cases, victims of family violence may be held responsible for being unable to protect their children from their partner's violence.<sup>80</sup>

22.59 National Legal Aid expressed reservations about the proposed amendments to make disclosures of children's exposure to family violence admissible, and suggested further consultations with relevant stakeholders on this issue. In addition, National Legal Aid suggested that, given the increasing number of organisations running child-inclusive mediations, consideration should be given to whether disclosures made by children should be treated differently from disclosures made by adults.<sup>81</sup>

22.60 Women's Legal Services NSW acknowledged that women have difficulties bringing evidence of family violence to court and that lack of available evidence is one of the biggest hurdles in family law proceedings. However, while Women's Legal Services NSW noted its support for efforts to improve the system's responsiveness to disclosures of family violence, it also emphasised that:

there are real concerns about a range of issues that arise in moving towards a system where there is more disclosure and sharing of information. These include potential risk of harm to the person disclosing violence; the integrity of counselling relationships and family dispute resolution processes; and the possibility that failure to indicate family violence could inappropriately lead to an assumption that there is no family violence. These and other concerns must be fully considered.<sup>82</sup>

22.61 The Dispute Resolution Committee of the Law Society of New South Wales expressed strong objections to the proposed amendments to ss 10E and 10J, arguing that if FDR practitioners were to commence giving evidence of disclosures made during FDR, parties will be guarded about what they say during FDR, and FDR

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79 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010. See also, Ch 6, which considers the potential role of typologies of family violence in the law, including separation-instigated violence.

80 J Stubbs, *Submission FV 186*, 25 June 2010. Another stakeholder suggested that admissibility of such disclosures should be limited to cases where adult victims of violence wished the evidence to be before the court and that adults should be able to state the effects on their children of exposure to violence, if recommended by a clinical psychologist: Confidential, *Submission FV 162*, 25 June 2010.

81 National Legal Aid, *Submission FV 232*, 15 July 2010.

82 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010. Women's Legal Services NSW also commented that any increased disclosure and information sharing would require prior informed consent: '[t]he makers of disclosures must be fully informed of the consequences of disclosure and have control over how the information is used in family law proceedings.'

practitioners will avoid being required to give evidence and being subjected to cross-examination.<sup>83</sup>

22.62 In another submission objecting to the proposed amendments, Geoff Charlton, an FDR practitioner, expressed serious concerns about drawing FDR practitioners into adversarial litigation processes and using largely untested claims of violence made in FDR in subsequent litigation. Charlton noted that FDR is not concerned with evidentiary proof, and warned that superimposing the culture and requirements of litigation on FDR would reduce its effectiveness. In Charlton's view, admissions of violence would not be made in FDR if they were to be subsequently used in court.<sup>84</sup>

22.63 As noted above, Domestic Violence Victoria and others, in a joint submission, expressed support for the Commissions' proposal to make disclosures regarding children's exposure to family violence admissible. The Commissions also note other comments made by these stakeholders with respect to improving evidence and information sharing generally. In their joint submission, Domestic Violence Victoria and others expressed the view that a shared understanding of risk factors and a common approach to risk assessment would improve the availability and quality of evidence to support claims of family violence in applications for protection orders through state and territory courts and parenting orders through federal courts. These stakeholders noted that:

Shared frameworks for supporting a woman to tell her story, and clear practice directions about asking questions about violence can assist her to tell her story more clearly, regardless of where she first presents for support. The flow on is that greater clarity and more detail about the violence that is available to the court will usually lead to good evidence to support the allegations.<sup>85</sup>

### ***Commissions' views***

22.64 Submissions highlighted the potentially significant implications of amending ss 10E and 10J to make disclosures of children's exposure to family violence admissible, and reflect significant differences in views on this matter.

22.65 The Commissions understand that exposure to family violence can have direct negative and serious effects on children.<sup>86</sup> The Commissions also accept that there can be considerable variation in the context and severity of the conflict between separating parents, and that this may affect the actual or likely detriment to children.

22.66 The Commissions note National Legal Aid's comment with respect to whether disclosures made by children about their exposure to family violence should be treated differently from disclosures made by adults. Disclosures made by a child about exposure to family violence may be significant in indicating detriment, or risk of

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83 Law Society of New South Wales, *Submission FV 205*, 30 June 2010, referring to the views of the Dispute Resolution Committee.

84 G Charlton, *Submission FV 240*, 9 August 2010.

85 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

86 See Ch 5 for a discussion of the effects of exposure of children to family violence.

detriment, to that child. In the absence of further submissions on this point, however, the Commissions do not have a sufficient basis upon which to make recommendations.

22.67 The Commissions have also considered the comments made by Chief Justice Bryant and Chief Federal Magistrate Pascoe with respect to the Family Court's CRP, and the willingness of participants in the CRP to raise issues or make disclosures, even though these communications may be admissible. The Commissions note, however, that CRP meetings between parents or carers, children and family consultants are different from FDR. The CRP is designed to complement and assist court processes and judicial decision making, rather than as a stand-alone alternative dispute resolution process. As an adjunct to court proceedings, it is logical that communications and disclosures made within the CRP may be treated as evidence to assist in the determination of the dispute before the court. In the Commissions' view, therefore, communications in the court-related environment of CRP meetings are not readily comparable with communications in the non-court environment of FDR.

22.68 The Commissions acknowledge the difficulties associated with gathering evidence of family violence. The Commissions have, therefore, given careful consideration to balancing the courts' need for evidence of children's exposure to family violence with the need to protect the integrity of FDR processes and family counselling relationships.

22.69 The Commissions note that the Family Court's CRP involves a comprehensive family violence screening and risk assessment process, including specific questions about children's exposure to family violence. As noted above, communications and disclosures made in CRP meetings are admissible in family law proceedings. In the Commissions' view, this is a more appropriate mechanism than FDR or family counselling for gathering evidence about children's exposure to family violence for the purposes of family law proceedings.

22.70 Below, the Commissions recommend that ss 10E and 10J be amended to clarify that they apply to state and territory courts when they are not exercising family law jurisdiction. The Commissions have considered the need for evidence of children's exposure to family violence for the purposes of non-family law proceedings. In particular, the Commissions have considered whether the value of evidence from FDR or family counselling about children's exposure to family violence would outweigh the significant implications of making such evidence admissible.

22.71 Disclosures about a child's exposure to family violence, made in the context of a non-forensic FDR process or non-forensic family counselling, are not tested and reviewed with appropriate legal safeguards. In the Commissions' view, such disclosures will, as a consequence, have limited evidentiary value. This limited value does not outweigh the significant implications of amending ss 10E and 10J to make such disclosures admissible.

22.72 The Commissions note stakeholder concerns about the implications of amending ss 10E and 10J, discussed above. In addition, the Commissions note that some of the concerns raised by stakeholders with respect to the Commissions' proposal to include information about family violence on s 60I certificates, discussed below, may also be

relevant in the context of admissibility of disclosures relating to family violence generally. In particular, the Commissions note the concern that if such disclosures can be used as evidence in legal proceedings, parties may be less open or may conceal information about family violence in FDR and family counselling. This would compromise the potential for safe arrangements and agreements to be made, and for appropriate outcomes to be secured through FDR and family counselling. As a consequence, victims of family violence could be exposed to greater risk.

22.73 As noted above, the Commissions acknowledge the difficulties associated with gathering evidence for family violence. The Commissions consider the difficulties of giving evidence of family violence to different courts in Chapter 18 of this Report. The Commissions note, in Chapter 18, that risk assessment is a key way in which courts can identify and respond to family violence. The Commissions further note that a common approach to risk assessment, across all jurisdictions, would mean that the needs of victims of family violence are consistently understood and addressed by all service providers, including courts and lawyers. In their comments about common risk assessment, referred to above, Domestic Violence Victoria and others expressed the view that a common approach to risk assessment would improve the evidence given to support claims of family violence before courts.

22.74 In this Report, the Commissions have made a number of recommendations in relation to definitions of family violence, additional education, training and specialisation of judicial and court officers and legal practitioners, and in relation to improving the quality of evidence supporting family violence allegations. The Commissions are of the view that the implementation of these recommendations, together with a common approach to risk assessment, will assist courts and legal practitioners in addressing family violence concerns in legal proceedings.

22.75 Having considered stakeholders' comments and the issues discussed above, the Commissions conclude that the arguments in favour of making disclosures of children's exposure to family violence admissible do not outweigh the public interest in protecting the integrity and ability of FDR and family counselling to secure safe outcomes for victims of family violence.

### **Other disclosures of family violence**

22.76 In the Consultation Paper, the Commissions sought stakeholder views as to whether ss 10E and 10J of the *Family Law Act* should be amended to enable the admission of communications made to family counsellors and FDR practitioners which disclose family violence, and if so, what limits should be placed on the admissibility of such evidence.<sup>87</sup>

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87 Consultation Paper, Question 10–15.

### ***Submissions and consultations***

22.77 A number of stakeholders indicated support for amendments to make disclosures of family violence admissible.<sup>88</sup> The Queensland Law Society and the Law Council of Australia were of the view that the amendment should be made subject to the current restriction on admissibility in ss 10E and 10J—that is, admissions or disclosures of children’s exposure to family violence should be admissible, unless, in the opinion of the court, there is sufficient evidence of the admission or disclosure available to the court from other sources.<sup>89</sup> The Dispute Resolution Committee of the Law Society of New South Wales, however, expressed strong objections to admissibility of disclosures of family violence, and referred to the same arguments it made against admissibility of disclosures about a child’s exposure to family violence.<sup>90</sup> Professor Stubbs also noted the risk of deterring frank discussions with FDR practitioners and family counsellors, which could be counterproductive.<sup>91</sup> National Legal Aid also indicated it had reservations and referred to its comments with respect to admissibility of disclosures about a child’s exposure to family violence.<sup>92</sup>

### ***Commissions’ views***

22.78 The Commissions consider that many of the concerns arising in the context of disclosures about a child’s exposure to family violence, also arise in relation to making disclosures of family violence admissible. As with disclosures about a child’s exposure to family violence, the potential implications of amending ss 10E and 10J to make disclosures relating to family violence admissible are significant. As well as concerns raised in the submissions discussed above, some of the concerns raised with respect to the Commissions’ proposal to include information about family violence on s 60I certificates may also be relevant in the context of admissibility of disclosures relating to family violence generally.<sup>93</sup> The possibility that parties will be less open, or will conceal information about family violence in FDR and family counselling because

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88 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 82*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010. The Women’s Legal Service Queensland indicated that such amendments should ‘probably’ be made: Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010. One stakeholder was of the view that written communications and possibly case notes, taken by the counsellor at the time the admissions were made, should be admissible: Confidential, *Submission FV 96*, 2 June 2010. Another stakeholder commented that family counsellors and FDR practitioners should be required to disclose such information: C Pragnell, *Submission FV 70*, 2 June 2010.

89 Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

90 Law Society of New South Wales, *Submission FV 205*, 30 June 2010, referring to the views of the Dispute Resolution Committee.

91 J Stubbs, *Submission FV 186*, 25 June 2010.

92 National Legal Aid, *Submission FV 232*, 15 July 2010.

93 Section 60I certificates are discussed further, below.

disclosures may be used as evidence, is of particular concern. This would compromise the potential for safe and appropriate outcomes to be secured through FDR and family counselling; consequently victims and potential victims of family violence may be exposed to greater risk.

22.79 As noted above, the Family Court's CRP involves a comprehensive family violence screening and risk assessment process, including specific questions about the frequency, pattern and type of any violence. In the Commissions' view, this is a more appropriate mechanism than FDR or family counselling for gathering evidence about family violence for the purposes of family law proceedings.

22.80 The Commissions have also considered the need for evidence of family violence for the purposes of non-family law proceedings. As with disclosures about a child's exposure to family violence, the Commissions are of the view that disclosures about family violence made in FDR or family counselling have limited evidentiary value. This limited value does not, in the Commissions' view, outweigh the significant implications of amending ss 10E and 10J to make such disclosures admissible. The Commissions reiterate their comments above with respect to other measures for improving evidence of family violence in legal proceedings. As noted above, implementation of the Commissions' recommendations in relation to: definitions of family violence; additional education, training and specialisation of judicial and court officers and legal practitioners; improving the quality of evidence supporting family violence allegations; and a common approach to risk assessment, will better assist courts and legal practitioners in addressing family violence concerns in legal proceedings.

22.81 As with disclosures about a child's exposure to family violence, the Commissions conclude that the arguments in favour of making disclosures about family violence admissible do not outweigh the public interest in protecting the integrity and ability of FDR and family counselling to secure safe outcomes for family violence victims and those at risk of family violence.

### **Application of sections 10E and 10J to state and territory courts**

22.82 Communications to family counsellors and FDR practitioners may be relevant to family violence and child protection matters before state and territory courts, as well as to matters before the family courts. In the Consultation Paper, the Commissions asked whether ss 10E and 10J should be amended to apply expressly to state and territory courts when they are not exercising family law jurisdiction.<sup>94</sup>

22.83 Sections 10E(1) and 10J(1) provide that FDR and family counselling communications are not admissible:

- in any court (whether or not exercising federal jurisdiction); or

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94 Consultation Paper, Question 10–16.

- in any proceedings before a person authorised to hear evidence (whether authorised by a Commonwealth, state or territory law, or by consent of the parties).

22.84 In *Anglicare (WA) v Department of Family and Children's Services*, the Supreme Court of Western Australia held that the prohibition on admissibility ‘in any court (whether or not exercising federal jurisdiction)’ set out in s 19N of the *Family Law Act*—the predecessor to the current s 10E—was limited by the definition of ‘court’ in s 4 of the *Family Law Act* to the court exercising jurisdiction in the *Family Law Act* proceedings. Accordingly, the inadmissibility provisions did not extend to proceedings in the Children’s Court of Western Australia.<sup>95</sup>

22.85 Similar reasoning was used by the majority of the Supreme Court of South Australia in *R v Liddy (No 2)* to permit the admission of *Family Law Act* counselling records in criminal proceedings. However, in a dissenting opinion, Wicks J expressed the view that ‘any court (whether exercising federal jurisdiction or not)’ should be interpreted more broadly:

Where non-federal jurisdiction, ie State jurisdiction, is concerned, the words (whether exercising federal jurisdiction or not) clearly make the expression ‘court’ applicable to courts generally, including this court, the Supreme Court of South Australia.

If the expression ‘court’ is used to have the widest possible meaning and is not limited merely to courts exercising federal jurisdiction relating to family law, the structure of sub-s (2) is logical. The sub-section begins by prohibiting courts of every complexion and whether exercising federal or State jurisdiction, from admitting into evidence anything said at a meeting or conference to which the sub-section applies. Par (b) then proceeds to deal with tribunals, mediations and arbitrations where the bodies concerned are authorised to hear evidence. In other words, sub-s (2) embraces the entire field in Australia of bodies authorised to hear evidence, be they courts or otherwise, from admitting into evidence anything said or any admission made at a meeting or conference referred to in the sub-section. ...

It seems to me that it would be illogical to limit the operation of the section to a few courts which deal with family law and yet to express par (b) in the widest possible terms specifically including persons authorised by a law of the Commonwealth, or of a State or territory or even by the consent of the parties, to hear evidence.<sup>96</sup>

22.86 The Commissions note that the Australian Government Attorney-General’s Department—in guidance material for FDR practitioners and family counsellors published on the Department’s website—has indicated that ss 10E and 10J extend to state and territory courts when they are not exercising family law jurisdiction. With respect to s 10E, the Attorney-General’s Department’s resource for FDR practitioners, *Frequently Asked Questions: Family Dispute Resolution Practitioner Obligations*, explains that ‘[c]ommunications made in family dispute resolution are not admissible

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95 In this case, the communications to the family counsellor were inadmissible due to s 64(2) of the *Family Court Act 1997* (WA): *Anglicare (WA) v Department of Family and Children's Services* (2000) 26 Fam LR 218.

96 *R v Liddy (No 2)* (2001) 79 SASR 401, [24]–[26].

in any court or proceedings, in any jurisdiction'.<sup>97</sup> The Attorney-General's Department's resource for family counsellors, *Family Counsellors in the Family Law System*, also explains that '[s]ections 10E and 10J of the *Family Law Act* provide that a communication made in family counselling (and family dispute resolution) is not admissible in any court or proceedings, in any jurisdiction'.<sup>98</sup>

### ***Submissions and consultations***

22.87 There was some support in submissions for amendments to expressly apply ss 10E and 10J to state and territory courts when they are not exercising family law jurisdiction.<sup>99</sup>

22.88 The Family Issues Committee of the Law Society of New South Wales expressed strong opposition to such amendments because, in the Committee's view, ss 10E and 10J operate inappropriately and potentially to the detriment of children.<sup>100</sup> The Dispute Resolution Committee of the Law Society of New South Wales, on the other hand, expressed its strong support for amendments to expressly apply ss 10E and 10J to state and territory courts on the basis of the Committee's view that the existing admissibility provisions in ss 10E and 10J operate appropriately and so should apply to state and territory courts.

### ***Commissions' views***

22.89 The Commissions note that there is no clear policy rationale for making communications to family counsellors and FDR practitioners inadmissible in *Family Law Act* proceedings but admissible in protection order proceedings or child protection proceedings under state and territory family violence or child protection legislation.

22.90 Consistency in the application of admissibility rules for FDR and family counselling communications across jurisdictions is important for both fairness and certainty. The Commissions consider that ss 10E and 10J should be amended to make it clear that the application of these provisions extends to state and territory courts when they are not exercising family law jurisdiction.

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97 Australian Government Attorney-General's Department, *Frequently Asked Questions: Family Dispute Resolution Practitioner Obligations* (2009).

98 Australian Government Attorney-General's Department, *Family Counsellors in the Family Law System* (2007).

99 Law Society of New South Wales, *Submission FV 205*, 30 June 2010, referring to the views of the Dispute Resolution Committee; Queensland Law Society, *Submission FV 178*, 25 June 2010. The Law Council of Australia indicated support for extending the exceptions in ss 10E and 10J to state and territory courts exercising family violence jurisdiction: Law Council of Australia, *Submission FV 180*, 25 June 2010. National Legal Aid was of the view that, in principle, any amendments to the confidentiality and admissibility provisions should also apply to state and territory courts when they are not exercising federal jurisdiction. In making this comment, however, National Legal Aid referred to its reservations with respect to amendments to admit disclosures about children's exposure to family violence as suggested in Proposal 10–10 of the Commissions' Consultation Paper: National Legal Aid, *Submission FV 232*, 15 July 2010.

100 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

**Recommendation 22–4** Sections 10E and 10J of the *Family Law Act 1975* (Cth), which regulate the admissibility of family dispute resolution and family counselling communications, should be amended to state expressly that the application of these provisions extends to state and territory courts not exercising family law jurisdiction.

## Section 60I Certificates: information about family violence

22.91 As discussed in Chapter 21, s 60I of the *Family Law Act* requires that, before applying for an order under pt VII of the Act (child-related proceedings), a person must first make a genuine effort to resolve the dispute by FDR. Subject to certain exceptions—including where the court is satisfied that there are reasonable grounds to believe that there has been, or there is a risk of, family violence by one of the parties to the proceedings—a court must not hear an application for such an order unless the applicant has filed a certificate from an FDR practitioner (a s 60I certificate).

22.92 A s 60I certificate may be issued on a number of grounds, including on the basis of an assessment by an FDR practitioner that ‘it would not be appropriate’ to conduct or continue FDR.<sup>101</sup> Such an assessment requires the FDR practitioner to consider whether the ability of a party to negotiate freely is affected by one or more of a number of factors, all of which are potentially relevant to violence.<sup>102</sup> The required form for s 60I certificates, however, allows the FDR practitioner to do no more than nominate the ground upon which the certificate is issued.<sup>103</sup> Where a s 60I certificate indicates that ‘it would not be appropriate’ to conduct or continue FDR, for example, it will not state why FDR was considered inappropriate.

22.93 In a submission to the 2009 *Family Courts Violence Review* undertaken by Professor Richard Chisholm (the Chisholm Review), Family Relationships Service Australia submitted that:

Currently Family Dispute Resolution practitioners have limited options for passing on information about risks identified to the Family Court where this would be appropriate. The Certificates prescribed in Section 60I of the *Family Law Act* allow for limited identification of reasons why Family Dispute Resolution is either inappropriate or unsuccessful.<sup>104</sup>

22.94 The Chisholm Review suggested that ‘it may prove useful’ to reconsider the drafting of s 60I of the *Family Law Act*.<sup>105</sup>

<sup>101</sup> Sections 60I(8)(aa) and (d). The other grounds upon which certificates may be issued are: a party did not attend FDR due to the refusal or failure of the other party (or parties) to attend (s 60I(8)(a)); the parties attended FDR with the practitioner, and all parties made a genuine effort to resolve the issue or issues (s 60I(8)(b)); the party attended FDR with the practitioner, but that party, or another party did not make a genuine effort to resolve the issue or issues (s 60I(8)(c)).

<sup>102</sup> See *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25(2).

<sup>103</sup> See *Ibid* reg 27(1), sch 1, which includes the *Certificate by Family Dispute Resolution Practitioner* form.

<sup>104</sup> R Chisholm, *Family Courts Violence Review* (2009), 77.

<sup>105</sup> *Ibid*.

22.95 The Family Law Council considered the issue in more detail its 2009 report. In its view

the function of the Certificate as simply the vehicle which authorises parties to move to litigation does not reflect the financial investment by Government in creating family relationship centres, or the skill of the family dispute resolution practitioner in working with the family to provide guidance to the Court as to the program or services best suited to the needs of the participants. In discussions with Family Relationship Centres, legal aid and others, the Council was not able to ascertain a consensus across all of the relevant agencies as to whether Family Relationship Centres could have some responsibility for communicating relevant information to the court without it compromising the inadmissibility of the intervention, or the anonymity of a violence allegation thereby placing a victim at risk.<sup>106</sup>

22.96 The Council noted that ‘many unintended consequences’ would flow from changing the role of the FDR practitioner in this way, including: the need for increased funding for the additional report writing skills and tasks required; the probability that FDR practitioners would have to testify about their methods and conclusions; and the disincentive for those committing violence to participate in, and for victims to disclose violence in, FDR processes.<sup>107</sup> The Council’s recommendation was that an options paper be written, outlining the advantages and disadvantages of reforms in this area, for comment by stakeholders.<sup>108</sup>

22.97 In the Consultation Paper, the Commissions proposed that s 60I certificates should include information about why FDR was inappropriate or unsuccessful—for example, because there has been, or would be a future risk of family violence by one of the parties to the proceedings.<sup>109</sup>

### ***Submissions and consultations***

22.98 Some of the submissions received by the Commissions indicated unequivocal support for the inclusion of additional information relating to family violence concerns in s 60I certificates.<sup>110</sup> Chief Justice Bryant of the Family Court of Australia and Chief

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106 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), [10.7.1].

107 Ibid.

108 Ibid, Rec 8.1.

109 Consultation Paper, Proposal 10–7.

110 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Confidential, *Submission FV 160*, 24 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010 (as long as the information is restricted to family violence, child abuse or personal safety risks); The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell,

Federal Magistrate Pascoe noted in their submission that there is merit in at least limited information being included in s 60I certificates to the effect that FDR was inappropriate or ineffective because of family violence.<sup>111</sup> Legal Aid NSW argued that some indication of risk of harm should be included in s 60I certificates because at the early or interim stage of a matter, a s 60I certificate may be one of the only sources of independent information available to a judicial officer who, otherwise, has to rely on the uncontested evidence of parties and the quality of their representation.<sup>112</sup> The Women's Legal Service Queensland commented that, given that family violence is often very hard to prove, the inclusion of such additional information on s 60I certificates may provide some limited corroboration.<sup>113</sup>

22.99 In contrast, the Law Council of Australia and the Peninsula Community Legal Centre, although supporting the inclusion of such additional information, commented that the information should only be used for screening and risk assessment purposes and not as evidence of a disputed allegation.<sup>114</sup> A number of submissions opposing the proposed inclusion of additional information relating to family violence raised significant objections. These objections are discussed below.

#### ***Undermining the nature of FDR***

22.100 Submissions opposing the proposed inclusion of additional information pointed to the benefits of FDR in encouraging and allowing parties to raise matters on a confidential basis and to discuss options for settlement without prejudice and outside court processes. It was argued that the culture of alternative dispute resolution is open and co-operative, not adversarial.<sup>115</sup> There was concern that publication of the factors that made FDR inappropriate would undermine the fundamental nature and benefits of a private, confidential out-of-court dispute resolution process.<sup>116</sup> It was argued that undermining the confidentiality of the FDR process makes FDR less effective and less attractive,<sup>117</sup> and that lack of confidentiality may discourage disclosure and honesty in communications.<sup>118</sup> Concern was also expressed about the undermining of FDR practitioner neutrality and impartiality.<sup>119</sup>

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Submission FV 70, 2 June 2010; National Peak Body for Safety and Protection of Parents and Children, Submission FV 47, 24 May 2010; M Condon, Submission FV 45, 18 May 2010.

111 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, Submission FV 168, 25 June 2010.

112 Legal Aid NSW, Submission FV 219, 1 July 2010.

113 Women's Legal Service Queensland, Submission FV 185, 25 June 2010.

114 Law Council of Australia, Submission FV 180, 25 June 2010; Peninsula Community Legal Centre, Submission FV 174, 25 June 2010.

115 G Charlton, Submission FV 240, 9 August 2010.

116 National Legal Aid, Submission FV 232, 15 July 2010; O Rundle, Submission FV 50 27 May 2010. In general comments relating to the Consultation Paper's Proposals 10–7 to 10–15 and Questions 10–12 to 10–20, the Women's Legal Services NSW also expressed concern about the effect of increased disclosure and information sharing on integrity of FDR processes: Women's Legal Services NSW, Submission FV 182, 25 June 2010.

117 National Legal Aid, Submission FV 232, 15 July 2010.

118 For example, G Charlton, Submission FV 240, 9 August 2010; O Rundle, Submission FV 50 27 May 2010.

119 G Charlton, Submission FV 240, 9 August 2010; Law Society of New South Wales, Submission FV 205, 30 June 2010, referring to the views of the Dispute Resolution Committee. The Dispute Resolution Committee noted that parties for whom FDR is not appropriate should be referred to family consultants.

### ***Section 60I certificates as signals of family violence concerns***

22.101 In the Consultation Paper, the Commissions noted that federal magistrates have pointed to the benefit of s 60I certificates signalling that a proceeding under pt VII of the *Family Law Act* involves family violence concerns.<sup>120</sup> However, as acknowledged by the FRSA, and noted by Chief Justice Bryant and Chief Federal Magistrate Pascoe, the limited amount of information currently included in s 60I certificates constrains their potential for passing on information about family violence concerns.<sup>121</sup>

22.102 On this point, it was argued that a s 60I certificate indicating simply that a matter was not appropriate for FDR should be sufficient to trigger an investigation by the court, and that in such cases parties should be referred to the court's family consultants for a report.<sup>122</sup> Submissions also indicated that the provision of more detailed information on s 60I certificates based on FDR practitioners' assessments would not remove the need for such further screening and assessment.<sup>123</sup>

22.103 In its submission, the Australian Institute of Family Studies (AIFS) cautioned against expansion of the role of s 60I certificates to include more specific information about allegations and admissions. In the view of AIFS the existing option for indicating on s 60I certificates that a matter is inappropriate for FDR does provide a mechanism to send a clear signal to a court (or to an advocate) that there are indications that something is 'seriously wrong'.<sup>124</sup> AIFS also commented, however, that while such a signal would be expected to trigger a response from lawyers or courts, the data from AIFS' evaluation of the 2006 family law reforms suggest that this rarely happens.<sup>125</sup> This observation was supported in the submission by the FRSA.<sup>126</sup>

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120 Federal Magistrates Court, *Consultation*, Sydney, 3 February 2010.

121 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

122 Dispute Resolution Committee, Law Society of New South Wales, *Submission FV 205*, 30 June 2010. Family consultants are psychologists and/or social workers who specialise in child and family issues after separation and divorce: Family Court of Australia and Federal Magistrates Court of Australia, *Fact Sheet—Family Consultants*. They are employed by the family law courts to assist and advise parties and courts in family law proceedings. Amongst other things, they may provide reports to the court and give evidence on matters relevant to the care, welfare and development of children. Communications with a family consultant are not confidential and are admissible as evidence. A court must consider seeking the advice of a family consultant before exercising certain powers, including the power to order that a person attend FDR: *Family Law Act 1975* (Cth) ss 11A, 11B, 11C, 11E, 55A, 62.

123 National Legal Aid, *Submission FV 232*, 15 July 2010; Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

124 This view is based on qualitative data from the Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009). See Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

125 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

126 The FRSA makes the observation that 'the Family Courts rarely rely on the type of Certificate issued for any purpose and the Certificate goes on file but rarely comes before the judicial officer': Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

***The role of FDR practitioners is not forensic***

22.104 Submissions expressed concern about the possibility that information about family violence on s 60I certificates would be regarded as evidence.<sup>127</sup>

22.105 The FRSA commented that it is not the role of the FDR practitioner to form a judgment about allegations of violence that have been contested or denied and expressed concern about the potential for the s 60I certificate to become part of the dispute and another point of contest.<sup>128</sup> Dr Rundle noted the negative implications of FDR practitioners being subjected to cross-examination about their methods and conclusions.<sup>129</sup>

22.106 AIFS commented that treating information about family violence on s 60I certificates as evidence would be ‘problematic’. FDR practitioners do not perform a forensic function and must accept communications from the parties at face value.<sup>130</sup> National Legal Aid commented that untested screening and risk assessments by FDR practitioners and counsellors cannot replace screening and assessment in the court context where evidence can be tested and reviewed.<sup>131</sup>

***Other unintended consequences of including additional information about family violence on s 60I certificates***

22.107 Submissions also pointed to the possibility that publication of allegations of violence on s 60I certificates, which are provided to both parties, may place victims—and FDR practitioners—at risk of retaliation by alleged perpetrators,<sup>132</sup> particularly where a victim has raised concerns with an FDR practitioner without the knowledge of the perpetrator.<sup>133</sup> While the National Council of Single Mothers agreed that s 60I certificates could include additional information about family violence, this stakeholder commented that a more effective method should be developed for passing on

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127 As noted above, some support for the inclusion of such information on s 60I certificates was given on the basis that the information only be used for screening and risk assessment purposes and not as evidence of a disputed allegation.

128 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

129 Rundle referred to the financial burden on service providers, FDR practitioners being taken away from direct service activity and the possible financial cost for self-employed FDR practitioners: O Rundle, *Submission FV 50* 27 May 2010.

130 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010. AIFS commented that while acceptance of these communications will affect how or whether FDR continues, it is not the FDR practitioner’s role to make judgments about substantive issues. Geoff Charlton, an FDR practitioner, also commented that FDR is not an investigatory process and is not concerned with evidentiary proof: G Charlton, *Submission FV 240*, 9 August 2010.

131 National Legal Aid, *Submission FV 232*, 15 July 2010. The One in Three Campaign also expressed concern about untested allegations being placed before the court: One in Three Campaign, *Submission FV 35*, 12 May 2010.

132 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010; O Rundle, *Submission FV 50* 27 May 2010. National Legal Aid was also concerned that the provision of more detailed information on s 60I certificates may place victims of family violence at risk: National Legal Aid, *Submission FV 232*, 15 July 2010.

133 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010. In general comments relating to the Consultation Paper’s Proposals 10–7 to 10–15 and Questions 10–12 to 10–20, the Women’s Legal Services NSW also expressed concern about the potential risk of harm to the person disclosing violence: Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

information to avoid putting victims who raise family violence concerns at risk.<sup>134</sup> Another stakeholder, a legal service provider, indicated general reservations about any amendments ‘which compromise mediation processes as a safe and confidential space where everything can be frankly discussed and all relevant information put on the table without fear of repercussions’.<sup>135</sup>

22.108 The Aboriginal Family Violence Prevention and Legal Service Victoria (AFVPLS Victoria) commented that, for various reasons, including reluctance of Indigenous women to disclose, there are problems with Family Relationship Centres identifying family violence experienced by Indigenous people. AFVPLS Victoria noted that if a certificate fails to mention family violence, it may become problematic for the victim to raise family violence in later proceedings.<sup>136</sup> Women’s Legal Services NSW also expressed concern that failure to indicate family violence could lead to an incorrect assumption that there is no family violence.<sup>137</sup>

#### *Alternatives to including additional information on s 60I certificates*

22.109 The FRSA supported greater information sharing by FDR practitioners with the courts about risks identified during the provision of family and relationship services. The FRSA noted, however, that s 60I certificates ‘are not the best or only mechanism for achieving this’. Rather than making the s 60I certificate an information sharing mechanism, the FRSA favoured retaining the current purpose of s 60I certificates—that is, as verification that a party has fulfilled the obligation to attempt FDR before going to court.

22.110 As an alternative, the FRSA supported the recommendation of the Chisholm Review for the development of a mechanism to improve information sharing as part of a broader approach to risk assessment. In particular, the FRSA indicated support for common risk assessment to incorporate mechanisms that would allow FDR practitioners and family counsellors to make case management recommendations to the court for management of the early stages of the case. In the FRSA’s view, this could obviate the need for s 60I certificates to contain additional information.<sup>138</sup>

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134 National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

135 Confidential, *Submission FV 164*, 25 June 2010.

136 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

137 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010. Alexandra Harland also queried what inference would be drawn if a party alleged violence in court proceedings, but the FDR practitioner had decided not to refer to violence on the s 60I certificate: A Harland, *Submission FV 80*, 2 June 2010.

138 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010. The FRSA indicated that case management recommendations could operate similarly to a referral from a General Practitioner to a specialist or a diagnostic service, including suggestions on how the case might be managed and what further assessment might be warranted. As an example, The FRSA have suggested that an FDR practitioner could alert the Family Court Registrar to a concern about a parent’s behaviour, and recommend that the case be ‘fast tracked’ or make suggestions such as the use of a children’s contact or family violence program. The FRSA have suggested that case management advice might include the practitioner’s assessment of urgency, safety concerns (in very general terms, for example recommending the appointment of an independent children’s lawyer, and giving a rating from a scale to indicate the existence of any safety issues and whether these are significant), and procedural fairness issues (case management recommendations to the Court that an interpreter, advocate or liaison worker be involved to assist the process).

22.111 The National Council of Single Mothers and their Children suggested that screening and assessment through an integrated response framework, with information sharing across services and a standardised risk assessment and risk management framework, might be one way of dealing with concerns about the safety of women who raise concerns about violence during the mediation process.<sup>139</sup>

22.112 According to AIFS it could be argued that, for the sake of any children involved, all cases deemed inappropriate for FDR deserve a rapid and informed response if parties subsequently pursue legal avenues to resolve their dispute. As noted above, AIFS has suggested that the s 60I certificate signal, which is currently rarely acted upon, could be amplified if the s 60I certificate categories were simplified from the existing five to three categories,<sup>140</sup> one of which could indicate that the matter was not suitable for FDR. This suggestion involves removing the s 60I certificate categories relating to whether or not the parties have made a ‘genuine effort’ to resolve their dispute through FDR. AIFS notes that interviews with dispute resolution practitioners undertaken for the AIFS evaluation indicated that most FDR practitioners regard the ‘genuine effort’ categories as problematic—‘mainly because they introduce a level of judgment about client motivation that is seen as largely incompatible with the role of an FDR [practitioners].’<sup>141</sup>

22.113 In its submission, National Legal Aid argued that, rather than diluting the current confidentiality of the FDR process, adequate resources need to be provided to the family law courts for screening and assessment and for timely and appropriate determination of these matters. National Legal Aid has also suggested appropriate education for registry staff, family consultants, and judicial officers on the need for screening and risk assessment where a certificate that a matter was inappropriate for FDR is issued. A further suggestion is that an amendment to the s 60I certificate could be made to include an optional alternative clause in the certificate allowing the FDR practitioner to recommend that the court conduct screening and risk assessment in the matter. This would draw the court’s attention to the existence of issues such as family violence as a factor for consideration in their case management process.<sup>142</sup>

#### ***Commissions’ views***

22.114 The Commissions accept that requiring FDR practitioners to perform a forensic role for the purpose of including additional information, as proposed, will change the role of FDR practitioners, and that this is undesirable.

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139 National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

140 For a description of the existing five categories, see above.

141 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010. On this point, Dr Rundle similarly argued that the requirement to make judgments about ‘genuine effort’ undermines the perception of practitioner impartiality: O Rundle, *Submission FV 50* 27 May 2010. In its submission, AIFS also discussed the possibility of passing information from the family relationship sector to the court through a validated screening and assessment self-reporting tool; the self-reported information generated would belong to the client, who could decide later to tender it as evidence in court.

142 National Legal Aid, *Submission FV 232*, 15 July 2010. National Legal Aid also suggested that such education may be appropriate where a s 60I certificate indicating that one of the parties failed or refused to attend FDR is issued. National Legal Aid argued that in some cases a party may not attend FDR because of a history of family violence, and may or may not have disclosed this to the FDR organisation.

22.115 The Commissions note concerns about reluctance of some Indigenous women to disclose family violence. Considerations relating to factors inhibiting disclosure are also relevant in relation to CALD women.<sup>143</sup> The various factors which affect the identification of family violence experienced by Indigenous and CALD women, including reluctance to disclose, may be better addressed through culturally sensitive screening and risk assessment at appropriate times through the course of proceedings. The Commissions do not consider that an option to provide more detailed information on s 60I certificates will adequately address these concerns or remove the need for ongoing screening through subsequent legal proceedings.

22.116 The Commissions accept that the recording of information about family violence on a s 60I certificate may be an incentive for perpetrators to conceal family violence in FDR; it may also discourage victims from disclosing violence. The Commissions are concerned, therefore, that compromising confidentiality of FDR communications by allowing additional information about family violence to be included on s 60I certificates, as proposed, may result in unsafe arrangements and agreements being made, and so place victims and potential victims of family violence at risk.

22.117 The Commissions accept that while the information currently included on s 60I certificates limit their potential for passing on information about family violence risks to family courts, the existing option to nominate that FDR is inappropriate does allow a s 60I certificate to function as a signal that family violence may be an issue. The Commissions agree that concerns about the failure of family courts and advocates to respond appropriately to s 60I certificates as a signal could be addressed by ensuring appropriate education of advocates, registry staff, family consultants, and judicial officers about the need for screening and risk assessment where such certificates have been issued.

22.118 Accordingly, the Commissions are of the view that s 60I certificates should not include information about why FDR was inappropriate or unsuccessful—for example, because there has been or is a future risk of family violence by one of the parties.

22.119 The Commissions note advice from the Australian Government Attorney-General's Department that the Department is developing a common risk assessment framework to support screening and risk assessment across the family law system.<sup>144</sup> While the Commissions understand that this is a framework rather than a tool, the Commissions believe this will create an opportunity for considering alternative mechanisms for identifying family violence as a concern.

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143 See, eg, Australian Human Rights Commission, *In Our Own Words: African Australians, a Review of Human Rights and Social Inclusion Issues* (2010); L Bartels, *Emerging Issues in Domestic/Family Violence Research* (April 2010), prepared for the Australian Institute of Criminology; S Armstrong, 'Culturally Responsive Family Dispute Resolution in Family Relationship Centres' (2009) 13 *Family Relationships Quarterly* 3; Women's Legal Services New South Wales, *Long Way to Equal: An Update of 'Quarter Way to Equal: a Report on Barriers to Access to Legal Services for Migrant Women'* (2007); Department for Victorian Communities, *CALD Women's Project: Final Report*, December 2005.

144 Australian Government Attorney-General's Department, *Submission FV 166*, 25 June 2010.

**Recommendation 22–5** The Australian Government Attorney-General’s Department should coordinate the collaborative development of education and training—including cross-disciplinary training—for family courts’ registry staff, family consultants, judicial officers and lawyers who practise family law, about the need for screening and risk assessment where a certificate has been issued under s 60I of the *Family Law Act 1975* (Cth) indicating a matter is inappropriate for family dispute resolution.



## 23. Intersections and Inconsistencies

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### Contents

Introduction	1055
ADR in family violence legislation	1056
Interaction between FDR and protection orders	1063
Inconsistencies between protection orders and participation in FDR	1063
The role of family violence protection orders in FDR processes	1069
Dispute resolution in child protection—law and practice	1073
Family law, child protection and family violence intersections in ADR	1085
Restorative justice	1092

### Introduction

23.1 This chapter examines the use of alternative dispute resolution (ADR) processes in family violence, family law and child protection matters, and the potential for inconsistencies in practices and outcomes as well as the potential for seamless and effective resolution of issues that intersect across jurisdictions.

23.2 In Chapter 21, the Commissions consider potential benefits and concerns relating to the use of (family dispute resolution) FDR<sup>1</sup> in cases involving family violence. One of the difficulties associated with the use of FDR in this context is that of ensuring that victims are not attempting or participating in FDR inappropriately. In this chapter, the Commissions consider the role of family violence protection orders in assisting FDR practitioners to identify family violence, and to manage family violence risks appropriately and effectively as they undertake FDR processes. The Commissions also consider possible inconsistencies between family violence protection order conditions and the arrangements made for, or the requirements under, the *Family Law Act 1975* (Cth) to attend, FDR.

23.3 The use of ADR in relation to protection order applications generally raises concerns about the exposure of victims to danger, and the potential for unfair or unsafe agreements to be made. The dynamics that typically characterise family violence raise particular concerns about the safety of victims participating in ADR processes with those who have committed family violence, and the appropriateness and efficacy of ADR processes in this context. In Chapter 21, the Commissions discuss the legislative and policy framework regulating the use of FDR in cases involving family violence. In this chapter, the Commissions consider the need for consistency between approaches to

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<sup>1</sup> The term ADR is used at different points in this chapter to include FDR.

the use of ADR in matters arising under family violence legislation and to the use of FDR in family law matters involving family violence.

23.4 The use of ADR in child protection matters involving family violence also raises a number of concerns similar to those relating to the use of FDR in family law cases involving family violence. The risk of compromising the safety of children, as well as parents who are victims of family violence where risks of family violence are unidentified, inadequately assessed or inappropriately managed, are significant concerns. Nevertheless, the potential benefits of using ADR in child protection matters involving family violence are also significant. For example, ADR processes may be faster and more cost-effective than court processes. In addition, the potential of ADR to offer more flexible and culturally responsive procedures means that outcomes may be more effective and sustainable.

23.5 In this chapter, the Commissions consider whether there is a need for legislative or other reforms to ensure that ADR mechanisms in child protection matters address family violence appropriately. The Commissions also consider the disconnection between the family law and the child protection systems and the need for consistency in practices and outcomes across jurisdictions to ensure the protection of women and children. The potential for collaboration between professionals across socio-legal service systems and for resolution of complex and intersecting family law and child protection issues within the same, integrated, ADR process is significant, and may lead to important benefits for children and their families in cases involving family violence. The Commissions consider that there would be value in exploring ADR models that can overcome jurisdictional divides to offer seamless and effective responses to family violence.

23.6 Finally, this chapter briefly considers the application of restorative justice practices in the context of family violence and in relation to sexual assault offences.

## **ADR in family violence legislation**

23.7 In most Australian jurisdictions, there is no specific provision in family violence legislation empowering courts to refer parties to mediation, although there may be power to refer matters to mediation under other legislation.<sup>2</sup>

23.8 In the ACT, the Magistrates Court does have express power under the *Domestic Violence and Protection Orders Act 2008* (ACT) to recommend that the respondent or an aggrieved person take part in (amongst other things) mediation.<sup>3</sup> The *Domestic Violence and Protection Orders Act* also specifically mandates referral of matters to mediation in protection order proceedings involving family violence in certain circumstances.<sup>4</sup> Section 25 of the Act provides that if, during a preliminary conference for an application for a protection order,<sup>5</sup> the registrar is satisfied that the application is

<sup>2</sup> For example, see *Alternative Dispute Resolution Act 2001* (Tas) s 5(1).

<sup>3</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 89.

<sup>4</sup> The term ‘protection order’ is generally used throughout this Report to refer to a family violence protection order. See Ch 1 for discussion on definitions and terminology.

<sup>5</sup> This provision does not apply to emergency protection orders.

likely to be more effectively resolved by mediation than by a hearing, the registrar must:

- recommend mediation to the parties;
- give the parties information about mediation; and
- adjourn the preliminary conference to enable mediation.

23.9 The Act was amended to include this requirement in 2005. The Explanatory Statement for the relevant bill explains that the obligation ‘highlights the importance of alternative dispute mechanisms in preventing further violence by facilitating discussions between the parties to an order’.<sup>6</sup>

23.10 In NSW, there is legislative power to refer matters to mediation in relation to Apprehended Personal Violence Orders (APVOs),<sup>7</sup> but not in relation to Apprehended Domestic Violence Orders (ADVOs), which apply to domestic relationships, broadly defined.<sup>8</sup> This reflects the recommendations of the New South Wales Law Reform Commission (NSWLRC) in its 2003 report, *Apprehended Violence Orders*.<sup>9</sup> In that report, while the NSWLRC recommended an express legislative basis for referral to mediation in the context of APVOs,<sup>10</sup> it expressed the following view:

It should be emphasised that this section deals exclusively with mediation of APVO disputes. The Commission is of the view that mediation should not be encouraged in relation to ADVOs. The Commission concurs with the arguments put in submissions that the fear and imbalance of power typically characterising domestic violence makes mediation in ADVO matters unsuitable, unproductive and unsafe.<sup>11</sup>

23.11 Consistently with this view, the NSWLRC also considered that there should not be a power of referral in the case of APVOs where there was a history,<sup>12</sup> or allegations, of personal violence, or conduct amounting to serious harassment.<sup>13</sup> This view is reflected in the legislation.<sup>13</sup>

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6 Explanatory Statement, Domestic Violence and Protection Orders Amendment Bill 2005 (ACT). The present clause is the same as s 18A of the *Domestic Violence and Protection Orders Act 2001* (ACT), which was inserted by s 11 of the *Domestic Violence and Protection Orders Amendment Act 2005* (ACT). This clause was not discussed in the Legislative Assembly of the ACT during the passage of the latter Act.

7 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 21.

8 Ibid s 15.

9 New South Wales Law Reform Commission, *Apprehended Violence Orders*, Report 103 (2003), Ch 5.

10 Ibid, Rec 17.

11 Ibid, [5.50].

12 Ibid, [5.51].

13 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 21(2) provides that a matter is not to be referred to mediation if the court is of the opinion that there has been a history of physical violence to the protected person by the defendant; the protected person has been subjected to conduct by the defendant amounting to a personal violence offence or stalking or intimidation under s 13 of that Act; the defendant has engaged in conduct amounting to harassment relating to the protected person’s race, religion, homosexuality, transgender status, HIV/AIDS infection or disability; or there has been a previous attempt at mediation in relation to the same matter and the attempt was not successful. Further, the *Community Justice Centres Act 1983* (NSW) provides the Director with a discretion to decline any dispute: ss 20(3), 22, 24.

23.12 The NSWLRC considered the issue again in its 2005 review of Community Justice Centres, which provide mediation services in NSW.<sup>14</sup> It noted that negotiations concerning a return to a violent relationship or the level, frequency and the intensity of violence ‘will always be inappropriate’, a view which was reflected in the policy of the Community Justice Centres.<sup>15</sup>

23.13 Similarly to the NSW legislation, the *Intervention Order (Prevention of Abuse) Act 2009* (SA) distinguishes between protection orders in relation to family violence and other cases. Section 21(4) of that Act provides that a court must consider, in determining whether to dismiss an application, ‘whether it might be appropriate and practicable for the parties to attempt to resolve the matter through mediation or by some other means’. However, this only applies where the application alleges ‘non-domestic abuse’.<sup>16</sup>

23.14 In the Consultation Paper, the Commissions asked whether, in practice, ADR mechanisms are used in relation to protection order proceedings under family violence legislation and, if so, whether reforms are necessary to ensure these mechanisms are used only in appropriate circumstances.<sup>17</sup>

#### ***Submissions and consultations***

23.15 A number of stakeholders reported that ADR is either not used, or is used in very limited cases in some jurisdictions. In NSW, ADR is not used in family violence protection order proceedings because, as observed by Women’s Legal Services NSW, the prevailing view of the government, courts and legal aid is that mediation in these matters is inappropriate.<sup>18</sup> Similarly, the North Australian Aboriginal Justice Agency advised that mediation never takes place for family violence matters in the Northern Territory,<sup>19</sup> and Family Relationship Services Australia commented that FDR services do not report receiving referrals from local courts for ADR in protection order proceedings.<sup>20</sup>

23.16 According to the Magistrates’ Court and the Children’s Court of Victoria and the Aboriginal Family Violence Prevention and Legal Service Victoria (AFVPLS Victoria), ADR is used extremely rarely, if ever, in cases involving intimate partner relationships in Victoria.<sup>21</sup> However, ADR may be used for disputes involving other

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14 New South Wales Law Reform Commission, *Community Justice Centres*, Report 106 (2005), [4.31]–[4.41].

15 Ibid, [4.31]–[4.34]. The NSWLRC recommended that a list of factors indicating when mediation might be inappropriate be included in the *Community Justice Centres Act 1983* (NSW). This recommendation was not implemented in the subsequent *Community Justice Centres Amendment Act 2007* (NSW).

16 This provision is not discussed in the Second Reading Speech or canvassed in M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007).

17 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 11-4.

18 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

19 North Australian Aboriginal Justice Agency, *Consultation*, Darwin, 26 May 2010.

20 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

21 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

family members, such as disputes involving low level violence between a parent and child or between siblings.<sup>22</sup> The AFVPLS Victoria also noted that exceptions to conditions in protection orders are usually put in place to allow potential family law FDR to proceed.<sup>23</sup>

23.17 In other jurisdictions, stakeholders reported that ADR processes are used in protection order proceedings. The Women's Legal Centre (ACT & Region) reported that a conferencing process—although not called ADR—is used for protection order applications in ACT courts. This process is conducted by a Registrar in a shuttle model, often with unrepresented parties.<sup>24</sup> National Legal Aid advised that Tasmanian courts hearing protection order proceedings may, and do, refer matters to mediation with the court's dispute resolution service. However, National Legal Aid remarked that the level of expertise among court-provided mediators varies significantly as does judicial officers' recognition of issues relating to power imbalances and their sensitivity to the appropriateness or otherwise of mediation.<sup>25</sup>

23.18 The Queensland Government reported that Queensland courts may refer parties to ADR when making a domestic violence protection order, or parties may make their own application for ADR. Under s 25(2) of the *Domestic and Family Violence Prevention Act 1989* (Qld), a court may also require a respondent to attend ADR as a condition of a family violence protection order.<sup>26</sup> The Queensland Government advised that the use of mediation processes in situations involving family violence is subject to guidelines and practices to ensure the safety of the parties and the appropriateness of ADR. The guidelines provide, for example, that before approving a mediation process, the mediator must take into account any existing domestic violence protection order, whether any such order prohibits contact between the parties, and if there are any exceptions to contact for the purposes of mediation. The mediator must also consider whether the allegations of domestic violence are so serious as to put a party at risk of danger or power imbalance in the mediation. The Queensland Government stated that participation in ADR is voluntary, safeguards are put in place to address safety concerns and parties are free to end the mediation at any point.<sup>27</sup>

23.19 A number of stakeholders expressed support for the use of ADR in protection order proceedings. The Family Reform Association NSW advocated for ADR to be used as the preferred option for resolving protection order applications prior to hearing.<sup>28</sup> The Commissioner for Children (Tas) also supported the use of ADR to

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22 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010. In Victoria, the *Family Violence Protection Act 2008* (Vic) provides for protections orders in family violence cases.

23 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

24 Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

25 National Legal Aid, *Submission FV 232*, 15 July 2010.

26 Section 25(2) of the *Domestic and Family Violence Protection Act 1989* (Qld) provides 'When a court makes or varies a domestic violence order, it may also impose conditions on the respondent that the court considers—(a) necessary in the circumstances; and (b) desirable in the interests of the aggrieved, any named person and the respondent.'

27 Examples of such safeguards were staggering start and finish times for mediation sessions and providing a chaperone to a party's vehicle after mediation sessions.

28 Family Law Reform Association NSW Inc, *Submission FV 142*, 24 June 2010.

resolve protection order applications. The Commissioner considered that ‘an agreement crafted by the parties themselves is far more likely to be sustained than one imposed on them unwillingly by a disinterested Court’. The Commissioner was also of the view that final protection orders should not be made until the parties had attended accredited mediation, the Family Relationship Centre or an accredited FDR Practitioner.<sup>29</sup>

23.20 Other stakeholders, however, raised concerns about the use of ADR mechanisms in relation to protection order proceedings. Women’s Legal Services NSW, for example, commented that living free from violence is an absolute right and should not be subject to mediation. Women’s Legal Services NSW also commented that ADR processes should never be used with respect to a protection order itself, however mediation about other issues where there is violence or a protection order in place may be appropriate, depending on the circumstances, risk assessment and a safety plan.<sup>30</sup> Other stakeholders expressed the view that ADR is not appropriate to resolve protection order applications.<sup>31</sup>

23.21 National Legal Aid recommended that caution be exercised in the use of ADR in protection order proceedings. In its view, it was essential that appropriate screening and assessment processes be established to determine the appropriateness of matters for ADR, and that training be provided to mediators on the nature and dynamics of family violence and on methods to manage mediation in the context of family violence.<sup>32</sup> The Women’s Legal Centre (ACT & Region)—commenting with respect to ACT conferencing processes where parties are often unrepresented—referred to the importance of the parties being well-informed about the process, and having the opportunity to seek legal advice about their situation.<sup>33</sup>

23.22 In its submission, the Queensland Government commented that, due to safety concerns for the victim, ADR is not appropriate where there are pending criminal proceedings in relation to domestic violence. The Queensland Government also commented that, while it is generally accepted that ADR is not appropriate for the majority of cases involving domestic and family violence, consultations for the Queensland Government’s review of the *Domestic and Family Violence Protection Act* have indicated support for making ADR processes available for Indigenous communities<sup>34</sup> and young people.<sup>35</sup>

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29 Commissioner for Children (Tas), *Submission FV 62*, 1 June 2010.

30 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

31 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010. National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

32 National Legal Aid, *Submission FV 232*, 15 July 2010.

33 Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

34 The Queensland Government referred to the Community Justice Group Program, which aims to reduce Aboriginal and Torres Strait Islander peoples’ contact with the court system. Community justice groups decide, on the basis of local and familial knowledge, whether the use of an ADR or restorative justice process is appropriate in a particular situation: Queensland Government, *Submission FV 229*, 14 July 2010.

35 Ibid.

23.23 The Department of Premier and Cabinet (Tas) indicated that reforms are necessary to ensure ADR mechanisms are used only in appropriate circumstances because ‘at the moment there does not seem to be consistency in the application of this or an in depth knowledge of family violence dynamics’.<sup>36</sup>

#### ***Commissions’ views***

23.24 The Commissions note inconsistencies across Australia in the approach taken to the use of ADR in protection order proceedings. In NSW and South Australia, for example, legislative provisions allow referral of protection order proceedings to ADR, but specifically exclude protection order proceedings that involve family violence. Elsewhere in Australia, legislative provisions and policy guidelines allow for referral of protection order applications involving family violence to ADR in some circumstances, either on a party’s application, or with the parties’ consent.<sup>37</sup> Family violence legislation in some jurisdictions allows courts to order matters to ADR, and to require parties to attend or participate in ADR. Submissions to this Inquiry also reported that in some protection order matters relating to family violence, courts are ordering mediation.

23.25 The Commissions reiterate the NSWLRC’s view that negotiations concerning a return to a violent relationship, or negotiations concerning the level, frequency and intensity of violence are inappropriate, and that violence should never be mediated. The Commissions consider, therefore, that state and territory legislation and policies for ADR in family violence protection order proceedings should provide that violence cannot be negotiated or mediated within alternative dispute resolution processes.

23.26 The Commissions are mindful, however, of the distinction between the mediation of violence and the mediation of other issues where there is violence in the relationship between the parties.

23.27 As discussed in Chapter 21, FDR may take place in parenting disputes where family violence is a factor. However, while family violence may arise as an issue in FDR, the subject of the dispute resolution in FDR is the parenting dispute, not the family violence. FDR—which seeks to resolve a *parenting* dispute—is, therefore, to be distinguished from ADR that attempts to mediate or negotiate *violence* itself. As indicated above, in the Commissions’ view, protection from violence should never be mediated or negotiated in ADR. The Commissions agree with Women’s Legal Services NSW that where there is violence (or a protection order is in place), ADR for issues *other than violence* may be appropriate, depending on the circumstances. There may be some matters other than violence that are ancillary to a protection order application and that may be resolved through ADR—for example, arrangements for the respondent’s return to the family home to collect belongings, or for telephone contact with the parties’ children.

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36 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

37 In Western Australia, the *Restraining Orders Act 1997* (WA) makes no provision for mediation.

23.28 In the Commissions' view, where protection order proceedings are to be referred to ADR for resolution of issues other than violence, screening and risk assessment will be necessary to determine the appropriateness of ADR in the particular circumstances, and to ensure the safety of the parties. The Commissions note, however, that submissions have raised concerns about courts' understanding of family violence and their assessment of the suitability of matters for ADR. Stakeholders have observed that the expertise of court-provided mediators varies; that judicial officers' understanding of the nature and dynamics of family violence varies, as does their sensitivity to the appropriateness of mediation; and that court assessment of the suitability of cases involving family violence for ADR is inconsistent.

23.29 The use of FDR in family law disputes is subject to a comprehensive legislative and policy framework for screening and risk assessment. The *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) prescribe assessment of the suitability of matters for FDR in accordance with a minimum list of considerations relating to family violence, safety of the parties, equality of bargaining power, risk of child abuse, and the emotional, psychological and physical health of the parties, as well as any other matter deemed relevant by the FDR practitioner. Considerable work has been done in the family law jurisdiction to develop screening and assessment tools for use in risk assessment and determining suitability of matters for FDR.<sup>38</sup> The Commissions are concerned that in jurisdictions where protection order proceedings may be referred to ADR, without such screening and risk assessment of matters relating to safety, parties may be referred to ADR by judicial or court officers in inappropriate circumstances and victims, or potential victims of violence, may be placed at risk.

23.30 In the Commissions' view, the family law FDR framework and state and territory ADR frameworks should operate consistently to protect victims and potential victims from family violence. In jurisdictions where protection order proceedings may be referred to ADR, legislation and policies for ADR in protection order proceedings should provide for comprehensive screening and risk assessment mechanisms to ensure that resolution of issues other than violence may be attempted safely. Further, state and territory governments, courts and ADR service providers should ensure that education and training is provided to judicial and court officers and ADR practitioners on the nature and dynamics of family violence, and the conduct of ADR processes in the context of family violence. The Commissions also agree with the Women's Legal Centre (ACT & Region) about the need, where parties are unrepresented, for parties to be well-informed about the ADR process, and to have the opportunity to seek legal advice.

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38 As noted above, this includes the development of the *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* by the Australian Government Attorney-General's Department and the Australian Catholic University, and the publication by the Victorian Government of a comprehensive screening and risk assessment framework. A national common risk assessment framework to support screening and assessment for family violence across the federal family law system is also currently being developed by the Australian Government Attorney-General's Department.

**Recommendation 23–1** Where state and territory family violence legislation permits the use of alternative dispute resolution in family violence protection order proceedings, such legislation should provide that violence cannot be negotiated or mediated.

**Recommendation 23–2** State and territory legislation and policies for alternative dispute resolution in family violence protection order proceedings should provide for comprehensive screening and risk assessment mechanisms.

**Recommendation 23–3** State and territory governments, courts, and alternative dispute resolution service providers should ensure that, where alternative dispute resolution is permitted in relation to family violence protection order proceedings, education and training is provided to judicial and court officers and alternative dispute resolution practitioners on:

- (a) the nature and dynamics of family violence; and
- (b) the conduct of alternative dispute resolution processes in the context of family violence.

## Interaction between FDR and protection orders

23.31 As discussed in Chapters 21 and 22, s 60I of the *Family Law Act* requires that, before applying for a parenting order under pt VII of the Act, a person must first make a genuine effort to resolve the dispute by FDR. In some cases, however, separating families who have experienced family violence will already have made contact with the legal system through protection order proceedings under state and territory family violence legislation. Where parties have obtained a protection order under a state or territory law and then seek to resolve their parenting disputes through FDR, the existence of, and conditions contained in, the protection order will be relevant to an FDR practitioner’s assessment of whether and how FDR should be conducted.

23.32 This section discusses two issues arising out of interactions between FDR for family law matters and protection orders made under family violence legislation: the potential for FDR processes to be in conflict with protection orders, and the role of protection orders in FDR processes. The Commissions consider options to minimise inconsistency between protection orders and the requirement to attend FDR, and the use of protection orders in FDR processes to identify family violence and manage the risks associated with it.

### Inconsistencies between protection orders and participation in FDR

23.33 As discussed in Chapter 21 of this Report, s 60I of the *Family Law Act* requires that, before applying for a parenting order, a person must first make a genuine effort to resolve the dispute by FDR. Subject to certain exceptions—including where the court is satisfied that there are reasonable grounds to believe that there has been, or there is a risk of, family violence by one of the parties to the proceedings—a court must not hear an application for such an order unless the applicant has filed a certificate from an FDR

practitioner.<sup>39</sup> A s 60I certificate may be issued on a number of grounds, including on the basis of an assessment by an FDR practitioner that ‘it would not be appropriate’ to conduct or continue FDR.<sup>40</sup> Such an assessment requires the FDR practitioner to consider whether the ability of a party to negotiate freely is affected by one or more of a number of factors which are potentially relevant to violence.<sup>41</sup>

23.34 The determination by an FDR practitioner that a matter is unsuitable for FDR and the consequent issuing of a s 60I certificate to that effect, relieves the parties of the obligation to attempt to resolve their dispute in FDR prior to initiating family law proceedings. The court, however, retains the power under s 13C of the *Family Law Act* to order the parties to attend FDR at any point in the proceedings—even where a s 60(I) certificate has been issued.

23.35 In some cases, conditions of protection orders made under family violence legislation may be inconsistent with an order or a requirement, under the *Family Law Act*, obliging the parties to attend FDR. This may give rise to an issue of inconsistency of laws as envisaged by s 109 of the *Australian Constitution*. Section 109 operates so that where an order made under state legislation is inconsistent with a law of the Commonwealth, the Commonwealth law will prevail and the order will be invalid, to the extent that the order is inconsistent with the Commonwealth law. On this point, the High Court has held that, pursuant to s 109, a state or territory law will be inoperative to the extent that it would

alter, impair or detract from the Commonwealth law’s conferral of jurisdiction [on a federal court] by directly or indirectly precluding, overriding or rendering ineffective an actual exercise of that jurisdiction. The practical effect of that *pro tanto* invalidity of the state or territory law is that orders made in the exercise of the Commonwealth jurisdiction will prevail over the provisions of the state or territory law or orders made or acts done in the exercise of power or authority which the state or territory law purportedly confers.<sup>42</sup>

23.36 In the context of a protection order relating to parties who become involved in a family law parenting dispute, inconsistency may arise, for example, in circumstances where the protection order imposes an absolute prohibition on contact of any kind, including indirect contact. In such circumstances, s 109 of the *Constitution* will render inoperative the protection order conditions, to the extent that they are inconsistent with requirements, or orders made, under the *Family Law Act* with respect to FDR.<sup>43</sup> In

39 *Family Law Act 1975* (Cth) s 60I(9).

40 Ibid ss 60I(8)(aa) and (d). The other grounds upon which certificates may be issued are: a party did not attend FDR due to the refusal or failure of the other party (or parties) to attend: s 60I(8)(a); the parties attended FDR with the practitioner, and all parties made a genuine effort to resolve the issue or issues: s 60I(8)(b); the party attended FDR with the practitioner, but that party, or another party did not make a genuine effort to resolve the issue or issues: s 60I(8)(c).

41 *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) Reg 25(2).

42 *P v P* (1994) 181 CLR 583.

43 While s 109 refers expressly to inconsistency between state and federal *laws*, it has operated—in effect—in cases of inconsistency between the provisions of orders made in the exercise of legislative powers. For example, the High Court has applied the section to inconsistencies between an order of the Family Court and the provisions of state legislation: *Ibid*, 601–603. In this case, the relevant ‘law’ for the purposes of

practice, where inconsistencies arise, an FDR practitioner will generally refer parties to a magistrates court to obtain a variation of the order. This has the undesirable effect of repeated contact with the justice system and increased costs for parties.

23.37 In addition to possible inconsistency of laws, as discussed above, practical problems may be caused by protection order conditions that conflict with the arrangements made for FDR.<sup>44</sup> For example, a protection order will often prohibit a person from contacting or approaching another person. FDR processes requiring the presence of both parties could, therefore, be in conflict with a protection order.

23.38 Most commonly, this issue is dealt with expressly in the application forms for protection orders, which allow for an exception to prohibitions on contacting the protected person for certain purposes, including in relation to FDR processes. There is such an exception in the application forms of Victoria, Tasmania, the Northern Territory and the ACT.<sup>45</sup> The form for South Australia also allows for a standard exception for counselling (but not mediation) if it is directed by the Family Court, and for any orders made by the Family Court.<sup>46</sup> The application form in NSW refers to an exception for counselling, mediation and conciliation.<sup>47</sup> There is no standard exception referred to in the forms for Queensland<sup>48</sup> or Western Australia.<sup>49</sup>

23.39 Typically, the standard condition prohibiting contact automatically includes an exception allowing contact for the purposes of FDR process. The ACT form, however, enables the applicant to nominate which exceptions to the prohibition on contact should apply, including at counselling or mediation.

23.40 A different approach is taken in Western Australia. The *Restraining Orders Act 1997* (WA) provides that it is a defence to a breach of a protection order if the person was using FDR as defined by the *Family Law Act* or using conciliation, mediation or

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s 109 was the authorising or enabling legislation—the *Family Law Act 1975* (Cth)—which invested the Family Court with jurisdiction to make the relevant order.

44 Conditions of protection orders are discussed in Chapter 11.

45 Magistrates' Court of Victoria, *Information for Application for an Intervention Order* (2009) <[www.magistratescourt.vic.gov.au](http://www.magistratescourt.vic.gov.au)> at 2 February 2010; Magistrates Court of Tasmania, *Application for a Family Violence Order* <[www.magistratescourt.tas.gov.au/divisions/family\\_violence/forms](http://www.magistratescourt.tas.gov.au/divisions/family_violence/forms)> at 29 March 2010; Northern Territory Magistrates Courts, *Application for Domestic Violence Order* <[www.nt.gov.au/justice/ntmc/forms\\_fees.shtml](http://www.nt.gov.au/justice/ntmc/forms_fees.shtml)> at 29 March 2010; Magistrates Court of the Australian Capital Territory, *Application for a Domestic Violence Order* (2009) <[www.courts.act.gov.au/magistrates](http://www.courts.act.gov.au/magistrates)> at 9 February 2010.

46 Magistrates Court of South Australia, *Affidavit to Support Application for Domestic Violence Restraining Order* <[www.courts.sa.gov.au](http://www.courts.sa.gov.au)> at 8 March 2010.

47 New South Wales, *Application—Apprehended Domestic Violence Order*. The condition states that the defendant must not ‘approach or contact the protected person(s) by any means whatsoever, except through the defendant’s legal representative or as agreed in writing or as permitted by an order or directions under the *Family Law Act 1975* (Cth), for the purpose of counselling, conciliation, or mediation’.

48 Magistrates Court of Queensland, *Protection Order Application (Form DVI)* <<http://www.communityservices.qld.gov.au/violenceprevention/forms/>> at 16 August 2010.

49 Magistrates Court of Western Australia, *Violence Restraining Order Application* <[www.magistratescourt.wa.gov.au/content/restraining.aspx](http://www.magistratescourt.wa.gov.au/content/restraining.aspx)> at 16 August 2010. The application form for Western Australia does not allow applicants to indicate which conditions they would like imposed upon the respondent. The Commissions recommend that application forms for protection orders should be amended to allow applicants to do so: Rec 11–6.

another form of consensual dispute resolution provided by a legal practitioner.<sup>50</sup> This is the only such provision in family violence legislation.

23.41 In the Consultation Paper, the Commissions expressed the view that it is preferable to minimise the potential for conflict between protection orders and *Family Law Act* provisions relating to FDR through an exception to a condition of a protection order, rather than provide (as is done in Western Australia) in legislation that attendance at mediation is a defence to a breach of a protection order. The Commissions proposed that state and territory courts should ensure that application forms for protection orders include an exception allowing contact for the purposes of FDR processes (an FDR exception clause).<sup>51</sup> The Commissions indicated that this exception should apply to participation in FDR processes as ordered or directed by a family court, or provided under the *Family Law Act*.

#### ***Submissions and consultations***

23.42 A number of stakeholders indicated their support for an FDR exception clause to be included in application forms for protection orders.<sup>52</sup> A small number of these submissions expressly stated their support for an optional rather than automatic FDR exception.<sup>53</sup> It was noted that the automatic addition of an exception clause would not be safe or appropriate in some situations.<sup>54</sup> It was also suggested that the court making the protection order should assess whether FDR is appropriate before including such an exception clause.<sup>55</sup> Where a court making an interim or final protection order has considered the appropriateness of parties attending FDR, and determined *not* to insert an exception clause in the protection order, National Legal Aid submitted that the court

50 *Restraining Orders Act 1997 (WA)* s 62(1)(a),(b).

51 Consultation Paper, Proposal 11–4.

52 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Confidential, *Submission FV 162*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; O Rundle, *Submission FV 50* 27 May 2010; M Condon, *Submission FV 45*, 18 May 2010. The Queensland Law Society supported the exception but commented that this is a matter within the responsibility of state and territory governments rather than the courts: Queensland Law Society, *Submission FV 178*, 25 June 2010. One stakeholder agreed subject to the use, where FDR is to be employed in a parenting dispute, of screening and risk assessment frameworks and tools by legally trained assessors who consider more than the terms and conditions of a protection order when determining whether FDR should proceed: Justice for Children, *Submission FV 148*, 24 June 2010. Women's Legal Service Queensland agreed but suggested careful consideration of the wording of the exception clause: Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010. Women's Legal Services NSW also made suggestions with respect to the wording of FDR exception clauses, discussed below: Women's Legal Services NSW, *Submission FV 182*, 25 June 2010. One stakeholder disagreed with the proposal: Confidential, *Submission FV 183*, 25 June 2010.

53 National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

54 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

55 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010. Confidential, *Submission FV 184*, 25 June 2010 also indicated assessment should be undertaken to ensure safety and appropriateness of FDR.

should clearly indicate on the order that it has considered the nature of the dispute and has made an order excluding FDR.<sup>56</sup>

23.43 A Victorian stakeholder, arguing that an FDR exception should only be inserted at the discretion of the protection order applicant, noted that the standard entry of FDR exceptions in protection orders confuses women who think they are obliged to undertake mediation and therefore agree to contact.<sup>57</sup> National Legal Aid supported the protection order applicant being given the option to elect to have an exception clause for FDR, but was of the view that even if the applicant chose such an exception clause, the court should still consider the appropriateness of FDR.

23.44 Concern was expressed about the potential for an FDR exception clause to undermine the use of screening and risk assessment tools because it might be seen, or relied upon, as an endorsement of the use of FDR in family violence cases.<sup>58</sup> Another stakeholder was concerned that an FDR exception clause appeared to be inconsistent with a protection order prohibiting contact and with s 60I(9) of the *Family Law Act*, which exempts parties from the s 60I requirement (to attempt to resolve a parenting dispute by FDR) in cases of actual or potential family violence.<sup>59</sup>

23.45 Some stakeholders also commented about the wording of the FDR exception clause. Women's Legal Service Queensland suggested that, rather than 'allow contact for the purposes of FDR', the exception should state 'FDR is allowed to be conducted between the parties'.<sup>60</sup> This would avoid the respondent harassing the applicant on the pretext of making contact for the purposes of setting up the FDR. Domestic Violence Victoria and others, in a joint submission, commented that the exception clause should specify the type of contact and its limitations<sup>61</sup> to avoid the contact arrangement being used for further abuse.<sup>62</sup> Women's Legal Services NSW submitted that the exception clause should clearly refer to FDR processes as ordered or directed by the Family Court, or provided under the *Family Law Act*.<sup>63</sup>

#### *Commissions' views*

23.46 As noted above, the *Family Law Act* provides for exemption from the requirements for FDR on the basis of, amongst other things, family violence. In many cases, FDR processes are likely to be inappropriate if a family violence protection order has been made. As discussed in Chapter 21, however, there may be cases where FDR is appropriate—despite the existence of a protection order.

56 National Legal Aid, *Submission FV 232*, 15 July 2010.

57 Berry Street Inc, *Submission FV 163*, 25 June 2010.

58 J Stubbs, *Submission FV 186*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010. The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation referred to an example of this happening despite an alleged history of extreme family violence.

59 Confidential, *Submission FV 171*, 25 June 2010.

60 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

61 For example, phone contact only, contact through FDR practitioner.

62 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

63 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

23.47 A family violence protection order prohibiting contact between parties to a family law dispute need not necessarily conflict with the use of FDR. Strategies such as shuttle mediation may be employed, for example, to enable compliance with a family violence protection order prohibiting direct contact. In the Commissions' view, qualified and experienced FDR practitioners, considering the matter at the time that the family law dispute arises—employing appropriate screening and risk assessment tools and taking into account the conditions of a family violence protection order, amongst other things—are well placed to consider the arrangements that may be made for appropriate and safe contact between the parties through FDR processes.

23.48 The Commissions note that the suitability or otherwise of a matter for FDR is an issue to be determined by an FDR practitioner in accordance with the *Family Law Act* and the *Family Law (Family Dispute Resolution Practitioners) Regulations 2008*,<sup>64</sup> and the family courts in accordance with the *Family Law Act*.<sup>65</sup> These matters are properly determined, at the relevant time, by the family courts, and by FDR practitioners, in accordance with family law legislation, rather than family violence courts exercising jurisdiction under state or territory family violence legislation.

23.49 In addition, conditions of protection orders that are inconsistent with an order or a requirement, under the *Family Law Act*, will be rendered inoperative. The approach taken in most jurisdictions, of allowing an exception to prohibition on contact for the purposes of FDR, as part of a standard order, minimises the potential for inconsistency between protection orders and legislative requirements and arrangements for participating in FDR.

23.50 The Commissions appreciate the concern expressed by the Women's Legal Service, Queensland that allowing contact for the purposes of FDR may provide a means by which the respondent to a protection order is able to harass the protection order applicant. FDR may be conducted without direct contact to minimise the potential for such harassment—for example, by using shuttle mediation, as noted above. To further minimise the potential for harassment, the Commissions are of the view that, rather than stating that contact is permitted for the purposes of FDR, the terms of a protection order should indicate that participation in FDR is not precluded by the protection order. Arrangements can then be made for FDR without direct contact between the parties.

23.51 The Commissions note that informal attempts to mediate by family or community members may not include appropriate safeguards for addressing family violence, and may leave victims vulnerable to pressures to mediate. The Commissions are of the view, therefore, that family violence protection orders should expressly refer to participation in FDR processes as ordered or directed by a family court, or provided under the *Family Law Act*.

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64     *Family Law Act 1975* (Cth) s 60I(8)(aa), 60I(8)(d); *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25(2).

65     *Family Law Act 1975* (Cth) ss 13C, 60I(9)(b).

**Recommendation 23–4** State and territory courts should ensure that the terms of a family violence protection order indicate that participation in family dispute resolution, as ordered or directed by a family court, or provided under the *Family Law Act 1975* (Cth), is not precluded by a family violence protection order.

**Recommendation 23–5** State and territory courts should ensure that parties to family violence protection order proceedings are informed that, if involved in proceedings or family dispute resolution under the *Family Law Act 1975* (Cth):

- (a) they may be exempt from requirements to participate in family dispute resolution under the *Family Law Act 1975* (Cth);
- (b) they should inform a family dispute resolution practitioner about any family violence protection orders or proceedings; and
- (c) they should inform family courts about any family violence protection orders or proceedings, where family court proceedings are initiated.

### The role of family violence protection orders in FDR processes

23.52 The next issue for consideration is the use of family violence protection orders in FDR processes. An evaluation of FDR practices in the legal aid sector noted that FDR practitioners across all jurisdictions commented that failures to ask about and obtain copies of protection orders could ‘derail the conferencing process’.<sup>66</sup>

23.53 Some, but not all, examples of screening tools in the *Framework for Screening and Risk Assessment* published by the Australian Government for use in the family law sector include questions about the existence of protection orders.<sup>67</sup> An example of a question about seeking revocation of protection orders is also included.<sup>68</sup> The Victorian Government’s comprehensive family violence screening and risk assessment refers to

<sup>66</sup> KPMG, *Family Dispute Resolution Services in Legal Aid Commissions: Evaluation Report* (2008), prepared for the Australian Government Attorney-General’s Department, 32. In an older survey conducted in 1996, the agencies surveyed all reported asking about protection orders and indicated that a current order would increase their caution about proceeding, although they would not definitely exclude mediation merely because of the order: Keys Young, *Research/Evaluation of Family Mediation Practice and the Issue of Violence: Final Report* (1996), prepared for the Australian Government Attorney-General’s Department, 38.

<sup>67</sup> See Australian Catholic University and Australian Government Attorney-General’s Department, *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line* (2008). For examples where protection orders are not asked about, see Attachment A, 79; Attachment F; Attachment G, 109–110. For examples where protection orders are asked about, see Attachment A, 87; Attachment D; Attachment G, 110–111.

<sup>68</sup> Ibid, Attachment G, 111.

the existence of protection orders, and includes questions about breaches of protection orders as relevant to assessment of family violence risks.<sup>69</sup>

23.54 The existence of a protection order is significant for screening and risk assessment because it indicates that there are likely to be issues of safety involved that need to be addressed. The conditions of a protection order may also provide useful information about the nature of the risks involved. Further, it may be necessary to obtain a copy of a protection order so that FDR practitioners can take protection order conditions into account when making arrangements for FDR.

23.55 In the Consultation Paper, the Commissions asked whether, in practice, protection orders are identified and used in risk assessment and management in FDR processes and whether any reforms are necessary to improve these processes.<sup>70</sup>

#### ***Submissions and consultations***

23.56 A number of submissions on this point indicated that protection orders are being used appropriately in FDR processes to identify and manage the risks associated with family violence.<sup>71</sup> National Legal Aid responded that legal aid commission FDR conferencing programs identify existing protection orders through intake and screening processes, and take them into account when assessing suitability of matters for mediation, and in the management of mediation and resulting agreements.

23.57 Family Relationship Services Australia commented that well-developed tools for intake and ongoing risk assessment are used to ensure that Family Relationship Services ask both parties questions about violence and abuse, and about the existence of family violence protection orders and any previous Family Court orders. These issues are followed up throughout the FDR process. Family Relationship Services rely on clients to answer the questions honestly and to provide copies of any current orders.<sup>72</sup>

23.58 Other stakeholders expressed some concerns about the use of protection orders in FDR processes to identify family violence and manage the associated risks. One stakeholder from a community service and advocacy organisation observed that there is inconsistency in the practice of mediation services; some services are very aware of family violence issues, while others are focused on parent agreement outcomes. This stakeholder referred to ‘poor practice’, including some mediators suggesting to women that they ‘bury’ a protection order so mediation can continue.<sup>73</sup> The Law Society of NSW also believed that the use of protection orders in FDR processes to identify

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69 Department of Human Services (Vic), *Family Violence Risk Assessment and Risk Management Framework* (2007), 61.

70 Consultation Paper, Question 11–3.

71 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Family Relationship Services Australia, *Submission FV 231*, 15 July 2010; Confidential, *Submission FV 71*, 1 June 2010; O Rundle, *Submission FV 50* 27 May 2010.

72 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

73 Berry Street Inc, *Submission FV 163*, 25 June 2010.

family violence was inconsistent, but noted that this should be addressed by ongoing education of the police, solicitors, the judiciary and the community rather than by legislative reform.<sup>74</sup>

23.59 Another stakeholder (a legal service provider) referred to the risk of exception clauses in protection orders—that permit contact for FDR purposes—being inappropriately relied on to assess a matter as suitable for FDR.<sup>75</sup> This stakeholder noted the need to apply screening and risk assessment frameworks and tools to ensure that legally trained assessors consider more than the terms and conditions of a protection order when assessing suitability of a matter for FDR. The Women's Legal Service Queensland commented that issues of domestic violence are routinely mediated and that systemic rather than piecemeal reform was needed.<sup>76</sup> The Department of Premier and Cabinet (Tas) indicated that protection orders are not identified and used in risk assessment and management in FDR processes; the Department referred to 'issues and barriers to disclosure and family violence going undetected' and commented that the sector's 'over confidence' in its management of family violence is 'problematic'. The Department also referred to an absence of long term research evidence indicating the efficacy of FDR in family violence cases.<sup>77</sup>

23.60 Women's Legal Services Australia commented that, where there is a protection order, FDR services are more likely to 'grant an exemption' from FDR.<sup>78</sup> Women's Legal Services Australia noted, however, that concerns remain where the family violence victim has been unable to obtain a protection order, or proceedings are in progress, and that greater clarity is required about whether the exemptions from FDR will apply in such cases.<sup>79</sup>

23.61 Domestic Violence Victoria and others, in a joint submission, stated that any screening or risk assessment tool should ask about past or current protection orders, and about the circumstances that led to the application for the order.<sup>80</sup>

#### ***Commissions' views***

23.62 While a number of stakeholders indicated that protection orders are being used appropriately in FDR processes to identify and manage family violence risks, it is concerning that there were some indications that this not always the case. Protection

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<sup>74</sup> Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

<sup>75</sup> This stakeholder referred to an instance where this had happened despite an alleged history of extreme family violence: The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010.

<sup>76</sup> Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Justice for Children was also of the view that protection orders were not being used appropriately and that reform is needed: Justice for Children, *Submission FV 148*, 24 June 2010.

<sup>77</sup> Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

<sup>78</sup> As discussed in Chapters 21, 22, and above, an FDR practitioner may determine that a matter is not appropriate for FDR because of family violence concerns: *Family Law Act 1975* (Cth) ss 60I(8)(aa) and (d); *Family Law (Family Dispute Resolution Practitioners) Regulations 2008* (Cth) reg 25(2).

<sup>79</sup> Women's Legal Services Australia, *Submission FV 225*, 6 July 2010.

<sup>80</sup> Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

orders may provide valuable information about the concerns that need to be addressed for FDR to take place safely. The Commissions agree with Domestic Violence Victoria and other stakeholders that screening and risk assessment tools should ask about past or current protection orders, and the circumstances that led to the application for the orders.

23.63 The Commissions also note the concerns of Women's Legal Services Australia about situations where the family violence victim has been unable to obtain a protection order or where an application for a protection order has not yet been determined. The Commissions are of the view that, where an application for a protection order is yet to be determined, the circumstances that led to the making of the application for a protection order may be relevant for the purposes of screening and risk assessment. In cases where an order was not made, the circumstances that led to the making of the application may nonetheless be relevant—particularly in cases where an application was withdrawn by the victim.

23.64 The Commissions note that existing family violence screening and risk assessment frameworks published by the Australian Government for use in the family law system, and the Victorian Government's comprehensive family violence screening and risk assessment framework, include identification of existing and past protection orders and breaches of such protection orders as relevant to assessment of family violence risks. In the Commissions' view, it would be helpful if family violence screening and risk assessment frameworks, intended for use in FDR processes, included questions about past and current *applications* for protection orders, as well as about past and current protection orders and any breaches of such orders. As noted elsewhere in this chapter, the Australian Government Attorney-General's Department is currently developing a national framework to support screening and assessment for family violence across the federal family law system. In the Commissions' view it would be helpful if this framework addressed the need to ask parties about past and current applications for family violence protection orders, as well as about past and current protection orders and any breaches of such orders.

23.65 The Commissions are also of the view that FDR service providers should ensure that tools used for family violence screening and risk assessment include questions about past and current applications for family violence protection orders, as well as questions about past and current family violence protection orders, and any breaches of such orders. Copies of family violence protection orders should also be requested from the parties.

**Recommendation 23–6** The Australian Government Attorney-General's Department and state and territory governments should ensure that family violence screening and risk assessment frameworks indicate the importance of including questions in screening and risk assessment tools about:

- (a) past or current applications for protection orders;
- (b) past or current protection orders; and

- (c) any breaches of protection orders.

**Recommendation 23–7** Family dispute resolution service providers should ensure that:

- (a) tools used for family violence screening and risk assessment include questions about past and current protection orders and applications, and any breaches of protection orders; and
- (b) parties are asked for copies of protection orders.

## Dispute resolution in child protection—law and practice

23.66 In most Australian states and territories, child protection legislation includes provisions designed to facilitate negotiated solutions. In addition, some government and community agencies use ADR procedures for child protection cases and have developed policy and practice in relation to ADR. There is a great deal of variation in the processes and terminology used to describe them.

23.67 Two frequently used processes are family group conferencing and mediation. Other examples of ADR in this area are conferences prior to a court hearing; the role of family consultants in the Family Court,<sup>81</sup> and ADR processes developed for Indigenous families, such as Care Circles.

23.68 The use of ADR in child protection matters appears to be developing, and has received strong support from some quarters.<sup>82</sup> There are, however, a number of concerns about the use of ADR in child protection cases, similar to those about the use of FDR in cases of family violence.

23.69 The potential for ADR processes to compromise the safety of children is a key concern.<sup>83</sup> Further, there are significant imbalances in power between: the child and parents; between parents (especially in cases of violence); and between families and government departments and other experts.<sup>84</sup> In their examination of family group conferencing and pre-hearing conferences in *Seen and Heard: Priority for Children in the Legal Process* (ALRC Report 84),<sup>85</sup> the ALRC and the (then) Human Rights and Equal Opportunity Commission (HREOC)<sup>86</sup> noted that ‘the vulnerability of some

81 The Magellan project is considered below and in Ch 19.

82 In NSW the Wood Inquiry was ‘of the strong view that ADR should be used before and during care proceedings’: J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), 489.

83 Ibid, 489.

84 R Sheehan, ‘Alternative Dispute Resolution in Child Protection Matters: The Victorian Experience’ (2006) 59 *Australian Social Work* 157, 169.

85 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997).

86 Now the Australian Human Rights Commission.

family members within violent and abusive families may mean that dynamics in conferences could hamper appropriate resolutions'.<sup>87</sup>

23.70 There is also the challenge of representing the interests of children who sometimes (appropriately) may not be part of the ADR process but are directly affected by it.<sup>88</sup> Additionally, the complexity of the cases means that most ADR involves multi-party processes requiring skilled management by well trained, experienced and possibly multiple conveners.

23.71 Nevertheless, as stated in ALRC Report 84, the use of ADR in child protection cases 'hold[s] a good deal of promise for the resolution of disputes about the care and protection of children'. The potential benefits of using ADR in child protection matters include processes which are often faster and more cost-effective<sup>89</sup> and the potential to repair important relationships and open channels of communication.<sup>90</sup> ADR processes may also offer flexibility to tailor procedures and outcomes to the needs and interests of children, families and their cultures.<sup>91</sup> The pilot of Care Circles in the Children's Court in Nowra NSW, which involves Indigenous elders as participants in a process to formulate care plans for Indigenous children, is one example of the flexibility of ADR to provide culturally responsive procedures and outcomes.<sup>92</sup> High levels of violence in some Indigenous communities, extensive involvement of child protection authorities with Indigenous children, and significant levels of distrust of child protection authorities by Indigenous peoples<sup>93</sup> are some of the factors which indicate a real need for culturally responsive ADR in child protection.

23.72 The family law and associated socio-legal service systems have been referred to as a maze.<sup>94</sup> It is possible that forms of ADR could assist in creating pathways of communication and decision making for the individuals who may find the 'maze' difficult to traverse. Many of the models of ADR in child protection involve group processes in which anyone who is relevant to the child's life, care and safety can be

<sup>87</sup> The report recommended further research into effective conferencing practices, and the setting down of procedures in child protection legislation based on this research. These recommendations have not yet been implemented.

<sup>88</sup> R Sheehan, 'Alternative Dispute Resolution in Child Protection Matters: The Victorian Experience' (2006) 59 *Australian Social Work* 157; Strategic Partners, *Family Services Branch Child Inclusive Practice in Family and Child Counselling and Family and Child Mediation* (1998), prepared for the Department of Family and Community Services.

<sup>89</sup> N Thoennes, 'What We Know: Findings from Dependency Mediation' (2009) 47 *Family Court Review* 1, 31–32.

<sup>90</sup> Ibid, 32–33; R Sheehan, 'Alternative Dispute Resolution in Child Protection Matters: The Victorian Experience' (2006) 59 *Australian Social Work* 157.

<sup>91</sup> N Thoennes, 'What We Know: Findings from Dependency Mediation' (2009) 47 *Family Court Review* 1; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), [17.48].

<sup>92</sup> J Hatzistergos (New South Wales Attorney General), 'Nowra Elders to Help Aboriginal Children at Risk' (Press Release, 22 September 2010). Such Care Circles can be convened by consent where the Children's Court has already determined a child or young person to be in need of care and protection: J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), 479–80.

<sup>93</sup> Aboriginal Child Sexual Assault Taskforce (NSW), *Breaking the Silence: Creating the Future. Addressing Child Sexual Assault in Aboriginal communities in NSW* (2006).

<sup>94</sup> T Brown and R Alexander, *Child Abuse and Family Law: Understanding the Issues Facing Human Service and Legal Professionals* (2007), 128.

present. All of the agencies involved with the child and family can come together, talk directly with each other and hear and understand the perspectives of all involved. Facilitating collaboration between professionals from the family law and family violence fields, as well as the child protection system, may be particularly beneficial for children and their families. Such collaboration across different systems may offer the possibility of using the same ADR process to resolve child protection issues together with intersecting parenting issues relating to the same family, and so provide more effective and consistent outcomes to protect children.

23.73 In the Consultation Paper, the Commissions asked how the potential of ADR mechanisms to improve collaboration in the child protection system could best be realised.<sup>95</sup> The Commissions also asked whether there is a need for legislative or other reforms to ensure that ADR mechanisms in child protection address family violence appropriately.<sup>96</sup>

### ***Submissions and consultations***

23.74 Themes which emerged in submissions from stakeholders generally related to the need for reform in law, policy and practice in child protection ADR. Stakeholders commented on power differentials in child protection interventions and the role of lawyers; the importance of early non-adversarial intervention mechanisms; the need for legislative provisions and other guidelines to address family violence concerns; the need for culturally-appropriate ADR; and the importance of facilitating the participation of children in ADR processes. Stakeholders also told the Commissions about the development of important initiatives in child protection ADR practice through government-funded and community-supported pilots.

#### ***Power differentials in child protection interventions and the role of lawyers in ADR***

23.75 AFVPLS Victoria noted the ‘serious human rights implications and significant power differentials present in child protection interventions’, highlighting the need to enhance judicial oversight. AFVPLS Victoria expressed concern about the upholding of natural justice, procedural fairness and legal rights in out-of-court meetings and conferences where parties are not legally represented. In its view, ADR processes must be conducted within a robust legal framework, and legal rights and systemic oversight of Indigenous children and families within the system must be enhanced.<sup>97</sup>

23.76 AFVPLS Victoria commented that ADR is not appropriate in many situations where family violence is involved, but where ADR does proceed, there must be an option for legal representation. Concern was expressed about the view, particularly within the Victorian Department of Human Services, that lawyers should be excluded from ADR processes.<sup>98</sup> AFVPLS Victoria considered it critical that Indigenous people, particularly those who were victims of family violence and sexual assault, have the

95 Consultation Paper, Question 11–5.

96 Consultation Paper, Question 11–6.

97 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

98 In their submission, the AFVPLS Victoria cited an example where an Aboriginal lawyer was excluded from the ADFM process: *Ibid.*

option to choose to be legally represented in all out-of-court dispute resolution processes and that they be advised of their right to make that choice. AFVPLS Victoria also advocated for culturally-appropriate legal advice and representation for Indigenous children and families to ensure that cultural issues are at the core of legal advocacy and increase the accountability of the child protection system. AFVPLS Victoria commented that provisions for Indigenous children in the *Children, Youth and Families Act 2005* (Vic) are not being adequately implemented.

23.77 Referring to an external court-referred mediation pilot (where cases are referred from Bidura Children’s Court), Legal Aid NSW commented that legal representatives are required to identify the issues in dispute and the factors potentially affecting a party’s ability to participate in ADR.<sup>99</sup>

23.78 The Law Society of New South Wales suggested that the potential for ADR mechanisms to improve communication and collaboration in the child protection system could best be realised by adopting an ADR mechanism similar to the legal aid commission FDR in which an independent children’s lawyer is a participant.<sup>100</sup>

23.79 The Legal Aid Commission of Tasmania was of the view that parents need to have legal assistance in child protection ADR because ‘victims of family violence have often been threatened with what will happen at court, and are untrusting of systems’.<sup>101</sup> The Women’s Legal Centre (ACT and Region) also commented on the need for parents to have legal assistance and representation for ADR to work well. The Centre noted that in the ACT conference processes are run by a Registrar at particular stages in child protection matters and that both the child and the ACT child protection agency<sup>102</sup> are legally represented. In the Centre’s view, this creates an imbalance of power between parents and the agency, which needs to be carefully managed in any ADR process.

23.80 The Women’s Legal Centre (ACT and Region) also commented on the ACT child protection authority’s lack of support for women trying to escape family violence, and the threat that women’s children will be removed if they do not remove themselves from the situation of family violence.<sup>103</sup> Commenting on the lack of understanding of power differentials between victims and abusers, other stakeholders also reported that state child protection authorities hold women responsible for protecting their children from an abusive partner, rather than holding the abuser responsible. According to these stakeholders, if a woman is unable to protect her children from an abusive partner, or from exposure to family violence, she is punished.<sup>104</sup> One stakeholder commented that

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99 Legal Aid NSW advised the Commissions that the parties in the Bidura Children’s Court pilot will be legally represented: Legal Aid New South Wales, *Correspondence*, 10 September 2010. See further discussion about the Bidura Children’s Court pilot below.

100 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

101 National Legal Aid, *Submission FV 232*, 15 July 2010, referring to the views of Legal Aid Commission of Tasmania.

102 This is the ACT Department of Disability, Housing and Community Services.

103 Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

104 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010. Professor Julie Stubbs made a similar comment in response to Proposal 10–10 in the Consultation Paper: J Stubbs, *Submission FV 186*, 25 June 2010.

ADR in child protection matters should focus on removing the risk factors from the child's current environment, rather than removing the child from his or her environment.<sup>105</sup>

23.81 Stakeholders commented that the attitude and practice of child protection authorities, described above, is counterproductive for female victims of family violence in any dispute resolution process within the child protection system.<sup>106</sup> In the view of the Women's Legal Centre (ACT and Region), it would be more useful if the mandate of the child protection authority encompassed providing support for the parent escaping family violence. The Legal Aid Commission of Tasmania suggested that Departmental workers and mediators should undertake education and training about family violence issues, including the impact of family violence on victims and children.<sup>107</sup>

#### ***ADR processes as early non-adversarial intervention mechanisms***

23.82 There was some support in submissions for the use of ADR processes as early non-adversarial intervention mechanisms in child protection cases.

23.83 The Victorian Aboriginal Legal Service (VALS) commented that the dispute resolution procedure in the Family Division of the Victorian Children's Court is overly legalistic and adversarial and that changing the focus of ADR on matters as *disputes* was a necessary starting point for improvement. According to VALS, '[c]ollaboration is diminished through the inherent pressure of the situation'; the parties and legal representatives are aware a contest in court is the only alternative if a dispute resolution conference fails to achieve outcomes. Noting the current limited use of conferencing mechanisms for child protection matters in Victoria, VALS expressed the view that conferencing mechanisms should be used as a preferred dispute resolution method at an early intervention stage. In particular, VALS referred to the Aboriginal and Torres Strait Islander Family Decision Making Program (ADFM) as the best model for early intervention alternative dispute resolution and referred to indications that, despite support for the use and expansion of ADFM, in practice it is not being utilised for child protection matters in Victoria. In VALS' view, 'all parents, children, families and communities coming into contact with Victoria's child protection system' could benefit from elements of the ADFM approach.<sup>108</sup>

23.84 The Office of the Child Safety Commissioner (Victoria) (OCSC) was of the view that ADR needs to be conducted as early as possible in the child protection process to avoid attempts to impose collaboration on parties after oppositional positions have become entrenched. In the OCSC's view, ADR mechanisms need to be 'embedded as part of a standard routine practice that replaces an adversarial approach, rather than being an adjunct to it'. Elevating the status of ADR by requiring outcomes

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105 Berry Street Inc, *Submission FV 163*, 25 June 2010.

106 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

107 National Legal Aid, *Submission FV 232*, 15 July 2010, referring to the views of Legal Aid Commission of Tasmania.

108 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

to be implemented, unless they are impractical or inconsistent with the legislation, would ensure that all parties are motivated to communicate and collaborate to develop a workable agreement.<sup>109</sup>

23.85 AFVPLS Victoria, however, was concerned that ADR is being positioned as a mandatory process in child protection cases before the Victorian Children's Court. AFVPLS Victoria commented that similar risks exist in Children's Court ADR as in FDR in the family law jurisdiction, and noted that the ADFM process is not appropriate for all situations, particularly where there is entrenched family conflict that may involve violence.<sup>110</sup>

23.86 The Magistrates' Court and the Children's Court of Victoria emphasised the importance of providing a range of appropriate ways to resolve child protection matters before a court. Like AFVPLS Victoria, however, the Courts expressed concern about the use of ADR where family violence is an issue.<sup>111</sup>

#### ***Legislative provisions and other guidelines to address family violence concerns***

23.87 The Deputy Chief Magistrate of South Australia commented that if conferencing is conducted with appropriate protective protocols and victim support and by qualified individuals who are aware of family violence dynamics, it has the potential to provide the only safe venue for a family violence victim to confront the offender.<sup>112</sup> A number of other stakeholders considered that legislative or other reforms were required to ensure that ADR mechanisms in child protection address family violence risks appropriately.<sup>113</sup>

23.88 The Magistrates' Court and the Children's Court of Victoria considered that legislation setting out broad principles in relation to family violence, and more specific guidelines, protocols or practice directions to support ADR processes were likely to be required. The Courts pointed out that any dispute resolution measures should observe the premise that family violence cannot be 'negotiated'. The Courts noted that in many cases ADR may not be appropriate, and where ADR is appropriate, significant safeguards may be required.<sup>114</sup>

23.89 AFVPLS Victoria argued that family violence exemptions, like those applying to FDR in the *Family Law Act*, should apply to ADR in the child protection

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109 Office of the Child Safety Commissioner, *Submission FV 215*, 30 June 2010.

110 This last point was conveyed to AFVPLS Victoria by that organisations' Aboriginal child protection lawyer: Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

111 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

112 A Cannon, *Submission FV 137*, 23 June 2010.

113 National Legal Aid, *Submission FV 232*, 15 July 2010; Department of Human Services (NSW), *Submission FV 181*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010. The Queensland Law Society however, expressing support for the continued use of ADR processes by the Queensland Department of Communities (Child Safety Services) and in Children's Court matters prior to hearing, was of the view that these processes adequately addressed family violence issues related to child protection concerns: Queensland Law Society, *Submission FV 178*, 25 June 2010; Justice for Children, *Submission FV 177*, 25 June 2010; N Ross, *Submission FV 129*, 21 June 2010.

114 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

jurisdiction. Legislative provisions should ensure safety as the priority, and safeguards such as appropriate screening for ‘family violence, safety and duress’ must be ensured.<sup>115</sup> Another stakeholder commented that the high likelihood that child protection cases also involve other forms of family violence must be recognised, and that very clear minimum standards and safeguards are needed, combined with monitoring and evaluation.<sup>116</sup>

23.90 The Department of Human Services (NSW) submitted that ‘the presence of family violence should not automatically exclude the use of ADR’. It suggested that measures, such as providing support persons or advocates for family violence victims or arranging for perpetrators to participate by letter, conference call or spokesperson, could allow families experiencing family violence to gain some of the benefits of ADR, such as personal empowerment and mobilisation of a range of supports. The Department also supported the implementation of comprehensive family violence screening mechanisms and proposed that the following screening criteria be incorporated in either legislation or guidelines:

- ADR should not be used where it would compromise the safety, welfare and well-being of the child or any other person [who] is a party to ADR (for example the child’s primary carer);
- In the event that there are allegations of violence between participants, participants will not be required to attend an ADR process. Where an ADR process is attended, those allegations must be addressed to the satisfaction of the participants, the agency conducting the mediation and the mediator;
- Parties have legal capacity and competency to participate; and
- Carers and designated agencies with case management should be able to participate (regardless of whether or not they were parties to the original care proceedings).<sup>117</sup>

#### ***Culturally-appropriate ADR***

23.91 Ensuring that ADR is culturally appropriate was emphasised by a number of stakeholders. VALS advocated for more holistic, community-based and culturally-appropriate dispute resolution for Indigenous children. It noted the value of involving respected local people of authority or elders in resolving disputes. Flexibility was also considered important, to deal with a range of issues, to accommodate family structures and groups of people who wish to be involved in the problem solving process, and so that the dispute resolution process can adapt when unanticipated cultural issues arise.

23.92 VALS referred to the ADFM program at Rumbalara Aboriginal Co-operative as an example of a decision-making forum for child protection that resolves issues from a whole-of-community perspective, in the spirit of self-determination and with collaboration as a key factor. This program involves Indigenous families and elders, community-based health and welfare organisations, the Victorian Department of

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115 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

116 J Stubbs, *Submission FV 186*, 25 June 2010.

117 Department of Human Services (NSW), *Submission FV 181*, 25 June 2010.

Human Services, and generalist and specialist support services as participants in the resolution of child protection matters.<sup>118</sup>

23.93 AFVPLS Victoria also commented on the need for culturally-appropriate processes to ensure better outcomes. AFVPLS Victoria noted that ‘experiences of racism, discrimination and oppression within and by the legal system have resulted in ongoing access barriers and mistrust by [Aboriginal and Torres Strait Islander] people’, hence, legislation should ensure all ADR with respect to Indigenous children is culturally appropriate.<sup>119</sup>

23.94 Legal Aid NSW advised that it has been funded to trial a mediation pilot, with matters referred from Bidura Children’s Court. Taking into account the demographic of children and families appearing before the Bidura Children’s Court, ADR practitioners selected to take part in the trial include practitioners who identify as Indigenous, as well as those from an Asian background. The parties will be legally represented; legal representatives will identify the issues in dispute and the factors potentially affecting a party’s ability to participate.<sup>120</sup>

23.95 Legal Aid NSW also advised the Commissions that the Care Circle Pilot, operating at the Nowra Children’s Court since 2009, features ‘care circle’ panels with members who are recognised within their community and are able to provide community and cultural knowledge. It is their role to ensure that there is a strong focus on the child’s needs—including the need to be linked to their family, community and culture. They provide information on extended family and kinship networks, advice about support services, where the child should live and contact between the child and their family.<sup>121</sup>

#### *Participation of children in ADR processes*

23.96 A number of submissions commented on the importance of facilitating consultation with, or participation of, children in ADR processes. For example, VALS expressed concern about the marginalisation and de-legitimisation of children’s voices in ADR processes based on an arbitrary age.<sup>122</sup>

23.97 Family Relationship Services Australia (FRSA) noted that experts in the child protection field have called for increased consultation with children and young people when decisions are being made that affect them. FRSA commented that:

Children and young people are well placed to inform decision-makers about the likely impact of different alternatives on their safety and wellbeing as well as to participate in the identification of arrangements that allow them to maintain meaningful relationships with parents even when they are in out-of-home or kinship care.<sup>123</sup>

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118 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

119 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

120 Legal Aid New South Wales, *Correspondence*, 10 September 2010.

121 *Ibid.*

122 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

123 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

23.98 Some FRSA member organisations already provide FDR for some child protection authorities, and there is growing interest in applying FDR to child protection matters across Australian jurisdictions. In FRSA's view, there is potential to develop a more substantial role for FDR in child protection matters. FDR can be used to resolve a dispute or to assist decision making involving a number of participants. In particular, FRSA referred to the use of child inclusive practice in FDR to facilitate supportive and developmentally appropriate consultation with children while avoiding or removing the burden of decision making from children.<sup>124</sup>

23.99 Legal Aid NSW told the Commissions that in the Nowra Care Circle Pilot, children have their own legal representative in all matters; children can participate 'if they are old enough to understand or want to participate and the magistrate approves this'.<sup>125</sup>

23.100 As noted above, the Department of Human Services (NSW) advocated that legislation or guidelines should provide for the participation of parties on the basis that they have 'legal capacity and competency to participate'.

#### ***Properly funded and developed pilots***

23.101 Stakeholders supported government-funded pilots to develop ADR mechanisms in order to improve communication and collaboration in the child protection system.<sup>126</sup>

23.102 National Legal Aid suggested that Commonwealth, state and territory funding is required for the trial and evaluation of appropriate pilot programs. As an example, National Legal Aid referred to improvement in communication and collaboration between key stakeholders since the commencement of a state-funded Legal Aid (WA) pilot child dispute resolution program involving lawyer-assisted meetings for pregnant women in the care of the West Australian Department of Child Protection or who already have a child or children in the care of the Department.<sup>127</sup>

23.103 Another stakeholder pointed to the importance of properly funded and developed pilots in the NSW Children's Courts as a good way to begin increasing inter-professional collaboration between lawyers and those trained in social sciences and ensuring that specific mechanisms are put in place for children and parents to be heard in ADR processes.<sup>128</sup>

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124 Ibid.

125 Legal Aid New South Wales, *Correspondence*, 10 September 2010.

126 Legal Aid New South Wales told the Commissions about pilots in culturally responsive ADR—the Nowra Care Circle pilot and the Bidura Children's Court external court-referred mediation pilot are discussed above.

127 National Legal Aid, *Submission FV 232*, 15 July 2010. The program referred to is the Signs of Safety child dispute resolution program, commenced in late 2009, in conjunction with the Perth's Children's Court, the West Australian Department for Child Protection, and the King Edward Memorial Hospital for Women. The program covers a combination of pre-court application meetings and matters referred to post-court application pre-hearing conferences. National Legal Aid also referred to a similar program underway in Victoria in which the Victoria Legal Aid Commission is collaborating with the Victorian Department of Human Services and Department of Justice and the Victorian Children's Court.

128 N Ross, *Submission FV 129*, 21 June 2010.

***Commissions' views***

23.104 The Commissions' view is that ADR in child protection may offer important benefits for children and their families. The Commissions also note, however, that, as with FDR in family law matters, ADR in child protection matters involves a number of challenges in the context of family violence. These include: dealing with relationships of power; protection from violence, abuse and intimidation; and ensuring that all voices are heard, including those of children. Some concerns may be addressed through training of ADR practitioners and ensuring best practice in ways similar to those discussed in Chapter 21 in the context of FDR. Others need additional measures, supported by legislation and policy.

23.105 As noted above, the Commissions support the view—expressed in the NSWLRC report on Community Justice Centres—that ADR negotiations concerning violence will always be inappropriate.<sup>129</sup> The Commissions are also of the view that, where family violence is a factor, ADR for issues *other than violence* may be appropriate, depending on the circumstances, and appropriate risk assessment and risk management. ADR may have significant benefits for children in cases involving family violence, if it is conducted by an experienced practitioner with appropriate safeguards. As the Commissions have previously discussed, ADR may offer opportunities for children and their families to repair important relationships and open channels of communication. ADR also provides a forum for communication and collaboration between various agencies and individuals involved in making decisions in child protection matters. This can facilitate more effective support for children, as well as members of their families, who have experienced family violence. The Commissions consider, however, that state and territory legislation and policies for ADR in child protection matters should make clear that violence cannot be negotiated or mediated.

23.106 Family violence concerns can arise in child protection ADR, as in FDR in the family law jurisdiction. The Commissions are of the view that, if family violence concerns render FDR inappropriate for particular parties, it is likely that ADR in any child protection proceedings involving the same parties will also be inappropriate. The Commissions agree with stakeholders that legislative provisions, guidelines and policies, should ensure that ADR mechanisms in child protection address family violence risks appropriately. In the Commissions' view, the FDR legislative and policy framework for family law matters and state and territory ADR legislative and policy frameworks for child protection matters should operate consistently to screen and assess risks relating to family violence.

23.107 As noted above and discussed in Chapter 21, the use of FDR in family law disputes is subject to a comprehensive legislative and policy framework requiring family violence screening and risk assessment,<sup>130</sup> supporting tools used by FDR

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129 New South Wales Law Reform Commission, *Community Justice Centres*, Report 106 (2005), [4.31]–[4.41].

130 For further discussion on this, see Ch 21.

practitioners to screen, assess risk and determine suitability of matters for FDR.<sup>131</sup> In order to promote consistency in understanding, identifying and responding to family violence in dispute resolution processes across the family law and child protection systems, the Commissions consider that it would be desirable if state and territory governments considered FDR screening and risk assessment frameworks and tools in any future development of family violence screening and risk assessment frameworks for ADR in the child protection sector. As noted in Chapter 18, stakeholders have indicated their view that the Victorian framework for common risk assessment is a good model. The Commissions suggest, in Chapter 18, that other state and territory governments consider the development of frameworks similar to Victoria to assess and manage the risk of family violence in their jurisdictions. The Commissions note that state and territory governments should also consider the application of a common risk assessment framework to ADR in child protection matters.

23.108 The participation of children in ADR processes was referred to by a number of stakeholders. As noted above, concern was expressed about the marginalisation of children in ADR processes on the basis of an arbitrary age. On this issue, the Commissions note that the *Convention on the Rights of the Child* states that children have a right to express their views and to have those views given due weight in accordance with their age and maturity—in relation to issues concerning them.<sup>132</sup> In the Commissions' view, practice models such as child inclusive practice in FDR and other initiatives in ADR, such as the Nowra Care Circle Pilot may provide useful models for determining the appropriate level of a child's direct involvement in ADR processes, depending on the child's understanding, ability and desire to participate.

23.109 The Commissions also note stakeholder concerns about the participation of unrepresented parents in child protection ADR, and about the lack of support by child protection staff for victim parents, and the impact this may have on ADR outcomes. In Chapter 5, the Commissions refer to stakeholder concerns about practices on the part of child protection agencies which may take a punitive rather than supportive approach to parents who are also victims of family violence. The Commissions agree with stakeholders that legal advisers, in addition to other support persons, can help to address power imbalances between parents and child protection authorities in ADR. This is particularly important where parents are victims of family violence. Lawyers advising parents in child protection ADR can work collaboratively with children's legal representatives and other professionals in the child protection system to help achieve the best outcomes for children and their families. Lawyers can also play a valuable role in helping families understand and navigate their way through the multiple legal systems and ADR processes in cases involving intersecting child protection, parenting and family violence issues.

131 As noted above, the Australian Government has published the *Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line*; the Victorian Government has also developed a comprehensive screening and risk assessment framework. The Australian Government Attorney-General's Department is also currently developing a national framework to support screening and assessment for family violence across the federal family law system.

132 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990), art 12(1). See Ch 2.

23.110 In this Report, the Commissions recommend that Australian, state and territory governments prioritise the provision of, and access to, legal services and culturally-appropriate victim support services for victims of family violence.<sup>133</sup> These recommendations include enhanced support for victims in high risk and vulnerable groups. The Commissions reiterate the view expressed in Chapter 5 that practical measures are required to bring about cultural change in the way child protection workers deal with family violence—including family violence training and changes in policies, practices and procedures. Policies and guidelines should make clear that parents are entitled to seek legal advice and other support in relation to their participation in ADR, particularly where family violence is involved. Family violence training for staff participating in ADR on behalf of child protection authorities and for ADR practitioners should highlight the need for parents, as well as children, who are victims of family violence to have access to appropriate support and assistance. Such an approach has particular significance for Indigenous people because of the high levels of involvement of child protection agencies with Indigenous children, the high levels of violence in some Indigenous communities, and the significant levels of distrust of child protection agencies by Indigenous people.<sup>134</sup>

23.111 The Commissions note stakeholder comments about the need for culturally-appropriate dispute resolution for Indigenous children. Some of the ADR programs and initiatives referred to by stakeholders demonstrate the potential for ADR procedures and outcomes to reflect the needs and interests of particular children, their families and their cultures. In Chapter 21, the Commissions discuss the value of culturally responsive dispute resolution processes which have the flexibility to accommodate—in so far as is appropriate, practicable and within the limits of the law—the cultural, religious and social values and practices of Indigenous and CALD communities.<sup>135</sup> The Commissions are of the view that, in child protection matters, agreements made in culturally responsive dispute resolution may be particularly beneficial for Indigenous and CALD children because they may be more sustainable and, therefore, more effective. Culturally responsive ADR is also valuable because it facilitates children's rights, as set out in the *Convention on the Rights of the Child* and child protection legislation, to enjoy their culture.<sup>136</sup>

23.112 As discussed in Chapter 21 in relation to culturally responsive FDR, however, the complexity of identifying and assessing family violence in Indigenous and CALD communities requires careful consideration in developing effective screening and assessment tools and appropriate referral protocols. The Commissions consider, therefore, that state and territory governments should take a comprehensive and strategic approach to support culturally responsive alternative dispute resolution processes—including screening and risk assessment processes—in child protection matters.

133 See Ch 29, Recs 29–3 and 29–4.

134 See Chs 19 and 20.

135 See Ch 21 for further discussion of culturally responsive dispute resolution processes.

136 *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990) art 30. See also, for example, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 9; *Children, Youth and Families Act 2005* (Vic) s 10.

**Recommendation 23–8** State and territory legislation and policies for alternative dispute resolution in child protection matters should provide that violence cannot be negotiated or mediated within alternative dispute resolution processes.

**Recommendation 23–9** State and territory legislation and policies for alternative dispute resolution in child protection matters should provide for comprehensive screening and risk assessment mechanisms.

**Recommendation 23–10** State and territory child protection agencies and alternative dispute resolution service providers should ensure that child protection staff and alternative dispute resolution practitioners undertake training on:

- (a) the nature and dynamics of family violence; and
- (b) the need for parents, as well as children, who are victims of family violence to have access to appropriate support.

**Recommendation 23–11** State and territory governments should take a comprehensive and strategic approach to support culturally responsive alternative dispute resolution—including screening and risk assessment processes—in child protection matters.

## Family law, child protection and family violence intersections in ADR

23.113 As discussed in Chapter 3, families experiencing breakdown and family violence may have multiple and simultaneous engagements with different legal systems. For example, a child protection agency may commence care proceedings in the children's court, while a parent may commence proceedings in a family court for parenting orders governing children's living arrangements. Similarly, parties may engage in child protection ADR as well as FDR to resolve their parenting dispute. Additionally, while a dispute is pursued through non-judicial dispute resolution in one jurisdiction, a dispute involving the same family may be pursued through court proceedings in the other jurisdiction. Greater use of alternative processes as a primary form of resolving disputes increases the likelihood of dual non-judicial dispute resolution processes, or concurrent court proceedings and non-judicial dispute resolution across jurisdictions.

23.114 Where family law, child protection and family violence issues intersect, minimising duplication of processes in different jurisdictions will ensure more efficient and effective use of resources. Achieving consistency in practices and in the outcomes reached in the different jurisdictions is also important to ensure the effective protection of victims and potential victims of family violence.

23.115 Reliable and timely access by courts and non-judicial dispute resolution practitioners to information about relevant agreements made in other jurisdictions is important for consistency of outcomes across jurisdictions. As discussed in Chapter 30, there are some significant limitations on courts' powers to obtain relevant information from other jurisdictions. This is even more pronounced for non-judicial dispute resolution practitioners who have no powers to require the production of relevant information and must rely on the voluntary provision of information by the parties.

23.116 The Commissions consider, below, the gaps between the family law, child protection and family violence systems and the intersection between parenting, child protection and family violence issues in the context of ADR. In particular, the Commissions consider the importance of reliable and timely inter-jurisdictional access to relevant FDR and ADR agreements, and how this may be best facilitated. The Commissions also consider how some ADR processes to resolve concurrent child protection and parenting disputes are operating in practice.

#### ***Submissions and consultations***

23.117 A number of stakeholders commented on the gaps between the family law, child protection, and family violence systems and identified ways of overcoming these.

23.118 The OCSC commented on the gaps between child protection service systems and family violence service systems, and argued that reforms to ensure that ADR mechanisms in child protection incorporate considerations of family violence were needed to address the gaps between these two systems. Referring particularly to the need for integration of child protection and family violence protection orders,<sup>137</sup> the OCSC suggested that courts' awareness of relevant orders, including orders relating to family members, could be ensured through a shared database.<sup>138</sup>

23.119 In its submission, FRSA expressed concern about the gap between the federal family law system and the state-based child protection system. In particular, it was concerned about children's matters proceeding through family law courts when child protection agencies should be involved. FRSA argued that stronger connections between the child protection and family law systems could include, among other things, improved information sharing across the two systems and increased resources for risk assessment.<sup>139</sup>

23.120 Stakeholders commented on the resolution of matters through dual ADR processes in the family law and child protection systems. As noted previously, parties to family law parenting disputes are subject to requirements for participation in FDR under the *Family Law Act*. The Australian Government Attorney-General's Department noted that families in the child protection system may also be required to

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137 The Office of the Child Safety Commissioner noted that because family violence issues are primarily considered in the Victorian Magistrates' Court system and child protection issues are primarily considered in the Victorian Children's Court system, family violence protection orders and child protection orders are not necessarily integrated with consideration of all relevant information: Office of the Child Safety Commissioner, *Submission FV 215*, 30 June 2010.

138 Ibid.

139 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

participate in non-judicial dispute resolution processes, and raised the issue of dual ADR processes in the family law and child protection systems operating in practice.<sup>140</sup>

23.121 The national peak body for FDR and other family relationship services, FRSA, stated that, in addition to providing FDR for family law parenting disputes, some FDR service providers are providing dispute resolution as part of child protection processes.<sup>141</sup> Legal Aid NSW also noted that its FDR service provides dispute resolution in child protection cases.<sup>142</sup>

23.122 FRSA stated that it was not aware of problems arising in FDR cases as a result of dual family law and child protection ADR processes,<sup>143</sup> and made the following comment with respect to consideration by FDR practitioners of relevant information from the other jurisdiction in cases where families may be involved in both family law and child protection matters:

in cases where FDR is for the resolution of disputes over parenting arrangements, risks concerned with violence, child welfare and safety are explored in initial and ongoing assessment, typically one or both parents will identify any child protection involvement or concerns, domestic violence orders or other socio-legal processes that impact on the care provision. Similarly, if providing FDR as part of a child protection intervention or to address a dispute over care arrangements involving others (eg grandparent care) the assessment will include past or current parenting plans, family court orders and other socio-legal processes of relevance.<sup>144</sup>

23.123 FRSA also commented that when parties are asked, they usually disclose such information.<sup>145</sup> In the context of commenting about the role of lawyers in child protection ADR, AFVPLS Victoria pointed to the difficulties experienced by victims in disclosing family violence, and commented that the best interests of children would not be served if agreements are made on inadequate information about family violence or safety issues.<sup>146</sup> However, FRSA stressed the importance of thorough assessments by appropriately skilled practitioners to fully identify risks (including violence, abuse, neglect, drug and alcohol misuse, and mental health issues) and the interactivity between risks. FRSA explained that assessments are undertaken by FDR practitioners who are qualified social scientists with experience and qualifications in the areas of child protection and family violence.<sup>147</sup>

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140 Australian Government Attorney-General's Department, *Submission FV 166*, 25 June 2010.

141 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

142 Legal Aid New South Wales, *Correspondence*, 10 September 2010.

143 Family Relationship Services Australia, *Correspondence*, 21 September 2010; Family Relationship Australia Services, *Correspondence*, 20 September 2010. The term FDR in this context refers to a practice model for dispute resolution, rather than simply ADR for family law disputes.

144 Family Relationship Australia Services, *Correspondence*, 20 September 2010.

145 Family Relationship Services Australia, *Consultation*, By telephone, 15 September 2010; Family Relationship Services Australia, *Consultation*, By telephone, 30 June 2010

146 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

147 Family Relationship Australia Services, *Correspondence*, 20 September 2010.

23.124 According to FRSA, there is growing interest in applying FDR to child protection matters across Australian jurisdictions,<sup>148</sup> and FDR is increasingly being identified as an alternative to potentially complex and resource-intensive court processes in child protection matters.<sup>149</sup> FDR can be used to resolve a dispute or to assist decision making involving multiple stakeholders,<sup>150</sup> including parents, grandparents, child protection agencies, and children (through child-inclusive practice).<sup>151</sup> FRSA also acknowledged, however, that the model of FDR used in child protection matters would have to be adapted to the power imbalance between the parents and child protection authorities. FRSA noted that further work may be warranted on practice models and implications for practitioner training and accreditation to support the application of FDR in child protection matters.<sup>152</sup>

23.125 FRSA also made a number of comments with respect to how intersecting family law parenting issues and child protection issues relating to one family may be addressed together through the same FDR processes.

23.126 FRSA explained that the majority of families access FDR as ‘family law system clients’ to resolve a dispute over parenting arrangements. However, in some of these cases, family violence, mental health issues, or drug and alcohol misuse by parents may mean that children are at risk. Statutory child protection authorities may already be involved, or may become involved following notification by the FDR service. Grandparents or other family members may also become involved. FRSA noted that ‘at some point the issues being dealt with in FDR may become more concerned with addressing family violence and securing the safety of the child through the best placement option, rather than being limited to the dispute between the parents’.<sup>153</sup> Strict distinctions between child protection and family law parenting issues may not work ‘on the ground’, and in some cases it may not be clear whether the primary issue is a parenting one or a child protection one:<sup>154</sup>

While distinctions between ‘family law’, ‘family violence’ and ‘child protection’ may be meaningful to legislators, policy analysts and program administrators, such distinctions do not reflect the lived experience of families affected by violence where relationship breakdown, violence and child abuse/neglect are often connected and not discrete or isolated problems.<sup>155</sup>

23.127 In FRSA’s view, there is ‘no apparent conflict between the *Family Law Act* and the child protection legislation that underpins the work of the child protection authority’. With respect to how family law and child protection legislative and policy frameworks might apply to dispute resolution processes dealing with intersecting

148 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

149 Family Relationship Services Australia, *Correspondence*, 21 September 2010.

150 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010.

151 Family Relationship Services Australia, *Correspondence*, 21 September 2010.

152 Family Relationship Services Australia, *Submission FV 231*, 15 July 2010. Other stakeholders’ comments about the significance of power imbalances between parents and child protection authorities in child protection ADR are considered above.

153 Family Relationship Services Australia, *Correspondence*, 21 September 2010.

154 Family Relationship Services Australia, *Consultation*, By telephone, 15 September 2010.

155 Family Relationship Services Australia, *Correspondence*, 21 September 2010.

parenting and child protection issues, however, FRSA acknowledged that ‘there is the potential for issues to arise in relation to confidentiality, admissibility, risk assessment etc., particularly if the dispute is not resolved and/or the matter proceeds to court in either the family court or children’s court’.<sup>156</sup>

23.128 FRSA noted that there is a lack of research or documented case examples exploring the family law, family violence and child protection legislation intersections at the direct service delivery level. In FRSA’s view, further research in this area, as well as consideration of case examples to demonstrate the actual and potential use of FDR in child protection, would be useful.

#### ***Commissions’ views***

23.129 The Commissions’ view is that some of the concerns discussed throughout this Report in relation to court proceedings, which arise out of fragmentation of jurisdictions, may also apply to non-judicial dispute resolution processes. In particular, the Commissions consider that the need for information sharing across systems to ensure that risk assessment is reliable and that outcomes are consistent, arises in the context of both court proceedings and non-judicial dispute resolution processes. The Commissions agree, therefore, with the OCSC that reforms to ensure the incorporation of family violence considerations into ADR mechanisms in child protection need to be implemented as part of a wider reform addressing the gaps between the child protection systems and family violence systems. The Commissions also agree with FRSA that greater connection between the family law and child protection systems is needed to improve information sharing and to increase resources for effective risk assessment.

23.130 The Commissions note FRSA’s comment about the importance of thorough assessments undertaken by qualified practitioners who have experience and qualifications in the area of child protection and family violence, as well as social science, and are able to identify risks and the interaction between risks. The Commissions also note FRSA’s comments that, as part of risk assessment procedures for dispute resolution in child protection or in family law matters proceeding through FDR in federally-funded family and relationship services, parties are asked about court orders, ‘socio-legal processes’ and agreements relating to the other jurisdiction.

23.131 The Commissions consider that dispute resolution practitioners’ reliable and timely access to information about relevant court orders and other non-judicial dispute resolution agreements is necessary to assist in such risk assessment, as well as to ensure that women and children are effectively protected against family violence by consistent outcomes across jurisdictions.

23.132 The Commissions discuss, above, the relevance of information about protection orders in assisting FDR practitioners to identify family violence and to manage the risks associated with it.<sup>157</sup> Information about relevant orders or agreements

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156 Ibid.

157 The Commissions have recommended that this screening and risk assessment frameworks and tools address the need to ask parties in FDR processes about the existence of relevant current protection orders, past protection orders, as well as applications for protection orders—see Recs 23–6 and 23–7.

and relevant legal proceedings or dispute resolution processes in the family law and family violence jurisdictions is also important to facilitate informed and appropriate responses to family violence by child protection dispute resolution practitioners, and to ensure that ADR in child protection disputes achieves safe outcomes for children. The Commissions are of the view that ADR service providers undertaking intake procedures for ADR in child protection should, therefore, ensure that parties are asked specifically about relevant orders and applications under state and territory family violence legislation, and relevant orders, injunctions and applications under the *Family Law Act*.<sup>158</sup> Similarly, intake procedures for child protection ADR should ask parties about relevant FDR agreements and FDR processes in the family law jurisdiction.<sup>159</sup>

23.133 Clearly, courts considering matters involving family violence may also be assisted by access to information about relevant agreements reached in child protection ADR or in FDR. One way of facilitating access by courts to relevant agreements would be to register such agreements as consent orders in the relevant court and subsequently include them on a national register which can be accessed by family courts and state and territory courts that hear family violence protection applications and child protection matters.<sup>160</sup> Registering agreements as consent orders may, however, be considered undesirable for a number of reasons, including the costs involved to the parties. It may also reduce the flexibility of agreements, and the discretion of child protection agencies in implementing agreements.<sup>161</sup>

23.134 In the Commissions' view, some of the arguments in favour of improving courts' access to relevant orders from other jurisdictions through a national register might also be made in favour of extending access to relevant orders to ADR and FDR practitioners. The Commissions note, however, that FDR and ADR may be undertaken by individuals and organisations in the private sector. As the Commissions do not have sufficient information regarding the concerns and implications that may arise out of an extension of access to private sector organisations and individuals, the Commissions make no specific recommendation on this point.

23.135 As noted above, where families are affected by violence, parenting and child protection issues may overlap. Stakeholders have indicated that, currently, FDR services may be utilised for the resolution of both child protection and parenting disputes. Dispute resolution processes that can address both types of disputes where the same family is involved—and so bridge jurisdictional divides which limit court processes—may have many benefits, particularly in minimising inconsistent outcomes. However, difficulties may also arise where legislative and policy frameworks for child protection dispute resolution may not be entirely consistent with legislative and policy

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158 Relevant applications, orders and injunctions are those relating to the children and their family members.

159 Relevant FDR agreements and FDR processes are those relating to the children and their family members.

160 The Commissions recommend that a national register be established to include protection orders under state and territory family violence legislation; child protection orders under state and territory child protection legislation and related orders and injunctions under the *Family Law Act 1975* (Cth): see Rec 30–18.

161 Implementation of family conference outcomes, for example, is generally not mandated in Australia, and the relevant child protection departments retain some discretion: N Harris, *Family Group Conferencing in Australia 15 Years On* (2008), prepared for the National Child Protection Clearinghouse.

frameworks for family law parenting dispute resolution. For example, provisions setting out requirements, obligations and other matters in relation to dispute resolution under the *Family Law Act* may be different from provisions relating to dispute resolution under child protection legislation.<sup>162</sup> Where disputes are not clearly characterised as either family law or child protection matters, there may be potential for confusion as to which provisions apply to the dispute resolution process. The need for cross-training and accreditation to enable practitioners to undertake dispute resolution in both family law and child protection disputes is a further consideration.

23.136 The comments made by FRSA suggest that the use of FDR—including child inclusive practice—as a model to resolve child protection issues together with intersecting parenting issues may be an emerging and significant trend. As FRSA has noted, however, evidence about this current and potential use of FDR is limited. The Commissions are unable, therefore, to come to any firm conclusions as to the implications—including the benefits and limitations—of applying FDR as a practice model to resolve child protection issues together with intersecting parenting issues relating to the same family.

23.137 The Commissions are of the view, however, that flexible dispute resolution processes, which can facilitate collaboration across socio-legal service systems and jurisdictional divides, may offer significant potential for seamless and effective resolution of intersecting child protection and parenting issues relating to the same family. This may be particularly valuable in cases involving family violence. In the Commissions' view, further work to explore the current and potential use of dispute resolution models in this context would be valuable.

**Recommendation 23–12** Alternative dispute resolution service providers should ensure that, in intake procedures for child protection matters, parties are asked about relevant:

- (a) orders, injunctions and applications under state and territory family violence legislation and the *Family Law Act 1975* (Cth);
- (b) family dispute resolution agreements and processes; and
- (c) alternative dispute resolution agreements and processes in family violence matters.

**Recommendation 23–13** The Australian Government Attorney-General's Department and state and territory governments should collaborate with Family Relationship Services Australia, legal aid commissions and other alternative dispute resolution service providers, to explore the potential of resolving family law parenting and child protection issues relating to the same family in one integrated process.

<sup>162</sup> For example, for a discussion of provisions relating to the confidentiality and admissibility of FDR communications under the *Family Law Act 1975* (Cth), see Ch 22.

## **Restorative justice**

23.138 Restorative justice has been described as ‘a process whereby parties with a stake in a specific offence collectively resolve how to deal with the aftermath of the offence and its implications for the future’.<sup>163</sup> However, such processes need not involve face-to-face meetings between victims and offenders, and can be used for victims alone or involve representatives of victims. Restorative justice initiatives may be employed at any stage in the criminal justice process, including the sentencing stage. Other stages could include: before or at the time a person is charged; after a person is convicted but before sentencing; and after a person has served his or her sentence. There are a number of restorative justice practices, with the three most common being victim-offender mediation, conferencing, and circle and forum sentencing.

23.139 Restorative justice practices in Australia differ widely in their application to family violence. There are some general limits to, and criteria for, these programs that restrict their application to family violence. In addition, a large number of programs have specific exclusions, either by way of legislation or guidelines, for conduct that might constitute family violence. In particular, it is common for such programs to exclude sexual offences and certain violent offences.<sup>164</sup>

23.140 The Consultation Paper raised questions about the application of restorative justice processes in family violence cases and in relation to sexual assault offences and offenders.<sup>165</sup>

### ***Submissions and consultations***

23.141 Many of the submissions in response indicated concern about, or opposition to, the use of restorative justice in family violence cases,<sup>166</sup> and particularly in cases involving sexual assault.<sup>167</sup>

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163 T Marshall, *Restorative Justice: An Overview* (1996), prepared for the Home Office—United Kingdom, 5.

164 For example, the NSW legislation establishing youth justice conferencing, the *Young Offenders Act 1997* (NSW), excludes its application to offences under the relevant family violence legislation (including a breach of a protection order, stalking and intimidation), and to a range of other offences that may constitute family violence.

165 Consultation Paper, Questions 11–7 and 11–8.

166 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010; P Easteal, *Submission FV 40*, 14 May 2010.

167 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 69*, 2 June 2010; P Easteal, *Submission FV 40*, 14 May 2010.

23.142 However, there was some support for the use of restorative justice in family violence cases.<sup>168</sup> One stakeholder argued that it is important to dispel the myths—particularly cultural assumptions and stereotypes—about restorative justice and to have restorative justice recognised as an alternative approach with respect to sexual violence within Indigenous communities. It was argued that such programs could potentially be tailored, with safety precautions and screening processes, and introduced in Victoria for persons of Aboriginal and Torres Strait Islander descent.<sup>169</sup>

23.143 Hannah McGlade commented that, while family violence and sexual assault against Indigenous victims may be serious criminal offences, the criminal justice system often does not respond to them as such. She advocated for the use of Aboriginal justice models to deal with violence and abuse of Indigenous women and children:

Aboriginal customary law has not ceased to exist, although subjected to abuse from colonisation onwards. Violence offences against women and children are a grave breach of Aboriginal customary law, which includes women's customary law, however, the non-Aboriginal criminal justice system continues to diminish Aboriginal women by supporting violence, often as a matter of 'culture'. Aboriginal justice models will encourage the revival of our culture and lawful ways that prohibit violence and abuse of women and children.<sup>170</sup>

23.144 Professor Julie Stubbs commented that restorative justice has limited application because it is not a forum for fact finding.<sup>171</sup> In her view, claims made about restorative justice practices assisting victims have been 'overstated, or not tested'. She noted that most of the evidence is derived from existing models in juvenile justice; and many of these models confine what might be provided to victims to apologies, or to the limited reparations the offender can make.<sup>172</sup> She was of the view that 'effective justice for domestic violence, sexual assault or gendered harms might reside in hybrid models that are not limited by [restorative justice] or by conventional criminal justice'.<sup>173</sup>

#### ***Commissions' views***

23.145 In the Consultation Paper, the Commissions expressed a preliminary view that the use of restorative justice practices in the context of family violence appears to be fraught with difficulties. The Commissions also suggested that the dynamics of power in a relationship where sexual offences have been committed make it very difficult to achieve the philosophical and policy aims of restorative justice, and that the use of restorative justice practices in that context appears to be generally inappropriate. Many of the comments made in submissions reflected these concerns.

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168 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Confidential, *Submission FV 71*, 1 June 2010.

169 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

170 H McGlade, *Submission FV 84*, 2 June 2010.

171 J Stubbs, *Submission FV 186*, 25 June 2010 (referring to international models).

172 Ibid.

173 Ibid.

23.146 As noted in the Consultation Paper, the Commissions agree with the Victorian Law Reform Commission (VLRC) that appropriate models of restorative justice must be based on rigorous research.<sup>174</sup> Further research, trials and evaluations had been recommended by the VLRC, the Victorian Parliament Law Reform Committee, and the National Council to Reduce Violence Against Women and their Children.<sup>175</sup> Given current and proposed developments, the Commissions conclude that it is premature to make any recommendations in this area, and that this issue should be revisited at a later stage.

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<sup>174</sup> Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), 84.

<sup>175</sup> Ibid; Law Reform Committee—Parliament of Victoria, *Inquiry into Alternative Dispute Resolution and Restorative Justice* (2009), Recs 72–73. In the Consultation Paper, the Commissions also referred to consultation and planning by the ACT Department of Justice and Community Safety’s Restorative Justice Unit to implement provisions in the *Crimes (Restorative Justice) Act 2004* (ACT). These provisions apply restorative justice practices to crimes constituting family violence under ACT family violence legislation.

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**Part G**

**Sexual Assault**

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# **24. Sexual Assault and Family Violence**

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## **Contents**

Introduction	1097
Chapter outline	1098
Terminology	1099
The prevalence of sexual violence	1100
A limited picture	1100
A snapshot of sexual violence	1103
Sexual assault in the family violence context	1106
Multiple forms of sexual violence	1106
Repetition of sexual violence	1106
Coexistence with other forms of violence and abuse	1107
Indigenous communities	1108
History of activism and legal change	1111
Historical approaches to sexual violence	1111
The nature of sexual offences	1114
Balancing rights?	1117
Law reform	1119
Focus of reform	1120
Other legal responses	1123
Law is not the only response	1125
The implementation gap	1125
Judicial and legal education	1127

## **Introduction**

24.1 This part of the Report concerns the second Term of Reference of the Inquiry. This requires the Commissions to focus on the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family violence context, including rules of evidence, on victims of such violence.

24.2 This chapter outlines key background understandings of sexual assault in a family violence context, its nature and prevalence, and the response of the criminal justice system and other areas of law.

24.3 Chapter 25 describes the range of existing sexual offences and identifies inconsistencies in relation to elements of these offences, notably in relation to the issue of consent. It also discusses the role that guiding principles and objects clauses can play in the interpretation of sexual offences and the application of rules of evidence in sexual assault proceedings.

24.4 Chapters 26, 27 and 28 highlight ways in which particular laws and procedures operate for victims of sexual assault. In some cases, where it is possible to identify certain approaches as more promising and progressive than others, the Commissions recommend that the Australian, state and territory governments should implement consistent measures based on the best model. Uniformity is not, of itself, a goal, but rather consistency with respect to identified best policy.

24.5 For simplicity, the Commissions' recommendations are most often worded to recommend that 'federal, state and territory' legislation should provide for certain matters, notwithstanding that:

- federal criminal law does not provide for ordinary sexual offences<sup>1</sup> and, in practice, only a small number of criminal and quasi-criminal matters are heard in federal courts;<sup>2</sup> and
- one or more jurisdictions may already have enacted legislation that fits the criteria recommended by the Commissions.

### **Chapter outline**

24.6 This chapter canvasses what is known about the prevalence of sexual assault in the family violence context and situates the experience of sexual assault as part of family violence more generally. It highlights aspects of family violence that are important in understanding and responding to this category of sexual violence—for example, the many types of sexual violence experienced by women and children, its repetition within the family violence context, its cumulative impact and coexistence with other forms of family violence. Sexual assault by current and former intimate partners, for instance, requires responses that take account of these interrelated contexts and acknowledge the distinct experience of sexual violence by an intimate partner.

24.7 The chapter then introduces the response of the criminal justice system—an examination that is expanded in Chapters 25 to 28. It outlines some of the unique features of sexual assault and the legal response, as well as the myths and stereotypes about women, children and sexual assault that continue to hold some sway in the community and in the legal system. The chapter introduces the substantial reform of law and procedure that has been undertaken in this area over the last three decades to provide more appropriate criminal justice responses to sexual assault.

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1 As opposed to sexual offences such as those relating to child sex tourism: *Crimes Act 1914* (Cth) pt IIIA; rape or sexual violence in the context of war or as a crime against humanity: *Criminal Code* (Cth) ss 268.14, 268.19, 268.59, 268.64. See also *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth).

2 Rather, the Australian Parliament chooses to rely heavily on the state and territory courts to adjudicate proceedings with respect to federal offences in order to avoid the financial and administrative costs associated with establishing a separate system of federal criminal courts. The use of state courts was made possible by the *Australian Constitution* ss 71 and 77(iii). *Judiciary Act 1903* (Cth) s 39(2) invests state courts with federal jurisdiction in both civil and criminal matters, subject to certain limitations and exceptions. Under *Judiciary Act 1903* (Cth) ss 68(1), 79 state and territory procedural and evidence laws are applied to federal prosecutions in state and territory courts.

24.8 The chapter briefly discusses other areas of the law which also respond to sexual assault (including protection orders, family law, statutory compensation and tort law). This discussion recognises that the criminal justice system is not the only legal response, nor is it simply the law that is (or should be) called on to respond to and reduce sexual violence.

24.9 Finally, the chapter discusses the ‘implementation gap’—the gap between written law and its practice—that remains despite extensive changes to law and procedure related to sexual assault.

### Terminology

24.10 In this chapter the Commissions use two terms to signify different aspects of sexual violence in a family violence context. First, the term ‘sexual violence’ is used to describe the full range of sexually coercive or unwanted acts that many women and children experience, not all of which are against the law. Secondly, the terms ‘sexual assault’ or ‘sexual offence’ are used to refer to those acts that are proscribed in the various Australian criminal laws (for example, sexual intercourse without consent, rape, indecent assault, offences against children, and offences against people with a cognitive impairment). This approach recognises both ‘experience-based’ and ‘offence-based’ definitions of sexual violence.<sup>3</sup>

24.11 The Australian Bureau of Statistics (ABS) provides the following experience-based definition of sexual violence:

Sexual assault is unwanted behaviour of a sexual nature directed towards a person:

- which makes that person feel uncomfortable, distressed, frightened or threatened, or which results in harm or injury to that person;
- to which that person has not freely agreed or given consent, or to which that person is not capable of giving consent;
- in which another person uses physical, emotional, psychological or verbal force or (other) coercive behaviour against that person.

Sexual assault may be located on a continuum of behaviours from sexual harassment to life-threatening rape. These behaviours may include lewdness, stalking, indecent assault, date rape, drug-assisted sexual assault, child sexual abuse, incest, exposure of a person to pornography, use of a person in pornography, and threats or attempts to sexually assault.<sup>4</sup>

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<sup>3</sup> The distinction was explored in recent work by the ABS and used in the *Time for Action* report: Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 8. National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009). For a more detailed discussion of this conceptualisation, see Australian Bureau of Statistics, *Sexual Assault Information Development Framework: Information Paper*, Catalogue No 4518.0 (2003), 7–10.

<sup>4</sup> Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 8.

24.12 Offence-based definitions are directly linked to the elements of the offences prescribed by the criminal law including, for example: penetration, absence of consent and the circumstances that negate consent (as defined in law).<sup>5</sup>

24.13 An understanding of both definitions is important in recognising the continuum of unwanted sexual behaviours that may exist in the family violence context. It is also important in ensuring appropriate responses, including service delivery and support for people who have experienced sexual violence that is not necessarily addressed by the criminal law.<sup>6</sup>

## **The prevalence of sexual violence**

### **A limited picture**

24.14 Information about the nature and prevalence of sexual assault is limited. This is due to a range of factors including lack of reporting generally, and under-reporting due to the methodologies and definitions employed in the various surveys or data sources.<sup>7</sup>

24.15 Moreover, many sexual assaults are not reported to anyone, let alone to the police.<sup>8</sup> For example, the 1996 ABS *Women's Safety Survey* found that one in five women who had been sexually assaulted did not tell anyone about it. In 2002, the National Crime and Safety Survey found that 80% of women did not report the most recent incident to the police.<sup>9</sup> Similarly, the Australian Component of the International Violence Against Women Survey (IVAWS) found that only 15% of women who experienced physical or sexual violence from an intimate partner reported that incident to the police.<sup>10</sup> In 2007, the Australian Institute of Criminology (AIC) estimated that less than 30% of sexual assaults and related offences are reported to the police.<sup>11</sup>

24.16 Some forms of sexual violence may be less likely to be reported than others. Notably, incidents (whether sexual or physical) committed by current or former intimate partners are less likely to be reported than those incidents committed by strangers.<sup>12</sup> In a submission to this Inquiry, Professor Patricia Easteal stated that research confirmed that 'partner rape has particularly low reporting, prosecution, and

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5 Ibid, 9. There is variation across the jurisdictions in what acts are defined as sexual offences and the way in which consent is defined: See Ch 25.

6 Ibid, 8.

7 Data collection is discussed further in Ch 26 and more generally in Ch 31. For a discussion of the limitations of various data sources, eg, police statistics, crime surveys and victim surveys, see B Cook, F David and A Grant, *Sexual Violence in Australia: Australian Institute of Criminology Research and Public Policy Series*, 36 (2001), 2–4.

8 See Ch 26 discussion of under-reporting and barriers to reporting sexual assault.

9 Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 57.

10 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004), 102.

11 Australian Institute of Criminology, *Guilty Outcomes in Reported Sexual Assault and Related Offence Incidents* (2007).

12 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004), 92, 102.

conviction rates'.<sup>13</sup> This has particular significance for an understanding of sexual violence in a family context.

24.17 Women and children may not report or disclose the sexual violence that they have experienced for a range of reasons,<sup>14</sup> including because: they have not identified the act as sexual violence, let alone as a criminal offence; they do not consider the incident serious enough to warrant reporting;<sup>15</sup> they are ashamed, fearful of the perpetrator, do not think that they will be believed, fear how they will be treated by the criminal justice system, and may consider that they can handle it themselves.<sup>16</sup>

24.18 The failure to recognise or identify an act as sexual violence, or more specifically as a sexual assault, may also be a 'survival strategy' for some women, particularly those who have been sexually assaulted by an intimate partner. As Debra Parkinson reported in 2008:

If they had recognised it as rape, they could not have managed their situation. Some excused the behaviour of their partners—even the most brutal rapes—as a consequence of being married to him, 'it was his right'. As a result, the way women complete surveys would be inaccurate.<sup>17</sup>

... women told us that it was not until they were no longer in the relationship and sometimes not until many years later that they had the perspective to recognise they were being raped within their relationship. While they were in the relationship, they struggled to make sense of what was happening to them, and were caught in our society's demand to make the marriage work. Whilst in the relationship, they minimised the rapes, they blamed themselves, or they feared even worse consequences if they didn't comply.<sup>18</sup>

24.19 Different surveys or data sources report different findings about the extent of sexual violence in Australia, including because different definitions of sexual violence or sexual assault are relied upon.<sup>19</sup> Unsurprisingly, narrower offence-based definitions

13 P Easteal, *Submission FV 38*, 13 May 2010.

14 Barriers to reporting are discussed in Ch 26. See, eg, J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004), 14, 16–17.

15 The perceived seriousness of an event has been identified as a critical determinant in whether a person reports an incident to the police (seriousness includes such factors as whether the victim had been detained in some way, injured, or threatened, and the relationship with the perpetrator): *Ibid*, 92–95.

16 See *Ibid*, 97–99, 105–106. See also L Kelly, 'Promising Practices Addressing Sexual Violence' (Paper presented at Violence Against Women: Good Practices in Combating and Eliminating Violence Against Women Expert Group Meeting, Vienna, 17–20 May 2005), Box 1, 5.

17 D Parkinson, *Partner Rape and Rurality* (2008), prepared for the Australian Centre for the Study of Sexual Assault, 18. Parkinson suggests that this may explain the disparity in some surveys between the number of women who disclose sexual assault by a current partner when compared to the number who disclose sexual assault by a former partner. For example, data in Australia Bureau of Statistics, *Personal Safety Survey*, 4906.0 (2005) show that of women who had experienced violence since the age of 15, 2.1% reported sexual violence by a current partner, compared to 21.7% by a previous partner: D Parkinson, *Partner Rape and Rurality* (2008), prepared for the Australian Centre for the Study of Sexual Assault, 18, 133.

18 D Parkinson, *Partner Rape and Rurality* (2008), prepared for the Australian Centre for the Study of Sexual Assault, 18.

19 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004), 24; Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 8.

tend to result in lower levels of sexual violence being recorded.<sup>20</sup> Under-reporting, and under-estimates of prevalence, may also be caused by the mode of survey delivery. For example, surveys conducted via the telephone may mean that certain groups of women, particularly those who are more vulnerable to violence,<sup>21</sup> may not be captured in the survey.<sup>22</sup> Some survey instruments may be better designed to enhance disclosure, for example, through the use of multiple opportunities for disclosure, or open-ended questions that allow participants to talk about experiences that might not neatly fit within the categories set by survey questions.<sup>23</sup> Other methodological variations include whether interpreters are available to assist in the administration of the survey, whether the criteria for inclusion are age-specific and so on. Results also vary depending on participants' perceptions of whether certain conduct constitutes sexual violence or a crime.<sup>24</sup>

24.20 There is general agreement that, given these methodological problems (and direct evidence of under-reporting of sexual assault), the available survey data are likely to underestimate the incidence and prevalence of sexual violence.

24.21 Understanding that sexual assault is under-reported is crucial background when considering the response of the criminal justice system. The vast majority of incidents of sexual assault do not come to the attention of the legal system. The problem is exacerbated in the family violence context. Therefore, an important part of the law reform focus should be on measures that might promote reporting and challenge community attitudes to sexual assault that continue to reinforce its invisibility.<sup>25</sup>

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20 See Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 16.

21 For example, those with unstable housing, Indigenous women particularly those living in rural and remote areas, women with limited or no English, women in custody, young women, or women in group homes or in institutional care.

22 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 15.

23 See discussion in M Schwartz, 'Methodological Issues in the Use of Survey Data for Measuring and Characterizing' (2000) 6 *Violence Against Women* 815, 820–821; W DeKeseredy, 'Current Controversies on Defining Nonlethal Violence Against Women in Intimate Heterosexual Relationships' (2000) 6 *Violence Against Women* 728, 741.

24 See discussion about methodology and design in H Johnson, 'Assessing the Prevalence of Violence Against Women in Canada' (Paper presented at A Statistical Overview, Challenges and Gaps in Data Collection and Methodology and Approaches for Overcoming Them: Expert Group Meeting, UN Division for the Advancement of Women, Violence Against Women, Geneva, 11–14 April 2005); P Tjaden, 'Defining and Measuring Violence Against Women: Background, Issues and Recommendations' (Paper presented at A Statistical Overview, Challenges and Gaps in Data Collection and Methodology and Approaches for Overcoming Them: Expert Group Meeting UN Division for the Advancement of Women, Violence Against Women, Geneva, 11–14 April 2005); S Walby, 'Improving the Statistics on Violence Against Women' (Paper presented at A Statistical Overview, Challenges and Gaps in Data Collection and Methodology and Approaches for Overcoming Them: Expert Group Meeting, UN Division for the Advancement of Women, Violence Against Women, Geneva, 11–14 April 2005).

25 See similar discussion in Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [1.11].

## A snapshot of sexual violence

24.22 This section presents a snapshot of the statistics available about the experience of sexual assault and sexual violence in Australia. Where possible, statistics on sexual assault within the family violence context are highlighted.

24.23 Sexual violence is strongly gendered with many more women reported as experiencing sexual violence than men.<sup>26</sup> When women and children are sexually assaulted, the perpetrator is likely to be someone well known to them, a current or former partner or family member.<sup>27</sup> While all women and children may be at risk of sexual violence, some are more vulnerable than others, including young women, Indigenous women, women from culturally and linguistically diverse backgrounds (CALD), and women with disabilities.

### ***Children***

24.24 There are limited available data about the extent of sexual violence against children. Available data come from crime statistics or child protection notifications. In 2003, it was estimated that 187 per 100,000 children aged 0–14 years were victims of sexual abuse.<sup>28</sup> Rates of sexual assault were higher for children aged 10–14 and ‘three-quarters of reported victims were girls’.<sup>29</sup>

There are no national data on how rates of reported physical and sexual assault vary across population groups. There is limited evidence suggesting that child sexual assault is more prevalent in rural and remote areas than in urban areas and is associated with social disadvantage. Information available from New South Wales and the AIHW National Child Protection Data Collection indicates that Aboriginal and Torres Strait Islander children are over-represented among victims of physical and sexual assault.<sup>30</sup>

24.25 By way of example, the *Little Children Are Sacred* report identified child sexual abuse as a significant issue for most of the remote Indigenous communities in the Northern Territory. While the report was not able to accurately estimate prevalence, it found that child sexual abuse involves both female and male victims; is committed by non-Aboriginal and Aboriginal males of all ages; has led to inter-generational cycles of offending; and occurs across urban and remote communities and in various circumstances.<sup>31</sup>

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26 See Australian Bureau of Statistics, *Personal Safety Survey*, Catalogue No 4906.0 (2005), Tables 3, 5.

27 See *Ibid*, Table 19 in relation to women.

28 Australian Institute of Health and Welfare, *A Picture of Australia's Children 2009* (2009), 113.

29 *Ibid*.

30 *Ibid*.

31 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007), 57–59. The available statistics on the incidence of child sexual abuse in Indigenous communities are summarised in A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 337–343.

### **Young women**

24.26 Young women are overrepresented as victims of sexual assault. The Australian component of the IVAWS found that younger women (aged 18–24) were more likely than other women to have reported experiencing sexual violence in the 12 months prior to the survey.<sup>32</sup> In a study on non-reporting and the hidden reporting of sexual assault, it was noted that women in the ‘15–19 age group report the highest rates of sexual assault, at 495 per 100,000 compared to the total rate for all females of 139 per 100,000’.<sup>33</sup> An over-representation of young women as victims of sexual violence was found in the ABS *Personal Safety Survey*—30.7% of women who reported sexual violence in the 12 months prior to the survey were aged 18–24, and a further 29.8% were aged 25–34.<sup>34</sup>

### **Aboriginal and Torres Strait Islander women**

24.27 Various surveys and police statistics generally confirm higher rates of sexual violence committed against Indigenous women compared to the non-Indigenous population:

- the Australian component of the IVAWS found that Indigenous women reported experiencing higher levels of all kinds of violence, with three times as many Indigenous women compared to non-Indigenous women reporting sexual violence in the 12 months prior to the survey.<sup>35</sup>
- crime statistics recorded in 2008 found that the Indigenous victimisation rate for sexual assaults in NSW was nearly 3.5 times the rate for the non-Indigenous population.<sup>36</sup> In South Australia and the Northern Territory the victimisation rate was over three times that for the non-Indigenous population.<sup>37</sup>
- A NSW study on Aboriginal women in prison found that over three quarters had experienced child sexual assault, just under half had been sexually assaulted as adults, and almost 80% had experienced family violence.<sup>38</sup>

32 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004), 29.

33 D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review* (2003), prepared for the Commonwealth Office of the Status of Women, 7.

34 Australian Bureau of Statistics, *Personal Safety Survey*, Catalogue No 4906.0 (2005), Table 6.

35 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004), 29. Note that Mouzos and Makkai emphasise that these result should be ‘viewed with caution due to the high relative standard error’: 30.

36 Australian Bureau of Statistics, *Recorded Crime: Victims*, Catalogue No 4510.0 (2008), 22. The ABS only reported on Indigenous victimisation for NSW, South Australia and the Northern Territory. It did not report on Indigenous victimisation for other jurisdictions given limitations in the quality of the data: 22. This ABS publication reports on selected offences recorded by the police for the 2008 calendar year: 53.

37 Ibid, 48, 51. See also N Taylor and J Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia* (2007), 2.

38 See N Taylor and J Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia* (2007), 2.

***Women from culturally and linguistically diverse backgrounds***

24.28 There is limited information available on the prevalence of sexual violence against women from CALD backgrounds. Not all surveys have adopted measures to assist in eliciting information from CALD women, and even when they have, there may be other limitations with the data.<sup>39</sup>

24.29 The Australian component of the IVAWS found that women from a non-English speaking background and English-speaking women reported similar levels of sexual violence in the preceding 12 months. While noting the difficulty in ‘quantifying the level of violence experienced by women from minority populations compared to women from the general population’<sup>40</sup> the IVAWS found English-speaking women reported higher levels of all types of violence over their lifetimes.

24.30 The IVAWS also recognised the likely impact on survey results of factors which influence perceptions and understandings about what constitutes violence, and significant barriers to discussing and reporting violence.<sup>41</sup> For example, there is variation in the extent to which women have knowledge about the law, ability to access the Australian legal system, willingness to engage with the police and other institutional actors, and knowledge about what unwanted sexual acts are against the law (for example, whether rape in marriage is illegal).<sup>42</sup>

24.31 It is important to recognise, however, that the CALD community is not a homogenous group, and includes women from a wide range of different backgrounds and experiences and varying English-language skills.

***Women with disabilities***

24.32 Many studies have documented the increased vulnerability to physical and sexual violence of people with disabilities. As with other groups of women, there is a dearth of statistics that document the extent of sexual violence. This is in part linked to the failure of existing data collection surveys and service providers, including the police, to ‘identify the disability status of participants’.<sup>43</sup> However, one study has found that 90% of women with intellectual disabilities have been sexually abused; and 68% of women with an intellectual disability will be subjected to sexual abuse before they reach 18 years of age.<sup>44</sup> This prevalence is consistent with overseas studies.<sup>45</sup>

39 See discussion in A Neame and M Heenan, *What Lies Behind the Hidden Figure of Sexual Assault: Issues of Prevalence and Disclosure*, Australian Centre for the Study of Sexual Assault Briefing (September 2003).

40 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004), 29.

41 Ibid, 32. See discussion in A Neame and M Heenan, *What Lies Behind the Hidden Figure of Sexual Assault: Issues of Prevalence and Disclosure*, Australian Centre for the Study of Sexual Assault Briefing (September 2003).

42 See discussion in N Taylor and J Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia* (2007).

43 S Murray and A Powell, *Sexual Assault and Adults with a Disability: Enabling Recognition, Disclosure and a Just Response* (2008), prepared for the Australian Centre for the Study of Sexual Assault, 3.

44 S Salthouse and C Frohmader, ‘Double the Odds: Domestic Violence and Women with Disabilities’ (Paper presented at Home Truths Conference, Melbourne, 15–17 September 2004).

## **Sexual assault in the family violence context**

24.33 The important features of sexual assault in a family violence context include: multiple forms of sexual violence; a likelihood of repetition; and the fact that sexual violence is likely to be accompanied by other forms of violence.

### **Multiple forms of sexual violence**

24.34 While this Inquiry is primarily concerned with sexual acts that are against the law, a range of unwanted or coercive sexual acts are experienced by many women and children in the context of their relationships.<sup>46</sup> Recognising the broader range is contextually important to understanding women's and children's experiences of sexual violence—and family violence more generally.

24.35 The findings of the Australian component of the IVAWS emphasise the importance of acknowledging this context. The 'most frequent type of sexual violence reported' by women who participated in that survey was 'unwanted sexual touching'. However, 'few women reported experiencing attempted forced sexual intercourse or actual forced sexual intercourse' over the same period.<sup>47</sup>

24.36 The ABS *Personal Safety Survey* also documented the range of unwanted sexual experiences of men and women. 32.5% of women reported that since they were aged 15, they had experienced inappropriate comments about their body or sex life, compared to only 11.7% of men. In addition, just over a quarter of women reported that they had experienced unwanted sexual touching, compared to 9.9% of men.<sup>48</sup>

24.37 Research has found that some women who experience family violence may also be subject to indecent assaults or unwanted touching. They may be exposed to pornography, have sexually explicit photographs taken without their permission, be subjected to degrading comments about their sexuality or sexual performance, or called sexually demeaning names. They may be constantly questioned about sexual activities with other people and placed under surveillance, or forced to engage in sexual activity without the protection of a condom.<sup>49</sup>

### **Repetition of sexual violence**

24.38 It is also important to recognise the extent to which sexual violence perpetrated in a family violence context is repeated and that this has 'cumulative impacts'.<sup>50</sup> Unlike

45 Ibid.

46 L Kelly, 'Promising Practices Addressing Sexual Violence' (Paper presented at Violence Against Women: Good Practices in Combating and Eliminating Violence Against Women Expert Group Meeting, Vienna, 17–20 May 2005).

47 J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004), 25.

48 Australian Bureau of Statistics, *Personal Safety Survey*, Catalogue No 4906.0 (2005).

49 See types of behaviour detailed in K Basile and L Saltzman, *Sexual Violence Surveillance: Uniform Definitions and Recommended Data Elements* (2009), 9–10. See also D Parkinson, *Partner Rape and Rurality* (2008), prepared for the Australian Centre for the Study of Sexual Assault, 27–37; E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007), 243.

50 L Kelly, 'Promising Practices Addressing Sexual Violence' (Paper presented at Violence Against Women: Good Practices in Combating and Eliminating Violence Against Women Expert Group Meeting, Vienna, 17–20 May 2005).

stranger sexual assault, which is far more likely to be a single incident, sexual violence within a relationship is likely to be repeated given the ongoing nature of the relationship and the opportunity this provides for continued perpetration.<sup>51</sup> For victims who are unable to escape such violence, the prospects of self-criticism and acquiescence are enhanced, as is the ‘normalisation’ of such conduct.

24.39 In a recent New Zealand study on pathways to recovery from sexual assault, over two thirds<sup>52</sup> of the participants who had been sexually assaulted by a current or former intimate partner or family or whānau (extended family) member,<sup>53</sup> reported that they had been sexually assaulted by that person before. The experience of repeat sexual assaults was highest for those reporting sexual assault by a former intimate partner (80%), followed by assaults by a current intimate partner (69%) and a family or whānau member (60%).<sup>54</sup>

24.40 In this Inquiry, family violence services noted their experience that sexual violence and sexual assaults occur frequently in the context of intimate partner relationships and some women report repeated experience of sexual violence and sexual assault throughout their relationships.<sup>55</sup>

### Coexistence with other forms of violence and abuse

24.41 Various research reports and studies have documented the extent to which women and children experience multiple forms of violence in a family violence context.<sup>56</sup> The World Health Organisation in its multi-country study on domestic violence and women’s health found ‘substantial overlap’ between the experience of physical violence and sexual violence by an intimate partner:

In all sites, more than half of the women who reported partner violence reported either physical violence only or physical violence accompanied by sexual

51 L McOrmond-Plummer, *Considering the Differences: Intimate Partner Sexual Violence in Sexual Assault and Domestic Violence Discourse* (2009), 2; E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007), 388; D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review* (2003), prepared for the Commonwealth Office of the Status of Women, 8. The vast majority of case studies presented in Parkinson’s study of partner rape document multiple rapes experienced by the women who participated in that study: D Parkinson, *Partner Rape and Rurality* (2008), prepared for the Australian Centre for the Study of Sexual Assault, 27–35.

52 22 out of 33 participants.

53 V Kingi and J Jordan, *Responding to Sexual Violence: Pathways to Recovery* (2009), prepared for the Ministry of Women’s Affairs (NZ), 48. 59% of the people in this study indicated that they had been sexually assaulted in a family violence context (ie, by a current/former intimate partner or by a family/whānau member). Only 8% were described as stranger assaults.

54 Ibid, 52. See also, in the US, P Tjaden and N Thoennes, *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey Research Report* (2000), prepared for the National Institute of Justice (US).

55 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

56 L Schaffran, S Lopez-Boy and M Davis, *Making Marital Rape a Crime: A Long Road Travelled, A Long Way to Go* (2009), prepared for the Washington Coalition of Sexual Assault Programs; E Stark, *Coercive Control: How Men Entrap Women in Personal Life* (2007), 388.

violence. In most sites between 30% and 56% of women who had ever experienced any violence, reported both physical and sexual violence.<sup>57</sup>

### **Indigenous communities**

24.42 The National Council to Reduce Violence Against Women and Children (the National Council) report, *Time for Action*, emphasised that there is no ‘one-size fits all approach’ to the problem of family violence against women and children; and acknowledged that different responses are needed for a range of vulnerable groups, including Aboriginal and Torres Strait Islander peoples.<sup>58</sup>

24.43 Family violence, encompassing sexual violence and assault and child sexual abuse, involving Aboriginal and Torres Strait Islander people, has been the subject of much attention over the past decade.

24.44 Numerous reports have discussed the context and impact of sexual violence and documented potential approaches to understanding and countering its impact on Aboriginal and Torres Strait Islander people.<sup>59</sup> The literature and reports which consider the interface between Indigenous family violence, child abuse and the criminal law,<sup>60</sup> focus on enhanced service delivery and exploring approaches that ‘attend to needs of all members of the community’.<sup>61</sup> However, as discussed above, inconsistent reporting and collection of information means there is a lack of comprehensive data in relation to the experience of family violence by Aboriginal and Torres Strait Islander women and children.<sup>62</sup>

24.45 It is clear that sexual violence affects Indigenous communities disproportionately. In essence, ‘sexual violence in Indigenous communities occurs at rates that far exceed those for non-Indigenous Australians’<sup>63</sup> and is ‘reported to be at

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57 C Garcia-Moreno and others, *WHO Multi-Country Study on Women's Health and Domestic Violence Against Women: Initial Results on Prevalence, Health Outcomes and Women's Responses* (2005), 32. See also L Kelly, *Surviving Sexual Violence* (1988), 53, 127–32.

58 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 14.

59 See, eg: Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007); Aboriginal Child Sexual Assault Taskforce (NSW), *Breaking the Silence: Creating the Future. Addressing Child Sexual Assault in Aboriginal communities in NSW* (2006).

60 See, eg, K Cripps and H McGlade, ‘Indigenous Family Violence and Sexual Abuse: Considering Pathways Forward’ (2008) 14 *Journal of Family Studies* 240; Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007); Aboriginal Child Sexual Assault Taskforce (NSW), *Breaking the Silence: Creating the Future. Addressing Child Sexual Assault in Aboriginal communities in NSW* (2006); M Keel, *Family Violence and Sexual Assault in Indigenous Communities: 'Walking the Talk'* (2004); S Gordon, K Hallahan and D Henry, *Putting the Picture Together, Inquiry into Response by Government Agencies to Complaints of Family Violence and Child Abuse in Aboriginal Communities* (2002).

61 M Keel, *Family Violence and Sexual Assault in Indigenous Communities: 'Walking the Talk'* (2004).

62 Barriers to reporting sexual assault are discussed in Ch 26.

63 D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review* (2003), prepared for the Commonwealth Office of the Status of Women, 56.

crisis levels'.<sup>64</sup> However, the lack of reliable data, including in relation to the effectiveness of measures introduced to reduce violence, hampers understandings about how to prevent and address such violence.<sup>65</sup>

24.46 In preventing and addressing family violence, the importance of an historically and culturally-sensitive understanding of the causes and nature of Indigenous family violence, and the specific interactions between Indigenous people and the legal system cannot be underestimated.

24.47 Dr Kylie Cripps and Hannah McGlade consider that the causes of Aboriginal and Torres Strait Islander family violence are 'a multitude of inter-related factors' which can usefully be understood by categorising them into two groups:

Group 1 factors include colonisation: policies and practices; dispossession and cultural dislocation; and dislocation of families through removal. Group 2 factors include: marginalisation as a minority; direct and indirect racism; unemployment; welfare dependency; past history of abuse; poverty; destructive coping behaviours; addictions; health and mental health issues; and low self-esteem and a sense of powerlessness.<sup>66</sup>

24.48 There are two key access to justice issues for Aboriginal and Torres Strait Islander women and children: first, a number of barriers impede access to assistance; secondly, services do not adequately recognise and respond to Indigenous experiences of family violence. A more nuanced understanding of family violence in Indigenous communities requires recognition of:

- the cumulative effects of 'poor health, alcohol, drug abuse, gambling, pornography, unemployment, poor education and housing and general disempowerment [which] lead inexorably to family and other violence and then on to sexual abuse...';<sup>67</sup>
- the endemic and intergenerational nature and 'normalisation' of violence;
- the impact of Indigenous concepts of family and community, including a culture of blame being shifted to victims and associated pressure or retribution for reporting violence or pursuing legal avenues of redress;

64 M Keel, *Family Violence and Sexual Assault in Indigenous Communities: 'Walking the Talk'* (2004), 1.  
65 See, eg. National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 54 (Strategies 1.5.2, 1.5.3); Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007), Part II: Supporting Research; Australian Institute of Health and Welfare, *Family Violence Among Aboriginal and Torres Strait Islander Peoples* (2006), 118–123.

66 K Cripps and H McGlade, 'Indigenous Family Violence and Sexual Abuse: Considering Pathways Forward' (2008) 14 *Journal of Family Studies* 240, 242.

67 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007), 6.

- Indigenous peoples' relationship with police, government agencies and courts, including a 'belief that both authorities and mainstream sexual assault services will not respond appropriately';<sup>68</sup>
- cultural, systemic and institutional barriers faced by Indigenous people in seeking assistance;<sup>69</sup> and
- the importance of framing family violence in a human rights context, in particular to ensure that violence against Indigenous women and children cannot be minimised by reference to cultural practices or arguments which supposedly condone violence.

24.49 Above all, it is important to recognise that neither Aboriginal and Torres Strait Islander women and children nor their experiences are the same, and to acknowledge the 'diversity of peoples within and across Indigenous communities'; the variation 'between communities in their current situation in terms of violence';<sup>70</sup> and the need to address the issues in a holistic way, if any real outcomes are to be achieved.<sup>71</sup>

24.50 In addition, tensions may exist between mainstream approaches and those of Indigenous women and communities to understanding and responding to violence. Mainstream approaches are said to have 'relied more heavily on feminist analyses of violence'<sup>72</sup> and Indigenous community members

have consistently criticised [the approach to violence that largely criminalises violence and relies on the institutionalisation of the offender to protect the victim] as being irrelevant, discriminatory and a repeat of the kinds of violence inherent in policies and practises of colonisation. Indigenous experiences with these approaches have found them to be disempowering and processes by which methods of power and control can be reinforced.<sup>73</sup>

24.51 In this part of the Report, the Commissions have recognised the particular experiences and needs of Aboriginal and Torres Strait Islander victims of sexual assault in a family violence context in developing their recommendations for reform.

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68 L Thorpe, R Solomon and M Dimopoulos, *From Shame to Pride: Access to Sexual Assault Services for Indigenous People* (2004). These barriers were also highlighted in consultations and submissions including: Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; H McGlade, *Submission FV 84*, 2 June 2010.

69 Barriers faced by Aboriginal and Torres Strait Islander women in reporting family violence and sexual assault are discussed in Ch 26.

70 M Keel, *Family Violence and Sexual Assault in Indigenous Communities: 'Walking the Talk'* (2004), 5. See, also, Queensland Police Service, *Statistical Comparisons 2002–2003* (2003); H Blagg, D Ray, R Murphy and E MacCarthy, *Crisis Intervention in Aboriginal Family Violence: Strategies and Models for Western Australia* (2000), prepared for the Partnerships Against Domestic Violence.

71 L Thorpe, R Solomon and M Dimopoulos, *From Shame to Pride: Access to Sexual Assault Services for Indigenous People* (2004), 21.

72 M Keel, *Family Violence and Sexual Assault in Indigenous Communities: 'Walking the Talk'* (2004), 3.

73 K Cripps and H McGlade, 'Indigenous Family Violence and Sexual Abuse: Considering Pathways Forward' (2008) 14 *Journal of Family Studies* 240, 243.

## History of activism and legal change

24.52 This section briefly canvasses the last three decades of legislative and procedural change to improve responses to sexual offences, increase reporting and to reduce the negative experience of complainants in sexual assault proceedings. The changes made to the law and procedures have variously been intended to

take greater account of the realities of rape and sexual abuse, to make the trial process less daunting for complainants and to encourage a higher proportion of victims of sexual assault to report these crimes to the police.<sup>74</sup>

24.53 Since the 1970s there has been considerable change to the law relating to sexual offences across Australia, as has been the case in many other countries—parallel to a move towards the introduction of family violence legislation and protection order regimes.<sup>75</sup> In relation to sexual assault reforms, these developments were brought about by a number of factors including: growing community awareness about the extent of sexual violence and the manner in which complainants were historically treated by the legal system; the growth and activism of the women's movement in this area;<sup>76</sup> and growing awareness about the particular problems faced by child sexual assault complainants in the legal system.<sup>77</sup>

## Historical approaches to sexual violence

24.54 Feminist research and advocacy from the 1970s argued that the law addressed sexual assault in discriminatory ways, including the way in which it viewed and assessed women and children as complainants. This work drew attention to a range of myths and misconceptions that underpinned the approach of not only the laws on sexual assault, but the approaches of key legal players (police, prosecutors, defence lawyers and judicial officers). This work highlighted the way in which the law in this area has largely been defined and implemented by men and presents particular historical ideas about women, children, men, sexual violence, and sexual relationships more generally.

### Myths and misconceptions

24.55 A range of myths and misconceptions about women, children and sexual assault have underpinned the legal and evidential rules in sexual assault proceedings. They have been the subject of extensive commentary in the literature and of considerable law reform in order to counter their resilience. Key myths and misconceptions (frequently inter-related) include the following.

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<sup>74</sup> Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [2.2].

<sup>75</sup> See Ch 4.

<sup>76</sup> Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), 3.

<sup>77</sup> Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 1; Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), 3.

***That women and children are inherently unreliable and lie about sexual assault***

24.56 The idea that women and children are inherently unreliable and lie about sexual assault focuses on the ‘untrustworthiness’ of women and children generally, particularly when they complain about sexual assault.<sup>78</sup> It is clearly demonstrated in the emphasis on corroboration of women’s and children’s evidence in sexual assault trials. While corroboration is no longer required, remnants of this myth can be discerned in various common law directions to the jury that remain in currency despite successive restrictions in legislation around Australia. Judicial warnings are discussed in detail in Chapter 28.

***That the accusation of rape is easily made, but difficult to challenge***

24.57 This view is clearly reflected in the oft-quoted assertion by the 17th century English jurist Sir Matthew Hale that ‘rape is an accusation easily to be made, hard to be proved, and harder yet to be defended by the party accused, tho’ never so innocent’.<sup>79</sup> The belief is connected with the emphasis on corroboration and ideas about what a ‘real’ rape looks like.<sup>80</sup> It is a powerful notion not only in positioning women and children as potential liars, but feeds into other conceptions of particular women as vindictive or vengeful—for example, a woman who makes allegations against a former spouse might be characterised in this way; and wanting to hide their sexual behaviour—the suggestion that some young women, in order to hide their sexual activities from their parents, ‘cry rape’.<sup>81</sup> It is one basis for the ever present concern about ‘false’ allegations.

***That sexual assault is most likely to be committed by a stranger***

24.58 Most sexual assaults are actually perpetrated by someone known to the victim and often known very closely. This fact conflicts with popular ideas of who is a rapist, and who is a ‘real victim’. This myth connects with a range of other myths—for example, the assumption that victims of rape report without delay, while this may be a more complex process of recognition and decision for those who are raped by an intimate partner or family member.

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78 See C Taylor, *Court Licensed Abuse: Patriarchal Lore and the Legal Response to Intrafamilial Sexual Abuse of Children* (2004), 30; K Mack, “You Should Scrutinise Her Evidence With Great Care”: Corroboration of Women’s Testimony about Sexual Assault in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 59, 59–61.

79 As quoted in L Schafran, S Lopez-Boy and M Davis, *Making Marital Rape a Crime: A Long Road Travelled, A Long Way to Go* (2009), prepared for the Washington Coalition of Sexual Assault Programs, 15.

80 ‘Real rape’ is rape perpetrated by a stranger in a dark alley against a ‘good’ woman, as opposed to ‘not real’ rape where the women is assaulted by someone she knows in circumstances where there are questions about her behaviour, eg, in terms of sexual experience and drug and alcohol use: see S Estrich, ‘Rape’ (1986) 95 *Yale Law Journal* 1087, 1088. The VLRC drew a distinction between the ‘classic’ rape scenario and its reality: Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [3.15].

81 See discussion in S Doyle and C Barbato, ‘Justice Delayed Is Justice Denied: The Experiences of Women in Court as Victims of Sexual Assault’ in J Breckenridge and L Laing (eds), *Challenging Silence: Innovative Responses to Sexual and Domestic Violence* (1999) 50, 50.

***That women cannot be sexually assaulted by their spouse***

24.59 This was the situation under common law—although significantly not the reality for many women—until the 1980s, when all Australian jurisdictions amended their law. Prior to this time it was generally not possible for a man to be charged with, and prosecuted for, raping his wife or, in some cases, de facto partner.<sup>82</sup> The marital rape immunity was based on historical notions that women became men's property on marriage, and that through marriage women consent, on a continuing basis, to sex with their spouse. It is the articulation of this notion by Sir Matthew Hale that is most often quoted:

[T]he husband cannot be guilty of rape committed by himself upon his lawful wife, for by their mutual matrimonial consent and contract the wife hath given up herself in this kind unto her husband, which she cannot retract.<sup>83</sup>

24.60 While this no longer holds true in the law across Australia, and in numerous overseas jurisdictions,<sup>84</sup> it continues to hold some sway in community understandings about what is sexual assault.<sup>85</sup> This influences the extent to which these cases continue to be less likely to be reported, prosecuted and result in conviction.

***That some sexual assaults are more serious and damaging than others***

24.61 Earlier studies revealed disparities in sentencing sexual assault offenders depending on their relationship to the victim—with spousal rapes traditionally being seen as less serious than stranger sexual assault—and the characteristics of the victim, with sexual assaults of sex workers, for example, either being seen as ‘not possible’ or less serious, given that the provision of sex is part of her occupation.<sup>86</sup>

***That non-consent is verbally articulated, evidenced by struggle and results in physical injuries***

24.62 Many people still believe that a ‘true’ sexual assault involves the use of physical violence and that there will be physical injuries that provide independent verification of the complainant’s story. Research, however, indicates that very few cases of sexual assault and/or rape have such physical evidence.<sup>87</sup> The 1996 ABS *Women’s Safety Survey* found that only 26% of women who had been sexually assaulted since the age

82 There were exceptions to this general approach: P Easteal, ‘Rape in Marriage: Has the Licence Lapsed?’ in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 107, 111.

83 As quoted in P Easteal and C Feerick, ‘Sexual Assault by Male Partners: Is the Licence Still Valid?’ (2005) 8 *Flinders Journal of Law Reform* 185, 186, n 6.

84 For a brief discussion of the different treatment of marital rape and the removal of this defence in various US jurisdictions see L Schafran, S Lopez-Boy and M Davis, *Making Marital Rape a Crime: A Long Road Travelled, A Long Way to Go* (2009), prepared for the Washington Coalition of Sexual Assault Programs, 12–13.

85 N Taylor and J Putt, *Adult Sexual Violence in Indigenous and Culturally and Linguistically Diverse Communities in Australia* (2007), 2–3 found that some CALD women do not know that rape by their spouse is against the law in Australia.

86 See discussion in R Graycar and J Morgan, *The Hidden Gender of Law* (2nd ed, 2002), 345–348.

87 M Heenan and H McKelvie, *The Crimes Rape Act 1991: An Evaluation Report* (1997), 44 as cited in Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), 309.

of 15 had sustained physical injuries.<sup>88</sup> It is worth reflecting here on the other ‘injuries’ and impacts sustained by women who have been sexually assaulted, including ongoing psychological impacts, fear, guilt, shame and depression.<sup>89</sup> Contrary to what many may assume, women who are raped by their partner may be more likely to sustain serious injuries than those raped by a stranger.<sup>90</sup> Considerable legislative change in the definition of consent and in directions to the jury, specifically seek to counter ideas about silence and the absence of physical struggle.

***That a ‘true’ or ‘genuine’ victim of sexual assault does not delay in reporting***

24.63 Many people still think that a person who has been sexually assaulted would report without delay, and that the failure to do so is suggestive of fabrication. Again this connects to the dominant idea that women and children lie about sexual assault. Given what is known about the fact that so few acts of sexual assault are reported in the first place, the resilience of this myth as an indicator of truth stands counter to the evidence. Despite legislation that requires a judge to explain to the jury that there may be ‘good reasons’ why a victim of sexual assault may delay in reporting to the police,<sup>91</sup> women and children can still expect to be cross-examined at length on this point.

24.64 There are other myths and misconceptions, including that men have uncontrollable sexual urges,<sup>92</sup> and related to this, that women have a responsibility to monitor and curtail their own behaviour (dress, intoxication, flirtation) in order to avoid sexual assault.

24.65 The various myths and misconceptions about sexual violence, women and children, have been challenged and addressed over time. There remain ongoing connections, however, between these historical notions demonstrated in prevailing community attitudes and in the application of the law in some instances, which is a key focus of this Inquiry. These connections are raised where appropriate in Chapters 25 to 28.

**The nature of sexual offences**

24.66 Research on legal responses to sexual assault highlights the unique features of these offences and their treatment by the legal system. These features include: the nature of the crime for the victim, the nature of the crime in terms of the elements that need to be proved and what this means for the content of the evidence that has to be

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88 Australian Bureau of Statistics, *Women’s Safety Australia* (1996), Table 3.14.

89 See discussion in Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [3.17].

90 P Tjaden and N Thoennes, *Extent, Nature and Consequences of Intimate Partner Violence: Findings from the National Violence Against Women Survey Research Report* (2000), prepared for the National Institute of Justice (US), iv.

91 See, eg, *Crimes Act 1958 (Vic)* s 61(1)(b). See Ch 28 on jury warnings.

92 While much of the mythology in this area is in the form of negative perceptions of women it is worth reflecting on this rather narrow negative perception of men and their sexuality. As Heath notes, some of the traditional ideas about rape and marriage leave ‘little room for male sexualities that are respectful rather than possessory, and little space for female sexualities that are autonomous rather than submissive, there-to-be-possessed’: M Heath, ‘Disputed Truths: Australian Reform of the Sexual Conduct Elements of Common Law Rape’ in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 13, 16.

elicited from the victim, the focus on credibility, the focus on consent in adult sexual assault matters, the length and nature of cross-examination, and the likelihood that there is some close relationship between the complainant and the victim (as current or former intimate partners or family members).

24.67 Two key empirical studies published in the mid-1990s highlighted the traumatic experience of the sexual assault trial, particularly for adult women victims.<sup>93</sup> In 2003, the Victorian Law Reform Commission (VLRC) commented:

During the late 1980s and early 1990s substantial reforms were made to procedure and evidence in sexual offence cases. The outcomes of our research and consultations suggest that these reforms have had limited success in improving the experience of complainants in sexual offence cases.<sup>94</sup>

24.68 In fact, the experience of the sexual assault trial has often been characterised by victims as being a re-traumatising experience, and in some instances like being sexually assaulted again.<sup>95</sup> One focus of the Commissions' work is to examine to what extent changes made since those landmark reports have served to address and limit that traumatic experience.

#### ***The ‘nature of the crime’ for the victim***

24.69 There are particular dimensions of sexual offences that distinguish victims' experiences from those of other victims of crime. These dimensions are linked to the relationship between the victim and the offender, the nature of the harm and its longstanding impact:

The crime experienced by sexual violence victims is more than an assault. The sexual nature of the act adds an additional and highly complex dimension ... not only is the victim assaulted, but the private and protected physical and psychological boundaries of the person are intrusively invaded ...

The very nature of crime evokes certain emotions in all victims ... The crime of sexual violence is no exception ... the sexual violence victim is often confronted with a range of additional feelings resulting from the social stigma and physical invasiveness of the incident. These feelings can include shame, guilt, embarrassment, confusion, feeling dirty and used. Feelings of self-blame and self-recrimination are particularly common among sexual violence victims.<sup>96</sup>

93 J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996); M Heenan and H McKelvie, *The Crimes Rape Act 1991: An Evaluation Report* (1997). This was the second report of the Rape Law Reform Evaluation Project (RLREP) overseen by the Victorian Attorney General's Department. See discussion of the work of the RLREP in Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [2.19]–[2.12].

94 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [4.4].

95 Ibid.

96 Legislative Council Standing Committee on Social Issues—Parliament of NSW, *Sexual Violence, The Hidden Crime: Inquiry into the Incidence of Sexual Offences in New South Wales*, Part 1 (1993), [1.1.1]–[1.1.2].

### ***Consent and credibility***

24.70 The vast majority of adult sexual offence cases rest on the issue of consent. More often than not, there is no physical evidence of the assault or witnesses to the assault. Therefore, the focus of the trial is on the competing evidence of the complainant and the defendant about whether the sexual activity was consensual. The Rape Law Reform Evaluation Project (RLREP) conducted in Victoria found that in 30% of rape trials conducted in 1992–93, the defendant's main argument was that the complainant had consented to the sexual intercourse. In a further 23% the 'main line of defence was either that the accused believed the complainant had consented, or a defence which involved a combination of consent and the accused's belief that the complainant consented'.<sup>97</sup>

24.71 The focus on consent, and the way in which consent is constructed in law, have been the subject of considerable criticism. It is seen as the key way in which the focus of the trial is placed on the complainant, her actions and behaviour—rather than on the behaviour of the accused. The focus on consent, therefore, is inextricably linked to the focus on credibility, where women and children—particularly when they raise allegations about sexual violence—have generally been seen as less credible.

24.72 In both adult and child sexual assault cases the key aim of defence questioning is to challenge and undermine the credibility of the complainant. For adult complainants this is intertwined with the issue of whether the activity was consensual. For children (as well as for adults) it is about whether their evidence can be believed.

### ***Elements of the offence***

24.73 In sexual offence proceedings, a complainant may be required to discuss elements of the offence, such as penetration or other genital or anal contact—in explicit detail and on multiple occasions. As noted by the New South Wales Law Reform Commission (NSWLRC), giving this type of intimate and graphic evidence can be very 'humiliating and distressing' for all victims of sexual assault, and may be particularly difficult for 'women who are from different cultural backgrounds in which such matters are not conventionally discussed in front of men'.<sup>98</sup> Such discussions are, of course, especially disturbing and traumatic for children giving evidence of their experience.

### ***Cross-examination***

24.74 In addition to having to discuss in detail the elements of the offence in evidence-in-chief and in cross-examination, there is the experience of cross-examination itself. As one of the key strategies of the defence is to challenge the credibility of the complainant, cross-examination may take on particularly personal dimensions that may not be seen in other criminal proceedings. Research has found that, on average, cross-

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97 As discussed in Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [5.19].

98 New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [2.5].

examination is longer in duration in a sexual assault trial when compared to other assault trials.<sup>99</sup>

### Balancing rights?

24.75 Possible changes to the law and procedure relating to sexual assault invariably raise questions and concerns about the need to balance the rights of the accused and the rights of the complainant.<sup>100</sup> It is important to recognise that these are not necessarily rights in contest (although they are commonly positioned this way), but rather they both occupy important, related positions in the administration of the criminal justice system.

24.76 The VLRC in its sexual offences report articulated these positions as follows:

The criminal justice system must be, and be seen to be, fair to the accused. People accused of sexual offences are entitled to the presumption of innocence. Conviction for a sexual offence has very serious consequences for an accused, which may include a lengthy prison sentence and life-long stigma. It is vital to ensure that any conviction is based on reliable evidence.

However, the criminal justice system must also take account of the needs of complainants who have a direct interest in the outcome of the prosecution, and of the community interest in encouraging people to report alleged offences and in convicting perpetrators ... [C]urrent deficiencies in the system contribute to substantial under-reporting of sexual offences and discourage people who allege they have been assaulted from giving evidence at committal or trial. Criminal procedures that discourage reporting or which stigmatise and traumatised witnesses in sexual assault cases may result in some offenders escaping apprehension, which may put more members of the community at risk.<sup>101</sup>

24.77 In the present Inquiry, the Commissions are similarly mindful of the rights of the accused, and the rights of the complainant, in discussing possible changes to the law and procedure relating to sexual offences. The Commissions recognise the very serious consequences of being charged with a sexual offence for an accused, and the need to be able to effectively test the evidence that is presented in the case against the accused.

24.78 The ‘rights of the accused’, in essence, entail that they are not to be convicted except following the conduct of a fair trial according to the law.<sup>102</sup> The International Covenant on Civil and Political Rights (ICCPR) provides some further detail about elements of a fair trial.<sup>103</sup>

99 D Brereton, ‘How Different are Rape Trials? A Comparison of the Cross Examination of Complainants in Rape and Assault Trials’ (1997) 37 *British Journal of Criminology* 242, 257–258.

100 See, eg. Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 87–90; New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [1.7]–[1.9].

101 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [1.9]–[1.10].

102 See *Dietrich v The Queen* (1992) 177 CLR 292, 299–300.

103 Including: the presumption of innocence, guilt determined according to law, adequate time to prepare defence and brief lawyer of own choosing, being brought to trial in a timely manner, being tried in his or her presence, having access to an interpreter if required and being able to effectively test the evidence presented against him or her: *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 14. See Ch 2.

24.79 The concept of a fair trial has not historically incorporated the rights of the complainant—instead the focus is on the Crown acting on behalf of the community.<sup>104</sup> However, the experience and role of victims in the criminal justice system has changed in recent times with greater recognition of the rights of victims, as evidenced by various charters of victims' rights, and in the reception of victim impact statements in some jurisdictions.<sup>105</sup> Rights to protection by the law and its processes are also articulated in various international conventions and declarations to which Australia is a party.<sup>106</sup>

24.80 The 'rights of the accused' are frequently raised as a powerful rhetorical tool to limit possible changes in law and procedure which aim to ameliorate some of the more negative experiences for complainants of sexual offence proceedings. Measures that might assist complainants are sometimes opposed by lawyers on the basis of perceived incursions into the rights of the accused without an appreciation of exactly what the measure is, what it is designed to do, and how it operates.<sup>107</sup>

24.81 The focus of reform that aims to reduce the traumatic experience of complainants in sexual offence proceedings should not be misconceived as merely aimed at increasing the rate of conviction (although this is important), but rather at improving the operation of the legal system and its response to serious criminal offences. Reform efforts to date have focused on challenging the myths that have underpinned the law's responses to sexual assault and arguably continue to resonate with some current practices and attitudes. Such myths bear no relationship to reality and hence do not concern the accused and the right to a fair trial, but rather foster implicit prejudices to raise 'doubts' about the complainant's credibility generally, and specifically credibility as a 'true' victim of sexual assault.

24.82 A good example of this process of interrogating what is a 'right of the accused' in a criminal proceeding is provided by recent legislative prohibitions on the accused conducting personal cross-examination of the complainant in sexual offence proceedings.<sup>108</sup> In introducing these measures there was a need to maintain the 'fundamental rule of natural justice that people on trial for criminal offences have the right to test the evidence against them' while addressing the 'highly distressing' situation of a complainant being cross-examined by their alleged attacker.<sup>109</sup> Law reform bodies that have considered this issue in detail have drawn a clear distinction between the right to test the evidence, and any perceived right to conduct cross-examination in any manner or format.

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<sup>104</sup> Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [4.6].

<sup>105</sup> For example, *Victims' Rights Act 1996* (NSW); *Victims' Charter Act 2006* (Vic).

<sup>106</sup> For example, under the *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979, [1983] ATS 9, (entered into force generally on 3 September 1981); *Convention on the Rights of the Child*, 20 November 1989, [1991] ATS 4, (entered into force generally on 2 September 1990). See Ch 2.

<sup>107</sup> Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [4.31].

<sup>108</sup> See Ch 28.

<sup>109</sup> New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [1.7].

24.83 A related theme can be characterised as the ‘spectre of false complaints’—that is, that false complaints of sexual assault are commonly made. The extent of false complaints of sexual assault is difficult to establish. However, the available evidence suggests that it is small. A Victorian study, which analysed 850 rapes reported to the police over the period 2000–03, found that only 2.1% of reports were designated as false by the police. In these cases, the alleged victim was either charged or told that she would be charged unless she dropped the complaint. While this only represents a fraction of the sample, there was a much larger proportion of cases where police were confident, or reasonably confident, that the allegations were false, but there was no attempt to institute charges against the alleged victim.<sup>110</sup>

24.84 Despite these data, concern about lying and fabrication has been a central feature of the sexual assault trial. Research has indicated that many complainants are asked about lying in cross examination. In the *Heroines of Fortitude* study, for example, 84% of complainants were asked questions about lying, and one complainant was asked 98 questions about lying in cross examination.<sup>111</sup> In addition, women are questioned about their motives for reporting, seeking revenge, and whether they made a report simply to access victims’ compensation—one-third of complainants in the *Heroines* study were asked about this.<sup>112</sup>

## Law reform

24.85 The present Inquiry follows an extensive body of work by law reform commissions<sup>113</sup> and other government bodies<sup>114</sup> on reform of the law and procedure

110 Statewide Steering Committee to Reduce Sexual Assault (Vic), *Study of Reported Rapes in Victoria 2000–03: Summary Research Report* (2006) as summarised in: Z Morrison, ‘What is the Outcome of Reporting Rape to the Police?’ (2008) (17) *Australian Centre for the Study of Sexual Assault Newsletter* 4.

111 S Doyle and C Barbato, ‘Justice Delayed Is Justice Denied: The Experiences of Women in Court as Victims of Sexual Assault’ in J Breckenridge and L Laing (eds), *Challenging Silence: Innovative Responses to Sexual and Domestic Violence* (1999) 50, 50. *Ibid*, 50–51.

112 See, eg: New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003); New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998); Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004); Queensland Law Reform Commission, *Reform of the Law of Rape*, Report 21 (1976); Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006); ACT Law Reform Commission, *Report on the Laws Relating to Sexual Assault*, Report 18 (2001); Northern Territory Law Reform Committee, *Report on the Laws Relating to the Investigation and Prosecution of Sexual Assault in the Northern Territory* (1999).

113 For example, at the national level, see Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999). In NSW: Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005); Legislative Council Standing Committee on Law and Justice—Parliament of New South Wales, *Report on Child Sexual Assault Prosecutions*, Report No 22 (2002); J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996). In Victoria: Crime Prevention Committee—Parliament of Victoria, *Combating Child Sexual Assault: An Integrated Model* (1995); the work of the RLREP, eg, M Heenan and H McKelvie, *The Crimes Rape Act 1991: An Evaluation Report* (1997). In Queensland: Crime and Misconduct Commission (Qld), *Seeking Justice: An Inquiry into How Sexual Offences are Handled by the Queensland Criminal Justice System* (2003). In Tasmania: Task Force on Sexual Assault

relating to sexual offences. Since the 1970s, there have been successive rounds of legislative and procedural change across Australian jurisdictions.

### **Focus of reform**

24.86 In relation to the substance of sexual offences, reform has focused, at different times and in different jurisdictions, on the following issues:

- **Terminology.** Some Australian jurisdictions have moved away from the language of rape to the language of sexual assault.<sup>115</sup> This was generally seen as a way to move away from the emphasis on sexual elements, to focus instead on sexual assault as an assault—that is, as an act of violence. Other jurisdictions have retained the language of rape.<sup>116</sup>
- **Consent.** Since the 1990s there has been a move to define consent in legislation. All Australian jurisdictions, with the exception of the ACT, now have a legislative definition of consent.<sup>117</sup> These definitions are based on a communicative model of consent.
- **Definition of sexual assault.** Definitions of what constitutes a sexual assault have been broadened, so that, for example, penetrative sexual offences includes penetration by a penis, object, part of a body or mouth.<sup>118</sup>
- **Gender neutral laws.** All jurisdictions amended the laws relating to sexual assault or rape so that they are gender neutral. Before this, rape had been specifically defined as an offence perpetrated by a man against a woman.<sup>119</sup>

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and Rape in Tasmania, *Report of the Task Force on Sexual Assault and Rape in Tasmania* (1998). In South Australia: see L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006), prepared for the Government of South Australia. In WA: Community Development and Justice Standing Committee—Parliament of Western Australia, *Inquiry into the Prosecution of Assaults and Sexual Offences* (2008).

115 In NSW, WA, ACT and NT, the offence of sexual penetration or sexual intercourse without consent is articulated as one of a number of sexual assault offences: see *Crimes Act 1900* (NSW) s 61I; *Criminal Code* (WA) s 325; *Crimes Act 1900* (ACT) s 54; *Criminal Code* (NT) s 192.

116 *Crimes Act 1958* (Vic) s 38; *Criminal Code* (Qld) s 349; *Criminal Law Consolidation Act 1935* (SA) s 48; *Criminal Code* (Tas) s 185. All jurisdictions, whether they call the penetrative offence ‘rape’ or ‘sexual intercourse without consent’, have broadened the offence beyond the common law offence of rape which was penile penetration of a woman without her consent (or against her will). There are still debates about what is the best approach and most appropriate language to employ: see discussion in M Heath, ‘Disputed Truths: Australian Reform of the Sexual Conduct Elements of Common Law Rape’ in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 13, 23–24. Professor Reg Graycar has observed that, while some jurisdictions have done away with the language of rape, the ‘phenomenon that women fear is still [called] rape’: R Graycar, ‘Frozen Chooks Revisited: The Challenge of Changing Law/s’ in R Hunter and M Keyes (eds), *Changing Law: Rights, Regulation and Reconciliation* (2005) 49, 55. See also discussion in J Bargen and E Fishwick, *Sexual Assault Law Reform: A National Perspective* (1995), prepared for the Office of the Status of Women, [6.2.2.1].

117 *Crimes Act 1900* (NSW) s 61HA; *Crimes Act 1958* (Vic) s 36; *Criminal Code* (Qld) s 348; *Criminal Law Consolidation Act 1935* (SA) ss 46–47; *Criminal Code* (Tas) s 2A; *Crimes Act 1900* (ACT) s 67; *Criminal Code* (NT) s 192. This issue is discussed in detail in Ch 25.

118 See, eg, *Crimes Act 1900* (NSW) s 61H(1).

119 A number of commentators thought that the move to gender neutrality might lead to improvements in the way that the law dealt with sexual offences as now men would have a ‘stake in making the law of rape work better’: M Heath, ‘Disputed Truths: Australian Reform of the Sexual Conduct Elements of Common Law Rape’ in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 13,

- **Graded sexual offences.** Some jurisdictions introduced graded sexual offences—that is, a range of sexual offences with different penalties attached. This differentiation usually takes account of the presence of physical violence or other aggravating circumstances.<sup>120</sup> It was an approach again intended to focus on sexual assault as an act of violence.
- **Removal of the marital immunity.** All jurisdictions legislated to remove the marital immunity.<sup>121</sup>
- **Age of criminal responsibility.** With the exception of Tasmania, all jurisdictions removed notions that a person was not capable, simply on the basis of their age, of having or intending to have sexual intercourse.<sup>122</sup>

24.87 In relation to criminal procedure and evidence law, reform has focused on:

- **Evidence of sexual reputation and experience.** Legislation was enacted to restrict the cross-examination of complainants and the admission of evidence of complainants' sexual reputation and prior sexual experience.<sup>123</sup>
- **Protecting counselling communications.** Legislation was enacted to protect confidential counselling communications from being disclosed or used in sexual offence proceedings.<sup>124</sup>
- **Jury warnings.** Legislation was enacted restricting or providing greater guidance to judicial officers, on warnings to the jury regarding unreliable evidence and corroboration<sup>125</sup> and the implications of delay in complaint.<sup>126</sup>

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15. However, other commentators pointed out that gender neutrality obscures 'who is doing what to whom', by failing to make explicit the fact that while men can be, and are, sexually assaulted, women and girls are overwhelmingly the victims of these acts (that is to say, that it is a particularly gendered crime: see discussion in S Bronitt and B McSherry, *Principles of Criminal Law* (2nd ed, 2005), 559; R Graycar and J Morgan, *The Hidden Gender of Law* (2nd ed, 2002), 364–365. Graycar and Morgan note that one of the ways in which the gendered nature of sexual assault can be recognised is through an objects, or guiding principles, clause: 365. This has been done in Victoria, see discussion in Ch 25.

120 For a discussion of arguments in favour and those against graded approaches see Heath in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998), 22.

121 For express statutory provisions see *Crimes Act 1900* (NSW) s 61T; *Crimes Act 1958* (Vic) s 62(2); *Criminal Law Consolidation Act 1935* (SA) s 73(3); *Crimes Act 1900* (ACT) s 69. The remaining jurisdictions have removed the immunity by inference.

122 *Crimes Act 1900* (NSW) s 61S; *Crimes Act 1958* (Vic) s 62(1); *Criminal Code* (Qld) s 29; *Criminal Code* (WA) s 29; *Criminal Law Consolidation Act 1935* (SA) s 73(2); *Crimes Act 1900* (ACT) s 68; *Criminal Code* (NT) s 38. In Tasmania, a male child under the age of seven is presumed to be incapable of having sexual intercourse: *Criminal Code* (Tas) s 18(3).

123 *Criminal Procedure Act 2009* (Vic) s 339(1); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4; *Evidence Act 1906* (WA) s 36A; *Evidence Act 1929* (SA) s 34L(1); *Evidence Act 2001* (Tas) s 194M(1); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 49; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4.

124 For current provisions see: *Criminal Procedure Act 1986* (NSW) ch 6 pt 5 div 2; *Evidence (Miscellaneous Provisions) Act 1958* (Vic) pt 2 div 2A; *Evidence Act 1906* (WA) ss 19A–19M; *Evidence Act 1929* (SA) pt 7 div 9; *Evidence Act 2001* (Tas) s 127B; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) pt 4 div 4.5; *Evidence Act 1939* (NT) pt VIA. Queensland has not enacted specific legislation protecting sexual assault counselling communications.

125 *Evidence Act 1995* (Cth) s 164(3); *Evidence Act 1995* (NSW) s 164(3); *Evidence Act 2008* (Vic) s 164(3); *Criminal Code* (Qld) s 632(2); *Evidence Act 1906* (WA) s 50; *Criminal Code* (Tas) s 136; *Evidence Act 2001* (Tas) s 164; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 69, 70.

126 Uniform Evidence Acts, s 165B; *Evidence Act 1929* (SA) s 34CB.

- **Giving evidence.** Legislation was enacted to restrict or provide limits on inappropriate and offensive questioning in cross-examination;<sup>127</sup> and to enable access to other modes of giving evidence, particularly for children and people with a cognitive impairment.<sup>128</sup> This has included the use of pre-recorded evidence, the use of closed circuit television or screens and enabling complainants to give evidence accompanied by a support person.<sup>129</sup>

24.88 At the same time, changes have occurred in relation to police and prosecutorial practices and procedure. For example, as discussed in Chapters 29 to 31, there have been moves towards more specialised and integrated police responses to sexual violence, aimed in part at ensuring that complainants receive appropriate support at the outset from the criminal justice system. In addition, prosecutorial guidelines require the interests of victims to be taken into account in various ways.

#### ***Recent work***

24.89 A number of important projects and law reform initiatives intended to address continuing concerns with how the criminal justice system responds to allegations of sexual assault have taken place since 2003. These have included the:

- NSW Criminal Justice Sexual Offences Taskforce;<sup>130</sup>
- VLRC sexual offences inquiry;<sup>131</sup>
- Queensland Crime and Misconduct Commission inquiry into the handling of sexual offences;<sup>132</sup>
- Western Australian government Inquiry into the Prosecution of Assaults and Sexual Offences;<sup>133</sup>
- South Australian Review of Rape and Sexual Assault Laws;<sup>134</sup>
- ACT Sexual Assault Response Program;<sup>135</sup> and

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127 Uniform Evidence Acts, s 41; *Evidence Act 1977* (Qld) s 21(2); *Evidence Act 1906* (WA) s 26(3); *Evidence Act 2001* (Tas) s 41(2); *Evidence Act 1939* (NT) s 16(2).

128 For example, in relation to the use of pre-recorded evidence: *Criminal Procedure Act 2009* (Vic) s 368; *Evidence Act 1977* (Qld) div 4, 4A; *Evidence Act 1906* (WA) ss 106HB; *Evidence Act 1929* (SA) s 13A; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) div 4.2B; *Evidence Act 1939* (NT) s 21E.

129 These issues of criminal procedure and evidence law are discussed in Chs 27–28.

130 Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005).

131 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).

132 Crime and Misconduct Commission (Qld), *Seeking Justice: An Inquiry into How Sexual Offences are Handled by the Queensland Criminal Justice System* (2003).

133 Community Development and Justice Standing Committee—Parliament of Western Australia, *Inquiry into the Prosecution of Assaults and Sexual Offences* (2008).

134 L Chapman, *Review of South Australian Rape and Sexual Assault Law: Discussion Paper* (2006), prepared for the Government of South Australia.

135 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005).

- Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Child Abuse.<sup>136</sup>

24.90 Other recent projects and law reform initiatives have examined aspects of evidence law and the giving of jury directions relevant to sexual assault proceedings. These include:

- NSWLRC and Queensland Law Reform Commission inquiries examining jury directions;<sup>137</sup> and
- the Tasmania Law Reform Institute inquiry examining tendency and coincidence evidence.<sup>138</sup>

24.91 In addition, the Standing Committee of Attorneys-General (SCAG), through the work of the SCAG National Working Group on Evidence, has been examining aspects of vulnerable witness protection and the sexual assault counselling communications privilege.<sup>139</sup> The ALRC has been specifically directed not to duplicate this work.<sup>140</sup>

### Other legal responses

24.92 As noted at the beginning of this chapter, sexual assault does not only appear in the criminal justice system—it is raised in, and may require a response from, a range of different legal areas, sometimes in relation to the same incident. These areas include:

- **Protection orders.** In most jurisdictions, sexual assault is nominated as one of the forms of violence that may ground an application for a civil protection order.<sup>141</sup> Such allegations may be contained in the actual complaint or raised in oral evidence before the court. There is little research available about the extent to which sexual violence is included within protection order proceedings. It has, however, been suggested that sexual violence is rarely referred to expressly in protection order complaints.<sup>142</sup> This has the potential to render this form of violence invisible in these proceedings and, in those cases where it has taken place—but has not been referred to—provides an inadequate picture in which to assess the need for protection. Protection orders and the relationship between protection orders and criminal law proceedings are discussed in Chapter 11.

136 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).

137 New South Wales Law Reform Commission, *Jury Directions*, CP 4 (2008); Queensland Law Reform Commission, *A Review of Jury Directions: Discussion Paper*, WP 67 (2009).

138 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009).

139 See Ch 27.

140 The Terms of Reference are set out at the front of this Report.

141 The main exception is Western Australia which does not specifically refer to sexual offences under the *Criminal Code* (WA). Queensland includes ‘indecent behaviour without consent’—which could potentially include a range of unwanted sexual behaviour.

142 In NSW, see J Wangmann, “‘She Said ...’ ‘He said ...’: Cross Applications in NSW Apprehended Domestic Violence Order Proceedings”, *Thesis*, University of Sydney, 2009, 152–153.

- **Family law.** Sexual violence may be raised in family law proceedings, including in relation to decisions about parenting or property orders. Child protection and the family law system is specifically discussed in Chapter 19. Research suggests that adult sexual assault is rarely raised in family law proceedings.<sup>143</sup> It has been suggested that sexual violence may be less visible than other forms of family violence due to the reluctance of lawyers, and other professionals, to ask specifically about sexual violence.<sup>144</sup> There may be a lack of understanding about how sexual violence is a risk factor in the future seriousness and repetition of family violence and, therefore, how it should be taken into account in any family law determinations. As with civil protection orders, the experience of sexual violence as part of family violence is important in understanding the risk faced by a victim, and in considering the ways in which it might have an impact on determinations about whether and how contact with children should proceed.
- **Crimes compensation schemes.** Compensation for victims of sexual assault may be available through the various state and territory crimes compensation schemes. For example, in NSW, persons injured by an act of violence, including a sexual assault, are eligible for an award of compensation between \$7,500 and \$50,000.<sup>145</sup> In recent years there have been changes to criminal injuries compensation schemes, in some jurisdictions, in terms of how family violence and sexual assault are dealt with, and flexibility around the time limits within which applications must be lodged. An area of concern for sexual assault victims is the manner in which related acts are defined and dealt with under the various statutory schemes. This is a particular issue given that family violence, including sexual assault, is the ‘quintessential repeat crime’.<sup>146</sup> Often these provisions mean that acts perpetrated around the same time, by the same perpetrator, and in similar circumstances, may be treated as related acts—limiting the claim to a single event.<sup>147</sup> This issue is discussed in detail in Chapter 29.
- **Law of torts.** The acts comprising sexual assault or family violence also constitute a civil wrong, known as a tort. In particular, the torts of battery, assault and negligence are possible sources of redress for victims of family violence. Bringing an action in tort for assaults and batteries that took place as part of family violence is rare when compared to claims made under the various state and territory compensation schemes. This is because there are a number of barriers that plaintiffs encounter, including: the cost of bringing such an action; the limited prospect of recovery, even if successful; the effect of limitation periods; the difficulty in proving the case, particularly if the events took place

<sup>143</sup> L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies, 69, Table 5.3.

<sup>144</sup> Women’s Legal Services NSW, *Consultation*, Sydney, 23 September 2009.

<sup>145</sup> Under the *Victims Support and Rehabilitation Act 1996* (NSW).

<sup>146</sup> R Felson and A Cares, ‘Gender and Seriousness of Assaults on Intimate Partners and Other Victims’ (2005) 67 *Journal of Marriage and the Family* 1182, 1183.

<sup>147</sup> See, eg, the procedural history in *JM v Victims Compensation Fund Corporation* [2009] NSWSC.

some time ago; and the adversarial nature of these proceedings (particularly when compared to the process available under crimes compensation schemes).<sup>148</sup>

24.93 In each of these areas questions may be raised about the visibility of sexual assault and whether the response of the legal system is adequate.

### **Law is not the only response**

24.94 The law (criminal and civil) is not the only mechanism available to respond to the problem of sexual assault. A range of legal and non-legal measures is required in order to substantially reduce sexual violence. This need is particularly clear given the very small number of cases that come to the attention of the criminal justice system. The VLRC recognised this reality, noting that:

An adequate response to the harm of sexual assault must go beyond the criminal justice process and include other mechanisms for assisting people who have been sexually assaulted such as access to information, provision of counselling and support services ... and compensation.<sup>149</sup>

24.95 While the Commissions recognise that non-legal measures are vital in developing an appropriately integrated response to sexual assault, the main focus in this part of the Inquiry is on the interpretation and application of criminal law and procedure. In this context it is important to recognise the process of feedback between the legal system and the community. On the one hand, community attitudes inform the legal system's responses to sexual assault; on the other, the law—how it defines and responds to sexual assault—plays a key symbolic role in forming community perceptions of sexual violence. As such, the law is a critical mechanism through which understandings of appropriate sexual relationships—based on notions of autonomy and freedom of choice—can be fostered.

### **The implementation gap**

24.96 Despite extensive changes to law and procedure, research continues to highlight a gap between written law and its practice—referred to as an ‘implementation gap’. This gap highlights the resistance to change evident in the legal system through its legal players who may still hold views about sexual assault characterised by myths and misconceptions. Some commentators question the over-reliance on, or confidence in, legislative change alone to bring about substantive changes for women and children as complainants in sexual offences.<sup>150</sup>

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148 Notwithstanding such difficulties, women have successfully brought such actions for physical and sexual abuse perpetrated as part of family violence. See, eg, *Morris v Karunaratne* [2009] NSWDC; *Giller v Procopets* (2008) 40 Fam LR 378; *Varmedja v Varmedja* [2008] NSWCA.

149 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [1.53].

150 See, eg, R Graycar, ‘Frozen Chooks Revisited: The Challenge of Changing Law/s’ in R Hunter and M Keyes (eds), *Changing Law: Rights, Regulation and Reconciliation* (2005) 49; J Stubbs, ‘Sexual Assault, Criminal Justice and Law and Order’ (2003) 14 *Women Against Violence* 14, 14; J Bargen and E Fishwick, *Sexual Assault Law Reform: A National Perspective* (1995), prepared for the Office of the Status of Women, 7–8.

24.97 The VLRC reflected on this problem in its report on sexual offences, noting that:

The changes to procedure and evidence laws which are recommended in this Report are unlikely to be effective unless they are also accompanied by changes to the culture of the criminal justice system.<sup>151</sup>

24.98 The likely continued disjunction between the purpose and intention of legislation and its application in practice without extensive cultural change needs to be borne in mind.

24.99 The disjunction is not confined to Australia. Commentators in other countries have also noted the limits of focusing on changes to legislation alone to bring about substantive change to sexual assault trials, the experience of complainants in those trials, the rates of conviction and acquittal, and the need instead to focus on attitudinal and cultural change.<sup>152</sup> Cultural change requires general community education, education of police officers, lawyers and judicial officers, as well as changes to policies and procedures.

24.100 *Time for Action* noted that ‘enhanced community awareness and education programs are needed to change violence-supportive attitudes’.<sup>153</sup> The report recommended a range of measures to strengthen community leadership, awareness and understanding of sexual assault and family violence; and to promote positive male behaviours.<sup>154</sup>

24.101 Community attitudes also determine the legal system’s response to sexual assault complaints. The key players in the legal system—police, lawyers, judicial officers, jury members—are also members of the general community (as are journalists), frequently sharing the same attitudes and beliefs about sexual assault, who perpetrates it, and who can be a victim. While there has been great progress in community attitudes about violence against women—including sexual assault—there are still a number of resilient myths in currency.

24.102 If key legal players also subscribe to some of these community attitudes and myths, the implementation of reform is hampered.<sup>155</sup> For example, one stakeholder referred to the difficulties in challenging the ‘dominant’ culture of the legal profession with its ‘emphasis upon the rights of the accused’ and asked

151 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), xxiv.

152 In South Africa, see C van der Bijl and P Rumney, ‘Attitudes, Rape and Law Reform in South Africa’ (2009) 73 *Journal of Criminal Law* 414. In the UK, see J Temkin and B Kráhe, *Sexual Assault and the Justice Gap: A Question of Attitude* (2008); P Rumney, ‘The Review of Sex Offences and Rape Law Reform: Another False Dawn’ (2001) 64 *Modern Law Review* 890. In Canada, see M Randall, ‘Sexual Assault in Spousal Relationships, “Continuous Consent” and the Law, Honest but Mistaken Judicial Beliefs’ (2008) 32 *University of Manitoba Law Journal* 144.

153 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 49.

154 Ibid, 50–51.

155 In its final report the VLRC noted that some police ‘are influenced by common myths surrounding sexual assault and the behaviour of victims’: Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), xxii.

how do you open up the psyche of a judge, immersed within the culture of legal professionals, who remains immovable in a personal opinion and outdated knowledge that influences their professional judgments and then remains unaccountable for reprehensible decisions that are being made right now?<sup>156</sup>

24.103 *Time for Action* included recommendations intended to ensure that judicial officers, law enforcement personnel and other professionals within the legal system have appropriate knowledge and expertise. These included the development and implementation of:

a national education and professional development framework that recognises the specific roles and functions of police; prosecutors; defence counsel; family and migration lawyers; legal advisers; court staff and the judiciary.<sup>157</sup>

### Judicial and legal education

24.104 The National Council also recommended the production of a model Bench Book, in consultation with jurisdictions, and as part of a national professional development program for judicial officers on sexual assault and family violence. This Bench Book would ‘provide a social context analysis and case law to complement existing resources and enhance the application of the law’.<sup>158</sup> Specialist sexual assault bench books have been developed by the Judicial Commission of New South Wales<sup>159</sup> and the Judicial College of Victoria.<sup>160</sup>

24.105 The need for judicial education in relation to dealing with sexual assault cases is highlighted in different contexts in the following chapters. For example, judicial and practitioner education on the ‘nature of sexual assault, including the context in which sexual offences typically occur, and the emotional, psychological and social impact of sexual assault’<sup>161</sup> may be needed in relation to decisions about jury warnings on the effect of delay on the credibility of complainants. Similarly, there may be a need for guidance on expert opinion about children’s responses to sexual abuse and their reliability as witnesses; and the admission of evidence about a complainant’s prior sexual activity.<sup>162</sup> In Chapters 26 to 28, the Commissions make a number of recommendations for the development and provision of education and training in relation to the response of the criminal justice system to sexual assault. In Chapter 31 the Commissions recommend the development of a national bench book for judicial officers dealing with family violence and sexual assault.

156 T Searle, *Submission FV 108*, 2 June 2010.

157 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 121.

158 Ibid.

159 Judicial Commission of New South Wales, *Sexual Assault Handbook* (2009) <[www.judcom.nsw.gov.au/publications/benchbks/sexual\\_assault/index.html](http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/index.html)> at 14 April 2010.

160 Judicial College of Victoria, *Sexual Assault Manual* (2008) <[www.judicialcollege.vic.edu.au/publications/sexual-assault-manual](http://www.judicialcollege.vic.edu.au/publications/sexual-assault-manual)> at 21 February 2010.

161 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [18.173].

162 See Ch 27.

24.106 More generally, the need for a ‘common knowledge base’ of family violence has been identified by the Family Law Council.<sup>163</sup> For this purpose, the Council has recommended that an expert panel be established that ‘considers research, distils accepted opinions, and agrees on information that should be included in the common knowledge base’.<sup>164</sup> Such a centralisation of information attached to a specific judicial education or other body (such as the Australian Institute of Family Studies) could support consistency and improved legal responses. Judicial officers, prosecutors, defence lawyers, police and others involved in the criminal justice response to sexual assault in the family violence context might all be better informed.

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163 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 38. The principal recommendations are noted in Ch 1.

164 Ibid, 38.

# 25. Sexual Offences

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## Contents

Introduction	1129
Overview of sexual offences	1130
Legislative framework	1130
‘Rape’: the penetrative sexual offence	1130
Commissions’ views	1135
Sexual offences against children and young people	1136
Persistent sexual abuse of a child	1142
Sexual offences against people with cognitive impairment	1146
Consent	1147
Statutory definition of consent	1147
Circumstances where consent is vitiated	1150
The fault element	1158
Commissions’ views	1168
Jury directions about consent	1170
Guiding principles and objects clauses	1176

## Introduction

25.1 This chapter outlines the legal framework of sexual assault offences, summarises the range of existing offences across Australian jurisdictions and identifies inconsistencies in relation to elements of these offences—notably concerning the issue of consent. It also discusses the symbolic, educative and practical role that guiding principles and statements of objectives can play in the interpretation of law and the application of rules with respect to sexual offences.

25.2 The summary of offences is not comprehensive, but focuses on those sexual offences that are most likely to be committed by a current or former intimate partner or family member. For example, sexual offences proscribed in the Commonwealth criminal law such as those relating to child sex tourism,<sup>1</sup> or rape or sexual violence in the context of war or as a crime against humanity<sup>2</sup> are not included.<sup>3</sup>

25.3 Despite extensive reform of the laws relating to sexual offences, there remain some significant gaps and inconsistencies between jurisdictions in the construction of offences. While some of these are examined in this chapter, the focus of the

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1     *Crimes Act 1914* (Cth) pt IIIA.

2     *Criminal Code* (Cth) ss 268.14, 268.19, 268.59, 268.64.

3     See also *Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010* (Cth).

Commissions' work has been on inconsistency in interpretation or application of laws in those areas with most direct impact on victims of sexual assault in a family violence context—in relation to the reporting and prosecution of offences as well as pre-trial and trial processes. These issues are discussed in Chapters 26 to 28.

25.4 The purpose of summarising sexual assault offences in this chapter is to illustrate the range of sexually coercive behaviour that is proscribed in various criminal laws and, in some instances, to point to promising approaches to counter such conduct. The discussion also provides background for later examination of pre-trial and trial processes in sexual assault proceedings.

## **Overview of sexual offences**

25.5 Extensive reforms of the laws relating to sexual offences over the last 25 years have resulted in a new range of sexual offences in most jurisdictions.<sup>4</sup> Key areas of law reform have included a move away from the language of 'rape' to that of 'sexual assault' as a way of emphasising sexual offences as acts of violence. Related to this was the grading of sexual offences to take account of different circumstances and aggravating factors. The scope of the penetrative offence has also been broadened in all jurisdictions.

## **Legislative framework**

25.6 Each Australian jurisdiction has its own set of substantive and procedural criminal laws. The main point of divergence between jurisdictions is whether the criminal law is codified or remains guided by the common law. Within that distinction, there is a further differentiation as to whether the jurisdiction has adopted the uniform Evidence Acts.<sup>5</sup>

25.7 In the criminal code jurisdictions—Queensland, Western Australia, Tasmania and the Northern Territory—statutes comprehensively set out the criminal law such that 'all crimes now exist in statutory form as defined by the various codes which have specifically supplanted common law crimes'.<sup>6</sup> In the common law jurisdictions—NSW, Victoria, South Australia and the ACT—any legislation is 'interpreted in the light of common law precepts unless Parliament has expressly, or by necessary implication, evinced a clear intention to displace the common law'.<sup>7</sup>

## **'Rape': the penetrative sexual offence**

25.8 Under the common law, rape was defined as carnal knowledge of a woman against her will and was subject to narrow and restrictive definitions of 'sexual intercourse'. Statutory extensions and modifications to the common law crime of rape have been made in all jurisdictions to varying degrees,<sup>8</sup> but with resulting

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4 See Thomson Reuters, *The Laws of Australia*, vol 10, *Criminal Offences*, 10.3, [10].

5 The uniform Evidence Acts are: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2004* (NI). See Ch 27.

6 M Bagaric and K Arenson, *Criminal Laws in Australia: Cases and Materials* (2nd ed, 2007), 18.

7 *Ibid*, 18.

8 See Thomson Reuters, *The Laws of Australia*, vol 10, *Criminal Offences*, 10.3, [140].

inconsistency across jurisdictions.<sup>9</sup> The penetrative sexual offence is no longer gender-specific and, despite some inconsistencies, generally includes penetration of the genitalia<sup>10</sup> by a penis, object, part of a body or mouth.<sup>11</sup>

25.9 A number of jurisdictions also prohibit a person from compelling another person to take part in sexual penetration.<sup>12</sup> In addition, common law understandings of consent, and the conditions or circumstances that are seen as negating consent, have been considerably modified.

25.10 The penetrative sexual offence is described as: ‘rape’ in Victoria,<sup>13</sup> Queensland,<sup>14</sup> South Australia<sup>15</sup> and Tasmania;<sup>16</sup> ‘sexual assault’ in NSW,<sup>17</sup> ‘sexual intercourse without consent’ in the ACT and the Northern Territory,<sup>18</sup> and ‘sexual penetration without consent’ in Western Australia.<sup>19</sup> The offence includes the continuation of sexual intercourse after penetration in order to address cases where consent has subsequently been withdrawn.<sup>20</sup>

25.11 The penalty for sexual intercourse without consent ranges from 12 years<sup>21</sup> to life imprisonment,<sup>22</sup> depending on the jurisdiction and the presence of aggravating factors.<sup>23</sup>

9 For example, there is some inconsistency between jurisdictions with respect to penetration of vagina/female genitalia or anus by a body part or object as well as penetration of the mouth by a penis. Western Australia is the only state in which the penetrative sexual offence includes the use of a victim’s body for penetration of the offender in the definition of penetration/sexual intercourse: *Criminal Code* (WA) s 319(1).

10 In some jurisdictions it is specified as penetration of the vagina or anus: eg, *Crimes Act 1900* (ACT) s 50. Penetration of a surgically constructed vagina is not included in legislative definitions in Western Australia or the ACT, nor is it included with respect to penetration of a surgically constructed vagina by an object in Tasmania (*Criminal Code* (Tas) s 1). For other jurisdictions, see *Crimes Act 1900* (NSW) s 61H(1); *Crimes Act 1958* (Vic) s 35; *Criminal Code* (Qld) s 1; *Criminal Law Consolidation Act 1935* (SA) s 5(3); *Criminal Code* (NT) s 1.

11 For example, in NSW, it includes ‘sexual connection occasioned by the penetration to any extent of the genitalia ... of a female person or the anus of any person’ by ‘any part of the body of another person, or any object manipulated by another person’: *Crimes Act 1900* (NSW) s 61H(1). See also the definition of sexual penetration in the Model Criminal Code: Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), app 2, cl 5.2.1.

12 See, eg, *Crimes Act 1958* (Vic) s 38A. See also Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), app 2, cl 5.2.7.

13 *Crimes Act 1958* (Vic) s 38.

14 *Criminal Code* (Qld) s 48.

15 *Criminal Law Consolidation Act 1935* (SA) s 48.

16 *Criminal Code* (Tas) s 185.

17 *Crimes Act 1900* (NSW) s 61I.

18 *Crimes Act 1900* (ACT) s 54; *Criminal Code* (NT) s 192.

19 *Criminal Code* (WA) s 325.

20 Non-consensual continuation of sexual intercourse is recognised in all jurisdictions except Queensland. See: *Crimes Act 1900* (NSW) s 61H(1)(d); *Criminal Code* (WA) s 319(1); *Criminal Law Consolidation Act 1935* (SA) s 5; *Criminal Code* (Tas) s 1; *Crimes Act 1900* (ACT) s 50(e); *Criminal Code* (NT) s 1. *Crimes Act 1958* (Vic) s 38(2)(b) refers to the failure to withdraw after becoming aware that a person is not consenting.

21 *Crimes Act 1900* (ACT) s 54(1).

25.12 In all jurisdictions the prosecution must prove that sexual penetration took place without the consent of the complainant. These are the physical elements of the offence, or *actus reus*. In the common law jurisdictions—NSW, Victoria, South Australia and the ACT—the prosecution must also prove that the accused knew that the victim was not consenting or was reckless about whether there was such consent.<sup>24</sup> This is known as the mental element of the offence, or *mens rea*. Similar provisions apply in the Northern Territory.<sup>25</sup> By contrast, in the code jurisdictions—Queensland, Western Australia and Tasmania—the prosecution need only prove intention.<sup>26</sup>

25.13 Until recently, in all the common law jurisdictions, a defendant who could prove an honest albeit unreasonable belief in consent would be acquitted of the offence. In the code jurisdictions, a defendant may raise the defence of an honest *and* reasonable belief in consent. Key changes in relation to the definition of consent and the mental element relating to consent are discussed later in this chapter.

#### ***Aggravated sexual assaults***

25.14 Each jurisdiction provides in some way for aggravating factors for the penetrative offence (as well as for other sexual offences). These may be outlined in a definition section,<sup>27</sup> articulated as a separate aggravating offence,<sup>28</sup> as a subsection of the substantive offence,<sup>29</sup> or as an entirely separate offence.<sup>30</sup> The Model Criminal Code provides for increased penalties for all sexual offences when certain aggravating factors are present.<sup>31</sup>

25.15 Factors that are commonly nominated as aggravating include: causing injury; using a weapon; detaining the victim; the victim's age; if the victim had a disability or cognitive impairment; or where the accused was in a position of authority in relation to the victim.<sup>32</sup>

25.16 For example, the penetrative sexual offence is supplemented with the separate crimes of 'aggravated sexual assault' in NSW and 'aggravated sexual penetration'

22      *Criminal Code* (Qld) s 349(1); *Criminal Law Consolidation Act 1935* (SA) s 48(1); *Criminal Code* (NT) s 192(3).

23      Under the Model Criminal Code it is proposed that the penalty would be imprisonment for a maximum of 15 years which would increase to 20 years if aggravating factors were present: Standing Committee of Attorneys-General, *Model Criminal Code* (1st edn, 2009) pt 5.2, div 2, cl 5.2.6.

24      *Crimes Act 1900* (NSW) s 61HA(3); *Crimes Act 1958* (Vic) s 38(2); *Criminal Law Consolidation Act 1935* (SA) s 48; *Crimes Act 1900* (ACT) s 54.

25      *Criminal Code* (NT) s 192(3)(b).

26      Thomson Reuters, *The Laws of Australia*, vol 10, *Criminal Offences*, 10.3, [320].

27      *Criminal Code* (WA) s 319.

28      See, eg, *Crimes Act 1900* (NSW) s 61J, aggravated sexual assault. See also: *Crimes Act 1900* (NSW) s 61JA, which combines sexual assault perpetrated in company with another aggravating factor; *Crimes Act 1958* (Vic) s 60A, sexual offence while armed with an offensive weapon; *Criminal Code* (WA) s 326, aggravated sexual penetration without consent.

29      See, eg, *Crimes Act 1958* (Vic) s 45, sexual penetration of a child under 16.

30      See, eg, *Criminal Code* (WA) s 330, which creates an offence of having sexual intercourse with persons, other than children, incapable of consent.

31      Standing Committee of Attorneys-General, *Model Criminal Code* (1st edn, 2009) pt 5.2, div 7.

32      See, eg, *Crimes Act 1900* (NSW) s 61J; *Criminal Code* (WA) s 326. A number of jurisdictions also have separate offences for sexual assaults taking place in these circumstances, eg, where the victim has a cognitive impairment or where the accused is in a position of authority in relation to the victim—these are discussed later in this chapter.

'without consent' in Western Australia.<sup>33</sup> These carry a higher maximum penalty than the basic offence. One of a range of aggravating factors must be proved including, for example,<sup>34</sup> the infliction of harm, the use of a weapon or being in company with another.<sup>35</sup>

25.17 In the ACT, the law provides for different offences ranging from sexual assault in the first degree—the most serious—to sexual assault in the third degree, depending on the existence of aggravating factors.<sup>36</sup> In the Northern Territory, the maximum punishment for the basic offence increases where there are aggravating factors—defined as where 'harm' or 'serious harm' is caused.<sup>37</sup>

#### ***Indecent assault and acts of indecency***

25.18 Indecent assault covers sexual acts that do not constitute rape. Indecent assault is an offence in all states.<sup>38</sup> For example, in Victoria, a person commits indecent assault if 'he or she assaults another person in indecent circumstances',<sup>39</sup> and in NSW the offence applies where any person 'assaults another person and ... commits an act of indecency on or in the presence of the other person'.<sup>40</sup> To establish this offence there must be an assault—actual or threatened—in addition to indecency. Some jurisdictions also have offences for aggravated indecent assault.<sup>41</sup>

25.19 The territories have adopted a different approach. The ACT has an offence for 'acts of indecency without consent',<sup>42</sup> which does not require an assault. Other jurisdictions also proscribe acts of indecency,<sup>43</sup> including in aggravated circumstances.<sup>44</sup> In the Northern Territory, instead of an offence of indecent assault, the legislation increases the maximum penalty for assault where the victim is assaulted in an indecent manner.<sup>45</sup>

25.20 Indecency is not defined in any of the legislative schemes. It is considered a word of 'ordinary meaning' for the jury to assess in the circumstances of the case and according to the standards of the day.<sup>46</sup>

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33     *Crimes Act 1900* (NSW) s 61J; *Criminal Code* (WA) s 326.

34     In NSW, there is also a separate offence of aggravated sexual assault in company, which carries a maximum penalty of life imprisonment: *Crimes Act 1900* (NSW) s 61JA.

35     *Crimes Act 1900* (ACT) ss 51–53.

36     *Criminal Code* (NT) s 192(7)–(8).

37     *Crimes Act 1900* (NSW) s 61L; *Crimes Act 1958* (Vic) s 39; *Criminal Code* (Qld) s 352; *Criminal Code* (WA) s 323; *Criminal Law Consolidation Act 1935* (SA) s 56; *Criminal Code* (Tas) s 127.

38     *Crimes Act 1958* (Vic) s 39.

39     *Crimes Act 1900* (NSW) s 61L.

40     Ibid s 61M; *Criminal Code* (WA) s 324; *Criminal Code* (Tas) s 127A.

41     *Crimes Act 1900* (ACT) s 60.

42     *Crimes Act 1900* (NSW) s 61N(2); *Criminal Code* (Qld) s 227; *Criminal Code* (Tas) s 137.

43     *Crimes Act 1900* (NSW) s 61O(1A): aggravating circumstances include where the act is performed in company; s 61O(3): where the accused is in a position of authority over the victim, or where the victim has a physical disability or cognitive impairment. As for sexual intercourse without consent, in relation to acts of indecency without consent the ACT provides for three further offences that relate to circumstances of aggravation, first, second and third degree: *Crimes Act 1900* (ACT) ss 57–59. See also *Criminal Code* (WA) s 324.

44     *Criminal Code* (NT) s 188(2).

45     Thomson Reuters, *The Laws of Australia*, vol 10, *Criminal Offences*, 10.3, [550].

### ***Assaults with intent to commit sexual acts***

25.21 In addition to crimes of sexual assault and indecent assault, some jurisdictions have offences involving assaults or acts with intent to commit sexual acts.<sup>46</sup> These offences apply where the accused uses violence or threatens to use violence in order to facilitate a sexual act.

25.22 The impetus for such offences was to ‘place primary emphasis on the violence factor in sexual assault, rather than on the element of sexual contact and consent’.<sup>47</sup> For example, in NSW, it is an offence for any person ‘with intent to have sexual intercourse with another person’ to inflict or threaten to inflict ‘actual bodily harm on the other person or a third person who is present or nearby’.<sup>48</sup>

25.23 Some jurisdictions also provide for offences where drugs or other substances have been administered to the victim in order to render that person unable to resist the sexual activity.<sup>49</sup>

### ***Submissions and consultations***

25.24 In the Consultation Paper, the Commissions asked whether significant gaps or inconsistencies arise among jurisdictions in relation to sexual offences against adults in terms of the:

- definition of sexual intercourse or penetration;
- recognition of aggravating factors;
- penalties applicable if an offence is found proven;
- offences relating to attempts; and/or
- definitions of indecency offences.<sup>50</sup>

25.25 Stakeholders highlighted gaps and inconsistencies across jurisdictions in relation to sexual offences, expressing the view that the Commissions should ‘be seeking to achieve fairness and consistency’ with respect to the formulation of sexual assault offences.<sup>51</sup> Overall, stakeholders who addressed the questions in this area focused on the definitions, aggravating factors and penalties for sexual offences.

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46 See, eg, *Crimes Act 1900* (NSW) ss 61K, 61P; *Crimes Act 1958* (Vic) s 40; *Criminal Code* (Qld) s 351.

47 Thomson Reuters, *The Laws of Australia*, vol 10, *Criminal Offences*, 10.3, [780].

48 *Crimes Act 1900* (NSW) s 61K.

49 See, eg, *Crimes Act 1958* (Vic) s 53; *Criminal Code* (Qld) s 218(1)(c). See also *Crimes Act 1900* (NSW) s 38A which is a general offence relating to ‘drink spiking’.

50 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010) Questions 16–1 and 16–2.

51 Law Society of New South Wales, *Submission FV 205*, 30 June 2010. This sentiment was echoed in submissions by the Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010 and National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

25.26 While there is much commonality among jurisdictions in the definitions of penetration and sexual intercourse, there are also ‘discrepancies resulting in different entitlements to justice depending on where the sexual assault occurs’.<sup>52</sup>

25.27 This also appears to be the case with aggravating factors. It was emphasised that ‘the range of circumstances of aggravation vary considerably between jurisdictions’,<sup>53</sup> and those circumstances which are more likely to be present as elements in intimate partner assault—such as threats to life, the presence of third parties or children and harm—are not universally recognised, resulting in the inconsistent application of aggravating circumstances between jurisdictions.

25.28 Finally, concerns were expressed about inconsistency in maximum penalties for sexual assault offences. However, the National Association of Services Against Sexual Violence (NASASV) highlighted the minimal impact this has on sexual assault in the family violence context. NASASV instead emphasised the need for guidance in relation to minimum penalties because the maximum penalty is rarely applied in such sexual assaults, which ‘seem to attract even lower sentences than, for example, stranger perpetrated sexual assaults’.<sup>54</sup>

### Commissions’ views

25.29 Legislative reform is only one of a number of mechanisms available to respond to problems arising from the response of the legal system to sexual assault. Nonetheless, to the extent that reform of the content of sexual offences can help ensure fairness through consistent expectations and treatment of sexual assault matters across jurisdictions, the Commissions support further harmonisation of sexual assault offence provisions.

25.30 In line with this policy, the Commissions recommend that the definition of sexual intercourse or penetration should be broad and not gender-specific, and should be made more consistent across jurisdictions. The definition recommended below is in keeping with the shift away from historically gendered and restrictive definitions of sexual intercourse and is consistent with the definition in the Model Criminal Code.

25.31 While other gaps and inconsistencies have been identified, in particular with respect to the recognition of aggravating factors and penalties, the Commissions do not make recommendations in relation to these issues. The Commissions suggest, however, that when state and territory governments review sexual assault offences, they should have regard to inconsistency in these areas—particularly where offences arise in a family violence context.

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52 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

53 Ibid.

54 Ibid.

**Recommendation 25–1** State and territory sexual assault provisions should include a wide definition of sexual intercourse or penetration, encompassing:

- (a) penetration (to any extent) of the genitalia (including surgically constructed genitalia) or anus of a person by the penis or other body part of another person and/or any object manipulated by a person;
- (b) penetration of the mouth of a person by the penis of a person; and
- (c) continuing sexual penetration as defined in paragraph (a) or (b) above.

## Sexual offences against children and young people

25.32 Each jurisdiction provides a range of offences concerning sexual conduct with children. These include, for example: sexual intercourse;<sup>55</sup> attempts to have sexual intercourse;<sup>56</sup> acts of indecency;<sup>57</sup> procuring or grooming a child for ‘unlawful sexual activity’;<sup>58</sup> and abducting a child with the intention of engaging in unlawful sexual activity.<sup>59</sup>

25.33 Offences against children are commonly expressed in terms of the age of the victim. For example, there are offences against young children—under the age of 10, 12 or 13 years of age, depending on the jurisdiction<sup>60</sup>—and offences against older children—generally under the age of 16,<sup>61</sup> but in some cases 17,<sup>62</sup> or 18 years of age.<sup>63</sup>

55 NSW: *Crimes Act 1900* (NSW) s 66A—under the age of 10 years; s 66C—aged between 10 and 16 years. Victoria: *Crimes Act 1958* (Vic) s 45—under the age of 16 years. Queensland: *Criminal Code* (Qld) s 215—offences of ‘carnal knowledge of a child’ relating to children under 16 years of age; s 208(1)—sodomy relating to children under the age of 18 years. Western Australia: *Criminal Code* (WA) s 320(2)—children under the age of 13 years; s 321(2)—children aged between 13 and 16 years. South Australia: *Criminal Law Consolidation Act 1935* (SA) s 49(1)—under the age of 14 years; s 49(3)—under the age of 17 years. Tasmania: *Criminal Code* (Tas) s 124—under the age of 17 years. ACT: *Crimes Act 1900* (ACT) s 55(1)—under the age of 10 years; s 55(2)—under the age of 16 years. Northern Territory: *Criminal Code* (NT) s 127 under the age of 16 years.

56 *Crimes Act 1900* (NSW) ss 66B, 66D.

57 Ibid s 61N(1); *Crimes Act 1958* (Vic) s 47; *Criminal Code* (Qld) s 210—indecent treatment of a child under the age of 16 years; *Criminal Code* (WA) s 320(4)—indecently dealing with a child under the age of 13; s 321(4)—indecently dealing with a child aged 13 to 16; *Criminal Law Consolidation Act 1935* (SA) s 58—acts of gross indecency; *Criminal Code* (Tas) s 125B; *Crimes Act 1900* (ACT) s 61; *Criminal Code* (NT) s 127—gross indecency, s 132—indecent dealing with a child.

58 *Crimes Act 1900* (NSW) s 66EB. See also: *Crimes Act 1958* (Vic) s 58; *Criminal Code* (Qld) s 217—procuring child for carnal knowledge; *Criminal Code* (Qld) s 218A—using the internet to procure children; *Criminal Code* (WA) ss 320(3), 320(5), 321(3), 321(5); *Criminal Code* (Tas) ss 125C–125D; *Criminal Code* (NT) s 131. Western Australia also has an offence of using electronic communication to procure or expose a child to indecent material: *Criminal Code* (WA) s 204B.

59 *Crimes Act 1958* (Vic) s 56; *Criminal Code* (NT) s 201. See also Queensland which has an offence of ‘taking a child for immoral purposes’: *Criminal Code* (Qld) s 219.

60 Under the age of 10 years: *Crimes Act 1900* (NSW) s 66B; *Crimes Act 1958* (Vic) s 45(2)(a); *Crimes Act 1900* (ACT) s 55(1). Under 12 years of age: see *Criminal Code* (Qld) s 215(3). Under the age of 13 years: *Criminal Code* (WA) s 320.

61 *Crimes Act 1958* (Vic) s 45(2)(b); *Criminal Code* (Qld) s 215(1); *Crimes Act 1900* (ACT) s 55(2); *Criminal Code* (NT) s 127. NSW creates two age groups: *Crimes Act 1900* (NSW) s 66C(1)—victims

This gradation generally reflects the seriousness of offences against very young children. Accordingly, the sentences attached to those offences are higher than for those against older children. For example, in NSW, different penalties are provided where the child is under the age of 10 years (25 years imprisonment); between the ages of 10 and 14 years (16 years imprisonment); and between the ages of 14 and 16 years (10 years imprisonment).<sup>64</sup> As for offences against adults, aggravating factors are also applicable to offences against children.<sup>65</sup>

25.34 In some jurisdictions, consent by a person who is under the age of consent to sexual activity is excluded from operating as a defence to sexual offence charges, regardless of any similarity in age between the victim and the accused.<sup>66</sup> However, many jurisdictions recognise that consent may play a role in such situations, and consequently there are a range of statutory formulations involving consensual sexual activity between young people under the age of consent but similar in age.<sup>67</sup> For example, in Victoria, consent may be a defence to the offence of sexual penetration or an indecent act where the victim is aged 12 years and over and the accused is not more than two years older than the victim.<sup>68</sup> In South Australia similarity in age is recognised as a defence where the victim is over the age of 16 years and the accused is under the age of 17 years.<sup>69</sup> In Tasmania, consent is a defence, except in relation to anal sexual intercourse, where the victim is aged 15 years and over and the defendant is not more than five years older, or where the victim is aged 12 years or over and the defendant is not more than three years older.<sup>70</sup>

25.35 A related issue, of particular relevance in cases involving older children, is that of the age of consent. Historically, there were significant inconsistencies within and across jurisdictions with respect to the age of consent—the age at which young people are considered able to consent to sexual activity—based on gender, sexuality and other factors. Despite significant reforms, some inconsistency remains. For example,

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between the ages of 10 and 14 years; *Crimes Act 1900* (NSW) s 66C(3)—between the ages of 14 and 16 years.

62 In South Australia, the various sexual offences against children tend to be divided between those perpetrated against children under the age of 14 years, and under the age of 17 years: see *Criminal Law Consolidation Act 1935* (SA) s 49(1), s 49(3). Tasmania also has sexual offences against children under the age of 17: see *Criminal Code* (Tas) s 124.

63 In Queensland, in relation to sodomy, see *Criminal Code* (Qld) s 208.

64 *Crimes Act 1900* (NSW) ss 66A, 66C.

65 See, eg, *Crimes Act 1900* (NSW) ss 66A(3), 66C(5)—aggravating factors for sexual intercourse offences; s 61O(1)—aggravated acts of indecency.

66 For example, see *Crimes Act 1900* (NSW) ss 77, 78C.

67 Similarity in age in ‘boyfriend/girlfriend’ cases of sexual assault is also dealt with in prosecutorial guidelines in some jurisdictions. See, eg, Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines* cl 2.9.2.

68 *Crimes Act 1958* (Vic) s 44(5)(b), 47(2)(b). This is similar to the formulation in Western Australia, where consent may be a defence to sexual offences against children in some instances where the victim is aged 13 years or over and the accused is not more than 3 years older than the victim—*Criminal Code* (WA) ss 321(9)(b), 321A(9)(b); in the ACT, where the victim is aged 10 years and over and the accused is no more than two years older than the victim—*Crimes Act 1900* (ACT) s 55(3)(b); and under the Model Criminal Code where the victim is over the no defence age and the age difference between the parties is no more or less than 2 years—Standing Committee of Attorneys-General, *Model Criminal Code* (1st edn, 2009) cl 5.2.17.

69 *Criminal Law Consolidation Act 1935* (SA) s 49(4).

70 *Criminal Code* (Tas) s 124(3).

Commonwealth legislation sets the age of consent at 16 years of age,<sup>71</sup> which is consistent with legislation in NSW, Victoria, Western Australia, ACT and the NT.<sup>72</sup> However, the age of consent is 17 years of age in South Australia and Tasmania,<sup>73</sup> and legislation in Queensland distinguishes between vaginal sex and sodomy, in relation to which the age of consent is 16 and 18 years of age respectively.<sup>74</sup>

#### *Offences by a family member*

25.36 State and territory criminal law provides for a range of incest offences,<sup>75</sup> where the victim and the accused are closely related. For example, Victorian legislation provides that a person must not take part in an act of sexual penetration with a person whom he or she knows to be:

- his or her child or other lineal descendant or his or her stepchild;
- the child or other lineal descendant or the stepchild of his or her de facto spouse;
- his or her father or mother or other lineal ancestor or his or her stepfather or stepmother; or
- his or her sister, half-sister, brother or half-brother.<sup>76</sup>

25.37 Similarly, in most other jurisdictions sexual activity occurring in the context of biological and adoptive relationships or involving half-sisters and brothers or step-sisters and brothers is covered by the incest provisions.<sup>77</sup> However, legislation across jurisdictions is inconsistent with respect to whether incest offences also cover conduct arising in the context of de facto relationships or those arising from fostering and other legal arrangements.<sup>78</sup> Overall, incest type offences do not tend to make provision for offences arising in communities which may have extended family and kinship definitions and structures—as is the case within Aboriginal and Torres Strait Islander and some CALD communities.

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71 See, for example, *Criminal Code* (Cth) s 272.8.

72 *Crimes Act 1900* (NSW) s 66A; *Crimes Act 1958* (Vic) s 45; *Criminal Code* (WA) s 321; *Crimes Act 1900* (ACT) s 55; *Criminal Code* (NT) s 127.

73 *Criminal Law Consolidation Act 1935* (SA) s 49; *Criminal Code* (Tas) s 124.

74 *Criminal Code* (Qld) ss 208, 210.

75 See, Standing Committee of Attorneys-General, *Model Criminal Code* (1st edn, 2009), pt 5.2, div 6. There is considerable debate about the use of the term incest: Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [8.3]–[8.4]. In Western Australia, this offence is referred to as sexual offences by a ‘relative and the like’: *Criminal Code* (WA) s 329.

76 *Crimes Act 1958* (Vic) s 44(1)–(4).

77 See *Crimes Act 1900* (NSW) s 78A; *Criminal Code* (Qld) s 222(5)–(7A); *Criminal Code Act Compilation 1913* (WA) s 329; *Criminal Law Consolidation Act 1935* (SA) s 72; *Criminal Code Act 1924* (Tas) s 133; *Crimes Act 1900* (ACT) s 62; *Criminal Code Act 1983* (NT) s 134.

78 For example, Queensland is one of the few jurisdictions in which the incest provisions cover sexual activity in the context of adopted, step, de facto, foster and other ‘legal arrangement’-based relationships: *Criminal Code Act 1899* (Qld) s 222(5)–(7A). In some jurisdictions, rather than being incorporated into incest provisions, the provisions that create an offence against a child where the accused is in a position of trust or authority specifically apply where the accused is a step-parent, guardian or foster parent: see, eg, *Crimes Act 1900* (NSW) s 73(3)(a).

25.38 In some jurisdictions, these offences apply to all age groups—that is, children and adults.<sup>79</sup> In others, general offences in respect of children are applicable, and the incest offence relates to cases where the victim is over 16 years of age.<sup>80</sup>

#### ***Offences where the accused is in a position of trust or authority***

25.39 A number of jurisdictions have introduced offences that apply to a defendant who has a special relationship with the victim as a result of the defendant's position or authority, or the care that he or she provides to the child—for example, as a teacher, religious guide, doctor, employer or sports coach.<sup>81</sup> The former Standing Committee of Attorneys-General Model Criminal Code Officers Committee (MCCOC)—now the Model Criminal Law Officers Committee—recommended offences of this kind in relation to sexual penetration, indecent touching, and indecent acts directed at a young person by a person in a position of trust or authority, and considered that young people up to two years over the age of consent may be vulnerable in this context.<sup>82</sup>

#### ***Consultation Paper***

25.40 In the Consultation Paper, the Commissions proposed that the age of consent for all sexual offences should be set at 16 years of age.<sup>83</sup> The Commissions also asked questions about sexual offences against children and young people, including with respect to the availability and content of defences involving similarity in age, and honest and reasonable belief as to age.<sup>84</sup>

25.41 Some stakeholders supported the proposal that the age of consent for all sexual offences should be 16 years of age.<sup>85</sup> It was noted, however, that a higher or lower age of consent may be appropriate in some situations. For example, NASASV supported a higher age of consent where there is a care relationship or incest.<sup>86</sup>

79     *Crimes Act 1958* (Vic) s 44; *Criminal Code* (Qld) s 222; *Criminal Law Consolidation Act 1935* (SA) s 72; *Criminal Code* (Tas) s 133; *Crimes Act 1900* (ACT) s 62; *Criminal Code* (NT) s 134. This last section also provides for harsher penalties where the victim is a child under the age of 10, or between 10 and 16 years of age. See also Standing Committee of Attorneys-General, *Model Criminal Code* (1st edn, 2009), pt 5.2, div 6, cl 5.2.34.

80     *Crimes Act 1900* (NSW) s 78A.

81     The relationships included vary across the jurisdictions, see, eg, *Crimes Act* (NSW) s 73(3); *Crimes Act 1958* (Vic) s 49(4); *Criminal Law Consolidation Act 1935* (SA) s 49(5a); *Criminal Code* (NT) s 128(3).

82     Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), app 2, pt 5.2, div 4, cl 5.2.21. See also, L Kelly, ‘Promising Practices Addressing Sexual Violence’ (Paper presented at Violence Against Women: Good Practices in Combating and Eliminating Violence Against Women Expert Group Meeting, Vienna, 17–20 May 2005), 4, which canvassed ‘promising practices in legal reform’, including measures designed to address ‘capacity to consent for people with major disabilities and breach of trust offences committed by professionals and those in positions of authority and care’.

83     Consultation Paper, Proposal 16–1.

84     Ibid, Questions 16–3, 16–4.

85     For example, Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; Confidential, *Submission FV 162*, 25 June 2010.

86     National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

25.42 Stakeholders also highlighted issues arising from underage consensual sexual activity. Legal Aid NSW noted that

an age of consent of 16 may well be out of touch with the sexual habits of many teenagers below this age and a fixed age of consent means that many teenagers engaging in consensual sex are committing a criminal offence.<sup>87</sup>

25.43 Other stakeholders echoed this view, emphasising the need for provisions to ‘reflect contemporary practices in sexual relations between young people’,<sup>88</sup> provided such relations are consensual.

25.44 Legal service providers in the Northern Territory, including the North Australian Aboriginal Justice Agency and the Northern Territory Legal Aid Commission (NTLAC), expressed particular concern about the prosecution of non-exploitative consensual (but under-age) teenage sexual behaviour following the Northern Territory Emergency Response and in light of mandatory sentencing provisions for sexual offences.<sup>89</sup> NSW stakeholders highlighted similar concerns about the operation of NSW legislation on the basis that

all sexual contact with a child under 16, even consensual contact, is an offence, even where both parties are under 16. Secondly, an offence involving two juveniles is automatically ‘aggravated’ because it is designated as a ‘child sex offence’ which places the offence in a more serious category, attracting higher penalties. In addition, child sex offences attract the provisions of the Child Protection Register set up under the *Child Protection (Offenders Registration) Act 2000* (NSW), even where the offender and the victim are both children.<sup>90</sup>

25.45 Related to this issue, the Commissions asked how ‘similarity in age’ of the complainant and defendant should be dealt with.<sup>91</sup> Some stakeholders opposed similarity in age being used as a defence, despite operating as a defence in many jurisdictions.<sup>92</sup> Others emphasised that consent should remain a relevant consideration, or favoured the inclusion of lack of consent as an element of the offence in such circumstances.<sup>93</sup> Other stakeholders suggested that there should not be an offence

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87 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

88 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010. See also Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

89 North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

90 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

91 Consultation Paper, Question 16–3.

92 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Family Voice Australia, *Submission FV 75*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

93 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010.

where the age gap is two years or less,<sup>94</sup> or that similarity in age could be a relevant sentencing consideration.<sup>95</sup>

25.46 Stakeholders held differing views about the defence of honest and reasonable belief that a person was over a certain age. For example, the Law Society of NSW, Legal Aid NSW and NTLAC suggested that such a defence should be available at any age. The Canberra Rape Crisis Centre and NASAV expressed the opposite view, arguing that it should not be available at any age.<sup>96</sup> The Canberra Rape Crisis Centre observed that ‘the impact on the young victim is the same regardless of the belief of the perpetrator and this should be the primary consideration’.<sup>97</sup> NASAV stated that ‘an honest and reasonable belief that a person was over a certain age is at best irrelevant and at worst likely to be used as a difficult-to-challenge defence of the heinous crime of engaging sexually with children’.<sup>98</sup>

#### ***Commissions' views***

25.47 In considering offences involving children and young people there is a need to strike an ‘appropriate balance between the need to protect vulnerable persons from sexual exploitation, and the need to allow for sexual autonomy’,<sup>99</sup> and to recognise the realities of sexual behaviour.

25.48 Issues of age of consent, similarity in age, or honest or reasonable belief that a person was over a certain age are much less likely to arise where sexual assault occurs in a family violence context and are, therefore, somewhat peripheral to this Inquiry. Accordingly, these issues were not matters on which the Commissions consulted widely.

25.49 The Commissions suggest that the age of consent for sexual offences should be set at 16 years of age. This is consistent with legislation in many jurisdictions and the approach taken by MCCOC, which considered the issue at length and received numerous submissions from a range of stakeholders.<sup>100</sup> The Commissions’ recommendation, however, is that the age of consent for sexual activity should be made uniform both within and across jurisdictions, and that no distinction be made based on gender, sexuality or any other factor.

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94 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

95 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Family Voice Australia, *Submission FV 75*, 2 June 2010.

96 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

97 Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

98 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

99 Explanatory Memorandum, Crimes Legislation Amendment (Sexual Offences Against Children) Bill 2010 (Cth).

100 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 119–123.

25.50 Similarly, the Commissions do not make any recommendation with respect to how similarity in age should be dealt with or the age at which a defendant should be able to raise an honest and reasonable belief that a person was over a certain age. The Commissions emphasise, however, that any review of the relevant legislative provisions or the exercise of prosecutorial discretion should recognise contemporary realities of consensual and non-exploitative sexual activity between young people.

**Recommendation 25–2** Federal, state and territory sexual offence provisions should provide a uniform age of consent for all sexual offences.

## Persistent sexual abuse of a child

25.51 All jurisdictions have introduced offences in relation to the ‘persistent sexual abuse of a child’,<sup>101</sup> ‘maintaining a sexual relationship with a young person’,<sup>102</sup> or the ‘persistent sexual exploitation of a child’.<sup>103</sup>

25.52 The impetus for the enactment of these offences was recognition of the practical difficulties encountered in successfully prosecuting child sexual offences. The requirement of particularity in child sexual offences—that is, precise details of single incidents—fails to capture the multiple, repetitive experiences of many children, particularly in the context of sexual abuse by family members.<sup>104</sup>

25.53 As then NSW Attorney General Jeff Shaw QC explained in the second reading speech for the Crimes Legislation (Child Sexual Offences) Bill 1998:

children are often unable to give precise details of offences, particularly where the alleged sexual assaults took place over many years, involved numerous occasions of abuse, and the accused was in a position of trust or authority. ... [I]f the prosecution is unable to prove particulars of the time, date and place of an allegation of child sexual abuse, then the accused cannot be prosecuted. ... The Government is of the firm view that the time has come to introduce legislation to better protect children. This bill accomplishes that purpose. By creating the offence of persistent sexual abuse of a child, we recognise the reality of continuing or prolonged child sexual abuse.<sup>105</sup>

25.54 Generally these offences capture a number of unlawful sexual acts<sup>106</sup>—not necessarily of the same kind—against a child within the one indictment. The provisions stipulate that ‘it is not necessary to specify or to prove the dates and exact

101 *Crimes Act 1900* (NSW) s 66EA; *Crimes Act 1958* (Vic) s 47A; *Criminal Code* (WA) s 321A. See also Standing Committee of Attorneys-General, *Model Criminal Code* (1st edn, 2009) cl 5.2.14.

102 *Criminal Code* (Qld) s 229B; *Criminal Code* (Tas) s 125A; *Crimes Act 1900* (ACT) s 56; *Criminal Code* (NT) s 131A, maintaining a relationship of a sexual nature.

103 *Criminal Law Consolidation Act 1935* (SA) s 50.

104 See, eg, Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 133–137. See also, *S v The Queen* (1989) 168 CLR 266.

105 New South Wales, *Parliamentary Debates*, Legislative Council, 20 October 1998, 8541 (J Shaw QC—Attorney General).

106 Generally three or more, although in Queensland and South Australia it is simply more than one unlawful act: *Criminal Code* (Qld) s 229B(2); *Criminal Law Consolidation Act 1935* (SA) s 50(1).

circumstances of the alleged occasions on which the conduct constituting the offence occurred'.<sup>107</sup> Instead, reasonable particularity for the period during which the offences are alleged to have taken place is required, and there must be a description of the 'nature of the separate offences alleged to have been committed by the accused during that period'.<sup>108</sup> Judicial criticism of the provisions has highlighted the problems associated with such lack of particularity, specifically the potential to jeopardise the defendant's right to a fair trial and the impact on the admissibility of evidence.<sup>109</sup>

25.55 Most Australian jurisdictions require the approval of the Attorney-General or Director of Public Prosecutions (DPP) before proceedings for the offence may be commenced;<sup>110</sup> and the maximum penalty for the offences is relatively similar across the jurisdictions—ranging from life imprisonment in Queensland and South Australia,<sup>111</sup> to 20 years imprisonment in Western Australia.<sup>112</sup>

25.56 Various inquiries and reviews have indicated that the persistent sexual abuse provisions are rarely charged and that the specific provisions do not address the problems in the area.<sup>113</sup> This view was echoed in submissions to this Inquiry and is discussed further below.

### **Consultations and submissions**

25.57 In the Consultation Paper the Commissions asked whether the offence of 'persistent sexual abuse' or 'maintaining a relationship' had achieved its aims in assisting the prosecution of sexual offences against children in the family context, where there are frequently multiple unlawful acts.<sup>114</sup>

25.58 The majority of stakeholders were supportive of the policy rationale underlying the introduction of 'persistent sexual abuse' type offences, particularly in a family violence context, but highlighted that this is an area in which there 'is an

107 *Crimes Act 1900* (NSW) s 66EA(4). See also, *Crimes Act 1958* (Vic) s 47A(3); *Criminal Code* (Qld) s 229B(4); *Criminal Code* (WA) s 321A(5)(b); *Criminal Law Consolidation Act 1935* (SA) s 50(4); *Criminal Code* (Tas) s 125A(4)(a); *Crimes Act 1900* (ACT) s 56(4); *Criminal Code* (NT) s 131A(3).

108 *Crimes Act 1900* (NSW) s 66EA(5).

109 See, eg, *R v S* (1992) 58 SASR 523; *S v The Queen* (1989) 168 CLR 266.

110 See, eg, *Crimes Act 1900* (NSW) s 66EA(11); *Crimes Act 1958* (Vic) s 47A(7); *Criminal Code Act 1899* (Qld) s 229B(6); *Criminal Code* (WA) s 321A(7); *Criminal Code Act 1924* (Tas) s 125A(7); *Crimes Act 1900* (ACT) s 56(9); *Criminal Code Act 1983* (NT) s 131A(9).

111 *Criminal Code* (Qld) s 229B(1); *Criminal Law Consolidation Act 1935* (SA), s 50(1).

112 *Criminal Code* (WA) s 321A(4).

113 See L Chapman, *Review of South Australian Rape and Sexual Assault Law: Discussion Paper* (2006), prepared for the Government of South Australia, 30–45; ACT Law Reform Commission, *Report on the Laws Relating to Sexual Assault*, Report 18 (2001), [16]–[36]; Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55 (Part 1) (2000), ch 19. See also M Powell, K Roberts and B Guadagno, 'Particularisation of Child Abuse Offences: Common Problems When Questioning Child Witnesses' (2007) 19(1) *Current Issues in Criminal Justice* 64–74.

114 Consultation Paper, Question 16–5.

implementation gap between written law and its practice'.<sup>115</sup> Most stakeholders who addressed the issue indicated that the provisions are 'profoundly under utilised'.<sup>116</sup>

25.59 Some stakeholders outlined concerns about the potentially oppressive operation of the provisions and their impact on the rights of the accused, given the absence of particularity and resulting difficulties for the defence.<sup>117</sup> Similar concerns have been raised in the past, including by the MCCOC.<sup>118</sup>

25.60 The Office of the Director of Public Prosecutions (NSW ODPP) expressed the view that the NSW provision requires recasting because it is under-utilised for three reasons:

Firstly the reading down of the nature and purpose of the section by the Court of Criminal Appeal, secondly the failure of the section to sufficiently relieve the burden on the complainant to particularise offences and thirdly, by the requirement that the DPP sanction the laying of the charge.<sup>119</sup>

25.61 In relation to the requirement for DPP approval, the NSW ODPP stated that:

while the reasoning behind the sanction requirement was sound in 1998, as the offence was of a novel nature and should only be used in cases of substantial abuse, the [Sexual Assault Review Committee] question that the sanction is still necessary to commence proceedings. It does seem, by reference to the Police complaints that the charge is not being considered, that the practicalities and the resources involved in sanctioning the charge are prohibitive to the proper application of the section.<sup>120</sup>

25.62 Women's Legal Service Queensland identified another practical limitation of the provisions where persistent sexual abuse occurs over a lengthy period, during which time the victim becomes an adult. Acts which occur after the child becomes 18 years of age are either consensual, in which case no offence has been committed unless it is incest, or non-consensual, and therefore constitute a separate criminal offence. However, the Legal Service emphasised that this assumes that victims of persistent sexual abuse have the capacity to consent—which in many instances neither recognises nor reflects the reality of the lives of young people who are subjected to such abuse.<sup>121</sup>

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115 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010. This was echoed by the Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

116 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010. This was also supported by stakeholders such as the Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010 and Office of the Director of Public Prosecutions (WA), *Consultation*, Perth, 4 May 2010.

117 Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010; Office of the Director of Public Prosecutions (WA), *Consultation*, Perth, 4 May 2010.

118 See Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 137.

119 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010, endorsed by the NSW ODPP Interagency Sexual Assault Review Committee. See also M Powell, K Roberts and B Guadagno, 'Particularisation of Child Abuse Offences: Common Problems When Questioning Child Witnesses' (2007) 19(1) *Current Issues in Criminal Justice* 64, 64–74 for discussion of the argument that narrow judicial interpretation has contributed to the failure of the legislation to achieve its objectives.

120 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

121 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

25.63 National Legal Aid and Legal Aid NSW suggested that persistent sexual abuse offences would ‘benefit from further investigation by the NSW Bureau of Crime Statistics and Research or the Australian Institute of Criminology’.<sup>122</sup>

#### ***Commissions’ views***

25.64 The Commissions reaffirm the need for ‘persistent sexual abuse’ type offences in recognising and responding to the realities of child sexual abuse—particularly in a family violence context. As discussed by the MCCOC, the question in considering such offences is one of appropriate balance between addressing the difficulties faced by the prosecution in particularising sexual abuse and protecting the defendant’s right to a fair trial.<sup>123</sup>

25.65 The current legislative provisions in this area appear to be under-utilised, in part due to the limits of current legislative formulations, and factors related to judicial interpretation and the exercise of prosecutorial discretion. In a general sense it appears that the provisions, in at least some jurisdictions, have not been effective in overcoming the need to particularise offences, which was the rationale behind their introduction.

25.66 Jurisdictions such as Victoria and South Australia have enacted amendments intended to address under-utilisation of these offences. For example, in the revised South Australian provision, reference to ‘persistent sexual abuse of a child’ was replaced with ‘persistent sexual exploitation of a child’. The offence now focuses on acts of sexual exploitation that comprise a course of conduct, rather than requiring a series of separate particularised offences.<sup>124</sup> The NSW Attorney General has referred the issue of recasting the persistent sexual abuse provisions in NSW<sup>125</sup> to a government Sex Offences Working Party.<sup>126</sup>

25.67 Further work is required across jurisdictions to establish why persistent sexual abuse type offences are not being used, and in jurisdictions where they are, how the offences can be reformed to address the difficulties faced by both the prosecution and defendants in these cases. The Commissions, therefore, recommend that the Australian and state and territory governments review the utilisation and effectiveness of these offences, with a particular focus on offences committed in a family violence context.

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122 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010.

123 Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 135–137.

124 *Criminal Law Consolidation Act 1935* (SA) s 50.

125 *Crimes Act 1900* (NSW) s 66EA.

126 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010. At the time of writing the report of the Working Party had not been released.

**Recommendation 25–3** The Australian, state and territory governments should review the utilisation and effectiveness of persistent sexual abuse type offences, with a particular focus on offences committed in a family violence context.

## Sexual offences against people with cognitive impairment

25.68 Specific offences have been enacted to address the particular vulnerabilities to sexual assault of people with a cognitive impairment.<sup>127</sup> These specific offences may supplement other sexual offences where offending against a victim with a cognitive impairment is an aggravating factor. The offences often regulate people in a particular position, for example those who have a role in caring for the person,<sup>128</sup> or are providers of medical or therapeutic services<sup>129</sup> or special programs.<sup>130</sup>

25.69 The additional complexities surrounding sexual assault of adults with a cognitive impairment are particularly evident with respect to the issue of consent. In some jurisdictions, where the accused is a person responsible for the care of the person with the cognitive impairment, or where sexual intercourse was conducted with the intention of taking advantage of that person, consent is not a defence to the charge.<sup>131</sup>

25.70 In the case of sexual assault in a family violence context, the key question with respect to the construction of offences is one of balance—reconciling the need to protect people with a cognitive impairment from sexual exploitation while at the same time acknowledging their agency.

25.71 While legislative amendments have addressed some problematic areas in the engagement of victims of sexual assault with a cognitive impairment with the criminal justice system, the key issues appear to arise in relation to barriers to reporting sexual assault and in the tendency for crimes against people with a cognitive impairment to be ‘dealt with by administrative’ rather than legal channels, particularly within an institutional setting.<sup>132</sup> In light of this, and in the absence of any significant

127 *Crimes Act 1900* (NSW) s 66F; *Crimes Act 1958* (Vic) ss 51–52; *Criminal Code* (Qld) s 216; *Criminal Code* (WA) s 330; *Criminal Law Consolidation Act 1935* (SA) s 49(6); *Criminal Code* (Tas) s 126; *Criminal Code* (NT) s 130. See also Standing Committee of Attorneys-General, *Model Criminal Code* (1st edn, 2009) pt 5.2, div 5.

128 *Crimes Act 1900* (NSW) s 66(F)(2); *Criminal Code* (Tas) s 126.

129 *Crimes Act 1958* (Vic) s 51.

130 *Ibid* s 52; *Criminal Code* (NT) s 130.

131 See, eg, *Crimes Act 1900* (NSW) s 66F(5)–(6); *Crimes Act 1958* (Vic) ss 52–52; *Criminal Code* (Tas) s 126(2).

132 J Pestersilia, ‘Crime Victims with Developmental Disabilities: A Review Essay’ (2001) 28 *Criminal Justice and Behavior* 655. See Ch 26 for further discussion of the barriers faced by victims of sexual assault who have a cognitive impairment. See also, S Murray and A Powell, *Sexual Assault and Adults with a Disability: Enabling Recognition, Disclosure and a Just Response* (2008), prepared for the Australian Centre for the Study of Sexual Assault. Several inquiries and reports have examined the response of the criminal justice system to sexual assault of people with a cognitive impairment, see for example: Criminal Law Review Division Attorney General’s Department (NSW), *Intellectual Disability and the Law of Sexual Assault: Discussion Paper* (2007); Victorian Law Reform Commission, *Sexual*

stakeholder comment on this issue, the Commissions do not make any recommendations with respect to specific sexual offences against persons with a cognitive impairment.

## Consent

25.72 Sexual offences against adults generally require the prosecution to prove that the complainant did not consent to the sexual conduct. This is a matter for the jury to determine by reference to the complainant's actual state of mind at the time the sexual conduct occurred.

25.73 In adult sexual assault trials, it is common for the defendant to admit sexual activity but assert a belief that it was consensual. This is a matter for the jury to determine by reference to the defendant's actual state of mind—and, in some jurisdictions, by reference to whether that state of mind was reasonable—at the time the sexual conduct occurred. In a family violence context, where the complainant and the defendant know each other, the issue of consent is complex.

25.74 The report of the National Council to Reduce Violence Against Women and their Children (*Time for Action*) noted variations across Australia in terms of:

- the definition of consent;
- the conditions or circumstances that are seen as negating consent;
- the way in which a defendant's 'honest belief' in consent is dealt with; and
- the use of judicial directions as a way in which to inform and educate the jury about what amounts, or does not amount, to consent.<sup>133</sup>

## Statutory definition of consent

25.75 Statutory definitions of consent seek to provide legal clarity, make clear that resistance and injury are not required to prove lack of consent, and educate the general community about 'the boundaries of proscribed sexual behaviour'.<sup>134</sup> They may, however, be criticised as inflexible—because the dividing line between real consent and mere submission may be difficult to draw—and as introducing greater complexity.<sup>135</sup>

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*Offences: Final Report* (2004) Ch 6; Melbourne Disability Discrimination Legal Service, *Beyond Belief, Beyond Justice: The Difficulties for Victims/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice: Final Report* (2003); J Keilty and G Connelly, 'Making a Statement: An Exploratory Study of Barriers Facing Women with an Intellectual Disability When Making a Statement about Sexual Assault to Police' (2001) 16(2) *Disability and Society* 273.

133 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 107–109.

134 Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 33, 35. See also: Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 34. A definition of consent was subsequently inserted in the NSW legislation.

135 Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 35–37.

25.76 With the exception of the ACT,<sup>136</sup> every Australian jurisdiction has a statutory definition of consent based on one of the following formulations:

- free agreement;<sup>137</sup>
- free and voluntary agreement;<sup>138</sup> or
- consent freely and voluntarily given.<sup>139</sup>

25.77 The legislation of all jurisdictions—except Queensland—also specifically addresses the continuation of sexual intercourse after consent has been withdrawn.<sup>140</sup>

25.78 The Australian definitions accord with the recommendation of the United Nations Division for the Advancement of Women that legislation should approach consent as ‘unequivocal and voluntary agreement’ and that the accused should be required to prove the steps taken to ‘ascertain whether the complainant/survivor was consenting’.<sup>141</sup>

25.79 The United Kingdom definition of consent explicitly requires agreement: ‘a person consents if he agrees by choice, and has the freedom and capacity to make that choice’.<sup>142</sup> This model was initially recommended by the NSW Criminal Law Review Division in 2007 and included in its consultation draft bill.<sup>143</sup>

### ***Consultation Paper***

25.80 In the Consultation Paper, the Commissions proposed that federal, state and territory sexual offences legislation should provide statutory definitions of consent based on ‘free and voluntary agreement’.<sup>144</sup>

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136 *Crimes Act 1900* (ACT) s 67 lists a range of circumstances in which there is no consent. In 2001, the ACT Law Reform Commission recommended the enactment of a statutory definition, which was supported by the ACT Government: ACT Law Reform Commission, *Sexual Offences*, Report No 17 (2001), 71.

137 *Crimes Act 1958* (Vic) s 36; *Criminal Code* (Tas) s 2A(1).

138 *Criminal Code* (Cth) s 192(1); *Crimes Act 1900* (NSW) s 61HA(2); *Criminal Law Consolidation Act 1935* (SA) s 46(2); *Criminal Code* (NT) s 192(1). See also *Criminal Code* (Cth) ss 268.14, 268.19, 268.59, 268.64, 268.82, 268.87. As these are all sexual violence or rape offences in the context of war crimes or crimes against humanity, they are not discussed in this chapter.

139 *Criminal Code* (Qld) s 348(1); *Criminal Code* (WA) s 319(2). *Criminal Code* (Qld) s 348(1) further provides that consent means ‘consent freely and voluntarily given by a person with the cognitive capacity to give the consent’. See also *Michael v Western Australia* (2008) 183 A Crim R 348 for a discussion of the statutory definitions of consent and the role of deceit and fraud.

140 Continuation is not explicitly addressed in Queensland legislation but the ‘weight of authority supports treating the continuation of sexual intercourse as satisfying the physical act required for a charge of rape’: Thomson Reuters, *The Laws of Australia*, vol 10, *Criminal Offences*, 10.3, [190].

141 United Nations Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women* (2009), 27. See also discussion of this approach in *Time for Action*, 108, n 183 referring to earlier work by the Division of the Advancement of Women. The latter component of this definition regarding the steps taken by the accused is discussed below.

142 *Sexual Offences Act 2003* (UK) s 74.

143 Criminal Law Review Division, NSW Attorney General’s Department, *The Law of Consent and Sexual Assault*, Discussion Paper (2007), 12.

144 Consultation Paper, Proposal 16–2. Alternative formulations of the penetrative sexual offence, which seek to focus the offence away from issues of consent and instead focus on the circumstances under which

25.81 Stakeholders generally expressed support.<sup>145</sup> The Australian Institute of Family Studies (AIFS), for example, observed that a positive and communicative model of consent defined by legislation is an important step to take because it contributes to ‘a shift in how the offence of sexual assault is understood—from an offence that is committed forcibly and against the will of another person to an offence against a person’s agency’.<sup>146</sup>

25.82 Professor Patricia Easteal considered that a definition of consent based on free and voluntary agreement recognises the difficulty of proving lack of consent in the context of sexual assault by a partner.<sup>147</sup> Jenny’s Place Women and Children Refuge supported the proposal and considered that uniformity across all jurisdictions in relation to the definition of consent would provide ‘a clear standard and statement of the law that can be used to educate the community, and in particular victims of sexual assault’.<sup>148</sup>

25.83 Some stakeholders expressed concerns that the Consultation Paper proposal gives rise to issues of interpretation that may cause greater uncertainty about the law and does not appropriately reflect the reality of sexual interactions—which are best conceived as a spectrum from consensual sex to criminal behaviour.<sup>149</sup>

#### *Commissions’ views*

25.84 The Commissions support the adoption of a statutory definition of consent across all Australian jurisdictions. In taking this view, the Commissions are informed by the MCCOC’s discussion of the relative merits of a statutory or common law definition of consent.<sup>150</sup>

25.85 As discussed above, the Commonwealth, NSW, South Australia and the Northern Territory have already adopted ‘free and voluntary agreement’ as the current statutory definition of consent.<sup>151</sup> That definition is also consistent with the Model Criminal Code. Few stakeholders have expressed reservations about the adoption of a statutory definition of consent.<sup>152</sup>

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penetration took place, are beyond the scope of the current Inquiry. These are discussed in the Consultation Paper, [16.65]–[16.68].

145 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Jenny’s Place Women and Children Refuge, *Submission FV 54*, 28 May 2010; P Easteal, *Submission FV 38*, 13 May 2010.

146 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

147 P Easteal, *Submission FV 38*, 13 May 2010.

148 Jenny’s Place Women and Children Refuge, *Submission FV 54*, 28 May 2010.

149 North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

150 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 41–47.

151 *Criminal Code* (Cth) s 192(1); *Crimes Act 1900* (NSW) s 61HA(2); *Criminal Law Consolidation Act 1935* (SA) s 46(2); *Criminal Code* (NT) s 192(1).

152 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

25.86 The Commissions agree that a definition based on agreement properly reflects the two objectives of sexual offences law: protecting the sexual autonomy and freedom of choice of adults; and reinforcing both positive and communicative understandings of consent through use of the term agreement.<sup>153</sup> A majority of stakeholders similarly considered that consent should be conceived as a positive state of mind.

25.87 To the extent that introducing the concept of ‘agreement’ to the definition of consent may give rise to interpretation issues and problems in practice, the Commissions consider that supplementing any legislative provision that defines consent with a provision that includes a list of circumstances where free agreement may not have been given will assist, in practice, to clarify the meaning and expression of ‘agreement’.

25.88 The legislative definition of consent sets the standard to inform the community about the boundaries of proscribed sexual behaviour. The Commissions acknowledge criticisms that legislation alone is too blunt a tool to effectively inform community understandings, attitudes and beliefs about appropriate sexual interactions, and for this reason suggest that law reform driven by communicative understandings of consent should be supported by community education.<sup>154</sup>

**Recommendation 25–4** Federal, state and territory sexual offence provisions should include a statutory definition of consent based on the concept of free and voluntary agreement.

### Circumstances where consent is vitiated

25.89 In every Australian jurisdiction, legislation prescribes some circumstances where consent to a sexual act is defined not to exist. If the prosecution proves the presence of such a circumstance in a particular case, consent is deemed to be vitiated, or the complainant is to be regarded as not consenting.<sup>155</sup>

25.90 Many of the circumstances prescribed are common to all Australian jurisdictions. There is, however, considerable variation in scope and approach. Some codify the position at common law,<sup>156</sup> others go beyond the common law position—rectifying anomalies, deficiencies or gaps.<sup>157</sup>

153 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 43.

154 For example, education and training about the myths, facts and law in relation to sexual assault could be delivered to school students, teachers, parents and carers, social workers, guidance officers, nurses, doctors, police recruits and journalists.

155 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 39.

156 Ibid, 43.

157 See, eg, the discussion in Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 36; Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 43–49. For a general discussion of the common law’s resistance to

***Use of force and threat of the use of force***

25.91 In all jurisdictions, where force is used or threatened to be used against the complainant or another person there is deemed to be no consent.<sup>158</sup> The use of force or threatened use of force against another person is of particular relevance in the family violence context—for example, force or threats of force against children may be made to force the mother to agree to sexual intercourse.

25.92 Similarly, in some jurisdictions, there is no consent in circumstances of ‘fear of harm of any type’,<sup>159</sup> ‘fear of bodily harm’,<sup>160</sup> ‘threats of terror’,<sup>161</sup> and ‘reasonable fear of force’.<sup>162</sup> South Australia specifically provides that a ‘threat of the application of force’ may be express or implied.<sup>163</sup>

***Intimidation, coercion, extortion, deceit or fraud***

25.93 In a small number of jurisdictions, there is or may be no consent where agreement to engage in the sexual activity is obtained by intimidation,<sup>164</sup> coercive conduct,<sup>165</sup> extortion,<sup>166</sup> deceit<sup>167</sup> or fraud.<sup>168</sup>

***Other threats***

25.94 In South Australia, there is no consent when it is obtained because of ‘an express or implied threat to degrade, humiliate, disgrace or harass the person or some other person’.<sup>169</sup>

25.95 In the ACT, there is no consent where it is caused ‘by a threat to publicly humiliate or disgrace, or to physically or mentally harass, the person or another person’.<sup>170</sup>

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recognising that consent may be vitiated by fraud or mistake and hence the introduction of legislative provisions see Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 39–40.

158 *Crimes Act 1900* (NSW) s 61HA(4)(c); *Crimes Act 1958* (Vic) s 36(a); *Criminal Code* (Qld) s 348(2)(a); *Criminal Code* (WA) s 319(2)(a); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i); *Criminal Code* (Tas) 2A(2)(b); *Crimes Act 1900* (ACT) s 67(1)(a)–(c); *Criminal Code* (NT) s 192 (2)(a). In the ACT, this other person is required to be ‘present or nearby’—no other jurisdiction has this qualification around the use or threat of the use of force to a person other than the complainant. See also Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 38, app 2, cl 5.2.3.

159 *Crimes Act 1958* (Vic) s 36(b); *Criminal Code* (NT) s 192(2)(a).

160 *Criminal Code* (Qld) s 348(2)(c).

161 *Crimes Act 1900* (NSW) s 61HA(4)(c).

162 *Criminal Code* (Tas) s 2A(2)(b).

163 *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i).

164 *Criminal Code* (Qld) s 348(2)(b); *Criminal Code* (WA) s 319(2)(a). See also *Crimes Act 1900* (NSW) s 61HA(6)(b): ‘if the person has sexual intercourse because of intimidatory or coercive conduct, or other threat, that does not involve a threat of force’.

165 *Crimes Act 1900* (NSW) s 61HA(6)(b).

166 *Crimes Act 1900* (ACT) s 67(1)(c), including extortion against another person.

167 *Criminal Code* (WA) s 319(2)(a).

168 *Ibid* s 319(2)(a); *Criminal Code* (Tas) s 2A(f); *Crimes Act 1900* (ACT) s 67(1)(g).

169 *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA) s 46(3)(a)(ii).

170 *Crimes Act 1900* (ACT) s 67(1)(d).

25.96 Some jurisdictions seek to prescribe non-physical threats and acts as circumstances in which there is, or may be, no consent by including threats ‘that do not involve a threat of force’,<sup>171</sup> ‘of harm of any type’<sup>172</sup> or ‘of any kind’.<sup>173</sup>

#### *Asleep, unconscious or affected by drugs*

25.97 In NSW, Victoria, South Australia, Tasmania and the Northern Territory, there is no consent when the complainant is asleep or unconscious.<sup>174</sup>

25.98 In Victoria, South Australia, Tasmania and the Northern Territory, there is no consent where the complainant is so affected by alcohol or other drugs as ‘to be incapable of freely agreeing’ to the sexual activity.<sup>175</sup> In the ACT, the effect of alcohol or other drugs is less qualified; there is no consent if it is caused by ‘the effect of intoxicating liquor, a drug or anaesthetic’.<sup>176</sup> In NSW, there may be no consent where a complainant was ‘substantially intoxicated by alcohol or any drug’.<sup>177</sup> This formulation adopts the view expressed in the report of the Criminal Justice Sexual Offences Taskforce that the degree of intoxication and whether it was such that a person was ‘unable to consent’ are matters for the jury.<sup>178</sup>

#### *Mistaken identity*

25.99 In all jurisdictions—except Western Australia<sup>179</sup>—there is no consent where the complainant is mistaken as to the identity of the person with whom he or she has engaged in sexual activity.<sup>180</sup> In addition, NSW provides that there is no consent where the complainant mistakenly believed that he or she was married to the person.<sup>181</sup>

171 *Crimes Act 1900* (NSW) s 61HA(6)(b).

172 *Crimes Act 1958* (Vic) s 36(b), which covers a threat against another person; *Criminal Code* (NT) s 192(2)(a). See also *Criminal Code* (Qld) s 348(2)(c), which includes ‘fear of bodily’ harm.

173 *Criminal Code* (Tas) s 2A(2)(c).

174 In some jurisdictions, being asleep or unconscious is specified on its own as a circumstance that negates consent: *Crimes Act 1900* (NSW) s 61HA(4)(b); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(c). These jurisdictions deal with the lack of consent in the context of the effect of alcohol and other drugs separately. Other jurisdictions specify being asleep or unconscious along with the effect of alcohol and other drugs: *Crimes Act 1958* (Vic) s 36(d); *Criminal Code* (Tas) s 2A(h); *Criminal Code* (NT) s 192(2)(c). See also Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), cl 5.2.3, 38.

175 *Crimes Act 1958* (Vic) s 36(d); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(d); *Criminal Code* (Tas) s 2A(2)(h); *Criminal Code* (NT) s 192(2)(c). See also Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 38, app 2, cl 5.2.3.

176 *Crimes Act 1900* (ACT) s 67(1)(e).

177 *Crimes Act 1900* (NSW) s 61HA(6)(a).

178 Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 37.

179 Western Australia does however specify that consent is negated where it has been obtained by ‘deceit, or any fraudulent means’: *Criminal Code* (WA) s 319(2)(a).

180 *Crimes Act 1900* (NSW) s 61HA(5)(b); *Crimes Act 1958* (Vic) s 36(f); *Criminal Code* (Qld) s 348(2)(f); *Criminal Law Consolidation Act* (SA) s 46(3)(g); *Criminal Code* (Tas) s 2A(2)(g); *Crimes Act 1900* (ACT) s 67(1)(f); *Criminal Code* (NT) s 192(e).

181 *Crimes Act 1900* (NSW) s 61HA(5)(b). See also *Criminal Code* (Qld) s 348(2)(f) which specifies that there is no consent where the person agrees to the sexual activity when they had the ‘mistaken belief induced by the accused that they were sexual partners’.

***Mistaken about the sexual nature of the act***

25.100 In Victoria, South Australia, Tasmania and the Northern Territory there is no consent where the person agreed or submitted to sexual activity being mistaken about the sexual nature of the act.<sup>182</sup> Other specific factors in this category include:

- in NSW, Victoria and the Northern Territory—mistaken belief that sexual intercourse is for medical or hygienic purposes,<sup>183</sup> and
- in NSW and Queensland—agreeing or submitting to an act because of false or fraudulent representations about the nature or purposes of the act.<sup>184</sup>

***Capacity to understand nature of the act***

25.101 Most jurisdictions prescribe that there is no consent where the person who has agreed or submitted to the sexual act does not have the capacity to understand the sexual nature of the act.<sup>185</sup> The question of capacity is part of the Queensland definition of consent.<sup>186</sup>

***Abuse of position of authority or trust***

25.102 There is no consent when the accused person is in a position of authority or trust over the complainant in Queensland, Tasmania and the ACT.<sup>187</sup> There may be no consent where the accused has abused a ‘position of authority or trust’ in NSW.<sup>188</sup>

25.103 In addition, the *Crimes Act 1900* (NSW) specifies that consent is not a defence to a range of sexual offences occurring within relationships of authority or trust. For example, it is an offence for a person who is ‘responsible for the care’ of a person with a cognitive impairment to have sexual intercourse with that person, and consent is not a defence.<sup>189</sup>

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182 *Crimes Act 1958* (Vic) s 36(f); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(h); *Criminal Code* (Tas) s 2A(g), where the complainant must have been ‘reasonably mistaken about the nature or purpose of the act’; *Criminal Code* (NT) s 192(2)(e). See also Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), cl 5.2.3, 38.

183 *Crimes Act 1900* (NSW) s 61HA (5)(c); *Crimes Act 1958* (Vic) s 36(g); *Criminal Code* (NT) s 192(1)(f).

184 *Crimes Act 1900* (NSW) s 61HA(5)(c); *Criminal Code* (Qld) s 348(2)(e).

185 *Crimes Act 1900* (NSW) s 61HA(4)(a); *Crimes Act 1958* (Vic) s 36(e); *Criminal Law Consolidation Act 1935* (SA) s 46(f); *Criminal Code* (Tas) s 2A(2)(i); *Crimes Act 1900* (ACT) s 67(1)(i); *Criminal Code* (NT) s 192(2)(d). See also MCCOC, cl 5.2.3, 38. *Crimes Act 1900* (NSW) s 61HA(4)(a) specifically provides that a person does not consent to sexual intercourse where that person ‘does not have the capacity to consent to the sexual intercourse, including because of age or cognitive capacity’.

186 *Criminal Code* (Qld) s 348(1).

187 *Ibid* s 348(2)(d); *Criminal Code* (Tas) s 2A(2)(e); *Crimes Act 1900* (ACT) s 67(1)(h).

188 *Crimes Act 1900* (NSW) s 61HA(6)(c).

189 *Ibid* s 66F(2), (5). The penalty applicable for this offence, a maximum of 10 years imprisonment, is less than that for sexual assault without consent (14 years).

### ***Unlawful detention***

25.104 In most jurisdictions a person unlawfully detained does not consent to sexual activity.<sup>190</sup>

### ***Communicating consent***

25.105 Tasmania is the only jurisdiction in which there is no consent in the absence of verbal or physical communication as to free agreement.<sup>191</sup> In other jurisdictions, such as Victoria, the implications of communicating consent are dealt with by directions to the jury.<sup>192</sup>

### ***Consultation Paper***

25.106 In the Consultation Paper, the Commissions proposed that federal, state and territory sexual offences legislation should prescribe a non-exhaustive list of circumstances where consent may be vitiated—that is, made legally invalid or defective. The proposal stated that the circumstances ‘need not automatically negate consent, but the circumstances must in some way be recognised as vitiating consent’.

25.107 The proposal stated that, at a minimum, the non-exhaustive list of vitiating factors should include:

- lack of capacity to consent, including because a person is asleep or unconscious, or so affected by alcohol or other drugs as to be unable to consent;
- the actual use of force, threatened use of force against the complainant or another person, which need not involve physical violence or physical harm;
- unlawful detention;
- mistaken identity and mistakes as to the nature of the act (including mistakes generated by the fraud or deceit of the accused); and
- any position of authority or power, intimidation or coercive conduct.<sup>193</sup>

25.108 The Commissions also asked to what extent the circumstances vitiating consent set out in current legislation are appropriate to sexual assault committed in a family violence context, and whether any amendments are required to draw attention to the coercive environment created by family violence, or whether the current provisions are sufficient.<sup>194</sup>

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190 Ibid s 61HA(4)(d); *Crimes Act 1958* (Vic) s 36(c); *Criminal Law Consolidation Act 1935* (SA) s 46(3)(b); *Criminal Code* (Tas) s 2a(2)(d); *Crimes Act 1900* (ACT) s 67(1)(j); *Criminal Code* (NT) s 192(2(b). See also Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), cl 5.2.3, 38.

191 *Criminal Code* (Tas) s 2A(2)(a).

192 See *Crimes Act 1958* (Vic) s 37AA.

193 Consultation Paper, Proposal 16–3.

194 Ibid, Question 16–6.

### ***Submissions and consultations***

25.109 Stakeholders generally supported the proposal. There was near unanimous support from stakeholders for the idea that legislation should prescribe a non-exhaustive list of circumstances in which there may not be consent.<sup>195</sup> Points of difference arose, however, in respect to the legal effect of the existence of a prescribed circumstance—that is, whether in the circumstances prescribed consent is automatically negated or *may* be negated—and the adequacy of the proposed circumstances.

25.110 AIFS commented that a non-exhaustive list of circumstances where there can be no consent is an important step to support the conception of consent as ‘free agreement’.<sup>196</sup> Legal Aid NSW agreed this is consistent with a communicative model of consent, but argued that the existence of a prescribed circumstance should give rise to a rebuttal presumption of no consent.<sup>197</sup> The Law Council of Australia (the Law Council) considered the Consultation Paper proposal to be ‘internally inconsistent’<sup>198</sup> and opposed it to the extent that it attempted to specify circumstances in which the tribunal of fact *must* find there is no consent. The Law Council did not object, however, to a list of circumstances that would be ‘material’ to a finding of absence of consent.<sup>199</sup>

25.111 Stakeholders expressed a range of views about the circumstances proposed to be specified. In relation to threats of force, NASAV and the Canberra Rape Crisis Centre submitted that the legislation should prescribe ‘implied threats of use of force’ as a relevant circumstance.<sup>200</sup>

25.112 Other stakeholders provided anecdotal evidence suggesting the importance of including threats against others as a circumstance where there is no consent—

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195 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Jenny’s Place Women and Children Refuge, *Submission FV 54*, 28 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

196 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

197 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

198 That is, because the proposal stated that legislation should provide a non-exhaustive list of ‘circumstances where there is no consent to sexual activity, or where consent is vitiated’ and that those circumstances ‘need not automatically negate consent’: Law Council of Australia, *Submission FV 180*, 25 June 2010. Also Queensland Law Society, *Submission FV 178*, 25 June 2010.

199 Law Council of Australia, *Submission FV 180*, 25 June 2010. Also Queensland Law Society, *Submission FV 178*, 25 June 2010.

200 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010. As is the case under *Criminal Law Consolidation Act 1935* (SA) s 46(3)(a)(i).

especially as some women's partners threaten to abuse the children if the woman does not comply with her partner's demands.<sup>201</sup>

25.113 Women's Legal Service Queensland considered that the circumstance of 'any position of authority or power, intimidation or coercive conduct' would cover most sexual assault perpetrated in a family violence context.<sup>202</sup> NASASV suggested that legislation should also provide illustrative examples of such circumstances; and that the circumstance should be modified so as to capture any person in a position of authority or *trust*.<sup>203</sup>

25.114 Stakeholders emphasised that the issue of consent in the context of family violence and intimate relationships is complex; and that complexity is magnified where there is a history of violence and coerced 'consent'.<sup>204</sup> The disjunction between the criminal justice system's focus on isolated incidents, as opposed to a pattern or history of family violence, was identified as a particular challenge in proving lack of consent.<sup>205</sup>

25.115 Professor Patricia Easteal referred to research that identified four types of coercion in 'wife rape': social coercion, interpersonal coercion, threat of physical force and physical force. She noted that the literature suggests victims of sexual assault by an intimate partner 'may experience a combination of these types of coercion, and the nature of the coercion may change over the course of the relationship, in the context of changing abuse patterns'.<sup>206</sup>

25.116 Stakeholders had different views about how legislation can best address these realities. Easteal argued that vitiation of consent needs to be defined specifically to include the type of intimidation that can be generated in a marital or intimate relationship.<sup>207</sup>

25.117 Some stakeholders suggested that legislation should either prescribe family violence as a circumstance where there is no consent, or recognise family violence as an environment characterised by threats of force or terror and prescribe that there is no consent where it is obtained by such threats.<sup>208</sup> Others emphasised that the family violence context is such that actual threats or coercive behaviour need not be immediately present to affect the validity of consent and that the prescribed

201 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

202 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

203 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

204 P Easteal, *Submission FV 38*, 13 May 2010. Also National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

205 Victims of Crime Assistance League Inc NSW, *Submission FV 133*, 21 June 2010; P Easteal, *Submission FV 38*, 13 May 2010.

206 P Easteal, *Submission FV 38*, 13 May 2010.

207 Ibid.

208 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Jenny's Place Women and Children Refuge, *Submission FV 54*, 28 May 2010. As in *Crimes Act 1900* (NSW) s 61HA(4)(c).

circumstances should refer to a history of force and intimidation.<sup>209</sup> Rather than recognising the coercive nature of family violence as a circumstance affecting the validity of consent, the Magistrates' Court and Children's Court of Victoria and Professor Julie Stubbs considered that this issue should be dealt with as part of an objects clause to assist in the interpretation of the relevant provisions.<sup>210</sup>

25.118 Stakeholders also suggested that the circumstances vitiating consent set out in the Commissions' proposal should be expanded to include:

- economic abuse,<sup>211</sup>
- where consent is purported to be given by persons with a cognitive impairment to sexual activity with a carer,<sup>212</sup>
- fear of force or fear of harm of any type;<sup>213</sup>
- threats to harm animals,<sup>214</sup> and
- threats to damage property.<sup>215</sup>

#### ***Commissions' views***

25.119 Identifying the circumstances where there can be no consent, and where there may be no consent, as determined by the jury, has been a key concern of law reform in this area.<sup>216</sup>

25.120 The approach to circumstances vitiating consent varies across Australia. The ACT identifies the most circumstances and Western Australia the least. The Victorian approach is similar to that recommended by the MCCOC.<sup>217</sup> NSW is unique in separately specifying circumstances where there: (a) can be no consent; (b) may be no consent in the circumstances of the case—which is a question for the jury to decide.<sup>218</sup>

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209 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

210 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010.

211 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

212 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

213 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; P Easteal, *Submission FV 38*, 13 May 2010.

214 Confidential, *Submission FV 69*, 2 June 2010.

215 Ibid.

216 See, eg, discussion in Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 49. The MCCOC referred approvingly to the arguments made by Jennifer Temkin based around sexual choice and the recognition that some circumstances there remains choice, albeit unpalatable ones: T Temkin, 'Towards a Modern Law of Rape' (1982) 45 *Modern Law Review* 399, 411.

217 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 49. However, since the MCCOC report, NSW has legislated in a different way from other jurisdictions, as discussed below.

218 *Crimes Act 1900* (NSW) s 61HA(4)–(6).

25.121 The Commissions' view remains that, at a minimum, federal, state and territory legislation should recognise certain specified circumstances as ones where consent may be vitiated. The recommendation below intentionally leaves it open to the Commonwealth, state and territory parliaments to decide whether particular circumstances should be considered as automatically negating consent. The list of circumstances is non-exhaustive, as is presently the case in all Australian jurisdictions. This allows juries to find, on the evidence, that there was no consent, even if a case does not fall within one of the listed circumstances.<sup>219</sup>

25.122 The recommendation below incorporates minor changes of wording from the proposal, including to refer to abuse of a position 'of authority or trust'; and to threats against the 'complainant or any other person'—better reflecting circumstances that may arise in a family violence context.

**Recommendation 25–5** Federal, state and territory sexual offence provisions should set out a non-exhaustive list of circumstances that may vitiate consent including, at a minimum:

- (a) lack of capacity to consent, including because a person is asleep or unconscious, or so affected by alcohol or other drugs as to be unable to consent;
- (b) where a person submits because of force, or fear of force, against the complainant or another person;
- (c) where a person submits because of fear of harm of any type against the complainant or another person;
- (d) unlawful detention;
- (e) mistaken identity and mistakes as to the nature of the act (including mistakes generated by the fraud or deceit of the accused);
- (f) abuse of a position of authority or trust; and
- (g) intimidating or coercive conduct, or other threat, that does not necessarily involve a threat of force, against the complainant or another person.

### The fault element

25.123 The discussion below focuses on the fault elements<sup>220</sup> of sexual offences and the relationship between fault and lack of consent.

25.124 The penetrative sexual offence, or 'rape', comprises physical elements and fault elements. In all jurisdictions, the physical elements of the offence require the

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219 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 41.

220 Referred to as the 'mental' element in the Consultation Paper, [16.69]–[16.110].

prosecution to prove that sexual penetration took place without the consent of the complainant.

25.125 The fault element—the ‘state of mind of the accused which must be established beyond reasonable doubt before the accused can be convicted’<sup>221</sup> differs among Australian jurisdictions.

25.126 In Queensland, Western Australia and Tasmania, the fault element for rape is merely an intention to have intercourse.<sup>222</sup> In the remaining jurisdictions, the fault element for rape is both an intention to have intercourse and:

- in NSW, the ACT and the NT, that the accused ‘knows that the other person does not consent’ or is ‘reckless as to whether the other person consents’;<sup>223</sup>
- in Victoria, that the accused commits the act ‘while being aware that the person is not consenting or might not be consenting’ or ‘while not giving any thought to whether the person is not consenting or might not be consenting’;<sup>224</sup> and
- in South Australia, that the accused ‘knows, or is recklessly indifferent to, the fact that the other person does not so consent’.<sup>225</sup>

25.127 It is these additional fault elements—knowledge and recklessness—that have raised the most contentious questions for law reform,<sup>226</sup> both as elements of offences and in the context of the defences based on an accused’s ‘reasonable belief’ or ‘honest and reasonable belief’ that the complainant was consenting.

25.128 In all jurisdictions except NSW, the accused may raise a defence that he or she honestly believed that the complainant was consenting. In Victoria, South Australia, and the ACT, where this defence is under the common law, the honest belief in consent need not be reasonable.<sup>227</sup> In Queensland, Western Australia, Tasmania, and the Northern Territory, the belief must be both honest *and* reasonable.<sup>228</sup>

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221 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [8.1].

222 This is the only mental element required: *Criminal Code* (Qld) s 349; *Criminal Code* (WA) s 325; *Criminal Code* (Tas) s 13.

223 *Crimes Act 1900* (NSW) s 61HA(3); *Crimes Act 1900* (ACT). Similar terminology to that set out in the text is used in the Northern Territory: *Criminal Code* (NT) s 192(4). In NSW, it is also sufficient if the accused has no reasonable grounds for believing that the other person consents to sexual intercourse: *Crimes Act 1900* (NSW) s 61HA(3)(c).

224 *Crimes Act 1958* (Vic) s 38(2)(a).

225 *Criminal Law Consolidation Act 1935* (SA) s 48(1).

226 See, eg, Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 67; Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 42–52; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [8.6]–[8.36]; Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 214–216.

227 *Director of Public Prosecutions v Morgan* [1976] AC.

228 *Criminal Code* (Qld) s 24; *Criminal Code* (WA) s 24; *Criminal Code* (NT) s 32. See also Tasmania which has included recklessness within its treatment of a mistaken belief: *Criminal Code* (Tas) s 14A(1)(b). See discussion in Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 71; and Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [8.4].

25.129 Defences of mistaken belief in consent, or honest and reasonable belief in consent, are no longer relevant under the NSW legislation. Instead, the *Crimes Act 1900* (NSW) definition of consent refers to the accused's knowledge about consent in such a way that it is relevant to that legislation's definition of consent.<sup>229</sup>

### **Recklessness**

25.130 The concept of 'recklessness', in the context of sexual offences, differs substantially among Australian jurisdictions.

25.131 Recklessness is not defined in the NSW legislation, but may be established where the accused:

- 'realised the possibility that the complainant was not consenting' but went ahead regardless;<sup>230</sup> or
- 'failed to consider whether or not the complainant was consenting ... notwithstanding the risk that the complainant was not consenting would have been obvious to someone with the accused's mental capacity if they had turned his or her mind to it'.<sup>231</sup>

25.132 Both of these kinds of recklessness—'adverted' or 'non-adverted' recklessness respectively—are 'wholly subjective'.<sup>232</sup>

25.133 By criminalising 'non-adverted' recklessness, NSW is said to 'go further' than other jurisdictions.<sup>233</sup> The policy reasons why non-adverted recklessness should be included were expressed by Kirby P in *R v Kitchener*:

To criminalise conscious advertence to the possibility of non-consent, but to excuse the reckless failure of the accused to give a moment's thought to that possibility, is self-evidently unacceptable. In the hierarchy of wrong-doing, such total indifference to the consent of a person to have sexual intercourse is plainly reckless, at least in our society today ... Such a law would simply reaffirm the view that our criminal law, at crucial moments, fails to provide principled protection to the victims of unwanted sexual intercourse, most of whom are women.<sup>234</sup>

25.134 In South Australia, 'recklessly indifferent' is defined in the following way:

a person is **recklessly indifferent** to the fact that another person does not consent to an act, or has withdrawn consent to an act, if he or she—

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229 *Crimes Act 1900* (NSW) s 61HA(3).

230 Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 43. See also, *R v Hemsley* (1988) 36 A Crim R 334, 337–338; *R v Murray* (1987) 11 NSWLR 12, 15.

231 Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 43. See also, *R v Mitton* (2002) 132 A Crim R 123; *R v Tolmie* (1995) 37 NSWLR 660; *R v Kitchener* (1993) 29 NSWLR 696, 697.

232 Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 43. See also, *Banditt v The Queen* (2005) 224 CLR 262.

233 Thomson Reuters, *The Laws of Australia*, vol 10, *Criminal Offences*, 10.3, [300].

234 *R v Kitchener* (1993) 29 NSWLR 696, 697 (Kirby P). See also, *R v Tolmie* (1995) 37 NSWLR 660.

- (a) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but decides to proceed regardless of that possibility; or
- (b) is aware of the possibility that the other person might not be consenting to the act, or has withdrawn consent to the act, but fails to take reasonable steps to ascertain whether the other person does in fact consent, or has in fact withdrawn consent, to the act before deciding to proceed; or
- (c) does not give any thought as to whether or not the other person is consenting to the act, or has withdrawn consent to the act before deciding to proceed.<sup>235</sup>

25.135 The Victorian provision refers to a person who did not give ‘any thought’ as to whether or not the complainant was consenting.<sup>236</sup> This provision addresses the position in *R v Ev Costa*, where it was held that recklessness required conscious advertence to the question of whether the complainant was consenting.<sup>237</sup>

#### ***Defence of ‘honest belief’***

25.136 Fault elements, such as knowledge and recklessness, are elements of some defences. That an accused may be acquitted on the basis of an honest, but unreasonable, belief or mistake in consent was established by the House of Lords in *DPP v Morgan*.<sup>238</sup> In that case three men were told by the husband of the complainant that they could have sexual intercourse with her and that any resistance (physical or verbal) she made was pretence, with the husband suggesting that his wife found such behaviour exciting. The men proceeded to have intercourse with the woman and were subsequently charged with and found guilty of rape. The men appealed on the basis that they held an honest belief that the woman was consenting. The convictions were ultimately upheld on the basis that a jury ‘would have been extremely unlikely ... [to have] accepted this defence on the facts of the case’.<sup>239</sup>

25.137 The significance of *Morgan* is that a majority of the House of Lords held that where the accused held an honest, albeit unreasonable belief, that the complainant was consenting to the sexual intercourse, the offence of rape was not committed:

to insist that a belief must be reasonable to excuse it is to insist that the accused is to be found guilty of intending to do that which in truth he did not intend to do, or that

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235 *Criminal Law Consolidation Act 1935* (SA) s 47. For a discussion of the significance of the accused being aware of the ‘possibility’ as opposed to the ‘probability’ that the other person might not be consenting to the act or has withdrawn consent to the act, see *R v Egan* (1985) 15 A Crim R 20.

236 *Crimes Act 1958* (Vic) s 38(2). This legislation is not consistent with the recommendations of the Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004). See also, D Smith, ‘Reckless Rape in Victoria’ (2008) 32 *Melbourne University Law Review* 1007, 1008.

237 *R v Ev Costa* [1996] VSC. cf *R v Kitchener* (1993) 29 NSWLR 696, where complete failure to consider or avert to consent was held sufficient to constitute recklessness.

238 *Director of Public Prosecutions v Morgan* [1976] AC. In the Australian common law jurisdictions see: *Banditt v The Queen* (2005) 224 CLR 262; *R v Brown* [1975] 10 SASR 139. The decision in *Banditt* was made before the most recent legislative change in NSW, which has introduced an objective element. *Morgan* does not apply in the Code jurisdictions.

239 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 73.

his state of mind although innocent of evil intent, can convict him if it be honest but not rational.<sup>240</sup>

25.138 The decision in *Morgan* was controversial and generated considerable debate. It led to the creation in 1975 of an Advisory Group on the Law of Rape,<sup>241</sup> which concluded that the test was correct but that there should be clarification of the significance of ‘reasonable ness’ in the legislation.<sup>242</sup>

25.139 The defence of honest belief is currently available to accused persons in Victoria, South Australia, and the ACT in respect of the offence of rape or sexual intercourse without consent.<sup>243</sup> In Victoria, judges must direct juries to consider whether an accused’s belief was reasonable in all the circumstances, including reference to ‘whether the accused took any steps to ascertain whether the complainant was consenting’.<sup>244</sup>

#### ***Defence of ‘honest and reasonable belief’***

25.140 Generally, where the statutory defence of honest and reasonable belief is available to an accused, the question of whether a defence is available on the facts of a case is answered by a two-stage inquiry: (a) did the accused believe that the complainant was consenting; and (b) if so, was that belief reasonable?<sup>245</sup>

25.141 The Tasmanian *Criminal Code*, however, articulates a defence specific to mistake as to consent. This defence articulates that an accused’s mistaken belief about the existence of consent is not honest or reasonable if the accused:

- (a) was in a state of self-induced intoxication and the mistake was not one which the accused would have made if not intoxicated; or
- (b) was reckless as to whether or not the complainant consented; or
- (c) did not take reasonable steps, in the circumstances known to him or her at the time of the offence, to ascertain that the complainant was consenting to the act.<sup>246</sup>

#### ***New South Wales approach***

25.142 Until recently, the defence of honest belief that the complainant consented was available in NSW—a common law jurisdiction. Substantive changes in relation to

240 *Director of Public Prosecutions v Morgan* [1976] AC, 210 (Hailsham LJ).

241 The Advisory Group became known as the Heilbron Committee.

242 This recommendation was implemented in 1976, and was substantially superseded by later extensive reform of the law in the UK.

243 See, eg, *R v Brown* [1975] 10 SASR 139 (decided before *Morgan* but reaching the same decision); *Banditt v The Queen* (2005) 224 CLR 262.

244 *Crimes Act 1958* (Vic) s 37AA. This approach was also recommended by Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 85.

245 *Criminal Code* (Qld) s 24; *Criminal Code* (WA) s 24; *Criminal Code* (NT) s 32. See also Tasmania which has included recklessness within its treatment of a mistaken belief: *Criminal Code* (Tas) s 14A(1)(b). See also, Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 73.

246 *Criminal Code* (Tas) s 14A.

consent were enacted in 2007.<sup>247</sup> Section 61HA(3) of the *Crimes Act 1900* (NSW) now provides:

A person who has sexual intercourse with another person without the consent of the other person knows that the other person does not consent to the sexual intercourse if:

- (a) the person knows that the other person does not consent to the sexual intercourse, or
- (b) the person is reckless as to whether the other person consents to the sexual intercourse, or
- (c) the person has no reasonable grounds for believing that the other person consents to the sexual intercourse.

For the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case:

- (d) including any steps taken by the person to ascertain whether the other person consents to the sexual intercourse, but
- (e) not including any self-induced intoxication of the person.

### ***Subjective and objective fault elements***

25.143 Subjective fault elements, such as recklessness, knowledge and honest belief,<sup>248</sup> emphasise the perspective of a particular defendant. Objective elements, such as reasonableness, focus on ‘the actual consequences of an accused’s conduct or the actual circumstances under which the conduct occurred rather than on the accused’s mental state during the performance of the conduct’.<sup>249</sup> In this context, ‘honest and reasonable belief’ incorporates both a subjective and objective element.

25.144 The arguments for and against subjective fault elements have been canvassed in reports by the MCCOC and the VLRC.<sup>250</sup> The main arguments in support of subjective fault elements include the following.

- Consistency with fundamental notions of criminal responsibility—for example, the notion that the criminal law, particularly in relation to serious offences, should not impose guilt where the person did not knowingly transgress the law.<sup>251</sup>

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247 *Crimes Amendment (Consent—Sexual Assault Offences) Act 2007* (NSW).

248 See, *Director of Public Prosecutions v Morgan* [1976] AC, in relation to the classification of honest belief in consent as a subjective test.

249 M Findlay, S Odgers and S Yeo, *Australian Criminal Justice* (2005), 15.

250 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 77–83; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Ch 8.

251 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 83.

- Avoiding the practical difficulties of formulating objective standards—for example, the ‘reasonable person’ test raises issues in relation to whether the jury ought to consider what they would have done in the situation or whether the standard is that of a ‘reasonable man’. In addition, questions arise in relation to the qualities and attitudes about men and women that are ascribed to a ‘reasonable person’.<sup>252</sup>
- The view that the trier of fact, in determining whether a subjective mental state existed, may take into account the reasonableness of the mental state.<sup>253</sup>
- In respect of a defendant’s mistaken belief—the focus of only a small number of rape trials—an objective element would ‘jeopardise the principles of criminal responsibility without ensuring that a higher proportion of people who are actually guilty of rape are convicted’.<sup>254</sup>

25.145 The main arguments in support of objective fault elements include the following.<sup>255</sup>

- Subjective fault elements reinforce myths about men, women and children and sexuality—in particular as to whether sexual access is always available and expectations about how consent is conveyed.<sup>256</sup>
- An objective test is in accordance with the communicative model of consent established in the definitional frameworks.<sup>257</sup>
- A defendant should not ‘be able to avoid culpability’ on the basis that ‘he did not give any thought at all as to whether the complainant was consenting or not’.<sup>258</sup>
- The law ‘ought to impose a higher standard of care in sexual circumstances’,<sup>259</sup> because ‘it is possible for a man to ascertain whether a woman is consenting or not with minimal effort’;<sup>260</sup> and to have sexual intercourse with a woman without her consent is ‘to do her great harm’.<sup>261</sup>

<sup>252</sup> Ibid 77. See also, S Bronitt, ‘Rape and Lack of Consent’ (1992) 16 *Criminal Law Journal* 289, 305.

<sup>253</sup> Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 71. See also, *Report of the Advisory Group on the Law of Rape* HMSO, London (1975), 7.

<sup>254</sup> Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.91].

<sup>255</sup> See discussion in Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 79.

<sup>256</sup> The defence of honest belief ‘supports the attitude that a person is entitled to have sex, unless the other person actively indicates they do not wish to do so. This places the onus on a person approached for sex to indicate lack of consent, instead of requiring the initiator to ascertain whether the other person is consenting’: Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [8.7].

<sup>257</sup> Ibid, [8.7]; Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003) [7.94].

<sup>258</sup> Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [8.11]. See, eg, the Victorian decision of *R v Ev Costa* [1996] VSC 27, compared to the position in NSW stated in *R v Kitchener* (1993) 29 NSWLR 696, which found that failure to consider or advert to consent at all is reckless.

<sup>259</sup> Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.98].

<sup>260</sup> J Tempkin, ‘The Limits of Reckless Rape’ ([1983] *Criminal Law Review* 5, 15–16).

<sup>261</sup> Ibid, 15–16.

- Subjective tests are difficult because they contain a ‘double subjective element’: that is, both the complainant’s (was she consenting?) and defendant’s (did he know she was not consenting?) states of mind.<sup>262</sup> This difficulty is compounded because the jury often must make its decision on the basis of the competing evidence of the complainant and the accused.<sup>263</sup>

### **Consultation Paper**

25.146 In the Consultation Paper, the Commissions proposed that federal, state and territory sexual offences legislation should adopt legislation based on the NSW approach to the fault element. That is, legislation should provide that a person who performs a sexual act with another person, without the consent of the other person, knows that the other person does not consent to the act if the person has no reasonable grounds for believing that the other person consents. Further, for the purpose of making any such finding, the trier of fact must have regard to all the circumstances of the case, including any steps taken by the person to ascertain whether the other person consents, but not including any self-induced intoxication of the person.<sup>264</sup>

25.147 To better determine the impact of the defence of honest belief on complainants who have, or have had, an intimate relationship with the accused, the Commissions asked whether an honest belief in consent is more likely to be raised in cases where the complainant has or has had an intimate relationship with the accused; whether the insertion of an objective element would assist in such cases; and whether any other measures are required to clarify or restrict the defence of honest belief in such cases.<sup>265</sup>

### **Submissions and consultations**

25.148 Some stakeholders expressed support for the proposal but did not give reasons for their view.<sup>266</sup> Others supported the proposal, expressly or impliedly, by reason of the objective elements.<sup>267</sup> One stakeholder commented that, while there needs to be an objective element, even objective elements are not immune to bias and

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262 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003) [7.99].

263 Ibid, [7.99].

264 Consultation Paper, Proposal 16–4.

265 Ibid, Question 16–7.

266 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010.

267 Legal Aid NSW, *Submission FV 219*, 1 July 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Jenny’s Place Women and Children Refuge, *Submission FV 54*, 28 May 2010; M Condon, *Submission FV 45*, 18 May 2010. The NASASV supported the proposal as ‘a step forward for jurisdictions where the law does not currently require that belief there was consent be reasonable’ but also went further, arguing that criminal liability should turn on the question of whether or not there was consent and a mere intention to have intercourse.

prejudice about sexuality, including the sexuality of certain groups, such as Indigenous women.<sup>268</sup>

25.149 Some stakeholders noted than an objective element would make it easier for the prosecution to discharge the onus of proof.<sup>269</sup> Jenny's Place Women and Children Refuge stated that the legislation should require proof by the accused of the steps taken to ascertain whether the complainant was consenting, as recommended by the United Nations Division for the Advancement of Women.<sup>270</sup>

25.150 The Magistrates' Court and Children's Court of Victoria did not express an opinion about the proposal, but noted that:

a communicative model of consent ... can be difficult to reconcile with a purely subjective mental element. There is a perception that reconciling these elements makes it extremely difficult to give comprehensible jury directions.<sup>271</sup>

25.151 AIFS commented that legislative measures that require a belief in consent to be reasonable 'set up a situation in which the victim's behaviour can be used as evidence ... [of] the defendant's state of mind at the time' and have 'frequently resulted in the defence counsel drawing on information about the complainant's sexual history, or to appeal to rape myths in order to show that the defendant could have held that belief'.<sup>272</sup>

25.152 The Law Council and the Law Society of NSW strongly opposed the proposal to the extent that it 'provides for a single offence where alternative subjective and objective fault elements are applicable'.<sup>273</sup> The Law Council stated that, under the proposal:

a person who knows that consent is absent is convicted of the same offence and liable to the same maximum penalty as the person who honestly believes that there is consent but is found to have been negligent (that is, the tribunal of fact is satisfied that the person did not have 'reasonable grounds' for that belief).<sup>274</sup>

25.153 Both organisations criticised the approach because a negligent offender is not equally culpable as a deliberate offender and should not be liable to the same maximum penalty.<sup>275</sup> This, it was said, creates a situation where, after a jury trial resulting in a conviction, the sentencing judge will not know the basis upon which the

268 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

269 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Jenny's Place Women and Children Refuge, *Submission FV 54*, 28 May 2010; P Easteal, *Submission FV 38*, 13 May 2010.

270 Jenny's Place Women and Children Refuge, *Submission FV 54*, 28 May 2010 referring to United Nations Department of Economic and Social Affairs Division for the Advancement of Women, *Handbook for Legislation on Violence Against Women* (2009), 28.

271 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

272 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

273 Law Council of Australia, *Submission FV 180*, 25 June 2010. Also Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

274 Law Council of Australia, *Submission FV 180*, 25 June 2010. Also Queensland Law Society, *Submission FV 178*, 25 June 2010.

275 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010. Also Queensland Law Society, *Submission FV 178*, 25 June 2010.

jury found the accused guilty and could proceed to sentence on a more serious basis than in fact determined by the jury.<sup>276</sup>

25.154 In the Law Council's view, if an objective fault element is to be adopted, 'it must be in a discrete offence with a considerably lower maximum penalty than the penalties currently applicable to intentional or reckless sexual assault'.<sup>277</sup> The Law Society of NSW also submitted that:

- sexual assault is a serious crime with severe maximum penalties and it should be reserved for behaviour that is 'so seriously wrong as to be deserving of criminal punishment';
- although there are negligence offences with substantial penalties within the criminal law, this is the exception, rather than the rule with the vast majority of criminal offences requiring a 'guilty mind'; and
- an accused who lacks the capacity of a hypothetical reasonable person (for example, an accused with a cognitive impairment) and who mistakenly believes that consent is present should not be held to the standard of people who have full capacity.<sup>278</sup>

25.155 Some stakeholders considered the proposal's treatment of the self-induced intoxication of the accused to be problematic. Generally stakeholders agreed that self-induced intoxication is irrelevant to the question of whether a belief in consent is 'reasonable', but argued that it is relevant to the question of whether the accused 'honestly' held that belief.<sup>279</sup>

If the person does not know that consent is absent nor is reckless in that regard, then the person should not be found guilty of such an offence. It makes no difference whatsoever that the person was intoxicated. The necessary guilty mind is absent. There is no justification whatsoever for imposing liability for such a serious offence on the basis that, if the person had not been intoxicated, he or she would have known that consent was absent.<sup>280</sup>

25.156 NTLAC observed that the proposal's treatment of self-induced intoxication is 'out of kilter with patterns of actual sexual conduct (including misconduct) in the Northern Territory' and favoured the retention of the current Northern Territory fault provisions.<sup>281</sup>

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276 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010. Also Queensland Law Society, *Submission FV 178*, 25 June 2010.

277 Law Council of Australia, *Submission FV 180*, 25 June 2010.

278 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

279 Ibid; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010; NSW Legal Assistance Forum, *Consultation*, Sydney, 10 May 2010. Also Law Council of Australia, *Submission FV 180*, 25 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

280 Law Council of Australia, *Submission FV 180*, 25 June 2010.

281 Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

25.157 The Canberra Rape Crisis Centre also preferred an alternative approach, namely, making available the defence of honest and reasonable belief in all jurisdictions.<sup>282</sup>

25.158 There is some anecdotal evidence that the defence of honest belief is more likely to be raised in cases where there has been an intimate relationship<sup>283</sup> and may be ‘treated as more credible’ in the family violence context than other contexts.<sup>284</sup> Some stakeholders considered that other measures are required to clarify or restrict the defence of honest belief in this context. Women’s Legal Services NSW, for example, considered that ‘community education is a key aspect of ensuring the mutuality of consent in adult sexual relations’.<sup>285</sup>

#### *Commissions’ views*

25.159 ‘Honest belief’ is rarely the main or predominant issue in sexual offence proceedings, but the centrality of consent to sexual assault trials means that it invariably plays some role in how the legal system, its key players and jury members, understand and approach consent.<sup>286</sup> For this and other reasons, the VLRC recommended that the fault element should be changed to ensure that an accused takes reasonable steps to ascertain that the complainant was consenting. In addition, the VLRC recommended that a mandatory jury direction on consent should be required by legislation.<sup>287</sup> Only the latter of these recommendations has been implemented.<sup>288</sup>

25.160 In contrast, the MCCOC recommended that criminal liability for sexual offences should be determined on the basis of the subjective mental state of the accused. That is, that an accused should not be found guilty of sexual penetration without consent ‘unless the prosecution proves’ that the accused:

- knew that the victim was not consenting;
- was ‘reckless to the absence of consent’; or
- ‘failed to give any thought to the question of consent’.<sup>289</sup>

25.161 As such, the MCCOC approach permits an accused to rely on an honest, albeit unreasonable, belief in consent. Its reasons for this were based on the fact that the extent to which such a belief is unreasonable goes to the question of whether it has been established as a genuine or honest belief in consent. The MCCOC, like the

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282 Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

283 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

284 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

285 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010. See also, Justice for Children, *Submission FV 148*, 24 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

286 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [8.22]–[8.25].

287 *Crimes Act 1958* (Vic) s 37AA. This approach was also recommended by Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 85.

288 D Smith, ‘Reckless Rape in Victoria’ (2008) 32 *Melbourne University Law Review* 1007.

289 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 67.

VLRC, recommended that juries be directed in relation to whether the mistake or belief in consent was reasonable in all the circumstances.<sup>290</sup>

25.162 In the Commissions' view, the issues are best addressed by legislation providing that it is a defence to the charge of rape that the accused held an honest and reasonable belief that the complainant was consenting. In addition, legislation should require that judges direct juries in relation to the evidence presented about that belief and whether, as part of the honesty requirement, the accused took any steps to ascertain whether consent was present.<sup>291</sup>

25.163 In forming this view, the Commissions have sought to promote the communicative model of consent and reconcile it with the general proposition of law that the onus of proof in criminal trials lies with the prosecution.

25.164 The insertion of an objective fault element, or the modification of the subjective fault element by requiring reasonable steps to ascertain consent, has also been adopted by various overseas jurisdictions, for example, in New Zealand,<sup>292</sup> the United Kingdom<sup>293</sup> and Canada.<sup>294</sup> In the United Kingdom, the fault element is simply that a person commits rape when 'A does not reasonably believe that B consents'.<sup>295</sup>

25.165 The recommendation is consistent with the basic position in the Australian criminal code jurisdictions.<sup>296</sup> For complainants in non-code jurisdictions, it will introduce a second standard to be met by an accused who seeks to avoid criminal culpability because of their belief that the complainant consented. The introduction of an objective fault element discourages the assumption of consent, including in the context of a previous consensual relationship or family violence.<sup>297</sup>

25.166 In relation to the intoxication of the accused, the Commissions' view is that intoxication is relevant to the honesty of the accused's belief. The effect of intoxication on the accused, however, should not be a relevant factor in assessing the reasonableness of the accused's belief.

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290 Ibid, 85.

291 Jurors, when assessing the honesty and reasonableness of a belief, would have two tasks: assessing the honesty of the belief, including any steps taken by the accused to ascertain whether the complainant was consenting; and assessing the reasonableness of the belief, an objective factor to be judged by the standard of a reasonable person familiar with all the circumstances that were known to the accused at the relevant time.

292 *Crimes Act 1961* (NZ) s 128(2).

293 *Sexual Offences Act 2003* (UK) s 1. See also, s 75(1).

294 Criminal Code RSC 1985 C-46 s 273.2 However, see discussion of the effectiveness of these provisions in the context of sexual assault by a current or former intimate partner in M Randall, 'Sexual Assault in Spousal Relationships, "Continuous Consent" and the Law, Honest but Mistaken Judicial Beliefs' (2008) 32 *University of Manitoba Law Journal* 144.

295 *Sexual Offences Act 2003* (UK) s 1.

296 Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 49.

297 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [8.15].

**Recommendation 25–6** Federal, state and territory sexual assault provisions should provide that it is a defence to the charge of ‘rape’ that the accused held an honest and reasonable belief that the complainant was consenting to the sexual penetration.

### Jury directions about consent

25.167 Judicial directions to the jury on consent are an important mechanism for addressing the ‘stereotypical views of sexual roles in ... [the] assessment of consent, which some ‘jurors and judges continue to bring to bear’.<sup>298</sup> Where jury directions are directly responsive to continuing myths and misconceptions about sexual violence—for example, that physical resistance is necessary to convey lack of consent and that ‘true victims’ sustain injuries—they are also an important mechanism to reinforce the communicative model of consent. As the VLRC stated:

The jury direction performs an educative function by clarifying the law and establishing standards of behaviour for sexual relations which are based on principles of communication and respect.<sup>299</sup>

25.168 Victoria and the Northern Territory have legislated jury directions about consent. The MCCOC also recommended mandatory jury directions on consent in relevant cases.<sup>300</sup>

25.169 The Victorian model, introduced in 1991 and subsequently amended on a number of occasions,<sup>301</sup> has been referred to as ‘the most significant and progressive reform’.<sup>302</sup> In Victoria, the judge must direct the jury on consent only where it is ‘relevant to the facts in issue in a proceeding’.<sup>303</sup> The judge must relate any such direction to ‘the facts in issue in the proceeding’ and the ‘elements of the offence being tried ... so as to aid the jury’s comprehension of the direction’.<sup>304</sup> The matters about which the judge must direct the jury include the meaning of consent (free agreement) and the circumstances, prescribed by legislation, in which the complainant does not consent, as well as:

- (d) that the fact that the person did not say or do anything to indicate free agreement to a sexual act at the time which the act took place is enough to show that the act took place without that person’s free agreement;
- (e) that the jury is not to regard a person as having freely agreed to a sexual act just because—

298 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.3].

299 Ibid, [7.61].

300 Model Criminal Code Officers Committee–Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 263–264.

301 Between 2001 and 2004 the VLRC reviewed the law concerning sexual offences and recommended further reform of jury directions about consent. These recommendations were subsequently enacted, see *Crimes (Sexual Offences) Act 2006* (Vic).

302 S Bronitt and B McSherry, *Principles of Criminal Law* (2nd ed, 2005), 572.

303 *Crimes Act 1958* (Vic) s 37.

304 Ibid s 37.

- (i) she or he did not protest or physically resist; or
- (ii) she or he did not sustain physical injury; or
- (iii) on that or an earlier occasion, she or he freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person.<sup>305</sup>

25.170 There is considerable controversy about the Victorian model in the literature and the case law.<sup>306</sup> Concerns include that the directions may be seen to usurp the function of the jury in deciding the factual issue of consent, that they present an inaccurate picture of sexual activity and how people agree to such activity, that they are convoluted and confusing, and in some cases may contradict other aspects of the law—for example, the subjective test for an honest belief in consent.

25.171 The Northern Territory direction to the jury about consent is similar, but of more limited scope. In a relevant case, the judge must give a direction that a person is not to be taken as having consented to sexual intercourse simply because the person:

- (a) did not protest or physically resist;
- (b) did not sustain physical injury; or
- (c) had, on that or an earlier occasion, consented to:
  - (i) sexual intercourse; or
  - (ii) an act of gross indecency,

whether or not of the same type, with the accused.<sup>307</sup>

25.172 The Victorian legislation also requires a judge to direct juries about the accused's knowledge and awareness about the presence of consent where the defence raises in evidence, or asserts that, the accused believed that the victim was consenting to the sexual act.<sup>308</sup> In such circumstances, the judge must direct the jury that:

- in considering whether the offence has been proved beyond reasonable doubt that the accused was aware that the complainant was not consenting, the jury must consider –
- (a) any evidence of that belief; and
  - (b) whether that belief was reasonable in all the relevant circumstances having regard to—
    - (i) [in a case where one of the circumstances that vitiate consent exists] whether the accused was aware that that circumstance existed in relation to the complainant; and

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305 Ibid s 37AAA.

306 See discussion in J Willis, 'Legislatively Mandated Jury Directions in Sexual Offence Cases' (2006) 30 *Criminal Law Journal* 357, 357.

307 *Criminal Code* (NT) s 192A. This was introduced in the Northern Territory in 1994.

308 *Crimes Act 1958* (Vic) s 37AA.

- (ii) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and
- (iii) any other relevant matters.<sup>309</sup>

25.173 The Queensland Taskforce on Women and the Criminal Code considered that ‘compulsory directions would not necessarily overcome undesirable attitudes held by judges or juries’, but endorsed the Victorian model to the extent of recommending that the jury be directed to consider the steps taken by the accused to ensure that the complainant consented in cases where honest and reasonable belief in consent is raised.<sup>310</sup>

25.174 The MCCOC recommended a provision which follows the Victorian model, except for a significant amendment to the first clause.<sup>311</sup> This provision stated:

- (1) ... the judge must, in a relevant case, direct the jury (if any) that a person is not to be regarded as having consented to a sexual act just because:
  - (a) The person did not say or do anything to indicate that she or he did not consent; or
  - (b) The person did not protest or physically resist; or
  - (c) The person did not sustain physical injury; or
  - (d) On that or an earlier occasion, the person consented to engage in a sexual act (whether or not of the same type) with that person, or a sexual act with another person.
- (2) ...the judge must, in a relevant case, direct the jury (if any) that in determining whether the accused was under a mistaken belief that a person consented to a sexual act the jury may consider whether the mistaken belief was reasonable in the circumstances.<sup>312</sup>

### ***Consultation Paper***

25.175 In the Consultation Paper, the Commissions proposed that state and territory legislation should provide that a direction must be made to the jury on consent in sexual offence proceedings where it is relevant to a fact in issue. Such directions must be related to the facts in issue and the elements of the offence and expressed in such a way as to aid the comprehension of the jury. Such directions should cover:

- (a) the meaning of consent (as defined in the legislation);

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309 Ibid.

310 Taskforce on Women and the Criminal Code (Qld), *Report of the Taskforce on Women and the Criminal Code* (2000), Rec 64.3.

311 This recommendation was made before the term ‘normally’ was removed from *Crimes Act 1958* (Vic) s 37(1)(a). See discussion of problems with the term ‘normally’ in Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [7.34]–[7.40].

312 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), app 2, cl 5.2.43. Most of the submissions received by the MCCOC generally supported its approach. Some considered the Victorian model should be followed more closely: Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 265.

- (b) the circumstances that vitiate consent, and that if the jury finds beyond reasonable doubt that one of these circumstances exists then the complainant was not consenting;
- (c) the fact that the person did not say or do anything to indicate free agreement to a sexual act when the act took place is enough to show that the act took place without that person's free agreement; and
- (d) that the jury is not to regard a person as having freely agreed to a sexual act just because she or he did not protest or physically resist, did not sustain physical injury, or freely agreed to engage in another sexual act (whether or not of the same type) with that person, or a sexual act with another person, on an earlier occasion.

25.176 The Commissions also proposed that, where the defence asserts that the accused believed that the complainant was consenting to the sexual act, then the judge must direct the jury to consider:

- (e) any evidence of that belief; and
- (f) whether that belief was reasonable in all the relevant circumstances having regard to (in a case where one of the circumstances that vitiate consent exists) whether the accused was aware that that circumstance existed in relation to the complainant;
- (g) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps; and
- (h) any other relevant matters.<sup>313</sup>

### ***Submissions and consultations***

25.177 Many stakeholders supported the Consultation Paper proposal.<sup>314</sup> The main reasons stakeholders gave for supporting a jury direction about consent were the need to educate the jury;<sup>315</sup> to assist jurors to understand and apply the legal definition of consent;<sup>316</sup> to redress juror bias, where it exists,<sup>317</sup> to debunk myths about sexual assault;<sup>318</sup> and to reinforce a communicative model of consent.<sup>319</sup>

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313 Consultation Paper, Proposal 16–5.

314 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; T Searle, *Submission FV 108*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Jenny's Place Women and Children Refuge, *Submission FV 54*, 28 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

315 T Searle, *Submission FV 108*, 2 June 2010.

316 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

317 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

318 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

319 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

25.178 Some stakeholders strongly opposed a direction that the fact that the person did not say or do anything to indicate free agreement is enough to show that the act took place without the person's free agreement.<sup>320</sup> Concerns included that the direction goes too far—because such circumstances are material to the question of consent but cannot be determinative—and because the direction creates a presumption that a sexual act is unlawful unless proved otherwise.

25.179 The Law Society of NSW also specifically opposed a direction that consent is not to be regarded as having been freely given just because the complainant freely agreed to engage in another sexual act on an earlier occasion.<sup>321</sup> It considered that such a direction 'is fraught with difficulty if the fairness of the trial ... is to be maintained', and concerns matters for the jury. For example, where the accused may have made an honest and reasonable mistake about consent because of the nature of a previous relationship, it would be relevant for the jury to consider how consent had been shown in the past, rather than being directed that this evidence was irrelevant to the issue of consent. In contrast, Women's Legal Services NSW supported a broader direction, directing the jury that it is irrelevant to the issue of consent that the complainant 'was previously or at the time of the sexual act in a sexual relationship with that person or another person'.<sup>322</sup>

25.180 To the extent that the proposed direction addresses the accused's belief that the complainant was consenting, some stakeholders commented that the proposal reflected current practice.<sup>323</sup> The NASASV supported this aspect of the proposal on the basis that the limitations of the defence of honest and reasonable belief should be clearly understood by the jury.<sup>324</sup>

25.181 Jenny's Place Women and Children Refuge specifically supported a direction that the jury consider whether the accused took any steps to ascertain whether the complainant was consenting in order to quash 'conjecture and assumptions about continuous consent in intimate relationships'.<sup>325</sup>

#### *Commissions' views*

25.182 Research suggests that jurors find consent a difficult concept to understand and apply, and that jurors' pre-existing attitudes have been found to influence their judgments more than the facts of the case and the manner in which the evidence was given.<sup>326</sup> For these reasons, the Commissions support enacting positive judicial directions on consent: its meaning; the circumstances where there may be no consent;

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320 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010. Also Queensland Law Society, *Submission FV 178*, 25 June 2010.

321 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

322 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

323 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

324 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010. NASASV submitted that the defence of honest and reasonable belief should be abolished but supported the proposed direction, where the defence is available.

325 Jenny's Place Women and Children Refuge, *Submission FV 54*, 28 May 2010.

326 N Taylor, *Juror Attitudes and Biases in Sexual Assault Cases* (2007), 3–5.

and the relevance of not communicating consent, physical resistance, physical injury and consent to other sexual acts. Such directions may assist jurors to determine the facts of the case and apply the law to those facts, and reinforce the communicative model of consent. They may also operate to effect cultural change for those involved in the prosecution of sexual offences and where coupled with education in the community.

25.183 The Commissions' recommendation largely reflects the Victorian model to the extent that it requires a judge to direct the jury about the meaning of consent, the circumstances where there may be no consent and an accused's belief that the complainant was consenting. The manner by which the recommendation requires a judge to direct the jury about the relevance of certain factors to a jury's determination of whether a complainant consented in a particular case reflects the Model Criminal Code provisions.

**Recommendation 25–7** State and territory sexual offence provisions should provide that the judge must, if it is relevant to the facts in issue in a sexual offence proceeding, direct the jury:

- (a) on the meaning of consent, as defined in the legislation;
- (b) on the circumstances where there may be no consent, and the consequence of a finding beyond reasonable doubt that one of these circumstances exists;
- (c) that a person is not to be regarded as having consented to a sexual act just because:
  - (i) the person did not say or do anything to indicate that she or he did not consent; or
  - (ii) the person did not protest or physically resist; or
  - (iii) the person did not sustain physical injury; or
  - (iv) on that, or an earlier, occasion the person consented to engage in a sexual act—whether or not of the same type—with that person or another person.

Where evidence is led, or an assertion is made, that the accused believed that the complainant was consenting to the sexual act, then the judge must direct the jury to consider:

- (d) any evidence of that belief;
- (e) whether the accused took any steps to ascertain whether the complainant was consenting or might not be consenting, and if so, the nature of those steps;

- (f) the reasonableness of the accused's belief in all the circumstances, including the accused's knowledge or awareness of any circumstance that may vitiate consent; and
- (g) any other relevant matter.

## **Guiding principles and objects clauses**

25.184 The *Time for Action* report drew attention to the important role that guiding principles can play in the interpretation of the law relating to sexual offences and in the application of rules of evidence in sexual offence proceedings.<sup>327</sup> Victoria is currently the only Australian jurisdiction which provides an objects statement and guiding principles in relation to sexual offences and related procedural and evidentiary matters.

25.185 The *Crimes Act 1958* (Vic) provides that the objectives of its sexual offences provisions are:

- (a) to uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity;
- (b) to protect children and persons with a cognitive impairment from sexual exploitation.<sup>328</sup>

25.186 In addition, guiding principles were included within the legislation, which set out the facts that the court should have regard to when interpreting the various sexual offences in that Act. These are that:

- (a) there is a high incidence of sexual violence within society; and
- (b) sexual offences are significantly under-reported; and
- (c) a significant number of sexual offences are committed against women, children and other vulnerable persons including persons with a cognitive impairment; and
- (d) sexual offenders are commonly known to their victims; and
- (e) sexual offences often occur in circumstances where there is unlikely to be any physical signs of an offence having occurred.<sup>329</sup>

25.187 There are identical provisions in the *Evidence (Miscellaneous Provisions) Act 1958* (Vic) to assist the court when interpreting the provisions relating to confidential communications,<sup>330</sup> and in the *Criminal Procedure Act 2009* (Vic) to assist

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327 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 111–112.

328 *Crimes Act 1958* (Vic) s 37A.

329 *Ibid* s 37B.

330 *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32AB.

the court when interpreting the provisions relating in whole or in part to sexual offences.<sup>331</sup>

25.188 These objects statements and guiding principles were introduced following the recommendations of the VLRC.<sup>332</sup> The VLRC considered that such provisions are an important educative tool, addressing the need for cultural change and the implementation gap discussed in Chapter 24. The VLRC articulated three main arguments for including guiding principles:

The criminal law has both a regulatory and an educative function. It should emphasise that people have a right to make decisions about their sexual activity and to choose not to engage in sexual activity. The interpretation clause will ensure that the provisions of sexual offences laws are interpreted consistently with the goals of the legislation.

A statement of principles of interpretation will give added weight to any directions or instructions that a judge gives to the jury. The judge and jury can refer to the principles to shed light on where any ambiguity may exist in the interpretation of particular sections.

Sexual assault continues to be under-reported, and the serious social harm of sexual assault has only recently begun to be given the recognition that it deserves. The unique nature and context of sexual assault should be clearly stated by the legislature, so that this underwrites the interpretation of the particular provisions in the legislation.<sup>333</sup>

25.189 Some states and territories have also incorporated objects clauses and/or guiding principles in their family violence protection order legislation.<sup>334</sup> While there is some question about the extent to which such provisions have been effective in practice,<sup>335</sup> such principles may provide an important symbolic statement about the nature of such violence, the community's lack of tolerance for such violence, and the response of the law.<sup>336</sup>

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331 In *Director of Public Prosecutions (Vic) v Theophanous* [2009] VSC, the Supreme Court of Victoria considered the applicability of the guiding principles contained in, what was then, the *Evidence Act 1958* (Vic) s 32AB. This case considered, in part, whether the magistrate had applied those guiding principles when allowing the publication of certain parts of the complainant's evidence given in a committal proceeding. The court rejected the argument that s 32AB, and its intention to encourage the reporting of sexual assault, would necessarily mean that there could be no publication of evidence from a sexual assault proceeding.

332 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Recs 105, 106, 107.

333 Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [8.88]. See also [8.87].

334 See Ch 7.

335 In the family violence context see J Wangmann, “‘She Said ...’ ‘He said ...’: Cross Applications in NSW Apprehended Domestic Violence Order Proceedings”, *Thesis*, University of Sydney, 2009, 55–56.

336 In the family violence context see R Hunter, ‘Women’s Experience in Court: The Implementation of Feminist Law Reforms in Civil Proceedings Concerning Domestic Violence’, *Thesis*, Stanford University, 2006, 64; R Hunter and J Stubbs, ‘Model Laws or Missed Opportunity?’ (1999) 24 *Alternative Law Journal* 12, 12.

### ***Consultation Paper***

25.190 In the Consultation Paper, the Commissions proposed that state and territory sexual offence legislation should include a statement that the objectives of the legislation are to:

- uphold the fundamental rights of people to make decisions about their sexual behaviour; and
- protect children and persons with a cognitive impairment from exploitation.<sup>337</sup>

25.191 The Commissions also proposed that state and territory sexual offences, criminal procedure or evidence legislation should provide for guiding principles, to which courts should have regard when interpreting sexual offence provisions, which should at a minimum refer to the following:

- the high incidence of sexual violence within society;
- under-reporting of sexual offences;
- a significant number of sexual offences are committed against women, children and other vulnerable persons;
- sexual offenders are commonly known to their victims; and
- sexual offences often occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.<sup>338</sup>

25.192 Finally, the Commissions asked whether a statement of guiding principles should make reference to other factors, such as recognising specific vulnerable groups of women or acknowledging that sexual violence constitutes a form of family violence.<sup>339</sup>

### ***Submissions and consultations***

25.193 Many stakeholders supported the inclusion of statements of objectives<sup>340</sup> and guiding principles.<sup>341</sup> For example, AIFS emphasised that the introduction of a statement of objectives and guiding principles would be of benefit in providing:

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337 Consultation Paper, Proposal 16–6.

338 Ibid, Proposal 16–7.

339 Ibid, Question 16–8.

340 For example, Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Disability Services Commission (WA), *Submission FV 138*, 23 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; P Easteal, *Submission FV 38*, 13 May 2010.

accurate, objective information on sexual assault, and may assist in counteracting any misperceptions or adherence to rape myths in jury members or members of the judiciary.<sup>342</sup>

25.194 The Magistrates' Court and Children's Court of Victoria also supported the inclusion of statements of objectives and guiding principles, which 'provide useful guidance to the court in determining an approach to construing the meaning of relevant provisions'.<sup>343</sup>

25.195 Some stakeholders considered that 'it is desirable to specifically acknowledge that sexual violence constitutes a form of family violence'<sup>344</sup> and emphasised the need to refer explicitly to Aboriginal and Torres Strait Islander women and children, those from CALD communities, and persons with a disability.<sup>345</sup>

25.196 For example, Hannah McGlade emphasised that the fact that Aboriginal and Torres Strait Islander women and children are more vulnerable to sexual assault should be expressly acknowledged in guiding principles.<sup>346</sup> Other stakeholders agreed but urged caution, emphasising the importance of not undermining the sexual autonomy of vulnerable groups of women,<sup>347</sup> and that 'consultation is critical with respect to wording'.<sup>348</sup> NASASV submitted that:

groups should not just be tokenly listed as where the reader is otherwise ignorant of the factors this may feed existing prejudices, and potentially lead to further

341 For example, Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Disability Services Commission (WA), *Submission FV 138*, 23 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; P Easteal, *Submission FV 38*, 13 May 2010.

342 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

343 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

344 J Stubbs, *Submission FV 186*, 25 June 2010. Also Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010 and Education Centre Against Violence, *Submission FV 90*, 3 June 2010.

345 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Disability Services Commission (WA), *Submission FV 138*, 23 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; H McGlade, *Submission FV 84*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; P Easteal, *Submission FV 38*, 13 May 2010.

346 H McGlade, *Submission FV 84*, 2 June 2010. Also Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

347 J Stubbs, *Submission FV 186*, 25 June 2010.

348 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

disempowerment/reinforcement of stereotypes and racism. It would be preferable if the dynamics that make these groups of women more vulnerable could be identified so that they can then be recognised for what they are in the evidence.<sup>349</sup>

25.197 Stakeholders suggested other matters be included in any statement of objectives and or guiding principles.<sup>350</sup> Suggestions included reference to:

- the occurrence of sexual violence in the context of intimate relationships;<sup>351</sup>
- the need to protect young people as well as children from sexual exploitation,<sup>352</sup>
- the impacts of sexual assault, with particular emphasis on the fact that ‘there is no “typical” sexual assault, and no typical response to having been assaulted’;<sup>353</sup> and
- sexual assault constituting a human rights violation, including reference to international human rights standards.<sup>354</sup>

25.198 Some stakeholders opposed the proposals. National Legal Aid argued that appropriate education and training should instead be provided to law enforcement authorities, prosecutors, lawyers, judicial officers, and other relevant service providers.<sup>355</sup> The Law Society of NSW proposed including reference to the right of the accused to a fair trial, but stated that guiding principles are not needed because

judges already take these matters into account on sentence in NSW. The danger with enunciating these principles in legislation is that they may be given added weight thus leading to a double-counting effect in relation to matters that are already regarded as aggravating factors on sentence.<sup>356</sup>

### *Commissions' views*

25.199 Statements of objectives and guiding principles can perform an important symbolic and educative role in the application and interpretation of the law, as well as in the general community. While much more is required to change culture, such

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349 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

350 AIFS, for example, suggested including: emphasis on the fact that there is no ‘typical’ sexual assault, and no typical response to having been assaulted; that overt force and violence not being the norm in sexual offences; that the fact there is an ongoing sexual relationship does not negate the fact that non-consensual sex occurs; and that being sexually ‘experienced’ does not decrease the harm of sexual violence, nor does it mean a woman is more likely to have consented to an unwanted encounter: Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

351 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010.

352 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

353 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010. Other submissions, such as Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010 suggested adding reference to the trauma of sexual assault and resulting impacts on complainants’ capacity to report and participate in legal processes.

354 For example, Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; H McGlade, *Submission FV 84*, 2 June 2010.

355 National Legal Aid, *Submission FV 232*, 15 July 2010.

356 Law Society of New South Wales, *Submission FV 205*, 30 June 2010. Also Legal Aid NSW, *Submission FV 219*, 1 July 2010.

statements provide an important opportunity for governments and legal players to articulate their understanding of sexual violence and provide a benchmark against which to assess the implementation of the law and procedure.

25.200 In the Commissions' view, the statements of objectives and guiding principles articulated in the Victorian legislation are an instructive starting point for similar provisions in other jurisdictions.

25.201 While such objectives and principles are, however, intended to provide a contextual framework for the legislative response to sexual assault, rather than any exhaustive list of issues to which judicial officers and jurors should have regard, the recommendations below expand on the Victorian provisions to incorporate certain other matters.

25.202 In particular, the Commissions consider that it is desirable to acknowledge that sexual violence constitutes family violence, as it is precisely these cases that criminal justice systems deal with least effectively.<sup>357</sup> Further, it is important to recognise the particular vulnerability of certain groups of women and, as a result, specifically recognise Aboriginal and Torres Strait Islander women, those from CALD backgrounds and women with a cognitive impairment as victims of sexual violence.<sup>358</sup>

25.203 The Commissions recommend that legislative statements of objectives should underline the aims of upholding individual sexual autonomy and agency, while ensuring the protection of vulnerable persons from sexual exploitation. In addition, guiding principles should be incorporated in sexual offences, criminal procedure or evidence legislation, to recognise the nature and dynamics of sexual assault.

**Recommendation 25–8** State and territory legislation dealing with sexual offences should state that the objectives of the sexual offence provisions are to:

- (a) uphold the fundamental right of every person to make decisions about his or her sexual behaviour and to choose not to engage in sexual activity; and
- (b) protect children, young people and persons with a cognitive impairment from sexual exploitation.

**Recommendation 25–9** State and territory legislation dealing with sexual offences, criminal procedure or evidence, should contain guiding principles, to which courts should have regard when interpreting provisions relating to sexual offences. At a minimum, these guiding principles should refer to the following:

- (a) sexual violence constitutes a form of family violence;
- (b) there is a high incidence of sexual violence within society;

<sup>357</sup> National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 112.

<sup>358</sup> See also, Recs 5–1(b), 7–1.

- (c) sexual offences are significantly under-reported;
- (d) a significant number of sexual offences are committed against women, children and other vulnerable persons, including those from Indigenous and culturally and linguistically diverse backgrounds, and persons with a cognitive impairment;
- (e) sexual offenders are commonly known to their victims; and
- (f) sexual offences often occur in circumstances where there are unlikely to be any physical signs of an offence having occurred.

## **26. Reporting, Prosecution and Pre-trial Processes**

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### **Contents**

Introduction	1183
Decision points	1184
Attrition in sexual assault cases	1187
Statistics on attrition rates	1187
Data collection	1190
Recognising and reporting sexual assault	1193
Barriers to reporting	1193
Reporting to the police	1196
The prosecution phase	1196
The decision to prosecute	1197
Prosecution of sexual offences	1198
Charge and fact bargaining	1201
The views of victims	1202
Information and assistance	1205
Additional measures to reduce attrition	1212
Giving evidence at committals	1214
Joint or separate trial	1218
Implications of joint and separate trials	1219
A presumption of joint trial?	1220
Pre-recorded evidence	1225
Evidence of interview	1226
Other pre-recorded evidence	1226
Benefits and drawbacks	1228

### **Introduction**

26.1 The Terms of Reference for this Inquiry require the Commissions to inquire and report on ‘the impact of inconsistent interpretation or application of laws in cases of sexual assault occurring in a family/domestic violence context, including rules of evidence, on victims of such violence’.

26.2 Chapters 26 to 28 highlight ways in which particular laws and procedures operate for victims of sexual assault. In many instances, Australian jurisdictions take different approaches to law and procedure in the areas discussed. As a result, these chapters examine which approaches best recognise the nature of sexual violence and address the negative experience of complainants in the criminal justice system. Where

it is possible to identify certain approaches as more promising and progressive than others, the Commissions recommend that the Australian and state and territory governments should implement consistent measures of these kinds.

26.3 This chapter begins by mapping out the key ‘decision points’ in the prosecution of sexual assault offences. These decision points extend from reporting to the police, through the handling of cases by various offices of the Director of Public Prosecutions (DPP) and to procedures involved in the trial of sexual offences. At each of these decision points, cases are filtered out and this process—referred to as ‘attrition’—may lead to offences not being reported and cases being unnecessarily withdrawn or dismissed.

26.4 This chapter also discusses some of the problems that may lead to attrition of sexual assault cases at the reporting, investigation, prosecution and other pre-trial stages. Chapter 27 focuses on issues that arise at trial, notably in relation to the application of laws of evidence. Chapter 28 considers other trial processes, including the giving of jury warnings and the cross-examination of complainants and other witnesses in sexual offence proceedings. Overall, these chapters examine selected developments aimed at reducing attrition and improving the experiences of those who have suffered a sexual assault.

26.5 The focus of this aspect of the Inquiry is sexual assault committed in a family violence context—that is, for those who have been sexually assaulted by a current or former intimate partner (spouse, de facto, boyfriend/girlfriend) or family member. However, most of the issues apply to all sexual assault proceedings, regardless of the relationship between the complainant and the perpetrator.

26.6 The Commissions acknowledge that many areas of law and procedure relating to sexual assault proceedings are not addressed in this Report. Given the timeframe and ambit of the Terms of Reference, the Commissions’ work focused on inconsistencies in the interpretation or application of laws in those areas which have the most direct impact on victims of sexual assault in a family violence context.

26.7 The Commissions acknowledge that reform in this area has been substantial over the last three decades, resulting in legislative and procedural changes which have improved legal responses to sexual assault committed in a family violence context. However, as discussed in the preceding chapters, much remains to be done to address both legislative and practice-based gaps and inconsistencies which have a negative impact on victims of sexual assault.

## **Decision points**

26.8 The way in which complaints of sexual assault progress through the criminal justice system is complex. Decisions are made at multiple points which may in turn result in a complaint not proceeding:

From the point where a victim decides to report a sexual offence to the police—and the majority never do—various decision makers exercise discretion at multiple decision points, based on a range of criteria, so that only a small proportion of all sex crimes ever reach trial and conviction ... This filtering of cases begins with police

decisions to record and investigate a complaint and to charge a suspect with the offence. The exercise of police discretionary powers means that they are perhaps the most significant gatekeepers to the criminal justice system.

Once the police charge a suspect, DPP lawyers review the file to determine whether the case should be prosecuted. Cases that proceed are subject to continuous reassessment because the circumstances of the case can change over time. In addition different evidentiary standards apply at each decision-making stage: the police decision to charge is based on the *prima facie* test, which is a more inclusive standard than the *reasonable prospects* test applied by the prosecutor, while the jury's decision to convict is based on the stringent standard of *beyond reasonable doubt*.<sup>1</sup>

26.9 In addition, in the context of sexual assault, as attrition occurs at numerous decision points throughout the criminal justice process,

poor criminal justice outcomes for sexual offences have generated a self-perpetuating cycle in which decisions made at each stage of the process—from report to prosecution—are informed by anticipation of the decision which might be made at the next stage.<sup>2</sup>

26.10 These multiple decision points are summarised in the following diagram extracted from the 2004 report *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* by Dr Denise Lievore.<sup>3</sup>

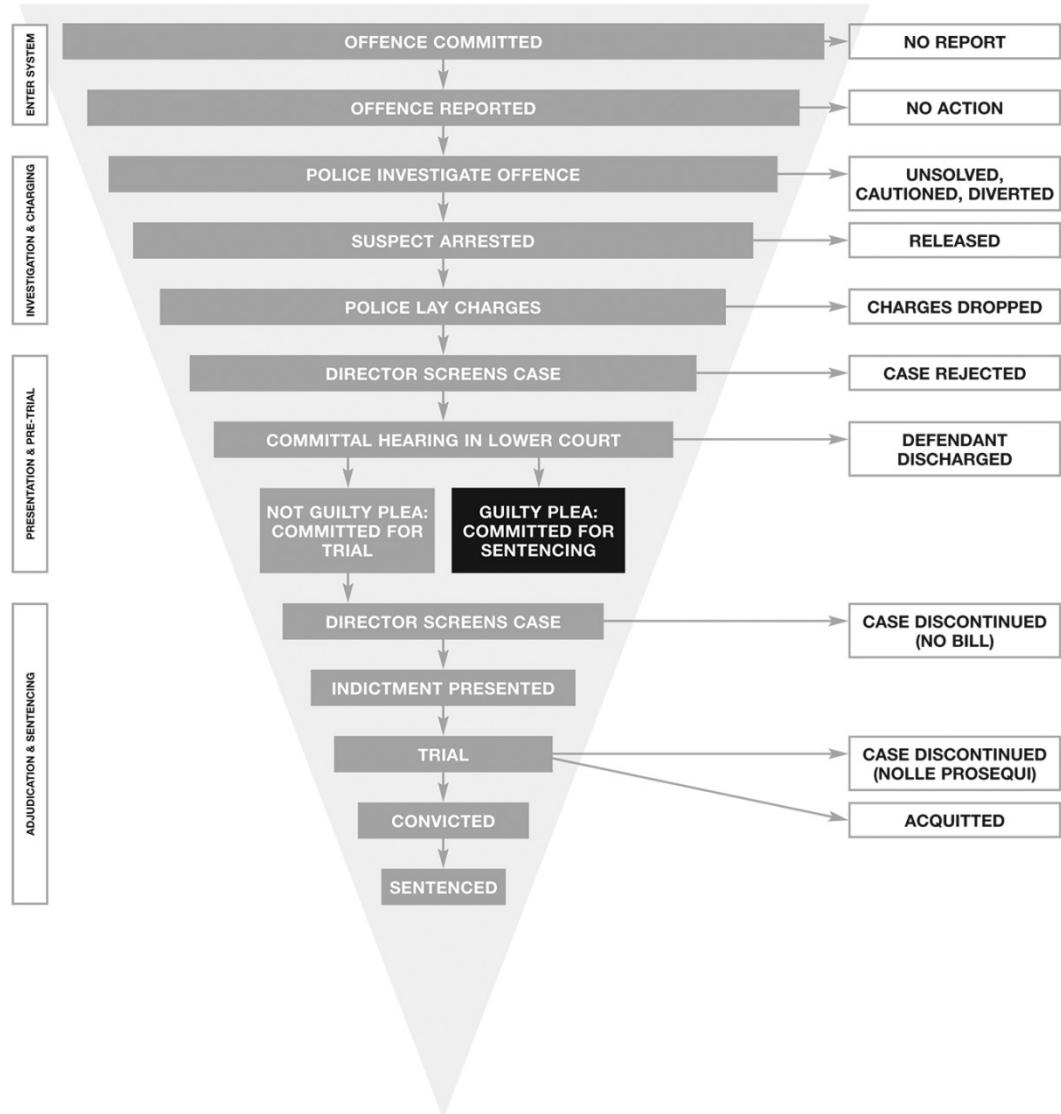
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1 D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), prepared for the Office of the Status of Women, 5 (references omitted, emphasis in original).

2 M Heath, 'Women and Criminal Law: Rape' in P Easteal (ed) *Women and the Law in Australia* (2010) 88. This was also reinforced in Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

3 D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), prepared for the Office of the Status of Women, 6.

Figure 1: Decision Points for Indictable Sexual Offences



## Attrition in sexual assault cases

26.11 Research has established that only a small proportion of sexual assaults enter the criminal justice system, and those that do face a range of barriers and filtering mechanisms, which means that few result in a charge, prosecution, or conviction.<sup>4</sup> This steady process of attrition has been the subject of much concern and is well documented.<sup>5</sup>

26.12 Substantial reforms over the last three decades—including legal and procedural reforms and policy changes—have been intended, at least in part, to address factors and barriers that have contributed to victims making decisions to withdraw, or key decision makers making determinations that cases not proceed.

### Statistics on attrition rates

26.13 While research indicates that the number of sexual assault cases that reach the point of adjudication is minimal,<sup>6</sup> much of the research into sexual assault has emphasised the difficulty of accurately measuring the extent of sexual assault or rates of attrition.<sup>7</sup>

26.14 The primary sources of sexual assault statistics are official police statistics, crime victimisation surveys, and more customised or targeted surveys.<sup>8</sup>

26.15 The limited availability of comprehensive statistics is evidently in part due to the very nature of under-reporting of sexual assault, an issue discussed further below, which is inherently difficult to measure accurately. However, the lack of data with respect to those cases which do enter the criminal justice system may also be attributed to factors such as inconsistencies in definitions of sexual assault as well limitations associated with current methods of data collection and evaluation.<sup>9</sup>

4 Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005) 8.

5 See, eg, *Ibid*, 8–17; National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 37–43.

6 See, eg, Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004); J Mouzos and T Makkai, *Women's Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004), 102.57 citing the findings of the 2002 National Crime and Safety Survey; Australian Institute of Criminology, *Guilty Outcomes in Reported Sexual Assault and Related Offence Incidents* (2007).

7 For further discussion see: D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), prepared for the Office of the Status of Women; D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review* (2003), prepared for the Commonwealth Office of the Status of Women; B Cook, F David and A Grant, *Sexual Violence in Australia: Australian Institute of Criminology Research and Public Policy Series*, 36 (2001); Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010. In relation to Aboriginal and Torres Strait Islander peoples, see, eg, F Al-Yaman, M Van Doeland and M Wallis, *Family Violence Among Aboriginal and Torres Strait Islander Peoples* (2006), prepared for the Australian Institute of Health and Welfare.

8 D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review* (2003), prepared for the Commonwealth Office of the Status of Women.

9 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

26.16 By way of overview, Lievore concluded that the available Australian studies, taken together, indicate that:

- case attrition is highest at the police stage, but prosecutors regularly exercise their discretion to discontinue cases;
- in recent years there has been an increase in the numbers of persons charged with sexual assault, but this is not reflected in conviction rates;
- the proportion of defendants pleading guilty to sexual assault is low relative to other offence types; and
- the high proportion of cases proceeding to trial is reflected in high numbers of acquittals compared to other offences.<sup>10</sup>

26.17 More specifically, some of the key published statistics available on attrition rates at various points of the criminal justice system are set out below. The figures relate to data collection across different time periods, jurisdictions and sample sizes, making it difficult to draw any firm conclusions from them. However, the figures do provide a useful statistical overview of sexual assault matters at the investigation, prosecution and trial stages, which is illustrative of the process of attrition.

### ***Investigation***

- The Australian Bureau of Statistics (ABS) reported that in 2009, 30 days after the initial complaint an offender been proceeded against in only 19.8% of sexual assault investigations.<sup>11</sup> Similarly, for incidents of sexual assault recorded by police in 2002, offenders were proceeded against for approximately one in four victims of sexual assault.<sup>12</sup>
- A 2000–03 Victorian study found that police did not proceed with more than 60% of sexual assault investigations.<sup>13</sup> Offenders were charged in only 15% of cases.<sup>14</sup>
- New South Wales research showed that only 28% of sexual and indecent assaults against children and 30% of those against adults, reported to NSW police in 2004, were ‘cleared’ within six months.<sup>15</sup>

<sup>10</sup> D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), prepared for the Office of the Status of Women, 3.

<sup>11</sup> Australian Bureau of Statistics, *Recorded Crime: Victims*, Catalogue No 4510.0 (2008), 34.

<sup>12</sup> Measured at six months from the date the incident became known to the police: Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 54.

<sup>13</sup> Of these cases, 15% of rape complaints were withdrawn; and 46% resulted in no further police action: Statewide Steering Committee to Reduce Sexual Assault (Vic), *Study of Reported Rapes in Victoria 2000–03: Summary Research Report* (2006), 5. Offenders were proportionately more likely to be a current or former partner of the victim in cases where the complaint was subsequently withdrawn compared to cases where charges were laid.

<sup>14</sup> Ibid.

<sup>15</sup> J Fitzgerald, ‘The Attrition of Sexual Offences from the New South Wales Criminal Justice System’ (2006) 92 *Crime and Justice Bulletin* 3, 3. A cleared criminal incident is one that police are no longer investigating, either because they have commenced criminal proceedings against a suspect or the complaint has been withdrawn. Incidents that are not cleared are unlikely to proceed any further.

- A 2003 South Australian study noted that 40% of child sexual assault incidents reported in 2000–01 had not been cleared by police when followed up a year later; and 23% of cases were cleared other than through a suspect being apprehended, including because the victim requested no further action.<sup>16</sup>
- In 2007, the Australian Institute of Criminology (AIC) estimated that less than 20% of sexual offence incidents which are reported to the police result in charges being laid and criminal proceedings being instigated.<sup>17</sup>

### ***Prosecution***

- The Victorian Law Reform Commission (VLRC) found that, based on cases between 1997–99, fewer than one in six reports to police of rape, and fewer than one in seven reports of incest or sexual penetration of a child, proceeded to prosecution.<sup>18</sup>
- NSW research found that it was common for incidents to be recorded as cleared by the police, even though there had been no criminal proceedings commenced through the issuing and filing of a court attendance notice.<sup>19</sup> Among all sexual offences reported to police, criminal proceedings are initiated in only 15% of incidents involving child victims and 19% of incidents involving adult victims.<sup>20</sup>
- A 2003 South Australian study found that 27% of reports of child sexual assault incidents proceeded to prosecution.<sup>21</sup>

### ***Trial***

- The ABS reported that in 2008–09 (of a total of 3,085 defendants in sexual assault and related cases finalised in higher criminal courts) 49.4% entered a guilty plea, 15.1% were acquitted and 11.9% pleaded not guilty and were convicted. A total of 21.7% of cases were withdrawn by the prosecution.<sup>22</sup>
- Similar figures were reported by the ABS for 2002–03, where (of 1,567 defendants) 60% of sexual assault defendants entered a guilty plea, 20% pleaded

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16 J Wundersitz, *Child Sexual Assault: Tracking from Police Incident Report to Finalisation in Court* (2003), prepared for the Office of Crime Statistics and Research, 9.

17 Australian Institute of Criminology, *Guilty Outcomes in Reported Sexual Assault and Related Offence Incidents* (2007).

18 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [1.6].

19 Within 180 days of reporting, criminal proceedings had been commenced against a person of interest in 53% of cleared incidents involving a child victim and in 59% of incidents involving an adult victim: J Fitzgerald, ‘The Attrition of Sexual Offences from the New South Wales Criminal Justice System’ (2006) 92 *Crime and Justice Bulletin* 3, 4.

20 Ibid. The odds of criminal proceedings being commenced were higher where: the victim was aged over five years; reporting of the incident occurred within ten years of its occurrence; the offender was known to the victim; the victim was female; and aggravating circumstances were present: J Fitzgerald, ‘The Attrition of Sexual Offences from the New South Wales Criminal Justice System’ (2006) 92 *Crime and Justice Bulletin* 3, 7.

21 J Wundersitz, *Child Sexual Assault: Tracking from Police Incident Report to Finalisation in Court* (2003), prepared for the Office of Crime Statistics and Research, 9.

22 Australian Bureau of Statistics, *Criminal Courts of Australia Catalogue No 4513.0 (2008–2009)*, 24.

not guilty and were convicted and 19% were acquitted.<sup>23</sup> Defendants in higher criminal courts, with a principal offence of sexual assault and related offences, were three times more likely to have an acquittal outcome (20%) than defendants for all offences (7%).<sup>24</sup>

- The VLRC found in 2004 that, even if a sexual offence is reported and the defendant is prosecuted, guilty pleas and conviction rates are lower than for other criminal offences.<sup>25</sup>
- NSW research found that 44% of persons prosecuted for a sexual offence against a child, and 42% of persons prosecuted for a sexual offence against an adult, were found guilty on at least one count.<sup>26</sup>
- South Australian research found that less than 10% of cases reported to South Australian police in 2000–01 resulted in a conviction on at least one of the offences arising from a reported child sexual assault incident.<sup>27</sup>
- An analysis of finalised child sexual offences in the Northern Territory between 2001–02 and 2005–06 found that 28% resulted in a guilty verdict (the vast majority of which resulted from a guilty plea) while 47% of cases were withdrawn by the prosecution.<sup>28</sup>

### **Data collection**

26.18 In the Consultation Paper, the Commissions proposed that the Australian Centre for the Study of Sexual Assault (ACSSA), the AIC and similar state and territory agencies should prioritise the collection of comprehensive data on attrition rates and outcomes in sexual assault cases, including in relation to sexual assault perpetrated in a family violence context.<sup>29</sup>

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23 Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 77.

24 Ibid, 54.

25 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [1.6].

26 J Fitzgerald, ‘The Attrition of Sexual Offences from the New South Wales Criminal Justice System’ (2006) 92 *Crime and Justice Bulletin* 3, 4.

27 J Wundersitz, *Child Sexual Assault: Tracking from Police Incident Report to Finalisation in Court* (2003), prepared for the Office of Crime Statistics and Research, 9.

28 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007), 252.

29 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010) Proposal 17–1.

### **Submissions and consultations**

26.19 Many stakeholders supported the proposal,<sup>30</sup> highlighting high rates of attrition and the fact that

there is great complexity involved in estimating attrition rates of sexual assault cases and case outcomes in Australia. This complexity results from the need to collect police and court data from different jurisdictions with different record keeping systems and legislation. Data collection systems may not be compatible or readily available. Yet it is important to grapple with these issues to begin to understand attrition in sexual assault cases.<sup>31</sup>

26.20 Several stakeholders articulated the need for comprehensive data which details not only the reasons for attrition but also the point of attrition. In particular, the National Association of Services Against Sexual Assault (NASASV) submitted that data ‘should be collected that specifies exactly when the case fell out, how far along the process it got and exactly why it was not pursued/successful’.<sup>32</sup>

26.21 Several stakeholders recognised that adequate resourcing is essential to ensure adequate data collection and analysis.<sup>33</sup> However, the Magistrates’ Court and Children’s Court of Victoria noted that, despite ‘challenges and resourcing implications involved in identifying this data and arranging for its collection and analysis’, the Courts nonetheless regard data collection as an ‘urgent priority’—highlighting that the ‘paucity of adequate data is a significant impediment to appropriate and effective policy development and coordinated support for relevant court users’.<sup>34</sup>

26.22 Stakeholders noted the positive role the process of data collection can play in ‘institutional change in and of itself’<sup>35</sup> and emphasised that in the course of collecting data on attrition rates and outcomes in sexual assault cases, care should be taken to ensure that specific data and trends can be identified in relation to Aboriginal and Torres Strait Islander people.<sup>36</sup> Finally, in addition to collecting data in relation to criminal sexual assault matters, the Magistrates’ Court and Children’s Court of

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30 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; P Easteal, *Submission FV 38*, 13 May 2010.

31 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

32 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010. Also Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

33 For example, Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

34 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

35 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

36 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

Victoria suggested that data collection and evaluation should ‘include reference to other relevant jurisdictions where allegations of sexual assault are made’.<sup>37</sup>

#### **Commissions’ views**

26.23 Improved data collection in relation to the reporting and prosecution of sexual assault, including in a family violence context, is clearly desirable. The collection of more comprehensive statistics on attrition rates and outcomes in sexual assault cases, as well as access to such data, is critical to identifying problems as well as designing and monitoring solutions in relation to how the criminal justice system deals with sexual assault.

26.24 Bodies such as ACSSA and the AIC, along with state and territory counterparts, have an important role to play in this regard. One of the roles of ACSSA, in particular, is to ‘improve access to current information on sexual assault in order to assist policymakers and others interested in this area to develop evidence-based strategies that respond to, and ultimately reduce, the incidence of sexual assault’. Another body, the Australian Domestic and Family Violence Clearinghouse, plays a role in providing information about domestic and family violence issues and practice, including through an online good practice database.

26.25 The Commissions recognise the role that police, DPPs, courts and other bodies play in collecting raw data. However, in light of the specific roles of bodies such as ACSSA, the Commissions recommend that ACSSA, the AIC and similar state and territory agencies should prioritise the collection of comprehensive data in relation to sexual assault, particularly where perpetrated in a family violence context. In particular, the Commissions emphasise the need to collect data using a consistent methodology as well as identifying the reasons for attrition, the decision point at which attrition occurred, outcomes of cases and trends in relation to particular groups such as Aboriginal and Torres Strait Islander people.

**Recommendation 26–1** The Australian Centre for the Study of Sexual Assault, the Australian Institute of Criminology and similar state and territory agencies should prioritise the collection of comprehensive data in relation to sexual assault perpetrated in a family violence context. In particular on:

- (a) attrition rates, including reasons for attrition and the attrition point;
- (b) case outcomes; and
- (c) trends in relation to particular groups including Aboriginal and Torres Strait Islander peoples.

<sup>37</sup> Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

## Recognising and reporting sexual assault

26.26 The first step in engaging with the criminal justice system following sexual assault involves the complainant understanding that what happened to them constitutes a sexual offence. There is a wide range of acts of sexual violence that a victim may experience as part of family violence, many of which constitute a sexual offence under criminal law.<sup>38</sup>

26.27 As discussed in Chapter 24, many women may find it difficult to recognise what an intimate partner or family member has done to them is a sexual assault. WESNET—The Women’s Services Network submitted that:

Workers report that quite often women do not see what they have experienced as sexual abuse until the worker provides a definition. At that point many women acknowledge that they have experienced sexual violence.<sup>39</sup>

26.28 Particular groups of women may face special difficulties in recognising sexual assault. For example, for some Aboriginal and Torres Strait Islander women the ‘normalisation of violence’; or for women from culturally and linguistically diverse (CALD) backgrounds, lack of knowledge about the Australian legal system may make it difficult to identify the harm suffered as a criminal offence—as can the fact that ‘in some traditional cultures there may not be a concept of sexual violence occurring in marriage and no definitions of consenting sexual activity’.<sup>40</sup>

26.29 More generally, women and other victims of sexual assault may lack knowledge about the options that they have, and the mechanisms that are available to assist them in reporting sexual violence and engaging with the criminal justice system.

## Barriers to reporting

26.30 Where victims do recognise that what happened to them is a criminal offence, in many instances they may decide not to make a report to the police in any event. Numerous surveys show that the majority of sexual assaults never enter the criminal justice system because few victims report sexual assaults to the police.<sup>41</sup>

26.31 There are several reasons underlying some victims’ reluctance to disclose sexual assault or report sexual assaults to the police, including considerations related to: the relationship that they have with the perpetrator; fear of the perpetrator; how serious the victim perceives the assault to be; lack of confidence in the criminal justice system to assist; previous experiences with reporting; and notions of privacy, shame, trauma and stigma.

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38 See Ch 25.

39 WESNET—The Women’s Services Network, *Submission FV 217*, 30 June 2010.

40 Migrant Women’s Emergency Support Service trading as Immigrant Women’s Support Service, *Submission FV 61*, 1 June 2010.

41 See, eg. Australian Bureau of Statistics, *Sexual Assault in Australia: A Statistical Overview* (2004), 57; J Mouzos and T Makkai, *Women’s Experiences of Male Violence: Findings of the Australian Component of the International Violence Against Women Survey* (2004), 102.

26.32 During the Inquiry, stakeholders emphasised the shame and trauma surrounding sexual assault. For example, Hannah McGlade remarked that:

Rape is a severe, profound violation of the physical, emotional, psychological and spiritual self and the trauma of sexual assault and violence can ‘suppress’ sexual assault as a coping response. Women and children may be so harmed by sexual assault they are unable to even articulate the offence. Women and girls may also be well aware that the law does not respond sensitively to rape, and this fear is especially valid for Aboriginal women and girls.<sup>42</sup>

26.33 Where sexual assault occurs in a family violence context, there are additional factors associated with the nature and dynamics of family violence which mean victims may not report the assault to police. These factors may include, for example, an ongoing relationship between the victim and perpetrator; economic dependence and potential homelessness; the presence of children; and other avenues for redress such as civil protection orders.

26.34 While some barriers to reporting sexual assault are unique to the victim, others are heavily influenced by more general characteristics and factors including: the victim’s age; disability;<sup>43</sup> geographical location;<sup>44</sup> sexual orientation or gender identity;<sup>45</sup> and race or ethnicity.

26.35 For example, children as victims of sexual assault face specific barriers to disclosure, particularly in a family violence context. These include: fear of not being believed; ‘fear of family breakdown’; ‘a sense of ongoing responsibility’ for the stability of the family or safety of siblings and other family members; and fears for their own personal safety.<sup>46</sup>

42 H McGlade, *Submission FV 84*, 2 June 2010.

43 For further discussion see for example: S Murray and A Powell, *Sexual Assault and Adults with a Disability: Enabling Recognition, Disclosure and a Just Response* (2008), prepared for the Australian Centre for the Study of Sexual Assault; Melbourne Disability Discrimination Legal Service, *Beyond Belief, Beyond Justice: The Difficulties for Victims/Survivors with Disabilities when Reporting Sexual Assault and Seeking Justice: Final Report* (2003); J Keilty and G Connolly, ‘Making a Statement: An Exploratory Study of Barriers Facing Women with an Intellectual Disability When Making a Statement about Sexual Assault to Police’ (2001) 16(2) *Disability and Society* 273.

44 For further discussion, see for example: L Bartels, *Emerging Issues in Domestic/Family Violence Research* (2010), prepared for the Australian Institute of Criminology; D Parkinson, *Partner Rape and Rurality* (2008), prepared for the Australian Centre for the Study of Sexual Assault, 21; A Neame and M Hennan, *Responding to Sexual Assault in Rural Communities* (2004), prepared for the Australian Centre for the Study of Sexual Assault.

45 For further discussion, see for example: L Bartels, *Emerging Issues in Domestic/Family Violence Research* (2010), prepared for the Australian Institute of Criminology; W Leonard, A Mitchell, S Patel and C Fox, *Coming Forward: The Underreporting of Heterosexist Violence and Same Sex Partner Abuse in Victoria* (2008), prepared for the Australian Research Centre in Sex, Health and Society; B Morris, ‘Domestic Violence in Lesbian Relationships’ (2008) (2) *Domestic Violence Resource Centre Quarterly* 21; M Pitts, A Smith, A Mitchell and S Patel, *Private Lives: A Report on the Health and Wellbeing of GLBTI Australians* (2006), prepared for the Australian Research Centre in Sex, Health and Society.

46 A Neame and M Heenan, *What Lies Behind the Hidden Figure of Sexual Assault: Issues of Prevalence and Disclosure*, Australian Centre for the Study of Sexual Assault Briefing (September 2003). This was also emphasised in Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

26.36 Barriers faced by Aboriginal and Torres Strait Islander women may include:

- family and community pressure concerning speaking out about sexual assault, including a culture of blame being shifted to victims;
- feelings of guilt and shame as well as privacy concerns associated with not wanting issues publicly aired;
- the potential for retribution from the perpetrator and the perpetrator's family as well as the victim's own family and community;
- issues associated with police, including: lack of permanent police presence in some communities; past inappropriate police responses; lack of Aboriginal and Torres Strait Islander or female police officers; as well as fear of police attention in light of other matters such as outstanding arrest warrants;
- cultural and linguistic communication barriers; and
- systemic barriers such as lack of appropriate services.<sup>47</sup>

26.37 Women from CALD backgrounds also face a range of cultural and systemic barriers—based on language and other issues—including:

- limited knowledge of, or access to, culturally appropriate and sensitive avenues for reporting or support services;
- family and community pressures concerning disclosure of sexual assault or, alternatively, isolation where there is an absence of immediate or extended family and community support in Australia;
- cultural and linguistic communication barriers, such as the lack of information in diverse community languages or of professional interpreters; and
- fears about immigration status.<sup>48</sup>

26.38 The Immigrant Women's Support Service also emphasised that:

Women may also have a strong internal sense of responsibility to protect their family/community identity and reputation. There may also be cultural values and traditions that foster violence against women and children that remain unchallenged in CALD communities, and gender related roles that may result in restrictive behaviours, beliefs and institutional arrangements.<sup>49</sup>

47 These barriers were highlighted in consultations and submissions including: Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; K Hall, *Submission FV 113*, 8 June 2010; A Cossins, *Submission FV 112*, 9 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; H McGlade, *Submission FV 84*, 2 June 2010.

48 Migrant Women's Emergency Support Service trading as Immigrant Women's Support Service, *Submission FV 61*, 1 June 2010. See also A Neame and M Heenan, *What Lies Behind the Hidden Figure of Sexual Assault: Issues of Prevalence and Disclosure*, Australian Centre for the Study of Sexual Assault Briefing (September 2003).

49 Migrant Women's Emergency Support Service trading as Immigrant Women's Support Service, *Submission FV 61*, 1 June 2010.

26.39 Finally, McGlade pointed out that both Aboriginal and Torres Strait Islander and CALD women face common institutional and structural barriers, including discrimination in the form of sexism and racism which in turn contributes to women's reluctance to report sexual assault.<sup>50</sup>

### **Reporting to the police**

26.40 Where a victim recognises that a sexual assault has occurred and is willing to make a report, the next step in engaging with the criminal justice system about a sexual offence is to make a report to the police, or have the offence notified to the police in some way (for example through a parent, teacher, doctor or neighbour).<sup>51</sup>

26.41 Stakeholders emphasised that the initial response of the criminal justice system is vital, not only to ensuring that subsequent stages function effectively, but also to minimise the trauma of the process for complainants.<sup>52</sup> Consequently, where sexual assault is reported, the response of the police is vital to the complainant's decision to continue to pursue their complaint. As the VLRC observed:

How the police are perceived by people who report an assault and the quality and consistency of their investigative and decision-making practices will have a major impact on reporting and prosecution patterns.<sup>53</sup>

26.42 In light of this and the barriers to reporting outlined above, the function of police should include protecting and supporting victims.<sup>54</sup> The issue of specialised police responses and investigation as well as other aspects of victim support and liaison are discussed in more detail in Chapters 29 and 32.

### **The prosecution phase**

26.43 Determining whether to commence or continue prosecution of sexual assault offences is a significant decision point within the criminal justice process. The exercise of prosecutorial discretion is also one of the key points of attrition for sexual assault cases. Prosecutors play a key role as gatekeepers, 'determining which victims of crime have access to justice and which defendants will be processed through the criminal justice system'.<sup>55</sup>

26.44 Commonwealth, state and territory DPPs exercise considerable discretion in deciding whether to prosecute alleged offenders and how any such prosecution should proceed. This discretion is subject to prosecution policies or guidelines in each jurisdiction. DPPs are regularly subject to criticism about the exercise of their

50 H McGlade, *Submission FV 84*, 2 June 2010.

51 See discussion in National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 97.

52 For example, this was raised by P Easteal, *Submission FV 38*, 13 May 2010.

53 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 104.

54 See, eg, Queensland Police Service, *Reporting to Police* <[www.police.qld.gov.au/programs/crimePrevention/adultassault/report/](http://www.police.qld.gov.au/programs/crimePrevention/adultassault/report/)> at 21 January 2010.

55 D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), prepared for the Office of the Status of Women, 3.

discretion in sexual assault matters and the exercise of prosecutorial discretion has been characterised as ‘one of the most important but least understood aspects of the administration of criminal justice’.<sup>56</sup>

### The decision to prosecute

26.45 Prosecutorial decision making in sexual assault matters is influenced by a range of factors. Each Australian jurisdiction has adopted guidelines and policies which contain similar criteria for the exercise of the discretion to prosecute an alleged offender. While there is variation between policies, prosecutorial discretion is guided by two primary considerations: first, the sufficiency of the evidence and, secondly, the public interest.

26.46 The first consideration informing the decision is whether the evidence is sufficient to justify the commencement or continuation of a prosecution. There must be enough admissible, substantial and reliable evidence not only to support a *prima facie* case but also to provide a reasonable prospect of a conviction being secured.<sup>57</sup>

26.47 An evaluation as to whether there is a reasonable prospect of conviction requires an assessment of a number of factors including: the availability, competence, credibility and reliability of witnesses; the likely impression that the witnesses will make on the judge or jury; the admissibility of evidence such as a confession by the accused; and any lines of defence open to the accused.<sup>58</sup> Such an evaluation is also, at least in part, based on the prosecutor’s assessment of the likely views of judges and juries at trial. Consequently, ‘without prosecutions which test and redefine understanding of the boundaries of rape legislation, opportunities to clarify the law and improve the chance of future convictions are lost’.<sup>59</sup>

56 Ibid, 1.

57 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cls 2.4–2.5; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 4(2); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.1.3; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 4(i); Office of the Director of Public Prosecutions (SA), *Prosecution Policy*, 3; Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 24; Office of the Director of Public Prosecutions (Tas), *Prosecution Guidelines*; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.3; Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 2.1.

58 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cls 2.6–2.7; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 4(2); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cls 2.1.4–2.1.5; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 4(i); Office of the Director of Public Prosecutions (SA), *Prosecution Policy*, 3; Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 29; Office of the Director of Public Prosecutions (Tas), *Prosecution Guidelines*; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.4; Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 2.4.

59 M Heath, ‘Women and Criminal Law: Rape’ in P Easteal (ed) *Women and the Law in Australia* (2010) 88, 92. For discussion of the role of criminal justice officials in influencing victim choices in line with their assessments of the prospects of conviction see also W Kerstetter and B van Winkle, ‘Who Decides? A Study of the Complainant’s Decision to Prosecute in Rape Cases’ (1990) 17 *Criminal Justice and Behavior* 268.

26.48 Once the prosecutor is satisfied that the evidence is sufficient to justify the institution or continuation of a prosecution, the second key consideration is whether it is in the public interest to pursue the prosecution.<sup>60</sup> The factors which are taken into account in determining the public interest are multifaceted and non-exhaustive. These include: the seriousness of the alleged offence; mitigating or aggravating circumstances impacting upon the appropriateness of the prosecution; the age, mental state, physical health or vulnerability of the alleged offender or victim; the period of time elapsed since the offence; the background and prior convictions of the alleged offender; the attitude of the victim to the prosecution; the actual or potential harm occasioned by the alleged offence; the length and expense of a trial; and the necessity to maintain public confidence in the administration of justice.<sup>61</sup>

26.49 Guidelines also specify a number of factors that must not influence a decision to prosecute. These include: the race, religion, sex or beliefs of the alleged offender; personal feelings concerning the alleged offender or victim; possible political advantage to the government or a political group; or the possible personal or professional effect of the decision to prosecute on those making that decision.<sup>62</sup>

### **Prosecution of sexual offences**

26.50 In recognition of the fact that the exercise of prosecutorial discretion is one of the key points of attrition for sexual assault cases, considerable attention has been focused in recent years on the way in which sexual offences are prosecuted.<sup>63</sup> In

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60 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cl 2.8; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 4(3); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.1.6; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 4(ii); Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 23; Office of the Director of Public Prosecutions (SA), *Prosecution Policy*, 4; Office of the Director of Public Prosecutions (Tas), *Prosecution Guidelines*; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.5; Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 2.1.

61 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cl 2.9–2.10; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 4(3); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.1.10; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 4(ii); Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 31; Office of the Director of Public Prosecutions (SA), *Prosecution Policy*, 4; Office of the Director of Public Prosecutions (Tas), *Prosecution Guidelines*; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.5; Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 2.5.

62 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cl 2.13; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 4(i)–(v); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.1.12; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 4(iii); Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 33; Office of the Director of Public Prosecutions (SA), *Prosecution Policy*, 6; Office of the Director of Public Prosecutions (Tas), *Prosecution Guidelines*; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.7; Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 2.7.

63 See, eg, Community Development and Justice Standing Committee—Parliament of Western Australia, *Inquiry into the Prosecution of Assaults and Sexual Offences* (2008); Office of the Director of Public

particular, the study by Lievore in 2004 on the exercise of prosecutorial discretion in adult sexual assault cases across the Australian jurisdictions analysed 141 case files from five jurisdictions in which the primary charge was rape or the equivalent penetrative sexual assault offence. This involved 148 victims and 152 defendants. Overwhelmingly the victims in this study were women (99%).<sup>64</sup> Most had been sexually assaulted by someone known to them (76%) with 15% having been assaulted by a current partner, 15% by a family member, 11% by a former partner and 35% by another known person.<sup>65</sup>

26.51 Fifty-three of the cases in this study were withdrawn (38 prior to indictment; 15 after indictment). Almost half of the cases (24) were withdrawn because the victim did not wish to proceed, and in the remaining 29 cases the decision was based on prosecutorial assessment of the prospect of conviction and/or victim credibility.

26.52 There were significant differences in the circumstances of the sexual assault between the cases that were withdrawn and those that proceeded. In those that proceeded, the victim was more likely to have been injured, to have expressed non-consent either in words or through resistance, the assault was more severe in some way (for example, it involved a weapon), additional evidence was available, the defendant used force, the defendant was ‘non-Caucasian’,<sup>66</sup> and the defendant was a stranger.<sup>67</sup>

26.53 In terms of outcomes, 33% of cases were finalised by guilty plea (half of these pleas were entered after negotiations which resulted in the level of the charges or number of charges being reduced); and 29% of cases proceeded to trial (38% of which resulted in a guilty verdict).<sup>68</sup>

26.54 Importantly in the context of family violence, cases ‘involving strangers and other known defendants were more likely than cases involving intimate or family relationships to proceed through the criminal justice process and to end in conviction’.<sup>69</sup> Some of the other conclusions of the Lievore study are particularly relevant to cases involving sexual assault in a family violence context and to the range of evidence law and other issues discussed in Chapters 27 and 28.

There is ample empirical evidence, including the results of this study, that attrition of sexual assault cases at the prosecution stage is usually related to evidentiary matters, which are most complex in cases where the victim and the defendant are acquainted. These cases usually come down to word against word, with little or no corroborating evidence. The defence usually centres on consent or the defendant’s mistaken belief in

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Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005); D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), prepared for the Office of the Status of Women; Crime and Misconduct Commission (Qld), *Seeking Justice: An Inquiry into How Sexual Offences are Handled by the Queensland Criminal Justice System* (2003); G Samuels, *Review of the New South Wales Director of Public Prosecutions’ Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts* (2002).

<sup>64</sup> D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), prepared for the Office of the Status of Women, 25.

<sup>65</sup> Ibid, 28–29.

<sup>66</sup> ‘This finding should be considered in the light of the large proportions of Indigenous defendants in the Northern Territory and Western Australian samples’: Ibid, 33.

<sup>67</sup> Ibid, 32–33.

<sup>68</sup> Ibid, 37.

<sup>69</sup> Ibid.

consent, which is more likely to succeed if there has been prior consensual sex. Cases involving current or former partners are often discontinued due to victim withdrawals and insufficient prospects of conviction. It is understandable then that experienced prosecutors, who are mindful of the limits imposed by the substantive, evidence and procedure laws of sexual assault, would assess the prospects of conviction by considering prior relationship in combination with other factors, such as the strength of the evidence. At the same time, it is also clear that cultural assumptions about consensual sex impact on legal definitions of consent and the conduct of trials.<sup>70</sup>

26.55 As discussed, prosecutorial decision making in sexual assault matters is influenced by a range of factors, some of which are ‘extraneous to the legal elements of the case’.<sup>71</sup> It is said to be ‘unclear from current research what differences exist in prosecutorial decision-making processes for sexual assault occurring within a family violence context compared to those occurring outside of a family violence context’.<sup>72</sup> However, factors that may contribute to attrition of family-violence related sexual assault cases at the prosecutorial stage include:

- evidentiary matters, including in relation to corroboration and consent as well as witness evidence and credibility;
- socio-demographic characteristics of the victim and offender;
- the relationship between the victim and offender;
- cultural assumptions about issues such as consensual sex, responses to sexual assault as well as ‘typical’ psychological and emotional reactions to sexual assault;<sup>73</sup> and
- the views and preferences of victims.<sup>74</sup>

26.56 The availability of forensic evidence is another evidentiary matter of particular importance in influencing prosecutorial decision making as to the sufficiency of evidence in sexual assault cases.<sup>75</sup> This presents particular difficulties ‘in the context of

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70 Ibid, 49.

71 D Lievore, ‘Prosecutorial Decisions in Adult Sexual Assault Cases’ (2005) 291 *Trends and Issues in Crime and Criminal Justice* 1.

72 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

73 To a certain degree the stereotypes and myths surrounding sexual assault also influence the prosecution process, particularly decisions to discontinue: P Easteal, *Submission FV 38*, 13 May 2010.

74 D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), prepared for the Office of the Status of Women; Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010. See also Community Development and Justice Standing Committee–Parliament of Western Australia, *Inquiry into the Prosecution of Assaults and Sexual Offences* (2008); Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005); Crime and Misconduct Commission (Qld), *Seeking Justice: An Inquiry into How Sexual Offences are Handled by the Queensland Criminal Justice System* (2003); G Samuels, *Review of the New South Wales Director of Public Prosecutions’ Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts* (2002).

75 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010; P Easteal, *Submission FV 38*, 13 May 2010.

intimate sexual assaults [where] obtaining forensic evidence to strengthen an investigation, police brief or prosecution case is much less likely'.<sup>76</sup>

### Charge and fact bargaining

26.57 While the police make initial decisions about what charges are to be laid against a person, the prosecution also has the discretion to lay additional charges and amend the charges in a number of ways, including by reducing the number or the seriousness of the charges.<sup>77</sup>

26.58 The critical question in determining the appropriate charges generally involves an assessment of what charges the evidence can support. However, there may also be negotiation between the defence and the prosecution known as 'charge and fact bargaining' whereby the number and level of charges may be reduced in return for the defendant entering a guilty plea to some or all charges.<sup>78</sup> Such bargaining may also involve the prosecution agreeing to present a recommendation for sentence, including on the basis of an agreed summary of facts.

26.59 Lievore found that half of the guilty pleas in her study (33% of cases in her study were finalised this way) were the result of negotiations to reduce the level or number of the charges.<sup>79</sup> Interviews with Crown Prosecutors revealed a willingness to 'look for opportunities to negotiate charges rather than risk an acquittal'.<sup>80</sup>

26.60 While charge and fact bargaining may be criticised as placing the interests of expediency over those of justice, these processes can also be seen as vital to the administration of the legal system:

Charge negotiations are a legitimate means of resolving criminal litigation. The process is widely viewed as fundamental to the efficient operation of an under-resourced system and comprises a relatively informal process that incorporates both adversarial and cooperative aspects. In a situation of uncertainty, the prosecution and defence exchange risks and benefits to achieve mutually satisfactory goals.

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76 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

77 Charge and fact bargaining are incorporated into prosecutorial guidelines and policies in many Australian jurisdictions. See: Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cl 6.14–6.21; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 20; Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 15; Office of the Director of Public Prosecutions (SA), *Prosecution Policy Guideline No 2*; Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.6; Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 73–81; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.13; Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 6.

78 See discussion in D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), prepared for the Office of the Status of Women, 9–10; G Samuels, *Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts* (2002).

79 D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), prepared for the Office of the Status of Women, 1.

80 Ibid, 2.

Prosecutors avoid a costly trial and the risk of an acquittal, while the defendant avoids the risk of additional charges or facing a maximum sentence.<sup>81</sup>

26.61 Some victims express dissatisfaction about charge negotiation and fact bargaining, often because they are not consulted about the process or the outcome. As discussed in more detail below, while it may be desirable for the prosecution to seek the views of a complainant before charge or fact bargaining, this is not always required and, in some jurisdictions, guidelines expressly state that the victim has no right of veto in the charge negotiation process.<sup>82</sup> An example of how charge bargaining may be perceived by victims was provided, in the course of the present Inquiry, by a women's legal service coordinator

[There was] one case where [a young] Indigenous ... woman went through the whole process of providing evidence against her ex-partner for assaulting her. There were eight charges pending and each involved a serious domestic violence incident. The matter was resolved by the prosecution doing a deal with the defence. They agreed to dropping five charges and three were downgraded so that the ex-partner ended up with only a four month suspended sentence. The victim was not consulted and neither were we as the victim's advocate in the matter. To have something like that happen sends a negative message not only to that particular woman but to all other women. Essentially, although the law may in essence appear to be colour blind, in practice it is not always colour blind. Before an Indigenous or Culturally and Linguistically Diverse woman can even get her matter to trial she needs to convince the police to proceed with her matter and then she needs to navigate the complicated pre-trial processes. This is all before the matter proceeds to trial where the woman may have to counter issues/stereotypes that intersect between racism and sexism. On top of this, their access to justice is also hampered by the lack of suitable interpreters and by the general lack of cultural sensitivity and awareness of professionals within the system.<sup>83</sup>

### **The views of victims**

26.62 There is some variation across jurisdictions in relation to the extent to which regard must be had to the wishes of victims in instituting or continuing the prosecution of an alleged offender, or in charge and fact bargaining.

26.63 As outlined above, prosecutorial discretion is guided by two primary considerations: first, the sufficiency of the evidence and, secondly, the public interest.<sup>84</sup> The guidelines in each jurisdiction stipulate that one of the factors that may be relevant in determining whether the public interest requires a prosecution includes the attitude

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81 Ibid, 9.

82 See G Samuels, *Review of the New South Wales Director of Public Prosecutions' Policy and Guidelines for Charge Bargaining and Tendering of Agreed Facts* (2002); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.6.6. Note, the code outlined in Amnesty International, *Setting the Standard: International Good Practice to Inform an Australian National Plan of Action to Eliminate Violence Against Women* (2008), 52 recommends that plea bargains be recorded and justified and that victims be consulted prior to any plea reduction.

83 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers*.

84 The Commonwealth guidelines specify that consultation will occur in relation to public interest, rather than evidentiary decisions, a distinction emphasised by the Commonwealth DPP. Commonwealth Director of Public Prosecutions, *Submission FV 76*, 2 June 2010.

of the alleged victim to a prosecution.<sup>85</sup> Most jurisdictions have additional guidelines stipulating requirements to engage victims in decision-making processes. For example, the Commonwealth guidelines state that the views of victims may be taken into account where they are available, and where it is appropriate in determining whether it is in the public interest to commence or discontinue a prosecution, agree to a charge negotiation or decline to proceed with a prosecution after committal.<sup>86</sup>

26.64 The NSW guidelines state that the victim must be advised and consulted whenever the DPP is considering whether or not to discontinue a prosecution. The victim should also be consulted where the DPP is considering whether to reduce a charge in scope or severity, where charge negotiations are undertaken, or where a statement of agreed facts is being prepared. The views of the victim about the acceptance of a plea of guilty and the contents of a statement of agreed facts will be taken into account before final decisions are made but those views are not alone determinative.<sup>87</sup>

26.65 The Victorian legislation and guidelines state that the DPP is obliged to have regard to the need to ensure that the prosecutorial system gives appropriate consideration to the concerns of the victims of crime.<sup>88</sup> In exercising the power to discontinue a prosecution, the views of the victim or, where appropriate, the relatives of the victim are sought. Their views are taken into account but are not determinative.<sup>89</sup>

#### ***Specific provisions in relation to sexual assault***

26.66 DPP policies and guidelines in many jurisdictions also contain specific provisions in relation to victims of sexual assault.<sup>90</sup>

26.67 Guidelines in most jurisdictions dictate that careful consideration should be given to any request by a victim that proceedings be discontinued, particularly in sexual assault matters.<sup>91</sup> For example, both the NSW and Western Australian

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85 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cl 2.10(o); Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cls 4(3.20); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.1.10(n); Office of the Director of Public Prosecutions (Qld), *Director's Guidelines*, cl 4(ii)(l); Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 31(k); Office of the Director of Public Prosecutions (SA), *Prosecution Policy*, cl 5(o); Office of the Director of Public Prosecutions (Tas), *Prosecution Guidelines*; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.5(q); Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 2.5(21).

86 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cls 4.6, 6.18(l), 6.23. See also cl 5.3.

87 See Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cls 7, 9, 19, 20.

88 Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines; Public Prosecutions Act 1994* (Vic) ss 24(c), 36(3), 38(3).

89 Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cls 2.3.7, 7.1.1.

90 Some jurisdictions have also established specialist sexual offence units within the DPP, such as the Specialist Sexual Offences Unit established within the Victorian Office of Public Prosecutions.

91 Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 19; Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 128. Other jurisdictions include similar clauses in relation to consideration of requests by victims that proceedings be discontinued, for example, Office of the Director of Public Prosecutions (Qld), *Director's*

guidelines provide that requests by victims of sexual offences to discontinue proceedings, where freely made, should be accorded significant weight. The guidelines note, however, that the expressed wishes of victims may not coincide with the general public interest. In such cases, particularly where there is other evidence implicating the accused person, a history of similar offending, or where the gravity of the alleged offence requires it, the general public interest in prosecution must prevail.<sup>92</sup>

26.68 Many of the cases in the Lievore study were withdrawn because the victim did not wish to proceed. Importantly, the files indicated that ‘the prosecutors believed that the victims who chose to withdraw from prosecution were telling the truth’.<sup>93</sup> There is a range of reasons why a victim of sexual assault committed in a family violence context may request a matter be discontinued, including:

- fear of the defendant;
- ongoing relationship with, or attachment to, the defendant, including where children are involved;
- family or community pressure; and
- trauma or other issues associated with the trial process, including the impact of giving evidence and often lengthy delays.<sup>94</sup>

26.69 The Victorian guidelines provide that in the great majority of cases involving allegations of sexual offences, the public interest will strongly suggest that the prosecution should proceed.<sup>95</sup> However, the guidelines also specify that careful attention must be given to the public interest test in ‘boyfriend/girlfriend’ cases involving sexual offences.<sup>96</sup> In these cases, the guidelines note that, although the evidence indicates that ‘an offence has technically been committed’, the objective circumstances of the offence, in combination with the personal circumstances of the complainant and offender, do not satisfy the ‘public interest test’.<sup>97</sup>

26.70 The Queensland guidelines provide that, where there is sufficient reliable evidence to warrant a prosecution, there will seldom be any doubt that the prosecution is in the public interest.<sup>98</sup>

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92 Guidelines, cl 20; Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 11.10; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 11.

93 Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 19; Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 128.

94 D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), prepared for the Office of the Status of Women, 30.

95 These factors were emphasised in *Ibid*, 30 as well as submissions such as Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010 and P Easteal, *Submission FV 38*, 13 May 2010. See also: Z Morrison, ‘What is the Outcome of Reporting Rape to the Police?’ (2008) (17) *Australian Centre for the Study of Sexual Assault Newsletter* 4.

96 Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.9.1.

97 *Ibid*, cl 2.9.2.

98 *Ibid*. The guideline also provides a list of factors to which consideration should be given when deciding whether prosecution is in the public interest, which relate to the subjective features of the complainant and the alleged offender and the nature of their relationship.

99 Office of the Director of Public Prosecutions (Qld), *Director’s Guidelines*, cl 5(iv).

26.71 The Northern Territory guidelines also note that prosecutions that involve offences committed in the context of family violence, including sexual assault, require special attention.<sup>99</sup> The guidelines cover the procedures which must be followed where a victim indicates that they do not wish to give evidence,<sup>100</sup> and note that suitable prosecutions should proceed without the evidence of an unwilling victim.<sup>101</sup>

26.72 DPP policies and guidelines across jurisdictions also include a range of other provisions with respect to sexual offences, including child sex offences and the prosecution of sexual assault.

### Information and assistance

26.73 It is clear that the most positive experiences of the criminal justice system for victims arise when they are ‘treated respectfully ... listened to, believed and taken seriously’ as well as being provided with timely and accurate information.<sup>102</sup> In addition it is said that ‘ensuring the complainant is well informed and well supported can improve not only their wellbeing and experience as a witness but their capacity to testify confidently’.<sup>103</sup> Accordingly, Australian jurisdictions all recognise that victims of crime are entitled to receive information about the prosecution of the alleged offender. In each state and territory support and liaison services are in place to keep victims and witnesses informed and to assist them with navigating the criminal justice process.

26.74 The Commonwealth Victims of Crime Policy provides that victims should, on request, be kept informed in a timely manner about the progress of a prosecution.<sup>104</sup> Where a victim is required to give evidence, any inconvenience to the victim should be minimised as far as possible and victims should be advised about their role as a witness.<sup>105</sup> The Commonwealth DPP has a Witness Services Officer and is piloting a Witness Assistance Service to provide formalised assistance to witnesses and victims.

26.75 New South Wales guidelines provide that victims, whether witnesses or not, should have explained to them, at an early stage of proceedings, the prosecution process and their role in it.<sup>106</sup> The NSW Charter of Victims’ Rights, contained within the *Victims’ Rights Act 1996* (NSW), provides for numerous safeguards to be afforded to victims. Victims are to be informed about the investigation of the alleged crime, the prosecution of the accused, the outcome of any bail applications, and their role as a

99 Notably, the NT Guidelines include specific guidelines in relation to domestic violence, the role of Aboriginal and Torres Strait Islander customary law and the prevalence of violence ‘by Aboriginal men against their Aboriginal female partners or ex-partners’: Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 20.

100 Ibid, cl 21.

101 Ibid, cl 21.3.

102 D Lievore, *No Longer Silent: A Study of Women’s Help-Seeking Decisions and Service Responses to Sexual Assault* (2005), vi, 42.

103 M Heath, ‘Women and Criminal Law: Rape’ in P Easteal (ed) *Women and the Law in Australia* (2010) 88, 107.

104 Office of the Director of Public Prosecutions, *Victims of Crime Policy* (2010), cls 4–6.

105 Ibid, cl 5.

106 Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 19.

witness in the trial.<sup>107</sup> Although a victim is entitled to make a formal complaint if the Charter is not complied with, non-compliance does not give victims any civil cause of action or legal right.<sup>108</sup>

26.76 The NSW DPP is required to seek the services of the Witness Assistance Service as early as possible in cases involving sexual assault, domestic violence or child victims and witnesses. The Service can assist with providing information, identifying special needs of victims and witnesses, referring victims for counselling and support, providing court preparation and coordinating court support.<sup>109</sup>

26.77 In 2006, the Victorian Government passed the *Victims' Charter Act 2006* (Vic), which sets out principles governing how participants in the criminal justice system, including the DPP, should respond to victims of crime.<sup>110</sup> The Charter principles set out the rights of the victim to be informed of the progress of any investigation, prosecution or bail application involving the alleged offender. In addition, the Charter provides that victims should be provided with information about the court process, their role as a witness and their entitlements to support services and the protection of their personal information.<sup>111</sup> While the Act does not create legal rights or give rise to any civil cause of action, victims can complain to the DPP if the Charter principles have not been upheld.<sup>112</sup>

26.78 The Victorian DPP also has a Witness Assistance Service which is available to all prosecution witnesses and victims of crime who are involved in cases handled by the DPP. This service provides information and support including written guides and is staffed by professionals experienced in witness and victim support. The role of the service is to ensure that witnesses have been made aware of their rights and the processes they are likely to experience, and to ensure they are kept aware of the progress of their case.<sup>113</sup>

#### ***Consultation Paper***

26.79 In the Consultation Paper the Commissions acknowledged that it may be possible, and desirable, to reduce attrition rates at the prosecution stage by providing additional support and information to victims. As a result, the Commissions proposed that the policies and guidelines of DPPs in dealing with sexual assault cases should:

- facilitate the referral of victims and witnesses to appropriate legal and support services;

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107 *Victims' Rights Act 1996* (NSW) s 6.

108 Ibid s 8.

109 Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 19.

110 Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 7.2.1.

111 *Victims' Charter Act 2006* (Vic) ss 6–10. The *Victims of Crime Assistance Act 2009* (Qld) provides a similar declaration of nine fundamental principles that the criminal justice system and victim support agencies must follow when responding to victims of crime.

112 Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 7.2.8; *Victims' Charter Act 2006* (Vic) ss 20–22.

113 Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 7.1.2. There are similar services in other states and territories, for example the Queensland DPP refers victims directly to Victim Assist Queensland.

- require consultation with victims in relation to prosecutorial decisions;
- require and facilitate the provision of information and assistance to victims about legal and court processes and the status of proceedings; and
- ensure that necessary protection and intervention orders are sought in all relevant circumstances.<sup>114</sup>

26.80 The Commissions also asked what further prosecutorial guidelines, policies or other measures should be taken to reduce the attrition of sexual assault cases, including where committed in a family violence context, during the prosecution phase.<sup>115</sup>

### ***Submissions and consultations***

26.81 A majority of stakeholders who addressed these issues supported additional measures to reduce attrition and trauma to complainants during the prosecution phase, and emphasised the importance of ‘relevant and timely support for victims and witnesses’.<sup>116</sup>

26.82 Stakeholders proposed a range of measures to reduce the attrition of sexual assault cases, including those committed in a family violence context, during the prosecution phase. Primarily these concerned: victim information and support; integrated responses;<sup>117</sup> education, training and awareness raising;<sup>118</sup> and specialisation.<sup>119</sup> In many instances, the measures suggested are also discussed in a general sense in other parts of this Report.<sup>120</sup> A more detailed examination of some of these issues in the sexual assault context appears below.

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114 Consultation Paper, Proposal 17–2.

115 Ibid, Questions 17–6 and 17–7.

116 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010. This was also supported by Public Defenders Office NSW, *Submission FV 221*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 38*, 13 May 2010.

117 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

118 Women’s Legal Service Brisbane, *Submission FV 223*, 2 July 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010; P Easteal, *Submission FV 38*, 13 May 2010.

119 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010 and Legal Aid NSW, *Submission FV 219*, 1 July 2010. For similar recommendations see also D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), prepared for the Office of the Status of Women, 53.

120 See Chs 29–32.

### ***Provision of additional information and support***

26.83 Numerous stakeholders expressed support for DPP guidelines requiring the provision of additional information and support to victims and witnesses.<sup>121</sup> As submitted by Women's Legal Services NSW:

the availability of clear and consistent advice about the process and any protective provisions available and general information about investigation and trial processes would provide complainants with a greater degree of support and security to participate.<sup>122</sup>

26.84 In particular, some stakeholders proposed that guidelines should require information to be given about claiming the privilege for sexual assault counselling communications.<sup>123</sup> Many submissions also emphasised the importance of ensuring that victims and witnesses are aware of the protective provisions available when giving evidence in criminal proceedings.<sup>124</sup>

### ***Consultation and engagement with victims***

26.85 Stakeholders expressed a consistent view that victims and witnesses would benefit enormously from assistance in navigating the criminal process—in effect, having someone 'walk with them through the system'.<sup>125</sup>

26.86 While recognising resource constraints, stakeholders emphasised the importance of 'consistency of lawyers throughout the process, early assignment of briefs to allow adequate preparation'<sup>126</sup> and the need for prosecutors to establish a relationship, or at a minimum, regular communication with victims in the lead up to the hearing.<sup>127</sup>

26.87 Some stakeholders also highlighted the benefits of special victim and witness support, liaison and advocacy services located within ODPPs.<sup>128</sup>

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121 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

122 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

123 Ibid; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

124 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

125 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

126 J Stubbs, *Submission FV 186*, 25 June 2010. Also supported by Women's Legal Services NSW, *Submission FV 182*, 25 June 2010 and Legal Aid NSW, *Submission FV 219*, 1 July 2010.

127 Confidential, *Submission FV 164*, 25 June 2010.

128 For example, Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

26.88 With respect to the proposal to require consultation with victims about key prosecutorial decisions, NASASV noted that any such consultation

should be with a view to achieving the highest charge possible and supporting and encouraging the victim to continue with the charges. By this we do not in any way endorse any kind of pressure on the victim, but it has been observed that often options are presented in a cautious and ‘neutral’ way that does not accurately represent the strength of the complainant’s case and chances of success.<sup>129</sup>

26.89 This was echoed in a confidential submission from a women’s legal service which observed that, in sexual assault cases, prosecutors often ‘adopt a neutral manner towards the victim which can be extremely isolating and discouraging’.<sup>130</sup>

26.90 A number of stakeholders reiterated that the decision by victims to withdraw from prosecution is one of the key issues impacting upon attrition of sexual assault matter. AIFS submitted that

it is likely that further research is required here to establish what support women require to prevent them from withdrawing charges against current or former partners, without diminishing the choice and autonomy of the woman.<sup>131</sup>

26.91 Further, in order to balance the need to avoid victims being pressured into withdrawing with a victim’s right to decide to do so, stakeholders emphasised the importance of ascertaining the victim’s wishes without the defendant being present and the role played by victim impact statements in conveying the victim’s expressed desire to withdraw.<sup>132</sup>

26.92 Finally, several stakeholders in the Northern Territory expressed the view that the Northern Territory Emergency Response, and subsequent increase in police presence and attention on prosecution of sexual assault, had a tendency to impact on the exercise of prosecutorial discretion.

#### ***Sensitive and appropriate services and support***

26.93 Aboriginal and Torres Strait Islander individuals and organisations emphasised that in engaging with Aboriginal and Torres Strait Islander women

there needs to be regular, ongoing and culturally appropriate support throughout the whole process from the beginning of the investigation phase to the end of the prosecution phase. There is enormous pressure placed on Aboriginal women who report family violence by her partner/ex-partner, his family and sometimes their community. In cases of sexual violence, where the legal stakes and consequences can be even higher, that pressure can be unbearable.<sup>133</sup>

26.94 Stakeholders emphasised the need for training and education in relation to the often unique experiences and needs of Aboriginal and Torres Strait Islander victims

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129 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

130 Confidential, *Submission FV 164*, 25 June 2010.

131 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

132 For example, Domestic Violence Legal Service, *Consultation*, Darwin, 26 May 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council, *Consultation*, Alice Springs, 28 May 2010.

133 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010.

and witnesses as well as those from CALD backgrounds.<sup>134</sup> Stakeholders noted that any referral of victims and witnesses to ‘health, legal, counselling and other support services should be to culturally appropriate services where available’.<sup>135</sup> The Immigrant Women’s Support Service highlighted the need for service providers to provide ‘relevant information in appropriate community languages’ as well as the need for professional interpreters.<sup>136</sup>

26.95 Stakeholders noted the importance of Aboriginal and Torres Strait Islander-specific liaison and support positions throughout the legal system, including within the police, courts and service providers, such as witness assistance services.<sup>137</sup> The Aboriginal Family Violence and Prevention Legal Service Victoria referred to the need to delineate between victim and defendant support and advice services. The submission emphasised that such a distinction is necessary to ensure ‘confidentiality and to avoid perceived conflicts of interest’, in particular because ‘victims may mistrust ... Aboriginal and Torres Strait Islander staff ... whose role is to support both victims and offenders’.<sup>138</sup>

26.96 Finally, individuals and organisations representing the gay, lesbian, bisexual, transgender and intersex (GLBTI) community emphasised the need for sensitive and appropriate service provision recognising and catering for gender and sexuality diverse individuals.<sup>139</sup>

#### *Commissions’ views*

26.97 The fact that the prosecution phase is a significant attrition point within the criminal justice process is emphasised in the available data. It is apparent that many cases are withdrawn because of the attitude of the victim.<sup>140</sup> While some of these cases would undoubtedly also have encountered evidentiary issues—and hence may have been subject to ‘subtle’ encouragement to withdraw—other factors, such as feared re-

134 Ibid; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

135 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010. Also supported by Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Immigrant Women’s Support Service FV 61, Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010; P Easteal, *Submission FV 38*, 13 May 2010.

136 Migrant Women’s Emergency Support Service trading as Immigrant Women’s Support Service, *Submission FV 61*, 1 June 2010. Support for interpreters was also expressed by a range of other stakeholders including Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

137 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; H McGlade, *Submission FV 84*, 2 June 2010.

138 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010. Also H McGlade, *Submission FV 84*, 2 June 2010 in relation to the need for a separate Indigenous legal service.

139 Same Sex Domestic Violence Interagency, *Submission FV 116*, 10 June 2010.

140 For example, in Lievore’s study, almost half the cases were withdrawn because the victim did not wish to proceed. D Lievore, *Prosecutorial Decisions in Adult Sexual Assault Cases: An Australian Study* (2004), prepared for the Office of the Status of Women.

victimisation from the defendant or the court process, family or community pressures or an ongoing relationship with the defendant, often contribute to victims' decisions to withdraw. This suggests that it may be possible—and desirable—to reduce attrition rates at the prosecution stage by providing additional support and information to victims. This is recognised in the Commissions' recommendation with respect to prosecutorial guidelines and policies below.

26.98 The data also appear to indicate that substantial numbers of sexual assault cases are discontinued by prosecutors—both before and after indictment. As discussed, while it may be difficult to assess the basis for prosecutorial decisions, it is evident that factors such as evidentiary matters, the characteristics of the victim and offender as well as cultural assumptions influence prosecutorial decision making in sexual assault cases. This suggests that measures to ensure that prosecutorial discretion is exercised taking into account the dynamics and issues associated with sexual assault in a family violence context may assist in reducing attrition in these cases. Consequently, in addition to recommending amendments to prosecutorial guidelines and policies, the Commissions recommend a range of other measures aimed at addressing this issue and reducing attrition of sexual assault matters.

26.99 The Commissions have identified best practice in the policies and guidelines of DPPs in dealing with sexual assault cases and have incorporated these into the recommendation below. To the extent that guidelines and policies in some jurisdictions already include those matters recommended, the Commissions suggest DPPs oversee the provision of ongoing training in relation to those existing obligations and processes as well as monitoring compliance.

26.100 Building upon this, case management or compliance monitoring mechanisms may be an important component of ensuring adherence to prosecutorial guidelines. For example, a joint Queensland Police Service and DPP Working Party has been created to examine individual failed sexual offence matters, in order to determine why matters fail and identify systemic issues contributing to such failures.<sup>141</sup>

26.101 The Commissions are also of the view that the establishment of special victim and witness support, liaison and advocacy services within DPPs is desirable.

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141 The Failed Sexual Offence Prosecutions Working Party was established in response to recommendations made in: Crime and Misconduct Commission (Qld), *Seeking Justice: An Inquiry into How Sexual Offences are Handled by the Queensland Criminal Justice System* (2003). The Working Party reports to the joint Queensland Police Service and ODPP Seeking Justice Committee.

**Recommendation 26–2** Commonwealth, state and territory Directors of Public Prosecution should ensure that prosecutorial guidelines and policies:

- (a) facilitate the referral of victims and witnesses of sexual assault to culturally appropriate welfare, health, counselling and other support services at the earliest opportunity;
- (b) require consultation with victims of sexual assault about key prosecutorial decisions, including whether to prosecute, discontinue a prosecution, or agree to a charge or fact bargain;
- (c) require the ongoing provision of information to victims of sexual assault about the status and progress of proceedings;
- (d) facilitate the provision of information and assistance to victims and witnesses of sexual assault in understanding the legal and court process;
- (e) facilitate the provision of information and assistance to victims and witnesses of sexual assault in relation to the protective provisions available to sexual assault complainants when giving evidence in criminal proceedings;
- (f) ensure that family violence protection orders or stalking intervention orders are sought in all relevant circumstances; and
- (g) require referral of victims and witnesses of sexual assault to providers of legal advice on related areas, such as family law, victims' compensation and the sexual assault communications privilege.

### **Additional measures to reduce attrition**

26.102 Cultural and societal change is important to address high rates of attrition in sexual assault cases—along with other aspects of the ‘implementation gap’ identified and discussed in Chapter 24. In addition to amendments to prosecutorial guidelines and policies, a range of other measures could be implemented to reduce attrition and trauma to complainants during the prosecution phase.

26.103 Several such measures are discussed in other parts of this Report, for example:

- increased integration and cooperation between prosecution agencies, victim support services, and forensic services;<sup>142</sup> and
- specialisation by relevant stakeholders, including specialist courts, prosecutors and judges, as well as the introduction or further utilisation of appropriate case management methods.<sup>143</sup>

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<sup>142</sup> See Chs 29–30.

<sup>143</sup> See Ch 32.

26.104 The importance of education and training is emphasised throughout this Report. In light of the specific dynamics of sexual assault, particularly in a family violence context, and in order to ameliorate some of the issues which have a particular impact on victims, the Commissions also recognise the need for training and education of those who engage with victims of sexual assault.

26.105 Training and education to be provided for police, the legal profession (particularly prosecutors and defence lawyers), judicial officers and victim referral and support services. The Commissions suggest that such training should encompass areas such as:

- myths and stereotypes surrounding sexual assault;
- understanding victims and the dynamics of sexual assault;
- the emotional, psychological and social impact of sexual assault on victims;
- barriers to recognising and reporting sexual assault;
- legislation and case law applicable in sexual assault cases;
- procedural and substantive provisions, rules and processes, for example in relation to the availability of special and protective measures in giving evidence; and
- the different experiences and needs of particular marginalised victims, such as people with a cognitive impairment, Indigenous people and those from CALD and GLBTI communities.

26.106 A range of bodies should be involved in providing this training and education, including the Australian and state and territory governments, legal professional organisations, judicial education bodies,<sup>144</sup> and relevant service delivery organisations.

26.107 This recommendation is consistent with the recommendation in *Time for Action* for the development and implementation of a ‘national education and professional development framework’ in order to ensure that judicial officers, law enforcement personnel and other legal professionals have appropriate knowledge and expertise. *Time for Action* emphasised the need for a framework that recognises, and is developed in accordance with, the specific roles of these key actors and that is ‘informed by research on the social context ... emphasises the diversity of experiences

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<sup>144</sup> For example, the National Judicial College of Australia offers a variety of education and training programs for all Australian judicial officers, which have included programs in relation to child witnesses in sexual assault matters. The DPP NSW, the Judicial Commission of NSW and the Judicial College of Victoria have developed comprehensive training, materials and curricula for judicial officers in relation to sexual assault amongst Australian jurisdictions. See, eg, Judicial College of Victoria, *Sexual Assault Manual: Investigation, Prosecution and Sentencing in Victoria* (2007).

and needs of victims ... and enhances understanding of the intent and operation of relevant legislation'.<sup>145</sup>

26.108 Further, more community education in relation to sexual assault and, in particular, sexual assault committed in a family violence context, is desirable. Such education should focus on dispelling the myths and stereotypes surrounding sexual assault, the availability of avenues for reporting sexual assault, and support services for victims.<sup>146</sup>

26.109 Finally, the Commissions emphasise the need for prosecution of sexual assault to occur in the context of a legal system which is alive to cultural and linguistic diversity, and the vital importance of culturally appropriate service provision. In particular, the Commissions strongly suggest:

- providing cultural awareness education and training for police, prosecutors, the legal profession, judicial officers, and victim referral and support services;
- prioritising the provision of, and access to, culturally appropriate victim support services, such as legal advice, counselling and other support services;
- ensuring the provision of professional translating and interpreting services where required and/or requested; and
- introducing or re-introducing Indigenous-specific victim liaison, support and advocacy positions throughout the legal system, including within the police, the courts and service providers.

26.110 The Commissions emphasise that Indigenous and CALD people must be given the opportunity to inform discussion surrounding which process and support mechanisms are most likely to assist victims of sexual assault from those communities.

**Recommendation 26–3** Federal, state and territory governments and relevant educational, professional and service delivery bodies should ensure ongoing and consistent education and training for judicial officers, lawyers, prosecutors, police and victim support services in relation to the substantive law and the nature and dynamics of sexual assault as a form of family violence, including its social and cultural contexts.

## Giving evidence at committals

26.111 Before an adult charged with an indictable sexual offence can be sent for trial, a committal hearing may be held.<sup>147</sup> Committal hearings or proceedings are a

145 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 121.

146 *Time for Action* recommended a range of measures to enhance community awareness and understanding of sexual assault, including in the family violence context: see *Ibid* 50–51.

147 That is, unless an ex-officio indictment is presented.

preliminary examination of the evidence by a judicial officer. Where the judicial officer finds there is sufficient evidence to support a conviction, the accused is committed to stand trial in a higher court.

26.112 At the committal stage, the defendant may apply to have witnesses produced for cross-examination. In many cases a committal hearing will be determined on the basis of documentary evidence alone, which is referred to as a ‘paper’ or ‘hand-up’ committal.<sup>148</sup>

26.113 The purposes of committal proceedings include ensuring the defendant knows the case against him or her and that a trial is justified.<sup>149</sup> The process has also come to provide an opportunity for the parties to: test evidence; filter out weak cases; refute evidence; identify early pleas; clarify issues before trial; and refine charges.<sup>150</sup>

26.114 Four key issues for complainants in sexual offence proceedings have been identified as arising from the committal process:

The victim is required to give evidence not once but twice and be subject to cross-examination at both committal and trial, exacerbating the stress of the court proceedings.

Cross-examination of complainants at committal is often more rigorous and intimidating because there is no jury present.

The experience of cross-examination at committal often leads complainants to seek to have the proceedings discontinued.

The final disposition of the proceeding is delayed.<sup>151</sup>

26.115 All state and territory jurisdictions place restrictions on the right to cross-examine witnesses at committal hearings in sexual offence proceedings.<sup>152</sup> These restrictions differ depending on whether the witness is a child, cognitively impaired or an adult complainant.

26.116 For example, in NSW, a complainant in a sexual offence who has a cognitive impairment, was under 16 years at the time of the alleged acts, or is under the age of 18 years at the time of the trial, cannot be directed to attend committal proceedings.<sup>153</sup> In any committal proceedings in which the accused person is charged with a sexual offence, the magistrate may not direct the attendance of an adult victim unless satisfied

148 For example, in NSW, committal proceedings for all indictable offences proceed by way of tendering the written statements of adult prosecution witnesses, unless the magistrate directs the witness to attend the committal hearing for the purposes of cross-examination: *Criminal Procedure Act 1986* (NSW) s 91.

149 See, eg, J Willis and D Brereton, *The Committal in Australia* (1990); *Barton v The Queen* (1980) 147 CLR 75, 99; *Grassby v The Queen* (1989) 168 CLR 1, 15.

150 Department of Justice and Attorney-General (Qld), *Review of the Civil and Criminal Justice System in Queensland* (2008), 162.

151 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 120.

152 *Criminal Procedure Act 1986* (NSW) s 91–93; *Criminal Procedure Act 2009* (Vic) ss 123–124; *Evidence Act 1977* (Qld) ss 21AG, 21AI; *Summary Procedure Act 1921* (SA) s 106(3); *Magistrates Court Act 1930* (ACT) s 90AB; *Justices Act 1928* (NT) s 105AA. Western Australia and Tasmania have effectively abolished committal hearings and committal to the higher court takes place administratively.

153 *Criminal Procedure Act 1986* (NSW) s 91(7A)–(8).

that there are ‘special reasons’ why the victim should ‘in the interests of justice’ attend to give oral evidence.<sup>154</sup>

26.117 Similarly, in Victoria, leave to cross-examine in a committal hearing for a sexual offence will not be granted where the complainant is a child or person with a cognitive impairment and they made a written or recorded statement which was served in the hand-up brief. Other witnesses, including adult complainants of sexual assault, may only be cross-examined with leave of the court. Before leave may be granted, the defence must identify the issue on which they want the witness to be cross-examined and provide a reason why the evidence of the witness is relevant to that issue. The court must then be satisfied of those matters and that the cross-examination of the witness on that issue is justified having regard to a list of factors.<sup>155</sup> Special mentions are held for this purpose.

26.118 Some states and territories prohibit child complainants in sexual offence proceedings from being required to attend or be cross-examined at committals,<sup>156</sup> while in other states, child witnesses may be cross-examined with the leave of a judicial officer in prescribed circumstances.<sup>157</sup>

26.119 In the Consultation Paper, the Commissions proposed that state and territory legislation should prohibit any complainant in sexual assault proceedings from being required to attend to give evidence at committal proceedings.<sup>158</sup> Alternatively, child complainants should not be required to attend committal proceedings and, for adult complainants, the court should be satisfied that there are special reasons for the complainant to attend.<sup>159</sup>

### ***Submissions and consultations***

26.120 Stakeholders generally agreed that children or adult complainants in sexual offence proceedings should not be required to attend, or be cross-examined at, committal hearings.<sup>160</sup>

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154 Ibid ss 93, 94.

155 *Criminal Procedure Act 2009* (Vic) ss 123–124.

156 *Criminal Procedure Act 1986* (NSW) s 91(8); *Criminal Procedure Act 2009* (Vic) s 123; *Magistrates Court Act 1930* (ACT) s 90AB; *Justices Act 1928* (NT) s 105AA.

157 *Evidence Act 1977* (Qld) ss 21AG(4), for example, allows cross-examination of a child witness where: the questioning relates to matters that could not reasonably have been anticipated before the committal; and the interests of justice cannot adequately be satisfied by leaving cross-examination to the trial. *Summary Procedure Act 1921* (SA) s 106(3) provides that leave to call a child under the age of 12 years for oral examination must not be granted unless the court is satisfied that the interests of justice cannot be adequately served except by doing so.

158 Consultation Paper, Proposal 17–3. In 1997, the ALRC and Human Rights and Equal Opportunity Commission recommended that child witnesses should not be required to give evidence in person at any committal hearing: Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), 319, Rec 95.

159 Consultation Paper, Proposal 17–3.

160 Wurringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010; Queensland Commission for

26.121 However, a complete ban on cross-examination of complainants could, on some occasions, work to the detriment of complainants—where, for example, a guilty plea might result from their testimony.<sup>161</sup> In some cases, the complainant may also wish to give evidence and, by doing so, may be better prepared for the trial.

26.122 NASASV emphasised that steps need to be taken to ensure that ‘the absence of the victim does not jeopardise the strength of any case’ and that ‘paper committals, such as those used in the ACT, achieve the same ends as oral evidence from the victim’.<sup>162</sup> The Law Society of NSW submitted that

Although it is rare for complainants to be called to give evidence in sexual assault committals, defendants who are required to answer charges decades after they are alleged to have occurred, have significant disadvantages in preparing their defence. For this reason, cross examination of a complainant at committal, even if restricted to issues relating to date and time of offences, can assist in preparation. Clarification of lengthy charge periods or details surrounding old offences assists with trial preparation for both the Crown and the defence.<sup>163</sup>

26.123 Some stakeholders considered that there should be some capacity for adult complainants to be required to attend to give evidence at a committal where there are ‘special’ or ‘exceptional’ reasons for evidence to be given in person.<sup>164</sup> It was submitted that such inflexibility is unwarranted, and may produce great unfairness in individual cases.<sup>165</sup>

26.124 On the other hand, there was some concern that, if complainants may be required to give evidence in committals on the basis of ‘special reasons’, the definition of special reasons should be ‘restricted to limited circumstances and be defined in the legislation to prevent being broadened via broad judicial interpretation’. For this reason, Women’s Legal Services NSW believes that the ‘special reasons’ test is not the appropriate threshold test to require complainants to give evidence at committals.<sup>166</sup>

#### *Commissions’ views*

26.125 As discussed above, there are restrictions in all states and territories on child complainants in sexual offence proceedings being required to give evidence at committal hearings.<sup>167</sup> Some states and territories prohibit child complainants in sexual

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Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; Office of the Director of Public Prosecutions (NT), *Consultation*, Darwin, 27 May 2010; NSW Legal Assistance Forum, *Consultation*, Sydney, 10 May 2010.

161 Public Defenders and Prosecutors, *Consultation*, Sydney, 7 June 2010.

162 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

163 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

164 National Legal Aid, *Submission FV 232*, 15 July 2010; Public Defenders Office NSW, *Submission FV 221*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; NSW Legal Assistance Forum, *Consultation*, Sydney, 10 May 2010; Public Defenders and Prosecutors, *Consultation*, Sydney, 7 June 2010.

165 *Public Defenders Office NSW, Submission FV 221*, 2 July 2010.

166 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

167 The age of a child for these purposes differs among jurisdictions. See, eg, *Criminal Procedure Act 1986* (NSW) s 91(7A)–(8) (under the age of 16 years at the time of the alleged acts, or under the age of

offence proceedings from being required to attend or be cross-examined at committals. In the Commissions' view, the latter position is appropriate and should apply in all jurisdictions.

26.126 Another question is whether further restrictions on giving evidence at committals should apply to adult complainants in sexual offence proceedings. For example, the *Magistrates Court Act 1930* (ACT) provides that complainants in sexual offence proceedings must not be required to attend, give evidence or be cross-examined at a committal hearing in relation to the offence.<sup>168</sup> There is no provision for leave to be granted by the court.

26.127 While the Commissions agree that there is generally 'little or no benefit in requiring that complainants give evidence twice',<sup>169</sup> prosecutors and others expressed concern about a complete prohibition on adult complainants providing oral evidence at committal hearings. Circumstances will arise in which it is in the interests of justice for a complainant to be required to attend to give evidence at committal.<sup>170</sup>

26.128 It is preferable, therefore, that adult complainants of sexual assault be able to attend, give evidence and be cross-examined in special or prescribed circumstances. There is a range of different approaches that might be adopted, including those in NSW and Victoria.<sup>171</sup>

**Recommendation 26–4** State and territory legislation should prohibit:

- (a) any child; and
- (b) any adult complainant, unless there are special or prescribed reasons, from being required to attend to give evidence at committal hearings in relation to sexual offences.

## Joint or separate trial

26.129 Sexual assault cases—especially those within a family violence context—commonly involve multiple incidents and multiple complainants. The following discussion deals with situations where there are two or more complainants who have allegedly been sexually assaulted by the same defendant—for example, in a family context, a number of siblings may allege that a parent has sexually abused them.

18 years at the time of the trial); *Summary Procedure Act 1921* (SA) s 106(3) (child under the age of 12 years).

168 *Magistrates Court Act 1930* (ACT) ss 90AA(8), AB(1). In June 2010, legislation was introduced in the Northern Territory providing that, in sexual offence proceedings, a child or the alleged victim of a sexual offence is not required to attend a committal hearing; and cannot be examined or cross-examined at such a hearing: Justice Legislation Amendment (Committals Reform) Bill 2010 (NT) cl 7, proposed new *Justices Act 1928* (NT) s 105L.

169 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 130.

170 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010.

171 *Criminal Procedure Act 1986* (NSW) s 93; *Criminal Procedure Act 2009* (Vic) s 124.

26.130 In such situations, the prosecution is likely to make a pre-trial application to have the counts against the defendant heard in a joint trial, rather than separate trials. The defence, in contrast, is more likely to apply for separate trials for each offence. The power to order a joint trial is discretionary and is exercised in order to prevent prejudice to the defendant.<sup>172</sup> There is no limit to the circumstances which will justify separate trials. However, two factors which have received detailed consideration by the High Court are: charges where evidence in relation to one count is not admissible in relation to another, but is prejudicial; and where the charges are for sexual offences.<sup>173</sup>

26.131 The threshold question for holding a joint trial is whether or not each complainant's evidence will be admissible in respect of the charges involving the other complainant or complainants (that is, whether such evidence is 'cross-admissible'). Decisions to hold separate trials or refuse to admit relevant tendency or propensity evidence about a defendant's sexual behaviour can be seen as barriers to the successful prosecution of sex offences.<sup>174</sup>

26.132 Laws of evidence affecting the admissibility of tendency or coincidence evidence (under the uniform Evidence Acts), and as propensity or similar fact evidence at common law, are relevant in this context. The nature and admissibility of these kinds of evidence is discussed in detail in Chapter 27.

### Implications of joint and separate trials

26.133 When deciding whether to order joint or separate trials, a trial judge needs to determine whether each complainant's evidence will be cross-admissible. A possibility of prejudice to defendants is recognised to arise from joint trials, because jurors 'might use evidence relating to an offence charged in one count to decide that the person has also committed a different offence, even though there may be insufficient evidence to support a conviction for the second offence'.<sup>175</sup> It is commonly believed that jurors will

172 *Criminal Procedure Act 1986* (NSW) s 21(2); *Criminal Code* (Qld) s 597A(1AA); *Criminal Law Consolidation Act 1935* (SA) s 278(2a); *Criminal Code* (Tas) s 326(3); *Criminal Procedure Act 2009* (Vic) s 194; *Criminal Procedure Act 2004* (WA) s 133; *Crimes Act 1900* (ACT) s 264; *Criminal Code* (NT) s 341.

173 See ThomsonReuters, *The Laws of Australia*, vol 11 Criminal Procedure, 11.7, [39] (as at 22 March 2010). See, eg, *De Jesus v The Queen* (1986) 61 ALJR 1; *Sutton v The Queen* (1984) 152 CLR 528.

174 In NSW, Gallagher and Hickey compared the outcomes of joint trials with the outcomes from separate trials involving multiple complainants against the same accused. They found that 'the proportion of guilty and not guilty verdicts [was] quite close when there was one trial, while for multiple trials, the vast majority result[ed] in not guilty verdicts': P Gallagher and J Hickey, *Child Sexual Assault: An Analysis of Matters Determined in the District Court of New South Wales during 1994* (1997), prepared for the Judicial Commission of New South Wales, 20. The study examined the prosecution of 158 child sex offences in joint trials and 43 such offences in separate trials.

175 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), [3.3.14], quoting Victorian Law Reform Commission, *Sexual Offences: Discussion Paper* (2001), [8.51].

'assume that past behaviour is an accurate guide to contemporary conduct, and knowledge of other misconduct may cause the jury to be biased against the accused'.<sup>176</sup>

26.134 This view needs to be balanced against the research on juries that shows that a significant proportion of both jurors and jury-eligible citizens believe in various myths and hold a range of prejudices and misconceptions about women and children who report sexual assault.<sup>177</sup>

26.135 Separate trials can be considered to create an artificial individualised context in which the charges relating to each complainant are heard separately rather than in context. This is particularly the case where complainants come from the same family. The jury may not know that other children in the family have also made similar complaints. The prosecution case 'will be considerably weakened',<sup>178</sup> including in family violence contexts. Separate trials are said, therefore, to 'confer a significant tactical advantage on the accused'.

The defendant will be able to conduct his defence in each trial in isolation from the other charges and will be able to more convincingly argue that each complainant has fabricated her/his evidence due to lack of corroborating evidence from other victims, thus increasing the likelihood of acquittal.<sup>179</sup>

### **A presumption of joint trial?**

26.136 In 1997, Victoria established a presumption in favour of joint trials in sexual offence cases.<sup>180</sup> The presumption is now located in s 194(2) of the *Criminal Procedure Act 2009* (Vic), which provides that:

- (2) ... if in accordance with this Act 2 or more charges for sexual offences are joined in the same indictment, it is presumed that those charges are to be tried together.
- (3) The presumption created by subsection (2) is not rebutted merely because evidence on one charge is inadmissible on another charge.

<sup>176</sup> Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), [3.3.16]; footnotes omitted.

<sup>177</sup> These include the beliefs that: delay in complaint is evidence of fabrication; sexual assault will result in physical evidence and injury; a rape victim would scream and shout; a rape victim would be visibly upset in court; children are easily manipulated into giving false reports of sexual abuse; and a victim of sexual abuse will avoid the offender. See N Taylor and J Joudo, *The Impact of Pre-recorded Video and Closed Circuit Television Testimony by Adult Sexual Assault Complainants on Jury Decision-Making: An Experimental Study* (2005), 59; A Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153, 156; A Cossins, J Goodman-Delahunty and K O'Brien, 'Uncertainty and Misconceptions about Child Sexual Abuse: Implications for the Criminal Justice System' (2009) 16 *Psychiatry, Psychology and Law* 435, 440. See also D Koski, 'Jury Decisionmaking in Rape Trials: A Review and Empirical Assessment' (2002) 38 *Criminal Law Bulletin* 21.

<sup>178</sup> A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 179.

<sup>179</sup> Ibid, 181.

<sup>180</sup> *Crimes Act 1958* (Vic) s 372(3AA)–(3AC).

26.137 In 2008, South Australia introduced a similar presumption.<sup>181</sup> The South Australian provision modifies rules for the admissibility of evidence in sexual offence cases, in response to common law restrictions on propensity and similar fact evidence.

26.138 In Western Australia, the court has a discretion to order separate trials—otherwise the decision as to whether there will be a joint trial is that of the prosecution. The *Criminal Procedure Act 2004* (WA) states that a court can only order separate trials if satisfied that there would be a likelihood of prejudice to the accused by the joinder of two or more charges.<sup>182</sup> However, the court does not need to automatically order separate trials of particular offences simply because they are of a particular nature or because evidence in relation to some of the charges is not admissible in relation to others. Under s 133(5), it is open to the court ‘to decide that any likelihood of the accused being prejudiced can be guarded against by a direction to the jury’.<sup>183</sup>

26.139 At the same time, s 31A was inserted into the *Evidence Act 1906* (WA) to deal specifically with the problems associated with admitting propensity evidence in a joint trial. These modifications of evidence law, and those in other jurisdictions, are discussed in more detail in Chapter 27.

26.140 NSW and Queensland have considered—but specifically recommended against—the adoption of a presumption of joint trial due to concerns that juries may improperly use evidence in relation to one count when considering another count.<sup>184</sup> As discussed below, there are different views on the extent to which this concern may be able to be addressed through appropriate directions to the jury.

26.141 In the Consultation Paper, the Commissions proposed that federal, state and territory legislation should create a presumption of joint trial when two or more charges for sexual offences are joined in the same indictment and provide that this presumption is not rebutted merely because evidence on one charge is inadmissible on another charge.<sup>185</sup> This wording closely followed that of the Victorian provision.<sup>186</sup>

### ***Submissions and consultations***

26.142 A number of stakeholders agreed that legislation should provide for a presumption of joint trial.<sup>187</sup> Dr Anne Cossins, for example, submitted that there are

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181 *Criminal Law Consolidation Act 1935* (SA) s 278(2a).

182 *Criminal Procedure Act 2004* (WA) s 133(3). When considering the likelihood of prejudice to the accused from joinder of charges, the court cannot take into account that the evidence of two or more complainants or witnesses may be the result of collusion or suggestion: s 133(6).

183 Ibid s 133(5) is similar to *Criminal Procedure Act 2009* (Vic) s 194 because it envisages that a joint trial may be held even where the evidence of two or more complainants is not cross-admissible. It differs because it envisages that the risk of impermissible propensity reasoning by juries and prejudice to the accused can be corrected by an appropriate judicial direction: *Donaldson v Western Australia* (2005) 31 WAR 122, [146].

184 Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 85; Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55 (Part 2) (2000), 400.

185 Consultation Paper, Proposal 17–4.

186 *Criminal Procedure Act 2009* (Vic) s 194(2).

187 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs,

‘good public interest reasons’ for joint trials, particularly given the frequency and serial nature of sex offending:

[w]hile trial judges must consider the accused’s right to a fair trial when considering whether to order joint or separate trials, legislation governing this procedural issue shows that the decision is not black or white. In other words, it is possible to hold a joint trial that does not ‘prejudice or embarrass’ an accused’s defence.<sup>188</sup>

26.143 The DPP NSW strongly supported the proposal in the Consultation Paper, despite the rejection of this idea in 2005 by the NSW Sexual Offences Taskforce.<sup>189</sup> The DPP NSW noted that ‘the separation of trials can weaken the case to the point that there is no prospect of conviction’. Further, if trials are separated, complainants may have to give evidence in more than one trial and their evidence needs to be confined when it is not their own complaint. Severance of trials ‘increases the likelihood of inadmissible evidence being given inadvertently and possibly aborting the trial’.<sup>190</sup> The DPP also referred to the negative effects on complainants that may arise as a result of uncertainty about how trials are to proceed.

When the decision is finally made to proceed on separate indictments either by the court or the prosecutor, it can be devastating for complainants. This is probably a significant factor contributing to attrition during the prosecution phase of the case.<sup>191</sup>

26.144 Women’s Legal Services NSW (WLS NSW) stated that separating trials means that juries ‘do not get a full picture’ of the context and circumstances of the alleged offence and ‘is particularly difficult for child witnesses in child sexual assault matters and all witnesses/complainants in interfamilial matters’. WLS NSW supported the introduction of a presumption of joint trial based on the Victorian model.<sup>192</sup>

26.145 Others argued against the introduction of any presumption of joint trial<sup>193</sup> and considered jury directions unlikely to be effective in ensuring that evidence is not improperly taken into account by jurors.<sup>194</sup> The Law Council, for example, submitted

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*Submission FV 186*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010; A Cossins, *Submission FV 112*, 9 June 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010; Commissioner for Children (Tas), *Submission FV 62*, 1 June 2010.

188 A Cossins, *Submission FV 112*, 9 June 2010.

189 Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 85.

190 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

191 Ibid.

192 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010. WLS NSW and other stakeholders also referred to the distress that may be caused by inconsistent outcomes in separate sexual offence proceedings involving victims from the same family: Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010. Also National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010. The Canberra Rape Crisis Centre commented that sometimes ‘clients do not understand why this evidence is “not relevant” and are distressed when they are not believed or when they hear evidence adduced from the alleged offender that is patently untrue’: Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

193 Public Defenders Office NSW, *Submission FV 221*, 2 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010.

194 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010. WLS Qld also questioned whether it is possible to give ‘clear and

that where evidence is not cross-admissible, ‘the presumption should be that trials are separated’ to avoid the danger of unfair prejudice to the defendant.<sup>195</sup>

26.146 NSW Public Defenders stated that ‘there can be no legitimacy in conducting joint trials in circumstances other than where the evidence in one charge is admissible on the other charge’. The Public Defenders also observed that any higher rate of conviction in trials where evidence is not cross-admissible could only result from, in effect, ‘endorsing the suspension of the rule of law—or hoping that juries will disregard judicial direction as to the evidence which may be taken into account by them in connection with each charge’.<sup>196</sup>

#### ***Commissions’ views***

26.147 The *Time for Action* report recommended that state and territory sexual assault legislation should be reviewed to ensure it ‘ceases the artificial separation of court hearings involving multiple victims of the same offender’.<sup>197</sup>

26.148 In some cases, however, it is clear that the separation of court proceedings will be justified and not ‘artificial’. Even in those jurisdictions that have implemented a presumption of joint trial in sexual offence proceedings, some matters are still separated for valid reasons, notably the right of the defendant to a fair trial. It should be open to a court to order separate trials where evidence on one charge is inadmissible on another charge—for example, because its probative value is outweighed by the danger of unfair prejudice to the defendant.<sup>198</sup> In a recent case involving consideration of the presumption of joint trial, the Victorian Court of Appeal noted that

[t]he capacity to ensure a fair trial for the accused must always be the dominant consideration governing the exercise of a discretion; and the more complainants there are whose evidence is not admissible in the trials affecting other complainants, the more difficult it will be for adequate directions to be given by the trial judge to avoid prejudice occurring to the accused.<sup>199</sup>

26.149 On the other hand, the present situation in some jurisdictions appears to place judges in a difficult position in ordering joint trials of sexual offences. If the judge rules in favour of a joint trial which results in one or more convictions, it is said to be ‘almost inevitable’ that there will be an appeal against both the joinder and the trial judge’s decision to admit the evidence.<sup>200</sup> If the appeal is successful, this ‘will result in re-trials with all the attendant emotional costs to the complainants and financial costs to the State and the defendant’.<sup>201</sup> In this context, the DPP NSW stated that:

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understandable’ directions to a jury in these circumstances. Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

195 Law Council of Australia, *Submission FV 180*, 25 June 2010.

196 Public Defenders Office NSW, *Submission FV 221*, 2 July 2010.

197 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 121, Outcome 4.3.4.

198 For example, in the case of tendency evidence under Uniform Evidence Acts, ss 97, 101.

199 *CGL v Director of Public Prosecutions (Vic)* [2010] VSCA,[8].

200 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 180.

201 Ibid.

Sexual assault indictments in NSW involving more than one victim are regularly severed; indeed, it could be said anecdotally [that] there is a presumption in favour of separation.<sup>202</sup>

26.150 In ALRC 84, the ALRC and the Human Rights and Equal Opportunity Commission (HREOC) noted that when the complainant's credibility is attacked in a separate trial, 'evidence that would support his or her credibility is disallowed and the jury are kept in ignorance of the fact that there are multiple allegations of abuse against the accused'. This is a situation which may appear to offend common sense and experience, and have the potential to cause unfairness and injustice.<sup>203</sup>

26.151 Further, if separate trials are held, children involved may have to give evidence numerous times in their own trial, as well as in other trials, a process which can multiply the emotional stress experienced by child complainants.<sup>204</sup> Child complainants may have protection as complainants, which may not be extended to them as witnesses in separate trials, despite facing the same accused.<sup>205</sup> Adult victims of sexual offences in a family violence context also face additional trauma, especially as the pattern of offending is often long term rather than centred on one specific incident.

26.152 In the Commission's view, a presumption of joint trial, along the lines of the Victorian provision, is desirable to encourage judges to order joint trials in sexual offence proceedings wherever possible. The main justification for this recommendation is that joint trials tend to reduce trauma for complainants.

26.153 There is some reason to suggest that joint trials can be more frequently conducted without unfair prejudice to defendants. The Victorian reforms were evaluated by the VLRC in its 2004 *Sexual Offences* report. The evaluation found that the new legislation had made it easier for sexual offence matters involving multiple complainants to be heard together.<sup>206</sup> Stakeholders also suggested that the reforms in Western Australia have been successful in ensuring that more joint trials proceed than would otherwise have been the case.<sup>207</sup> The Commissions understand that there are very few challenges when the prosecution charges on joint indictments.

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202 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

203 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), 334–335.

204 Ibid, 334. For example, although a complainant's evidence may be held to be generally inadmissible in relation to the charges involving other complainants, portions of a complainant's evidence may be admissible for a non-tendency or non-propensity purpose. See also Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), [3.2.2], [3.2.4].

205 For example, in relation to the means of giving evidence or the coverage of vulnerable witness protections.

206 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 251. The VLRC noted that the Victorian Court of Appeal had recognised that the 'mischief' to which the new provisions were directed is 'the rule of practice that had developed whereby severance was almost automatically granted'. The provisions now started from the presumption that such matters will be heard together: Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 251.

207 Judicial Officer (WA), *Consultation*, Perth, 5 May 2010; Office of the Director of Public Prosecutions (WA), *Consultation*, Perth, 4 May 2010.

**Recommendation 26–5** Federal, state and territory legislation should:

- (a) establish a presumption that, when two or more charges for sexual offences are joined in the same indictment, those charges are to be tried together; and
- (b) state that this presumption is not rebutted merely because evidence on one charge is inadmissible on another charge.

## Pre-recorded evidence

26.154 In the following discussion pre-recorded evidence refers to evidence recorded before the trial and replayed at the trial. The focus of the Commissions' interest in pre-trial processes in sexual offence proceedings is on reform to reduce the trauma caused to complainants of sexual assault. In this context, the use of pre-recorded evidence is important because it may lessen or eliminate the need for complainants to give evidence in person at the trial.<sup>208</sup>

26.155 Pre-recorded evidence used in criminal proceedings can be categorised into recordings of:

- the initial interview between police and the witness (evidence of interview); and
- other evidence given by the witness.<sup>209</sup>

26.156 Federal, state and territory legislation provides for the use of pre-recorded evidence in criminal hearings and trials.<sup>210</sup> Such legislation applies to the use of pre-recorded evidence in sexual offence proceedings, and may apply to other criminal proceedings.<sup>211</sup>

26.157 The provisions generally apply to child witnesses and witnesses who are 'cognitively' or 'intellectually' impaired. In some jurisdictions, however, the provisions extend to any 'special' witness who requires protection<sup>212</sup> or all witnesses who are complainants of sexual assault.<sup>213</sup>

208 The use of pre-recorded evidence—like giving contemporaneous evidence by closed circuit television or video-link, using screens to restrict contact between the witness and the defendant, and excluding persons from the court—can be considered a form of vulnerable witness protection. Other aspects of vulnerable witness protection, in the specific context of cross-examination, are discussed in Ch 28.

209 See Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 130.

210 *Crimes Act 1914* (Cth) s 15YM; *Criminal Procedure Act 1986* (NSW) ss 306S(2), 306U(1)–(2); *Evidence Act 1977* (Qld) ss 21A, 21AI–21AO; *Evidence Act 1929* (SA) ss 13, 13A; *Criminal Procedure Act 2009* (Vic) ss 366–368; *Evidence Act 1906* (WA) ss 106A, 106HA, 106HB, 106K; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) pt 4, div 4.2A, 4.2B; *Evidence Act 1939* (NT) s 21B.

211 For example, to any 'indictable offence which involves an assault on, or injury or a threat of injury to a person': *Criminal Procedure Act 2009* (Vic) s 366(1)(b); or to any criminal proceeding: *Criminal Procedure Act 1986* (NSW) s 306S.

212 *Evidence Act 1977* (Qld) s 21A(1)(b). See also *Evidence Act 1906* (WA) s 106R(3).  
213 *Evidence Act 1939* (NT) s 21B.

### **Evidence of interview**

26.158 Evidence of interview refers to audiovisual recordings of an interview or interviews with the victim, which are typically done shortly after the complaint is initially disclosed. The person is interviewed by police or child protection workers, the interview is recorded, and the recording of the interview is played at the hearing or trial as the person's evidence-in-chief. This method of taking pre-recorded evidence applies, for example, under federal, NSW and Victorian legislation.<sup>214</sup>

26.159 In NSW, legislation provides that a 'vulnerable person is entitled to give, and may give, evidence in chief of a previous representation ... made by the person wholly or partly in the form of a recording made by an investigating official of the interview in the course of which the previous representation was made'.<sup>215</sup> Similarly, in Victoria, legislation provides that a 'witness may give evidence-in-chief (wholly or partly) in the form of an audio or audiovisual recording of the witness answering questions' put to him or her by a member of Victoria Police, or other person authorised in writing by the Chief Commissioner of Police who has successfully completed a training course on the relevant procedures.<sup>216</sup>

26.160 These provisions do not apply to all witnesses in sexual offence proceedings. The Commonwealth provisions apply only to child witnesses, and the NSW and Victorian provisions to children and cognitively impaired witnesses.<sup>217</sup> In the Northern Territory, however, a 'recorded statement' of interview of a witness—including any witness who is the alleged victim of a sexual offence to which the proceedings relate—may be admitted in evidence as the witness' evidence in chief.<sup>218</sup>

### **Other pre-recorded evidence**

26.161 Other evidence given by witnesses in sexual offence proceedings may also be pre-recorded. This may involve the pre-recording of part or the entirety of a witness' evidence. For example, at a pre-trial hearing the witness may give evidence via closed-circuit television from a remote room. The judge, prosecutor, defence lawyer and accused are all in the courtroom. There is no jury. The witness gives evidence, may be cross-examined and re-examined, and this is recorded. Some months later the trial is held. The witness does not attend the trial, and the jury is played the recording of the witness' evidence.

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214 *Crimes Act 1914* (Cth) s 15YM; *Criminal Procedure Act 1986* (NSW) ss 306R, 306U; *Criminal Procedure Act 2009* (Vic) ss 366–368.

215 *Criminal Procedure Act 1986* (NSW) s 306U. 'Vulnerable person' means a child or a cognitively impaired person: s 306M.

216 *Criminal Procedure Act 2009* (Vic) s 367; *Criminal Procedure Regulations 2009* (Vic) r 5.

217 The Victorian provision applies only to witnesses in sexual offence and assault matters: *Criminal Procedure Act 2009* (Vic) s 366.

218 *Evidence Act 1939* (NT) s 21B.

26.162 Similar methods of taking pre-recorded evidence apply under Queensland, South Australian, Victorian, Western Australian, ACT and Northern Territory legislation.<sup>219</sup>

26.163 In Victoria, the whole of the evidence—including cross-examination and re-examination—of young<sup>220</sup> or cognitively impaired complainants in sexual offence proceedings must be given at a special hearing, recorded as an audiovisual recording, and presented to the court in the form of that recording.<sup>221</sup> This has become known as the ‘VATE’ process (video or audio taping of evidence). The VATE recording is admissible in evidence as if its contents were the direct testimony of the complainant in the proceeding.<sup>222</sup>

26.164 At the special hearing, the accused and his or her legal practitioner are to be present in the courtroom, but the accused is not to be in the same room as the complainant when the complainant’s evidence is being taken. Rather, the accused is entitled to see and hear the complainant while the complainant is giving evidence (using closed-circuit television (CCTV) or other facilities) and to have at all times the means of communicating with his or her legal practitioner.<sup>223</sup>

26.165 Some legislation deals with both forms of pre-recorded evidence—pre-recorded evidence of interview; and other evidence. For example, in the ACT, audiovisual recordings of a witness answering questions of a ‘prescribed person in relation to the investigation of a sexual or violent offence’ may be admitted as evidence.<sup>224</sup> In addition, prosecution witnesses in relation to sexual offence proceedings may give evidence in chief at a pre-trial hearing and an audiovisual recording of this evidence may be admitted as the witness’ evidence at the trial.<sup>225</sup>

26.166 While the Victorian VATE provisions apply only to young or cognitively impaired complainants in sexual offence proceedings, in other jurisdictions, adult complainants of sexual assault may also be covered in some circumstances. For example, the Queensland and Western Australian provisions apply to any ‘special witness’, defined to include any person who in the court’s opinion would be likely to suffer severe emotional trauma or be likely to be so intimidated as to be disadvantaged as a witness, if required to give evidence in accordance with the usual rules and practice of the court.<sup>226</sup>

26.167 In South Australia, pre-recorded evidence may be used in relation to the evidence of a witness who is the alleged victim of a sexual offence to which the proceedings relate; and ‘in any other case—where, because of the circumstances of the

219 *Evidence Act 1977* (Qld) ss 21A, 21AI–21AO; *Evidence Act 1929* (SA) s 13A; *Criminal Procedure Act 2009* (Vic) s 368; *Evidence Act 1906* (WA) s 106HB; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) div 4.2B; *Evidence Act 1939* (NT) s 21E.

220 Under the age of 18 years.

221 *Criminal Procedure Act 2009* (Vic) ss 369–370.

222 *Ibid* s 374.

223 *Ibid* s 372.

224 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 40E, 40F.

225 *Ibid* ss 40P, 40Q, 40S.

226 *Evidence Act 1977* (Qld) s 21A(1); *Evidence Act 1906* (WA) s 106R.

witness or the circumstances of the case, the witness would, in the opinion of the court, be specially disadvantaged if not treated as a vulnerable witness'.<sup>227</sup> The Northern Territory extends the coverage of its provisions to any witness who is the alleged victim of a sexual offence to which the proceedings relate.<sup>228</sup>

### **Benefits and drawbacks**

26.168 Pre-recorded evidence has been described as offering the following benefits:

- improving the quality of evidence;<sup>229</sup>
- facilitating pre-trial decisions by the prosecution and the defence;
- helping with the scheduling and conduct of the trial; and
- minimising system abuse of witnesses.<sup>230</sup>

26.169 The drawbacks to pre-recorded testimony are said to include that:

- it is unfair to require the defence to cross-examine the main prosecution witness before the formal trial has begun;
- defence lawyers are concerned that they cannot prepare to cross-examine the most important prosecution witness until shortly before the trial is scheduled;
- video technology lacks the immediacy and persuasiveness of a witness' live-in-court testimony; and
- there can be problems with the technology.<sup>231</sup>

26.170 Other possible disadvantages include that the quality of the evidence is overly dependent on the skills of the interviewer, the evidence may be insufficiently tested by cross-examination, the witness may have to undergo multiple interviews to give a full account of the complaint and may suffer more stress and trauma where cross-examination is not preceded by giving evidence-in-chief in court.<sup>232</sup> In this

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227 *Evidence Act 1929 (SA)* ss 4, 13A.

228 *Evidence Act 1939 (NT)* s 21B.

229 It is said that a recording can be a more contemporaneous and accurate account than later evidence: C Corns, 'Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models' (2001) 25 *Criminal Law Journal* 75, 77.

230 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 132–133. For example, pre-recorded evidence may reduce the need to repeat evidence, reduce trauma for victims in giving evidence in court and increase guilty pleas where the evidence given is compelling: C Corns, 'Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models' (2001) 25 *Criminal Law Journal* 75, 77–78.

231 Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 133–134. WLS NSW stated that NSW courts 'may not have access to adequate audio-visual equipment and/or there can be mistakes such as not recording the evidence or only partially recording it': Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

232 C Corns, 'Videotaped Evidence of Child Complainants in Criminal Proceedings: A Comparison of Alternative Models' (2001) 25 *Criminal Law Journal* 75, 78–79; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

context, Women's Legal Services NSW stated that complainants should be advised of any

possible disadvantages (including any possible effect of tendering pre-recorded material on the persuasiveness of the evidence, the experience of being cross-examined 'cold' without giving evidence in chief, potential delays etc) prior to the tendering of the evidence-in-chief. It is important that the complainant is advised they have a choice and can make an informed decision.<sup>233</sup>

### **Consultation Paper**

26.171 In the Consultation Paper, the Commissions proposed that federal, state and territory legislation should allow the tendering of pre-recorded evidence of interview and other pre-recorded evidence of child victims of sexual assault and victims of sexual assault who are vulnerable as a result of mental or physical impairment. The Commissions also proposed that any adult victim of sexual assault be permitted to give pre-recorded evidence, by order of the court.<sup>234</sup> Governments should, it was proposed, ensure that participants in the criminal justice system receive comprehensive education in relation to interviewing victims of sexual assault and creating pre-recorded evidence.<sup>235</sup>

26.172 Stakeholders expressed support for extending the potential use of pre-recording to evidence given by all adult complainants of sexual assault,<sup>236</sup> and for appropriate education and training to encourage such use.<sup>237</sup>

26.173 Northern Territory stakeholders stated that pre-recorded evidence is often used in sexual offence proceedings in the Territory, including for adult complainants in remote communities, and that these procedures are generally operating well.<sup>238</sup>

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233 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

234 Consultation Paper, Proposals 17–5, 17–6.

235 Ibid, Proposal 17–7.

236 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; R Copeland, *Submission FV 114*, 8 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010; H McGlade, *Submission FV 84*, 2 June 2010.

237 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

238 Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010; Office of the Director of Public Prosecutions (NT), *Consultation*, Darwin, 27 May 2010; Northern Territory Police, *Consultation*, Darwin, 26 May 2010; North Australian Aboriginal Justice Agency, *Consultation*, Darwin, 26 May 2010; Central Australian Aboriginal Family Legal Unit and Central Australian Women's Legal Service,

An advantage of the pre-recording of complainants' evidence in sexual cases is that if it is strong, there is an opportunity for the case to settle by way of a plea without the need for a jury trial, and if it is weak there is an opportunity for the charges to be withdrawn, without the need for a jury trial.<sup>239</sup>

26.174 The use of pre-recorded evidence was seen as important in increasing reporting of offences against Indigenous women in Central Australia and reducing the trauma attributable to giving evidence on multiple occasions and seeing the defendant in court.<sup>240</sup>

26.175 NASAV submitted that legislation should allow for the use of pre-recorded evidence, while not making it the only possible option:

For example, a fourteen year old girl who recently reported a sexually abusive man to police expressed a strong desire to give evidence in court, in his presence. Her healing and her court case may be strengthened by the opportunity to do so, rather than to provide evidence via video recording.<sup>241</sup>

26.176 While one advantage of pre-recording evidence of interview is to address forensic disadvantage caused by delay between the making of the complaint and the trial,<sup>242</sup> one stakeholder also noted that, where trials are held expeditiously, it may not be as worthwhile to pre-record evidence.<sup>243</sup> The NSW DPP opposed routine pre-recording of evidence:

Given that trials in NSW do proceed relatively expeditiously and any wholesale change to a system of pre-recording would, by adding an extra step, delay the final outcome, we are not in support of this change.<sup>244</sup>

26.177 The Public Defenders Office NSW doubted whether, in NSW, cross-examination of children in advance would make any positive change to the court experience for child complainants, because all evidence of child sexual assault complainants is given from a remote location via CCTV. The adducing of pre-recorded interviews of adult complainants taken by investigators was opposed given 'the need for an immediate account of the adult complainant's version to be taken for investigative purposes, and the unavailability of the assistance of Crown Prosecutors at this point'.<sup>245</sup>

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<sup>239</sup> *Consultation*, Alice Springs, 28 May 2010. Problems included lighting and other technical issues with videorecording of witnesses. Further, Aboriginal Community Police Officers are not authorised persons in relation to taking recorded statements under *Evidence Act 1939* (NT) ss 21A–B.

<sup>240</sup> Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

<sup>241</sup> *Ibid*; Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Central Australian Aboriginal Family Legal Unit and Central Australian Women's Legal Service, *Consultation*, Alice Springs, 28 May 2010.

<sup>242</sup> National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

<sup>243</sup> Barrister, *Consultation*, Sydney, 10 June 2010; Public Defenders and Prosecutors, *Consultation*, Sydney, 7 June 2010.

<sup>244</sup> Public Defenders and Prosecutors, *Consultation*, Sydney, 7 June 2010.

<sup>245</sup> Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010. Also Public Defenders Office NSW, *Submission FV 221*, 2 July 2010. On the other hand, the NSW DPP stated that, in some cases, it would be desirable for the prosecution to have the option of applying to the court (possibly at committal stage) to pre-record the evidence—including in matters where it is known there is likely to be a delay in proceeding to trial.

<sup>245</sup> Public Defenders Office NSW, *Submission FV 221*, 2 July 2010.

26.178 A range of other concerns about the use (or over-use) of pre-recorded evidence was identified by stakeholders, including that:

- pre-recorded evidence of interview may, in practice, have limited value as evidence-in-chief, and the complainant may still be required to give evidence at the trial;
- where evidence is recorded at a pre-trial hearing and then replayed at the trial, the use of court resources is duplicated; and
- there may be problems where there is lack of continuity in legal representatives or judicial officers.<sup>246</sup>

26.179 In relation to the last point, the Northern Territory Legal Aid Commission noted that, wherever possible, pre-recording of evidence should be conducted by the trial judge:

Otherwise, serious unfairness can arise, for example where the judge who conducts the [pre-recording] permits cross-examination of the complainant which the trial judge subsequently indicates he or she would not have allowed ...<sup>247</sup>

26.180 Stakeholders, including those representing defendants in sexual offence proceedings, did not highlight any particular disadvantage of pre-recorded evidence for defendants. If anything, it was considered that pre-recorded evidence of a victim would generally make less of an impression on a jury than in court testimony.<sup>248</sup>

#### *Commissions' views*

26.181 As discussed, most states and territories have enacted regimes for the comprehensive pre-recording of evidence for child victims of sexual assault (and those who are cognitively or intellectually impaired). There is little firm information about the extent to which pre-recording is used<sup>249</sup> or its effects on the experience of complainants or outcomes of trials.

26.182 In the Commissions' view, however, there seems no reason why similar provisions should not be available in relation to the evidence of all adult complainants of sexual assault. It is important to facilitate mechanisms that minimise the negative experiences of complainants of sexual assault in the criminal justice system where this can be done without prejudicing defendants' rights to a fair trial. All Australian jurisdictions should adopt comprehensive provisions dealing with pre-recorded evidence in sexual offence proceedings.

<sup>246</sup> Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010; Public Defenders and Prosecutors, *Consultation*, Sydney, 7 June 2010; Central Australian Aboriginal Legal Aid Service and Northern Territory Legal Aid Commission, *Consultation*, Alice Springs, 2010.

<sup>247</sup> Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

<sup>248</sup> Barrister, *Consultation*, Sydney, 10 June 2010; NSW Legal Assistance Forum, *Consultation*, Sydney, 10 May 2010.

<sup>249</sup> An evaluation of the use of VATE referred to by the VLRC stated that 'of 126 now finalised trials for which VATE transcripts were prepared, VATE was admitted into evidence in 11'. See Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), 254; C Corns, 'Videotaped Evidence in Victoria: Some Evidentiary Issues and Appellate Court Perspectives' (2004) 28 *Criminal Law Journal* 43, 52.

26.183 These provisions should permit the tendering of pre-recorded evidence of interview between investigators and a sexual assault complainant as the complainant's evidence-in-chief and apply to all complainants of sexual assault (adults and children).

26.184 In addition, child complainants of sexual assault, and complainants of sexual assault who are vulnerable as a result of mental or physical impairment, should be permitted to provide evidence recorded at a pre-trial hearing. This evidence should be able to be replayed at the trial as the witness' evidence. Adult victims of sexual assault should also be permitted to provide evidence in this way, by order of the court.

26.185 The Commissions do not consider that, in the context of this Inquiry, it would be appropriate to make recommendations detailing the grounds on which the admission of pre-recorded evidence should be ordered or the kind of evidence to which pre-recording should apply. The Commissions observe, however, that the wishes of the complainant should be taken into account in the decision-making process by the court and prosecutors.<sup>250</sup>

26.186 The availability of mechanisms for giving pre-recorded evidence does not mean, however, that pre-recording will always be used. There is a range of reasons why it may not be appropriate to do so, for example:

the prosecutor may have formed the view that [pre-recorded evidence] was not in an appropriate form to use because of the way in which the questions were asked or, because of some technical difficulty with the tape, such as poor quality sound or visual display. It may also be that some prosecutors prefer to call the complainant to give *viva voce* evidence ... because, for whatever reasons, this is perceived as improving the chances of securing a conviction. In some cases the complainant may wish to give *viva voce* evidence and/or the prosecutor forms the view that *viva voce* evidence will present as more compelling and impressive evidence. This is simply an aspect of the overall prosecutorial discretion to decide what evidence shall be called at trial and how that evidence is to be presented.<sup>251</sup>

26.187 A 2009 study identified problems with VATE, including concerns about the interview techniques and the technical quality of recordings.<sup>252</sup> Clearly, legislation permitting wider use of pre-recorded evidence should be supported by investment in up-to-date technology and a comprehensive training program for interviewers. All participants in the criminal justice system should receive training in relation to the new provisions, including the rationale for them.<sup>253</sup>

250 For example, *Criminal Procedure Act 1986* (NSW) s 306T provides that 'A person must not call a vulnerable person to give evidence of a previous representation by means other than a recording made by an investigating official of the interview in the course of which the previous representation was made unless the person has taken into account any wishes of the vulnerable person'.

251 C Corns, 'Videotaped Evidence in Victoria: Some Evidentiary Issues and Appellate Court Perspectives' (2004) 28 *Criminal Law Journal* 43, 52.

252 M Powell and R Wright, 'Professionals' Perceptions of Electronically Recorded Interviews with Vulnerable Witnesses' (2009) 21 *Current Issues in Criminal Justice* 205, 209–213. However, the study found that, 'given the numerous benefits of the VATE process', several stakeholders proposed that it should be extended to a wider range of witnesses and to all sex offence cases, 208.

253 See Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), Rec 6.3.

26.188 The work of the Standing Committee of Attorneys-General (SCAG) on vulnerable witness protections, through the National Working Group on Evidence, is expected to include consideration of the use of audiovisual records of a witness to give evidence in proceedings. Any recommendations for reform of the uniform Evidence Acts (including to facilitate use of pre-recorded evidence in sexual assault proceedings) would need to be considered by the Australian and state and territory governments through the mechanism of SCAG.<sup>254</sup>

**Recommendation 26–6** Federal, state and territory legislation should permit the tendering of pre-recorded evidence of interview between a sexual assault complainant and investigators as the complainant's evidence-in-chief. Such provisions should apply to all complainants of sexual assault, both adults and children.

**Recommendation 26–7** Federal, state and territory legislation should permit child complainants of sexual assault and complainants of sexual assault who are vulnerable as a result of mental or physical impairment, to provide evidence recorded at a pre-trial hearing. This evidence should be able to be replayed at the trial as the witness' evidence. Adult victims of sexual assault should also be permitted to provide evidence in this way, by leave of the court.

**Recommendation 26–8** The Australian, state and territory governments should ensure that relevant participants in the criminal justice system receive comprehensive education about legislation authorising the use of pre-recorded evidence in sexual assault proceedings, and training in relation to interviewing victims of sexual assault and pre-recording evidence.

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254 Australian Government Attorney-General's Department, *Submission FV 166*, 25 June 2010.



# **27. Evidence in Sexual Assault Proceedings**

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## **Contents**

Introduction	1235
Evidence issues	1236
Sexual reputation and experience	1237
Evidence of witnesses who are not complainants	1238
Terminology	1239
Sexual reputation	1241
Sexual experience	1242
Granting leave to adduce sexual experience evidence	1246
Procedural issues	1253
Sexual assault communications privilege	1257
Current law	1257
Assisting complainants to invoke the privilege	1260
Expert opinion evidence and children	1266
Reform of the opinion rule	1267
Tendency and coincidence evidence	1274
Current law	1274
Impact in sexual assault proceedings	1275
Reform options	1281
Commissions' views	1287
Relevance and consent	1291
Relationship evidence	1294
Case law	1295
Reform options	1297
Evidence of recent and delayed complaint	1299
Uniform Evidence Acts jurisdictions	1299
Other modifications to the common law	1301
Evidence of delayed complaint	1302

## **Introduction**

27.1 The previous chapter discussed some of the problems that may lead to attrition of sexual assault cases at the reporting, investigation, prosecution and other stages before cases reach trial.

27.2 This chapter, and Chapter 28, examine selected issues that arise in the trial of sexual assault cases. This chapter deals with aspects of the application of the laws of evidence. Chapter 28 deals with the giving of jury warnings, the cross-examination of

complainants and other witnesses in sexual assault proceedings and certain other aspects of giving evidence.

27.3 These issues have been selected because the application of law in these areas has a direct and significant impact on the experiences in the criminal justice system of women and children who have suffered sexual assault, including in a family violence context—the focus of the Commissions' Terms of Reference. The way in which these aspects of the law are applied may lead to cases being withdrawn at a late stage or tried without the full evidentiary picture being before the jury. The procedures required at trial may make complainants reluctant to continue to give evidence in sexual assault proceedings.

## Evidence issues

27.4 Evidence issues of particular concern in the context of sexual assault proceedings include the law and procedure relating to: evidence of sexual reputation and experience; the disclosure of confidential counselling communications; expert opinion evidence and children; tendency and coincidence evidence; relationship evidence; and evidence of recent and delayed complaint.

27.5 While these issues may appear disparate, there are some common themes—notably those relating to consent and credibility. Evidence issues often arise where the defence is seeking to show that sexual activity was consensual and, in doing so, to undermine the credibility of the complainant. This can sometimes result in unjustifiable trauma to complainants. In other contexts, the policy challenge is posed by evidence of prior misconduct by the defendant, which is highly prejudicial and may carry a risk of wrongful conviction. At the same time, it can be highly important and probative evidence.<sup>1</sup>

27.6 The rules of evidence vary among jurisdictions depending, in particular, on whether the uniform Evidence Acts apply. In this Report, the term 'uniform Evidence Acts' is used to refer to legislation based on the Model Uniform Evidence Bill, which was considered and endorsed by the Standing Committee of Attorneys-General (SCAG) in July 2007, or on the *Evidence Act 1995* (Cth) and *Evidence Act 1995* (NSW). The Model Uniform Evidence Bill is based on these latter Acts, with amendments recommended in *Uniform Evidence Law* (ALRC Report 102).<sup>2</sup>

27.7 The Australian Government has an ongoing commitment to the harmonisation of evidence law across Australian jurisdictions through the work of the SCAG National Working Group on Evidence. Recommendations for reform of the uniform Evidence Acts made in this Report need to be considered by the Australian and state and territory governments through the mechanism of SCAG.

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1 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [11.15].

2 Ibid, [11.15].

27.8 The uniform Evidence Acts jurisdictions are the Commonwealth, NSW, Victoria, Tasmania, the ACT (which applies the federal legislation) and Norfolk Island.<sup>3</sup> There are minor differences in the uniform Evidence Acts applying in these jurisdictions.<sup>4</sup> The uniform Evidence Acts work in conjunction with evidentiary provisions contained in a range of other federal, state and territory legislation.

27.9 As discussed in ALRC Report 102, the uniform Evidence Acts in their entirety are not a code of the law of evidence. The enactment of the uniform legislation resulted in substantial changes to the common law in some areas. In other areas the common law remains an important reference assisting application of the uniform Evidence Acts. Stated simply, the uniform Evidence Acts govern admissibility issues, but reference to the common law can facilitate an understanding of underlying concepts and help to identify the changes brought about by the Acts.<sup>5</sup>

27.10 In other jurisdictions, referred to for convenience as ‘common law evidence jurisdictions’,<sup>6</sup> the common law has also been modified by statute in significant and varying ways, including in relation to the admissibility of evidence in sexual offence proceedings.

## Sexual reputation and experience

27.11 This section considers legislation intended to restrict the admission of evidence of a complainant’s sexual reputation and sexual experience. A number of complexities arise in analysing existing legislation of this kind.

27.12 First, existing restrictions apply to evidence defined in varying ways, including as evidence of sexual reputation, sexual history, sexual experience and sexual activities. The implications of this terminology are considered below. For convenience, the Report uses the term sexual experience to mean the sexual activities (consensual or non-consensual) of a complainant.

27.13 Secondly, existing legislative provisions not only restrict the admission of sexual reputation and sexual experience evidence generally, but also for specific purposes—including for the purpose of establishing that the complainant is the ‘type’ of person who is more likely to consent to sexual activity, or as an indicator of the complainant’s truthfulness.<sup>7</sup>

<sup>3</sup> The corresponding legislation comprises: *Evidence Act 1995* (Cth); *Evidence Act 1995* (NSW); *Evidence Act 2008* (Vic); *Evidence Act 2001* (Tas); *Evidence Act 2004* (NI).

<sup>4</sup> For example, the Tasmanian Act has a number of sections not found in the Commonwealth or NSW legislation, such as those dealing with procedures for proving certain matters, certain privileges, certain matters concerning witnesses and rape shield provisions.

<sup>5</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [2.4]–[2.10].

<sup>6</sup> In 2006, the Northern Territory Law Reform Committee recommended that the uniform Evidence Act be adopted in the Northern Territory: Northern Territory Law Reform Committee, *Report on the Uniform Evidence Act* (2006).

<sup>7</sup> The relationship between these provisions and the uniform Evidence Acts has previously been considered by the Commissions: Australian Law Reform Commission, New South Wales Law Reform Commission

### **Evidence of witnesses who are not complainants**

27.14 State and territory legislation generally restricts the admission of evidence of the complainant's sexual reputation and sexual experience in proceedings in which a person stands charged with a sexual offence.<sup>8</sup> The Commonwealth restrictions apply to every child witness in sexual assault proceedings.<sup>9</sup>

27.15 The provisions therefore do not apply to evidence about the sexual reputation or sexual experience of the following groups:

- in the Commonwealth jurisdiction, adult sexual assault complainants in sexual assault proceedings;
- in all jurisdictions, adult sexual assault victims who are witnesses, but not complainants in sexual assault proceedings; and
- in the state and territory jurisdictions, child witnesses who are not complainants in a sexual assault proceeding.

### ***Submissions and consultations***

27.16 In the Consultation Paper, the Commissions asked whether federal, state and territory evidence laws and procedural rules should limit the admission of evidence about the sexual reputation and prior sexual history of all witnesses in sexual assault proceedings.<sup>10</sup>

27.17 A number of stakeholders supported the extension of legislative restrictions in relation to the admission of evidence about sexual reputation and sexual experience to all witnesses in sexual assault proceedings.<sup>11</sup>

27.18 Women's Legal Service Queensland suggested that it would be unusual for evidence about the sexual reputation or sexual experience of a witness who is not the complainant to be relevant in sexual assault proceedings.<sup>12</sup>

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and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [20.11]–[20.40].

8       Criminal Procedure Act 2009 (Vic) s 339(1); Criminal Law (Sexual Offences) Act 1978 (Qld) s 4; Evidence Act 1906 (WA) s 36A; Evidence Act 1929 (SA) s 34L(1); Evidence Act 2001 (Tas) s 194M(1); Evidence (Miscellaneous Provisions) Act 1991 (ACT) s 49; Sexual Offences (Evidence and Procedure) Act 1983 (NT) s 4.

9       Crimes Act 1914 (Cth) ss 15Y, 15YB, 15YC.

10      Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Question 18–1.

11      Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

12      Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

### **Commissions' views**

27.19 The Commissions consider that, in practice, questions are not likely to arise often concerning the admissibility of evidence of the sexual reputation or sexual experience of a witness who is not the complainant in sexual assault proceedings. One possible scenario might involve attempts to adduce sexual experience evidence about a witness who has been engaged in prostitution, in order to impugn her credibility.

27.20 Where such evidence is sought to be adduced, existing evidence law may adequately deal with the possibility. For example, evidence about the sexual reputation or sexual experience of a witness may fail the relevance requirement under s 55 of the uniform Evidence Acts. If questioning on the subject is intended to harass or intimidate the witness, questioning may (or must) be disallowed under s 41 of the uniform Evidence Acts. Finally, if the evidence is sought to be admitted in cross-examination as to credibility, it will be excluded under s 102 of uniform Evidence Acts unless it 'could substantially affect the assessment of the credibility of the witness'.<sup>13</sup>

27.21 While some stakeholders suggested existing restrictions in relation to the admission of evidence of sexual reputation or sexual experience should be extended to all witnesses, the Commissions consider that there are insufficient grounds to make such a recommendation.

### **Terminology**

27.22 Australian legislation restricts the admission of evidence variously described as being of:

- the general reputation of the complainant with respect to chastity;<sup>14</sup>
- sexual reputation;<sup>15</sup>
- reputation with respect to sexual activities;<sup>16</sup>
- disposition of the complainant in sexual matters,<sup>17</sup> or evidence that raises inferences about a complainant's general disposition;<sup>18</sup>
- sexual history;<sup>19</sup>

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13 Uniform Evidence Acts, s 103.

14 *Criminal Procedure Act 2009* (Vic) s 341. Section 4(1)(b) of the *Sexual Offences (Evidence and Procedure) Act 1983* (NT) uses a similar phrase: 'the complainant's general reputation as to chastity'.

15 *Criminal Procedure Act 1986* (NSW) s 293(2); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(1); *Evidence Act 1906* (WA) s 36B; *Evidence Act 1929* (SA) s 34L(1)(a); *Evidence Act 2001* (Tas) s 194M(1)(a); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 50.

16 *Crimes Act 1914* (Cth) s 15YB.

17 *Evidence Act 1906* (WA) s 36BA; *Evidence Act 2001* (Tas) s 194M(6)(b).

18 *Crimes Act 1914* (Cth) s 15YC; *Criminal Procedure Act 2009* (Vic) s 352(a); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(4); *Evidence Act 1929* (SA) s 34L(3); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 53(2); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(2)(a).

19 *Criminal Procedure Act 2009* (Vic) ss 340, 343.

- sexual experience,<sup>20</sup> or sexual experiences;<sup>21</sup> and
- ‘experience with respect to sexual activities’,<sup>22</sup> ‘sexual activity’<sup>23</sup> or ‘sexual activities’.<sup>24</sup>

27.23 Statutory and judicial guidance<sup>25</sup> about the meaning and boundaries of each of these terms and the kinds of evidence covered are limited.<sup>26</sup> In practice, this uncertainty may inhibit the ability of judicial officers and practitioners to apply and observe the current legislative provisions.<sup>27</sup>

### ***Submissions and consultations***

27.24 In the Consultation Paper, the Commissions asked how judicial officers and legal practitioners can best be assisted to develop a consistent approach to the classification of evidence as being of ‘sexual reputation’ as compared with ‘sexual experience’ (or ‘sexual activities’).<sup>28</sup>

27.25 National Legal Aid noted that the operation of the legislative provisions governing these kinds of evidence is not monitored, but should be, and that there is often no empirical evidence to assess whether the intention of Parliament in enacting particular provisions is being met.<sup>29</sup> A number of other stakeholders observed that the classification of evidence as being of ‘sexual reputation’ or ‘sexual experience’ is not an issue in practice.<sup>30</sup>

27.26 The Magistrates’ Court and Children’s Court of Victoria suggested that multifaceted education and training would assist the development of a consistent approach to the classification of evidence as being of ‘sexual reputation’ or ‘sexual experience’. This should include targeted judicial professional development.<sup>31</sup>

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20 Ibid s 293(4); *Evidence Act 2001* (Tas) s 194M(1)(b).

21 *Evidence Act 1906* (WA) s 36BC.

22 *Crimes Act 1914* (Cth) s 15YC.

23 *Criminal Procedure Act 1986* (NSW) s 293(3); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(2).

24 *Criminal Procedure Act 2009* (Vic) s 342; *Evidence Act 1929* (SA) s 34L(1)(b); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 51; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1)(b).

25 The leading case of *Bull v The Queen* (2000) 201 CLR 443, [54]–[64] discusses the distinctions between evidence relating to the ‘sexual reputation’, ‘disposition of the complainant in sexual matters’, ‘sexual experience’ and ‘sexual experiences’.

26 For further discussion about the meaning and boundaries of the terms, see Consultation Paper, [18.16]–[18.20].

27 For example, an empirical study undertaken in relation to sexual assault hearings in the District Court of New South Wales over a one year period between 1 May 1994 and 30 April 1995 concluded that sexual reputation evidence cannot be clearly distinguished from sexual experience evidence: J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996), 11. In the context of the Western Australian legislation, ‘a difficulty arises because evidence of a complainant’s sexual experiences, which is made admissible by s 36BC, will often, but not necessarily, also be evidence relating to a person’s sexual disposition’ which shall not be adduced or elicited by or on behalf of an accused: *Bull v The Queen* (2000) 201 CLR 443, [61].

28 Consultation Paper, Question 18–2.

29 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010. Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Central Australian Aboriginal Legal Aid Service and Northern Territory Legal Aid Commission, *Consultation*, Alice Springs, 2010.

30 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

### ***Commissions' views***

27.27 It is important that sexual *reputation* evidence is distinguishable from sexual *experience* evidence because, broadly speaking, sexual reputation evidence is inadmissible in most jurisdictions, whereas sexual experience evidence is admissible in some circumstances. However, it is not clear whether, or to what extent, evidence is inconsistently categorised in practice.

27.28 The Commissions suggest that this is an area in which empirical research might usefully be conducted to establish how existing provisions are being applied and interpreted in sexual assault proceedings. Judicial and practitioner education concerning relevant definitions and their boundaries may also assist to ensure that the concepts are more clearly understood and delineated.

### ***Sexual reputation***

27.29 Evidence relating to a complainant's sexual reputation is inadmissible in all Australian states and the ACT.<sup>32</sup> Evidence of sexual reputation is excluded on the basis that, 'even if relevant and therefore admissible, [it] is too far removed from evidence of actual events or circumstances for its admission to be justified in any circumstances'.<sup>33</sup>

27.30 In the Northern Territory, evidence relating to the complainant's general reputation as to chastity may be elicited or led with the leave of the court. Leave is not granted unless the evidence has substantial relevance to the facts in issue.<sup>34</sup>

27.31 Under federal legislation, evidence of a child witness or child complainant's sexual reputation is only admissible in a proceeding if the court is satisfied that the evidence is substantially relevant to the facts in issue.<sup>35</sup>

### ***Submissions and consultations***

27.32 In the Consultation Paper, the Commissions proposed that federal, state and territory legislation should provide that a court must not admit any evidence of the sexual reputation of the complainant.<sup>36</sup>

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32      *Criminal Procedure Act 1986* (NSW) s 293(2); *Criminal Procedure Act 2009* (Vic) s 341; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(1); *Evidence Act 1906* (WA) s 36B; *Evidence Act 1929* (SA) s 34L(1)(a); *Evidence Act 2001* (Tas) s 194M(1)(a); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 50.

33      Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 219.

34      *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4.

35      *Crimes Act 1914* (Cth) s 15YB.

36      Consultation Paper, Proposal 18–1.

27.33 Stakeholders generally supported the proposal.<sup>37</sup> Some stakeholders, however, preferred a model where sexual reputation evidence *may* be elicited or led with the court's leave.<sup>38</sup> The Magistrates' Court and Children's Court of Victoria noted that the Consultation Paper proposal went further than the current restrictions in Victoria and that any such law needs to be supported by judicial education and lawyer accreditation in family violence and sexual assault.<sup>39</sup>

#### ***Commissions' views***

27.34 The Consultation Paper proposal reflected the current legal position in most jurisdictions. It is clear that the policy basis for excluding evidence of sexual reputation—that it is too far removed from the evidence of actual events or circumstances for its admission to be justified in any circumstances—is widely accepted. However, the federal and Northern Territory exclusionary rules do not give the policy full effect.

27.35 In the Commissions' view, federal, state and territory legislation should be consistent in providing that the court must not allow any questions as to, or admit any evidence of, the sexual reputation of the complainant. Judicial and practitioner education concerning the scope of evidence of sexual reputation may be desirable.

**Recommendation 27–1** Federal, state and territory legislation should provide that complainants of sexual assault must not be cross-examined in relation to, and the court must not admit any evidence of, the sexual reputation of the complainant.

#### ***Sexual experience***

27.36 Australian jurisdictions have adopted different approaches to the admission of evidence of the complainant's sexual experience—described variously as evidence of 'sexual activities', 'sexual activity', 'sexual experiences' and 'sexual experience'.

27.37 This issue is an important one for all complainants in sexual assault cases for whom the admission of sexual experience evidence can have the effect of re-traumatisation through humiliation and 'victim-blaming'.

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37 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Commissioner for Children (Tas), *Submission FV 62*, 1 June 2010.

38 National Legal Aid, *Submission FV 232*, 15 July 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

39 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

27.38 The Commissions have heard that evidence of a complainant's prior sexual history is more likely to be admitted in proceedings concerning sexual offences perpetrated in a family violence context, as compared with other sexual assault proceedings.<sup>40</sup>

27.39 Sexual experience evidence may also reinforce certain prejudices that jury members may hold. Statutory restrictions relating to the admission of sexual experience evidence have been enacted to curtail reasoning influenced by what have been described as the 'twin myths'.<sup>41</sup> That is,

to forbid any chain of 'reasoning' that asserts that, because the complainant has a certain sexual reputation or a certain disposition in sexual matters or has had certain sexual experiences, he or she is the 'kind of person' who would be more likely to consent to the acts the subject of the charge ... [and] to forbid the chain of 'reasoning' that asserts that, because a complainant has a particular sexual reputation or disposition in sexual matters or has had certain sexual experiences, he or she is less worthy of belief than a complainant without those features.<sup>42</sup>

### ***Scope of the restrictions***

27.40 The issues in this area include whether rules prohibiting the admission of evidence of sexual experience should apply to evidence of the complainant's:

- sexual experience with the defendant, as well as with other persons; or
- non-consensual, as well as consensual, sexual experiences.

27.41 In the ACT, the restrictions apply only to evidence about sexual activity with persons other than the accused.<sup>43</sup> In Victoria, Western Australia and Tasmania the sexual experience provisions apply (expressly or by implication) to prior sexual experience between the complainant and the defendant.<sup>44</sup> In the remaining jurisdictions, the sexual experience or conduct provisions do not restrict the admission of evidence about 'recent' sexual activity between the complainant and the defendant.<sup>45</sup>

27.42 The Victorian legislation is unique in expressly restricting questions and evidence about both the consensual and non-consensual sexual activities of the complainant.<sup>46</sup> The legislation covers non-consensual sexual activities in order to clearly restrict cross-examination of complainants about earlier incidents of child

40 Ibid; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

41 S Chapman, 'Section 276 of the Criminal Code and the Admissibility of "Sexual Activity" Evidence' (1999) 25 *Queen's Law Journal* 121.

42 *Bull v The Queen* (2000) 201 CLR 443, [53].

43 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 51(2).

44 *Criminal Procedure Act 2009* (Vic) s 342; *Evidence Act 1906* (WA) s 36BC(1); *Evidence Act 2001* (Tas) s 194M(1)(b).

45 *Criminal Procedure Act 1986* (NSW) s 293(4); *Criminal Procedure Act 1986* (NSW); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(4) and *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(3) (acts which are 'substantially contemporaneous'); *Evidence Act 1929* (SA) s 34L(1)(b) ('recent sexual activities with the accused').

46 *Criminal Procedure Act 2009* (Vic) s 342. See also, Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Rec 68.

sexual abuse or sexual assault.<sup>47</sup> The Victorian Law Reform Commission (VLRC) noted that:

in many cases the main purpose of this type of cross-examination is to unsettle the complainant by suggesting he or she is prone to lie or is mentally unstable ...

Many complainants find it difficult to understand why the defence should be able to cross-examine them about prior abuse when evidence about the accused's prior sexual behaviour is rarely admissible and the accused is entitled to exercise the right to remain silent.<sup>48</sup>

27.43 In all jurisdictions, except Western Australia, the sexual experience provisions apply to evidence adduced or elicited by the prosecution or the defendant. In Western Australia the provisions apply only where the evidence is adduced or elicited by the defendant.<sup>49</sup>

#### ***Discretionary and mandatory approaches***

27.44 Another important distinction between the different approaches to restricting the admission of evidence of the complainant's sexual experience is whether or not admissibility is subject to leave granted by a judicial officer in an exercise of their discretion.

27.45 New South Wales is the only Australian jurisdiction in which a judicial officer does not have an overriding or residual discretion to admit sexual experience evidence. Section 293 of the *Criminal Procedure Act 1986* (NSW) provides that sexual experience evidence is inadmissible unless it falls within a specific statutory exception. Evidence which falls outside of the exceptions is excluded.

27.46 In all other Australian jurisdictions, admissibility is a matter for the judicial officer's discretion, the exercise of which is subject to legislative criteria.

#### ***Submissions and consultations***

27.47 In the Consultation Paper, the Commissions proposed that federal, state and territory legislation should provide that the court must not admit any evidence as to the sexual activities (whether consensual or non-consensual) of the complainant other than those to which the charge relates, without the leave of the court.<sup>50</sup>

27.48 Stakeholders expressed support for the Consultation Paper proposal.<sup>51</sup> Some stakeholders commented that the NSW approach to the exclusion of sexual experience

47 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.44].

48 Ibid, 201–202.

49 *Evidence Act 1906* (WA) ss 36A–36BC.

50 Consultation Paper, Proposal 18–2.

51 Public Defenders Office NSW, *Submission FV 221*, 2 July 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 69*, 2 June 2010.

evidence is overly prescriptive, and that the Commissions' proposal strikes an appropriate balance between allowing an appropriate defence and protecting the victim.<sup>52</sup>

#### **Commissions' views**

27.49 The main policy objective informing restrictions on admitting sexual experience evidence concerns minimising the distress, humiliation and embarrassment experienced by complainants who testify at trial.<sup>53</sup> To adequately safeguard sexual assault complainants against such distress, particularly where such evidence is sought to be adduced through cross-examination, restrictions should have broad application.

27.50 Restrictions should apply to evidence of both the consensual and non-consensual sexual experience of the complainant. This should prevent evidence of prior sexual assault and incidents of sexual abuse in childhood being admitted. It will also ensure that survivors of sexual abuse are offered protection from investigation into their sexual history.<sup>54</sup> The provisions should also apply to the complainant's sexual experience with the accused and with other persons, regardless of whether the experience was 'recent' or not.

27.51 The Commissions therefore support the enactment of legislation similar to s 342 of the *Criminal Procedure Act 2009* (Vic), which states:

The complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual activities (whether consensual or nonconsensual) of the complainant (other than those to which the charge relates), without the leave of the court.

27.52 In the Commissions' view, such restrictions on the admission of evidence of the complainants' sexual experience are unlikely to cause injustice to the defendant, provided that any evidence covered by the rule may be admitted with the leave of the court.<sup>55</sup>

27.53 Concerns about whether the admissibility of sexual experience evidence is better dealt with by the statutory exception approach of NSW or the discretion-based approaches of other jurisdictions have been canvassed in reports by the former Model Criminal Code Officers Committee of SCAG (MCCOC)—now the Model Criminal Law Officers Committee—the New South Wales Law Reform Commission

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52 Barrister, *Consultation*, Sydney, 10 June 2010; NSW Legal Assistance Forum, *Consultation*, Sydney, 10 May 2010.

53 The experience of testifying at trial is sometimes said to cause complainants almost as much trauma as the actual assault, and the anticipated admission of sexual history evidence may contribute to the reluctance of many women to report sexual assaults to the police. See, eg, S Bronitt and T Henning, 'Rape Victims on Trial: Regulating the Use and Abuse of Sexual History Evidence' in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998) 76, 81; J Bargen and E Fishwick, *Sexual Assault Law Reform: A National Perspective* (1995), prepared for the Office of the Status of Women, 75.

54 New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998), [6.122].

55 The circumstances in which the leave of the court may be granted are discussed below.

(NSWLRC) and VLRC.<sup>56</sup> These reports considered the relative merits of each approach and whether the statutory exception approach is too restrictive and excludes material relevant to the defendant's defence. Each report favoured a structured discretionary model.<sup>57</sup>

27.54 In the Commissions' view, the relevant issues related to each approach—for both complainants and defendants—have been sufficiently canvassed in, and appropriately evaluated by, these earlier reports. The Commissions agree that the admission of sexual experience evidence should be determined by judicial officers exercising their discretion in accordance with criteria set out in legislation. The discussion that follows focuses on identifying the optimal formulation for this approach.

**Recommendation 27–2** Federal, state and territory legislation should provide that the complainant must not be cross-examined, and the court must not admit any evidence, as to the sexual activities—whether consensual or non-consensual—of the complainant, other than those to which the charge relates, without the leave of the court.

### Granting leave to adduce sexual experience evidence

27.55 The discussion below considers the legislative criteria that apply to the judicial discretion to grant leave to admit evidence of the complainant's sexual experience, including where the evidence is sought to be admitted because it:

- may raise an inference as to the complainant's general disposition;<sup>58</sup> or
- relates to the complainant's credibility as a witness.

27.56 Generally, leave must not be given under the federal legislation to admit evidence of a child witness or child complainant's sexual experience unless the evidence is substantially relevant to the facts in issue.<sup>59</sup> In relation to evidence relating to the credibility of a child witness adduced in cross-examination of the child, leave must not be granted unless the evidence has substantial probative value.<sup>60</sup> The court may have regard to a range of factors in deciding whether the evidence has substantial probative value, but must have regard to:

56 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004); Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999); New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998).

57 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5: Sexual Offences Against the Person* (1999), 243–45; New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998), [6.100]–[6.113]; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Recs 69–71.

58 Including an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates.

59 *Crimes Act 1914* (Cth) s 15YC(2)(a).

60 *Ibid* s 15YC(2)(b).

- (a) whether the evidence tends to prove that the witness knowingly or recklessly made a false representation when the witness was under an obligation to tell the truth; and
- (b) the period that has elapsed since the acts or events to which the evidence relates were done or occurred.<sup>61</sup>

27.57 In addition, the federal legislation provides that sexual experience is not admissible merely because of any inference it may raise about general disposition.<sup>62</sup>

27.58 In Victoria, the court must not grant leave unless it is satisfied that the evidence has substantial relevance to a fact in issue and that it is in the interests of justice to allow the cross-examination or to admit the evidence, having regard to a list of considerations.<sup>63</sup> One consideration is ‘whether the probative value of the evidence outweighs the distress, humiliation and embarrassment that the complainant may experience’.<sup>64</sup>

27.59 The admission of sexual history evidence to support an inference that the complainant is ‘the type of person who is more likely to have consented to the sexual activity to which the charge relates’ is prohibited in Victoria.<sup>65</sup>

27.60 In addition, s 352 of the *Criminal Procedure Act 2009* (Vic) provides that:

Sexual history evidence is not to be regarded—

- (a) as having a substantial relevance to the facts in issue by virtue of any inferences it may raise as to general disposition; or
- (b) as being proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely materially to impair confidence in the reliability of the evidence of the complainant.

27.61 The Queensland, ACT and Northern Territory legislation are substantially similar. The court must not give leave unless satisfied that the evidence has substantial relevance to the facts in issue or is a proper matter for cross-examination about credit.<sup>66</sup> Evidence relating to, or tending to establish the fact that, the complainant has engaged in sexual activity with a person or persons is not to be regarded as being a proper matter for cross-examination about credit unless the evidence would be likely materially to impair confidence in the reliability of the complainant’s evidence.<sup>67</sup> Sexual activity evidence that relates to or tends to establish that the complainant has engaged, or was accustomed to engaging, in sexual activity is not to be regarded as

61 Ibid s 15YC(4).

62 Ibid s 15YC(3).

63 *Criminal Procedure Act 2009* (Vic) s 349.

64 Ibid s 349(a).

65 Ibid s 343.

66 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(3); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 53(1); *Sexual Offences (Evidence and Procedure) Act 1983* (NT), s 4(1), (2)(b).

67 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(5); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 53(3); *Sexual Offences (Evidence and Procedure) Act 1983* (NT), s 4(2)(b).

having a substantial relevance to the facts in issue because of any inference,<sup>68</sup> or by reason only of an inference,<sup>69</sup> it may raise about general disposition.

27.62 The Western Australian and Tasmanian legislation are alike in so far as they provide that the court shall not grant leave unless the evidence sought to be adduced or elicited has substantial relevance to the facts in issue and the probative value of the evidence that is sought outweighs the distress, humiliation or embarrassment which the complainant must suffer as a result of its admission.<sup>70</sup>

27.63 The Tasmanian legislation requires the judicial officer to take into account the age of the complainant and the number and nature of the questions likely to be put, when assessing the amount of the distress, humiliation or embarrassment to the complainant.<sup>71</sup> It also provides that evidence relating to sexual experience does not have the requisite relevance to a fact in issue if it is relevant only to the credibility of the complainant.<sup>72</sup>

27.64 In South Australia, leave to ask questions or admit evidence about the complainant's sexual activities must not be granted unless, taking into account the 'principle that alleged victims of sexual offences should not be subjected to unnecessary distress, humiliation or embarrassment through the asking of questions or admission of evidence', the admission of the evidence is 'required in the interests of justice' and is either of 'substantial probative value' or 'would, in the circumstances, be likely materially to impair confidence in the reliability of the evidence of the alleged victim'.<sup>73</sup> Evidence the purpose of which is only to raise inferences concerning some general disposition of the complainant, is not admissible.<sup>74</sup> The admissibility of sexual experience evidence which relates to the credibility of the complainant is determined by general credibility rules.<sup>75</sup>

### ***Consultation Paper***

27.65 In the Consultation Paper, the Commissions made a number of proposals, substantially based on the current Victorian legislation,<sup>76</sup> relating to the federal, state and territory legislative provisions governing the admissibility of sexual experience evidence.

27.66 The Commissions proposed that federal, state and territory legislation should provide that the court shall not grant leave for complainants of sexual assault to be cross-examined about their sexual activities unless it is satisfied that the evidence has

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68      *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(4); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 53(2).

69      *Sexual Offences (Evidence and Procedure) Act 1983* (NT), s 4(2)(a).

70      *Evidence Act 1906* (WA) s 36BC(2); *Evidence Act 2001* (Tas) s 194M(2). The Western Australian legislation also prohibits the eliciting or admission of evidence relating to the disposition of the complainant in sexual matters: *Evidence Act 1906* (WA) s 36BA.

71      *Evidence Act 2001* (Tas) s 194M(4).

72      *Ibid* s 194M(3).

73      *Evidence Act 1929* (SA) s 34L(2).

74      *Ibid* s 34L(3).

75      *Ibid* s 23.

76      *Criminal Procedure Act 2009* (Vic) ss 343, 349, 352.

significant probative value to a fact in issue and the probative value substantially outweighs the danger of unfair prejudice to the proper administration of justice.<sup>77</sup>

27.67 The Commissions also proposed that legislation should provide that the court, in deciding whether the probative value of the evidence substantially outweighs the danger of unfair prejudice to the proper administration of justice, must have regard to:

- (a) the distress, humiliation, or embarrassment which the complainant may suffer as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked;
- (b) the risk that the evidence may arouse in the jury discriminatory belief or bias, prejudice, sympathy or hostility;
- (c) the need to respect the complainant's personal dignity and privacy;
- (d) the right of the accused to make a full answer and defence; and
- (e) any other factor which the court considers relevant.<sup>78</sup>

27.68 The Commissions asked whether federal, state and territory legislation should provide that sexual experience evidence is not:

- (a) admissible to support an inference that the complainant is the type of person who is more likely to have consented to the sexual activity to which the charge relates; and/or
- (b) to be regarded as having substantial probative value by virtue of any inference it may raise as to general disposition.<sup>79</sup>

27.69 Finally, the Commissions proposed that federal, state and territory legislation should provide that sexual experience evidence is not to be regarded as being a proper matter for cross-examination as to credit unless, because of special circumstances, it would be likely materially to impair confidence in the reliability of the evidence of the complainant.<sup>80</sup>

### **Submissions and consultations**

27.70 Stakeholders who addressed the issue agreed generally with the proposals and answered the question about legislative restrictions on the admission of evidence of 'general disposition' in the affirmative.<sup>81</sup>

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77 Consultation Paper, Proposal 18–3.

78 Ibid, Proposal 18–4.

79 Ibid, Question 18–4.

80 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Proposal 18–5.

81 National Legal Aid, *Submission FV 232*, 15 July 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

27.71 The Public Defenders Office NSW, for example, supported the introduction of a structured discretionary model for the admission of sexual experience evidence.<sup>82</sup> It considered that the proposal that ‘the court shall not grant leave unless ... the evidence has significant probative value to a fact in issue’ adequately deals with the focus of relevance, but that the phrase ‘to a fact in issue’ should be dropped from the proposal because it may cause technical problems. The Public Defenders Office NSW also considered that the primary restriction on the admission of sexual experience evidence<sup>83</sup> should be redrafted to apply also to evidence that may raise an inference about the complainant’s ‘general disposition’ or the complainant’s credibility as a witness.

27.72 The Law Council of Australia (Law Council) opposed ‘any rigid exclusionary rule that prohibits reasoning in respect of sexual history evidence’ on the basis that, in some circumstances, such evidence is ‘highly probative and it would be unjust for the defence to be prevented from putting such evidence before the tribunal of fact’. The Law Council considered that restricting cross-examination about sexual activities to situations where the evidence’s probative value substantially outweighs the danger of unfair prejudice provides the appropriate test and ‘if that test is satisfied, it is impossible to see any justification for, nonetheless, excluding the evidence’.<sup>84</sup>

27.73 National Legal Aid observed that ongoing education and professional development of the judiciary and legal practitioners would help to ensure that legislation effectively curtails the distress, humiliation and embarrassment of the complainant due to the admission of irrelevant sexual experience evidence.<sup>85</sup>

27.74 The Magistrates’ Court and Children’s Court of Victoria commented on the similarities between the proposals and recently enacted Victorian legislation, and noted that the effects of the Victorian reforms are still to be fully assessed.<sup>86</sup>

#### *Commissions’ views*

27.75 The Commissions have sought to identify the best formulation of the court’s discretion to admit evidence of the complainant’s sexual experience. Such a formulation should attempt to adequately safeguard complainants against irrelevant and harassing cross-examination, but also uphold the defendant’s right to a fair trial.

27.76 The Consultation Paper proposal on restricting the circumstances in which evidence of a complainant’s sexual experience may be adduced<sup>87</sup> was based upon s 349 of the *Criminal Procedure Act 2009* (Vic). The Commissions’ proposals are also

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82 Public Defenders Office NSW, *Submission FV 221*, 2 July 2010.

83 That is, as set out in Consultation Paper, Proposal 18–3.

84 Law Council of Australia, *Submission FV 180*, 25 June 2010. The Queensland Law Society supported the Law Council view: Queensland Law Society, *Submission FV 178*, 25 June 2010.

85 National Legal Aid, *Submission FV 232*, 15 July 2010.

86 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

87 Consultation Paper, Proposal 18–3.

substantially consistent with relevant recommendations of the VLRC's report, *Sexual Offences*,<sup>88</sup> and the NSWLRC's report, *Reform of Section 409B*.<sup>89</sup>

27.77 In the Commissions' view, all jurisdictions should enact legislative provisions substantially similar to s 349 of the *Criminal Procedure Act 2009* (Vic), and this is reflected in the recommendations set out below—with some changes.

27.78 First, the recommendation, if implemented, would require the evidence to have 'significant probative value', rather than 'substantial relevance to a fact in issue'. The latter formulation appears in the legislation of a number of jurisdictions.<sup>90</sup> The term 'significant probative value' is more consistent with the overall approach of the uniform Evidence Acts, under which relevance is a threshold test of admissibility<sup>91</sup> and there is no concept of 'substantial' relevance. The use of 'significant probative value' as a test is also consistent with the formulation of other admissibility rules, including those applying to tendency and coincidence evidence,<sup>92</sup> and was recommended by the NSWLRC.<sup>93</sup>

27.79 Secondly, the list of factors that the court must consider to balance the considerations of fairness to the defendant with the need to protect the complainant from distress, humiliation and embarrassment resulting from an invasion of her sexual privacy, should be non-exhaustive. In the Commissions' view, the listed matters address the main concerns about admitting sexual experience evidence. Others may arise in the particular circumstances of a case, however, and a judicial officer should not be precluded from taking such a relevant matter into account.<sup>94</sup>

27.80 Finally, the words 'in the jury' have been deleted from the reference to evidence that might 'arouse in the jury discriminatory belief or bias, prejudice, sympathy or

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88 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), Recs 69–73.

89 New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998), Rec 2.

90 *Crimes Act 1914* (Cth) s 15YC(2)(a); *Criminal Procedure Act 2009* (Vic) s 349; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4; *Evidence Act 1906* (WA) s 36BC; *Evidence Act 2001* (Tas) s 194M; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 53; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(1).

91 That is, under uniform Evidence Acts ss 55–56.

92 See, eg, uniform Evidence Acts ss 97–98. In the context of those provisions, 'significant probative value' has been interpreted to require that evidence be 'important' or 'of consequence' to the issues. It has been held to mean something more than mere relevance but something less than a 'substantial' degree of relevance. For further discussion see: Australian Law Reform Commission, *Evidence*, (Interim) Report 26, vol 1, [806]; New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998), [6.117]; S Odgers, *Uniform Evidence Law* (8th ed, 2009), [1.3.6680].

93 New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998), [6.117], Rec 2.

94 The VLRC considered that a non-exhaustive list 'would leave open the possibility that sexual activity evidence could be introduced inappropriately': Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [5.58]. In assessing the 'interests of justice' of a particular case, judicial officers should be informed not only by the circumstances of the case, but also by the guiding principles and objects clauses of the legislation: see Ch 25.

hostility'. This is consistent with similar provisions in the uniform Evidence Acts, which do not make any distinction between jury and non-jury trials.<sup>95</sup>

27.81 The recommendation differs from the Consultation Paper proposal in that it follows more closely the Victorian (and South Australian) legislation by requiring the admission of sexual experience evidence to be in 'the interests of justice' (having regard to the listed factors). The phrase 'interests of justice' is used in a number of evidentiary and procedural provisions, including in the uniform Evidence Acts.<sup>96</sup>

27.82 The Commissions also recommend that evidence as to the sexual activities of the complainant, other than that to which the charge relates, should not be admissible to show, for example, that the complainant is more likely to have consented to the sexual activity to which the charge relates, because of any inference it may raise about 'general disposition'. A provision of this nature has been enacted in all Australian jurisdictions except NSW and Tasmania.<sup>97</sup> Evidence of prior sexual activity is not normally relevant to the issue of consent, and tendency (or propensity) reasoning in this regard suffers from dangers of reliance on resilient myths and misconceptions about sexual assault complainants.

27.83 In the Commissions' view, there is no need to make special provision concerning the admissibility of sexual experience evidence for credibility purposes.<sup>98</sup> Section 103 of the uniform Evidence Acts already provides that evidence may not be adduced in cross-examination of a witness unless 'the evidence could substantially affect the assessment of the credibility of a witness'.<sup>99</sup> Sexual experience evidence is unlikely to meet this standard.<sup>100</sup>

**Recommendation 27–3** Federal, state and territory legislation should provide that the court must not grant leave under the test proposed in Rec 27–2, unless it is satisfied that the evidence has significant probative value and that it is in the interests of justice to allow the cross-examination or to admit the evidence, after taking into account:

95 See, eg, Uniform Evidence Acts, ss 135–137. See also Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [2.57]–[2.70].

96 See, eg, Commonwealth *Evidence Act 1995* (Cth) s 128(4) ('Privilege in respect of self-incrimination in other proceedings'); *Criminal Procedure Act 1986* (NSW) s 306Y ('Evidence not to be given in the form of recording if contrary to the interests of justice'); *Criminal Procedure Act 1986* (NSW) s 29(3) ('When more than one offence may be heard at the same time').

97 The Commissions note that the circumstances in which sexual experience evidence may be admitted pursuant to s 293(4) of the *Criminal Procedure Act 1986* (NSW) are so narrowly cast that evidence which only raises an inference as to the complainant's general disposition in sexual matters is likely to be excluded in practice: *Criminal Procedure Act 1986* (NSW) s 293(4).

98 As in Victoria under *Criminal Procedure Act 2009* (Vic) s 352.

99 Uniform Evidence Acts, s 103(1).

100 S Odgers, *Uniform Evidence Law* (8th ed, 2009), [1.3.7760]. This constraint does not apply in common law evidence jurisdictions where, as a general rule, questions designed to attack the witness' credit are permissible in cross-examination of another party's witness: See Thomson Reuters, *The Laws of Australia*, vol 16 Evidence, 16.4.

- (a) the distress, humiliation and embarrassment that the complainant may experience as a result of the cross-examination or the admission of the evidence, in view of the age of the complainant and the number and nature of the questions that the complainant is likely to be asked;
- (b) the risk that the evidence may arouse discriminatory belief or bias, prejudice, sympathy or hostility;
- (c) the need to respect the complainant's personal privacy;
- (d) the right of the defendant to fully answer and defend the charge; and
- (e) any other relevant matter.

**Recommendation 27–4** Federal, state and territory legislation should provide that evidence about the sexual activities—whether consensual or non-consensual—of the complainant, other than those to which the charge relates, is not of significant probative value only because of any inference it may raise as to the general disposition of the complainant.

## Procedural issues

27.84 In all jurisdictions, a determination about the admissibility of evidence of the complainant's sexual reputation or sexual experience is decided by the court in the absence of the jury.<sup>101</sup> In Victoria, Queensland, the ACT and the Northern Territory, an application for leave may be heard in the absence of the complainant at the defendant's request.<sup>102</sup> This approach allows for the full examination of the nature and purpose of the proposed evidence by counsel for both sides without causing embarrassment to the complainant<sup>103</sup> and may afford a practical opportunity to limit and frame questions.

27.85 In the Commonwealth, Victorian and ACT jurisdictions, an application for leave is to be made in writing.<sup>104</sup> The Victorian provisions require service of the application on the Office of Public Prosecutions (OPP) or the informant at least seven days before summary hearings, committal hearings and sentencing hearings, and 14 days before trials and special hearings.<sup>105</sup> The written application for leave must set out the initial questions sought to be asked, the scope of the questioning and how the evidence sought

101 *Crimes Act 1914* (Cth) s 15YD(1)(b); *Criminal Procedure Act 1986* (NSW) s 293(7); *Criminal Procedure Act 2009* (Vic) s 348; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(6); *Evidence Act 1906* (WA) s 36BC(1); *Evidence Act 1929* (SA) s 34L(4); *Evidence Act 2001* (Tas) s 194M(1)(b); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 52(b); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(4).

102 *Criminal Procedure Act 2009* (Vic) s 348; *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4(6); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 52(c); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(4).

103 J Bargen and E Fishwick, *Sexual Assault Law Reform: A National Perspective* (1995), prepared for the Office of the Status of Women, 83.

104 *Crimes Act 1914* (Cth) s 15YD(1)(b); *Criminal Procedure Act 2009* (Vic) s 344; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 52.

105 *Criminal Procedure Act 2009* (Vic) s 344.

to be elicited has substantial relevance to the facts in issue or why it is a proper matter for cross-examination as to credit.<sup>106</sup> These procedural controls were imposed after studies showed that the legislation had a limited effect on the admission of prior sexual history evidence.<sup>107</sup>

27.86 The Victorian OPP pursued a policy of writing to the defence in sexual offence matters and informing them of the procedural requirements imposed under then s 37A of the *Evidence Act 1958* (Vic).<sup>108</sup> As at December 2003, that practice increased the number of written applications for leave, but written applications were still only being made in approximately half of cases where they were required.<sup>109</sup> The VLRC recommended the OPP continue that practice.<sup>110</sup>

27.87 There is variation across the jurisdictions as to whether the court is required to record in writing the reasons for granting leave.<sup>111</sup>

### **Consultation Paper**

27.88 In the Consultation Paper, the Commissions made a number of proposals relating to the procedure by which an application for leave to admit sexual experience evidence should be made, determined and implemented.

27.89 The Commissions proposed that federal, state and territory legislation should require any application for leave to admit sexual history evidence to be:

- (a) made in writing; and
- (b) filed with the relevant court and served on the informant or the Director of Public Prosecutions within a prescribed minimum number of days,

and prescribe:

- (a) the required contents of such an application;
- (b) the circumstances in which leave may be granted out of time;
- (c) the circumstances in which the requirement that an application for leave be made in writing may be waived; and
- (d) that the application is to be determined in the absence of the jury, and if the accused requests, in the absence of the complainant.<sup>112</sup>

27.90 The Commissions also proposed that federal, state and territory legislation should require a court to give reasons for its decision whether or not to grant leave, and if leave is granted, to state the nature of the admissible evidence.<sup>113</sup>

106 Ibid s 345.

107 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.41].

108 Replaced by *Criminal Procedure Act 2009* (Vic) s 348.

109 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.52].

110 Ibid, Rec 74.

111 A court may be required to record in writing the reasons for granting leave, eg: *Crimes Act 1914* (Cth) s 15YD(2); *Criminal Procedure Act 1986* (NSW) s 293(8); *Criminal Procedure Act 2009* (Vic) s 351; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 52; or give reasons only, eg: *Evidence Act 2001* (Tas) s 194M(5); or may be free of any legislative requirement.

112 Consultation Paper, Proposal 18–6.

27.91 Finally, the Commissions proposed that Commonwealth, state and territory Directors of Public Prosecutions (DPPs) should introduce and implement a policy of writing to the defence in sexual assault matters and informing them of the procedural application requirements imposed under the relevant legislation relating to admitting sexual experience evidence.<sup>114</sup>

#### **Submissions and consultations**

27.92 Some stakeholders, including victims of family violence, supported the Consultation Paper proposals.<sup>115</sup>

27.93 The Public Defenders Office NSW opposed any requirement that written notice be filed in advance and considered that a requirement for the full articulation of reasons for allowing questioning, and for the scope of the questioning to be recorded in writing, would be adequate.<sup>116</sup> Other stakeholders noted that it is common for both prosecutors and defence counsel to be briefed on short notice in sexual assault proceedings. Accordingly, there needs to be a degree of flexibility in the process, including to allow applications to be made on short notice.<sup>117</sup>

27.94 The Commonwealth Director of Public Prosecutions (CDPP) opposed the proposal that DPPs should inform the defence of the procedural application requirements, on the basis that this would require the CDPP to provide legal advice to the defence.<sup>118</sup> The CDPP considered that the intent of the proposal could be met instead by professional bodies, such as the law societies, creating fact sheets for lawyers on the procedural requirements for admitting and adducing sexual experience evidence in a given jurisdiction.

27.95 National Legal Aid and the Magistrates' Court and Children's Court of Victoria submitted that it is common for impermissible questions eliciting sexual experience evidence to be asked, without reference to the legislation or legislative procedures.<sup>119</sup> National Legal Aid supported monitoring the provisions in practice. The Magistrates' Court and Children's Court of Victoria observed that active case management of matters in a specialised sexual assault list improves the ability of the Court to control impermissible questioning and helps ensure that matters are addressed in advance of the hearing.<sup>120</sup>

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113 Ibid, Proposal 18–7.

114 Ibid, Proposal 18–8.

115 J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Confidential, *Submission FV 130*, 21 June 2010.

116 Public Defenders Office NSW, *Submission FV 221*, 2 July 2010.

117 National Legal Aid, *Submission FV 232*, 15 July 2010; Barrister, *Consultation*, Sydney, 10 June 2010.

118 Other stakeholders opposed this aspect of the proposal on similar grounds: National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

119 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010.

120 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

***Commissions' views***

27.96 Formalising the procedure by which leave to admit evidence of the complainant's sexual experience is sought and granted will encourage judicial officers and legal practitioners to turn their minds to the admissibility issues before they arise in the course of proceedings and to help ensure compliance.

27.97 Legislation should require that an application for leave be made in writing and determined in the absence of the jury and, if the defendant so requests, in the absence of the complainant. The court should be required to give reasons for its decision whether or not to grant leave, and, if leave is granted, to state the nature of the admissible evidence.<sup>121</sup> The requirement that the court 'state the nature of the admissible evidence' is necessary to prevent questioning of the complainant beyond the scope of the evidence which has been ruled admissible.<sup>122</sup>

27.98 These legislative measures should be supported by judicial and practitioner education and training about the procedural requirements for adducing sexual history evidence through cross-examination of the complainant.

**Recommendation 27–5** Federal, state and territory legislation should require that an application for leave to cross-examine complainants of sexual assault, or to admit any evidence, about the sexual activities of the complainant must be made:

- (a) in writing;
- (b) if the proceeding is before a jury—in absence of the jury; and
- (c) in the absence of a complainant, if a defendant in the proceeding requests.

**Recommendation 27–6** Federal, state and territory legislation should require a court to give reasons for its decision whether or not to grant leave to cross-examine complainants of sexual assault, or to admit any evidence, about the sexual activities of the complainant and, if leave is granted, to state the nature of the admissible evidence.

**Recommendation 27–7** Australian courts, and judicial education and legal professional bodies should provide education and training about the procedural requirements for admitting and adducing evidence of sexual activity.

<sup>121</sup> A similar recommendation was made in NSWLRC 87: New South Wales Law Reform Commission, *Review of Section 409B of the Crimes Act 1900 (NSW)*, Report 87 (1998), [6.140], Rec 2.

<sup>122</sup> Ibid.

## Sexual assault communications privilege

27.99 Sexual assault communications are communications made in the course of a confidential relationship between the victim of a sexual assault and a counsellor. The defence may seek access to this material to assist with their preparation for trial and for use during cross-examination of the complainant and other witnesses.

27.100 From the mid-1990s, ongoing reform of sexual assault laws and procedure has included the enactment of legislation to limit the disclosure and use of these communications.<sup>123</sup> Every state and territory—except Queensland—now has specific legislation protecting counselling communications.<sup>124</sup>

27.101 The sexual assault communications privilege has been considered by a number of law reform bodies, including MCCOC,<sup>125</sup> the VLRC,<sup>126</sup> and by the ALRC, VLRC and NSWLRC in ALRC Report 102.<sup>127</sup> These reports have generally taken the view that the privilege serves the important public interest of encouraging people who have been sexually assaulted to seek therapy, and may also encourage people who are sexually assaulted to report the crime to the police.<sup>128</sup>

### Current law

27.102 Models of a sexual assault communications privilege differ markedly. Provisions may be formulated either as a privilege or as an immunity. A ‘privilege’ is a right to resist disclosing information that would otherwise be required to be disclosed.<sup>129</sup> An immunity prevents the disclosure of certain information in court proceedings, generally when the public interest in non-disclosure outweighs the public interest in disclosure.<sup>130</sup>

27.103 For example, the NSW provisions operate as a privilege—a person can object to producing a protected confidence on the ground that it is privileged;<sup>131</sup> but the

123 M Heath, *The Law of Sexual Offences Against Adults in Australia* (2005), prepared for the Australian Institute of Family Studies, 15.

124 For current provisions see: *Criminal Procedure Act 1986* (NSW) ch 6 pt 5 div 2; *Evidence (Miscellaneous Provisions) Act 1958* (Vic) pt 2 div 2A; *Evidence Act 1906* (WA) ss 19A–19M; *Evidence Act 1929* (SA) pt 7 div 9; *Evidence Act 2001* (Tas) s 127B; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) pt 4 div 4.5; *Evidence Act 1939* (NT) pt VIA. Some jurisdictions also provide for a ‘professional confidential relationships privilege’ capable of applying to sexual assault counselling communications: *Evidence Act 1995* (Cth) ss 126A–126F; *Evidence Act 1995* (NSW) ss 126A–126F.

125 Model Criminal Code Officers Committee—Standing Committee of Attorneys-General, *Model Criminal Code—Chapter 5, Fatal Offences Against the Person: Discussion Paper* (1998).

126 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.71]–[4.98].

127 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [15.45]–[15.84].

128 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.71].

129 For example, common law (and statutory) privileges against self-incrimination, client legal privilege, parliamentary privilege and the privilege in aid of settlement: Australian Law Reform Commission, *Making Inquiries: A New Statutory Framework*, Report 111 (2009), [3.20].

130 Ibid, [3.20]–[3.22]. See also, J Gans and A Palmer, *Australian Principles of Evidence* (2nd ed, 2004), 108–109.

131 *Criminal Procedure Act 1986* (NSW) s 298(1).

primary protected confider (the victim of a sexual assault) can consent to disclosure.<sup>132</sup> The South Australian provisions are formulated as an immunity, stating that sexual assault communications are ‘protected from disclosure in legal proceedings by public interest immunity’.<sup>133</sup> The immunity cannot be waived by participants in the protected communication.<sup>134</sup>

27.104 For simplicity, the discussion below uses the term ‘privilege’ to refer to both models for protecting sexual assault communications from disclosure in court proceedings.

27.105 Other points of divergence are whether the privilege is qualified or absolute; and whether the privilege applies in preliminary criminal proceedings, such as committal proceedings.

27.106 The privilege for communications to sexual assault counsellors under s 127B of the *Evidence Act 2001* (Tas) provides absolute protection for the communications unless the complainant consents to their production.

27.107 In New South Wales,<sup>135</sup> South Australia,<sup>136</sup> the ACT<sup>137</sup> and the Northern Territory,<sup>138</sup> there is an absolute prohibition against requiring the production of counselling communications in preliminary criminal proceedings and against the use of counselling communication in such proceedings. Otherwise, the privilege that applies in all jurisdictions, except Tasmania, is qualified, both in relation to the production of documents and the use of notes in evidence.<sup>139</sup>

27.108 One of the main issues relating to the scope of the privilege is that, in many jurisdictions, the current restrictions on admission of sexual assault counselling communications do not prevent a defence lawyer from issuing a subpoena requiring a person to produce counselling notes.<sup>140</sup> As a result, subpoenas are frequently used to ‘require counsellors to attend and give evidence or produce notes’ and ‘[p]rivate counsellors who are unaware that the law protects confidential counselling communications may produce records, rather than appearing in court to resist a subpoena’.<sup>141</sup>

27.109 Other factors that affect the scope of the privilege, and which are defined or dealt with inconsistently across the jurisdictions, include:

- the scope of the communications protected;<sup>142</sup>

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132 Ibid s 300.

133 *Evidence Act 1929* (SA) s 67E(1).

134 Ibid s 67E(3).

135 *Criminal Procedure Act 1986* (NSW) s 297.

136 *Evidence Act 1929* (SA) s 67F.

137 *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 57.

138 *Evidence Act 1939* (NT) s 56B.

139 See also, *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C; *Evidence Act 1906* (WA) s 19C.

140 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.74].

141 Ibid.

142 See, eg, *Evidence Act 1906* (WA) s 19A, cf *Evidence Act 1929* (SA) s 67D.

- whether preliminary examination by a judicial officer—to determine questions of leave to produce or adduce protected confidences—is a mandatory or discretionary requirement;<sup>143</sup>
- the thresholds at which the court must be satisfied before ordering production;<sup>144</sup>
- the factors the court must take into account for the purposes of the public interest balancing test;<sup>145</sup> and
- the express exemptions to the privilege.<sup>146</sup>

***Further reform of sexual assault communications privilege***

27.110 The harmonisation of sexual assault communications privileges has been considered by SCAG through the National Working Group on Evidence. The Working Group agreed that it is not appropriate to provide for a single model sexual assault counselling protection in Australia because of the ‘satisfactory operation of a variety of protections for sexual assault counselling communications and the variation between jurisdictions in criminal practice and procedure’.<sup>147</sup>

27.111 Instead, the SCAG Ministers agreed on seven principles (the SCAG principles) to be applied as the minimum standard for protection of sexual assault counselling communications in Australia, if jurisdictions legislate to restrict the disclosure of sexual assault counselling communications in criminal trials.<sup>148</sup>

27.112 In undertaking this Inquiry, the Terms of Reference instruct the ALRC to be ‘careful not to duplicate ... the work being undertaken through SCAG on the harmonisation of uniform evidence laws, in particular the development of model sexual assault communications immunity provisions’. For this reason, the focus of the Commissions’ consideration of the sexual assault communications privilege has been on how they operate in practice rather than on the harmonisation of provisions.

27.113 The SCAG principles acknowledge the importance of practical measures that facilitate the implementation of the privilege and its protection. For example, one of the seven principles provides that ‘jurisdictions should consider adapting court processes, with the aim of limiting inadvertent disclosure of sexual assault counselling communications’.<sup>149</sup>

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143 See, eg, *Criminal Procedure Act 1986* (NSW) s 298(1)(a), cf *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32C(6).

144 See, eg, *Criminal Procedure Act 1986* (NSW) s 298(3),(4), cf *Evidence Act 1906* (WA) s 19E.

145 See, eg, *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32D(2) cf *Evidence Act 1929* (SA) s 67F(5)–(6).

146 See, eg, *Evidence (Miscellaneous Provisions) Act 1958* (Vic) s 32E cf *Evidence Act 1939* (NT) s 56F.

147 Australian Government Attorney-General’s Department, *Submission FV 166*, 25 June 2010.

148 Standing Committee of Attorneys-General, *Communiqué*, 7 May 2010.

149 Ibid.

### **Assisting complainants to invoke the privilege**

27.114 As observed during this Inquiry, in practice, the sexual assault communications privilege may not achieve its intended policy objective of protecting the public interest in maintaining the confidentiality of the counselling relationship and its therapeutic benefits.<sup>150</sup>

27.115 In 2009, Women's Legal Services NSW coordinated a project providing pro bono representation to sexual assault victims seeking to maintain privilege over their counselling and medical records. The Sexual Assault Communications Pro Bono Referral Pilot Project in the Downing Centre (SACP Pilot)—a New South Wales Local Court—involved the NSW Bar Association, the Office of the Director of Public Prosecutions NSW (NSW ODPP) and three private commercial law firms. The project aimed to provide a ‘stop-gap’ measure for legal service provision, investigate the operation of the privilege, and identify areas in need of legislative and procedural reform.<sup>151</sup>

27.116 Women's Legal Services NSW has identified the following continuing problems for victims of sexual assault and counsellors pursuant to existing sexual assault communications privilege provisions:

- some counselling services do not inform sexual assault victims that their counselling notes have been subpoenaed;
- some counselling services produce material to the court without raising an objection or claiming the privilege;
- some counselling services give sexual assault victims inaccurate advice about the privilege;
- sexual assault victims may not receive written notice of the subpoenaed documents;
- sexual assault victims have difficulty obtaining legal assistance to uphold their privilege;
- sexual assault victims who seek to uphold their privilege often require legal representation at short notice, and the legal representation retained may only gain limited access to relevant materials;
- judicial officers permit reliance on improperly obtained confidences to support arguments about admissibility;
- the party seeking access to protected confidences may re-ventilate arguments about admissibility before trial judges—after a judicial officer presiding at an interlocutory hearing has made a ruling—and trial judges may overrule the decision;

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<sup>150</sup> Women's Legal Services NSW, *Consultation*, Sydney, 20 January 2010.

<sup>151</sup> Women's Legal Services NSW, *Submission FV 182*, 25 June 2010. At the time of writing, an evaluation report for the SACP Pilot was being prepared by Women's Legal Services NSW.

- sexual assault victims have reported feelings of violation due to the legal processes associated with seeking disclosure of their counselling records and seeking to uphold their privilege.<sup>152</sup>

27.117 Many of these problems appear to arise because, while the privilege is legally that of the participants in the counselling process,<sup>153</sup> the privileged documents sought to be produced and admitted belong to counselling services or individual counsellors responsible for their creation whose attitude to disclosure may differ from that of the victim because of the different professional and privacy interests at stake.

27.118 A qualified sexual assault communications privilege serves the broader public interest of ensuring the legal system is fair both to the accused and the complainant.<sup>154</sup> However, sexual assault victims, who are unrepresented in criminal proceedings, may not be in a position to claim or seek to enforce the privilege.

27.119 This difficulty has generated debate about whether victim advocates should be employed in the criminal justice process to make submissions as to rulings on the sexual assault communications privilege.<sup>155</sup> It is beyond the scope of the current Inquiry to consider that debate, which would require detailed consideration of difficulties inherent in reconciling the role of a separate legal representative with the current constraints of the adversarial system.<sup>156</sup>

27.120 Complainants, whether represented or unrepresented, may be assisted to invoke the sexual assault communications privilege by implementing some or all of the following measures:<sup>157</sup>

- requiring the party seeking production to provide notice in writing to each other party and if the sexual assault complainant is not a party—the sexual assault complainant;
- requiring that any such written notice issued be accompanied by a pro forma fact sheet on the privilege and providing contact details for assistance;

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152 Women's Legal Services NSW, *Consultation*, Sydney, 20 January 2010.

153 For example, as the 'protected confider' who made the 'counselling communication': *Criminal Procedure Act 1986 (NSW)* ss 295, 296. This may include the sexual assault victim, the person who provides the counselling service, and those present to facilitate the counselling process, such as a non-offending parent.

154 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [15.81].

155 See, eg, Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 179–180.

156 The NSW Criminal Justice Sexual Offences Taskforce observed that while 'there may be some merit to utilising independent legal representation in matters arising under the sexual assault communications privilege, as this is a privilege that belongs to the complainant, the proposal, as it currently stands, appears to create more problems than it may solve': *Ibid*, 180.

157 These proposed practices reflect the views of Women's Legal Services NSW as contained in: Women's Legal Services NSW, *The NSW Sexual Assault Communications Privilege: Current Procedure and Issues for Reform: Submission to the NSW Attorney-General's Department* (2008).

- educating defence counsel about their obligation to identify records potentially giving rise to the privilege to encourage compliance with any such written notice provisions;
- providing counsellors with education about the sexual assault communications privilege and next steps if they are served with a subpoena;<sup>158</sup>
- requiring that subpoenas be issued with a pro forma fact sheet on the privilege, providing contact details for legal assistance;
- improving access to free legal assistance about the sexual assault communications privilege;
- requiring that the court issuing a subpoena provide a copy of all subpoenas to the prosecution;
- educating prosecutors: to identify possible claims of the sexual assault communications privilege arising out of subpoenas; to inform the court of any such possible claims of the sexual assault communications privilege during pre-trial processes; where subpoenas are served at short notice during a trial, to query short service applications; to inform the court where documents containing protected confidences are improperly adduced, admitted or used in the course of proceedings;
- educating defence counsel generally about the sexual assault communications privilege with a view to limiting the use of improperly obtained protected confidences; and
- educating judicial officers about the impact of sexual assault on complainants, the role of counselling in alleviating victims' trauma and the desirability of encouraging people who have been sexually assaulted to seek therapy.

#### ***Submissions and consultations***

27.121 In the Consultation Paper, the Commissions asked what procedures and services would best assist sexual assault complainants to invoke the sexual assault communications privilege, assuming they continue to be unrepresented in sexual assault proceedings.<sup>159</sup>

27.122 Some stakeholders expressed support for the adoption of the measures raised in the Consultation Paper to assist sexual assault complainants to invoke the sexual assault communications privilege.<sup>160</sup>

27.123 The NSW ODPP submitted that the counselling communications privilege has not had adequate attention paid to it by participants in the criminal justice system in

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158 See, eg, Women's Legal Services NSW, *Counsellors and Subpoenas: A Practical Guide for Counsellors Served with Subpoenas* (2004).

159 Consultation Paper, Question 18–5.

160 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010.

NSW—including the courts, legal practitioners, counsellors, medical practitioners and organisations holding personal records.<sup>161</sup> The NSW ODPP noted that the absolute prohibition on the production of a document recording a protected confidence in committal proceedings is not respected in practice. Rather, subpoenas are regularly issued and documents produced, often without the knowledge of the prosecution.<sup>162</sup>

27.124 The NSW ODPP stated that complainants involved in the SACP Pilot gave ‘very positive’ feedback about the assistance they had received. The ODPP considers that the SACP Pilot has increased awareness of the privilege and the complainant’s rights and that legal assistance should be available to complainants either through a community victim’s advocacy service or the relevant legal aid commission. The NSW ODPP identified a number of problems with the sexual assault communications privilege, some of which were also identified by other stakeholders.

27.125 First, the prosecutor’s role in regard to privileged material was observed to be problematic because of the potential for conflict with the prosecutor’s obligations of disclosure. The NSW ODPP considered that it is inappropriate for the prosecutor to vet material, advise the complainant and argue the privilege, although the prosecutor should be present for any argument to assist the court.<sup>163</sup>

27.126 Secondly, the subpoena of counselling records puts complainants at risk of having their place of residence, contact information and other personal details disclosed to the court and others without appropriate vetting.<sup>164</sup>

27.127 Thirdly, the NSW ODPP observed that victims of family violence are particularly susceptible to the subpoena of counselling records because the offender’s knowledge of the victim enables them to identify potential sources of personal information. This can result in the issuing of multiple subpoenas, which can be perceived as an attempt to intimidate the victim.

27.128 Fourthly, late notice of the return date of a subpoena was a consistent problem encountered by the SACP Pilot and presented particular problems when this date was close to the scheduled trial date. In some instances, the complainant must choose between proceeding with the trial or claiming the privilege.<sup>165</sup>

27.129 The NSW ODPP suggested that:

- stringent procedures need to be adopted and adhered to by the Court in regard to subpoenas;

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161 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

162 The DPP NSW noted that one District Court Judge, on hearing an argument for privilege, observed: ‘again nobody paid any attention to the legislation and access was granted to those records [of a psychiatrist treating a complainant as a result of an assault] which is precisely the situation that the legislation is designed to avoid’. *Ibid.*

163 Women’s Legal Service Queensland similarly noted that the involvement of prosecutors in a claim for the privilege is limited: Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

164 This concern was also expressed by a victim of family violence who related their experience with the subpoenaing of counselling records during court proceedings: Confidential, *Submission FV 14*, 5 November 2009.

165 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

- where counselling notes are subpoenaed, there should be mandatory notification of the ‘other party’, so that, for instance, the prosecution has the opportunity to ask that access is not granted until such time as the complainant has been notified; and
- consideration should be given to introducing provisions to ensure that subpoenas are issued in a timely way.<sup>166</sup>

27.130 The Magistrates’ Court and Children’s Court of Victoria observed that the application of the privilege to civil proceedings, which may be related to criminal proceedings, has prevented ‘backdoor’ impermissible access to confidential communications. In the Courts’ experience, difficulties with the operation of the privilege in practice arise more commonly where access is sought from individual health professionals, as opposed to sexual assault-specific service providers. Centres Against Sexual Assault (CASA) are often represented and the complainant’s views are put before the court either by the prosecution or by the CASA.

27.131 The Courts observed that particular difficulties arise where access is sought to departmental records, particularly where child protection issues arise in relation to the complainant. The Courts suggested that it may be appropriate to require human services departments to categorise their material and be legally represented in relation to any subpoenas to which the department is required to respond.

27.132 The Courts expressed support for an approach that ensures that all stakeholders’ legitimate interests are put before the court and that minimises the potential for the subpoena of counselling records to operate as a ‘fishing exercise’.<sup>167</sup>

27.133 Other stakeholders also expressed views about how to improve the operation of the privilege in practice for sexual assault complainants. For example, the Women’s Legal Service Queensland supported the development of processes to better enable unrepresented people to assert the privilege.<sup>168</sup> The National Association of Services Against Sexual Violence (NASASV) suggested that measures should target third parties who hold confidential records to ensure that they are informed about the communications privilege.<sup>169</sup> The Canberra Rape Crisis Centre supported absolute protection of communications unless the complainant consents to their production.<sup>170</sup>

#### ***Commissions’ views***

27.134 The SCAG National Working Group on Evidence found that the varying models for protecting the confidentiality of sexual assault counselling communications are operating satisfactorily.<sup>171</sup> The Commissions are, however, unconvinced by this conclusion.

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166 Ibid.

167 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

168 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

169 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

170 Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

171 Australian Government Attorney-General’s Department, *Submission FV 166*, 25 June 2010.

27.135 While the SCAG principles may assist in harmonising legislative provisions, the Commissions consider that the principles do not deal adequately with the fundamental cause of difficulties with the operation of the privilege in practice identified by stakeholders in this Inquiry. That is, while the privilege is legally that of the participants in the counselling process,<sup>172</sup> the documents subject to the privilege belong to counselling services or individual counsellors responsible for their creation, and it is to these parties that subpoenas will be directed. Counsellors may have professional and therapeutic reasons to oppose disclosure, but these interests may differ from the privacy and other interests of the complainant. Moreover, counsellors are not always aware of their rights and responsibilities in relation to subpoenas issued for the production of counselling communications concerning complainants.

27.136 In the Commissions' view, more needs to be done to ensure that existing legislative provisions operate effectively to protect counselling communications. In particular, steps should be taken to ensure that complainants are notified, in a timely manner, about the subpoena of counselling communications and given information about their legal rights and options for accessing legal advice. In this context, SCAG Principle 4 states that jurisdictions 'should consider adapting court processes, with the aim of limiting inadvertent disclosure of sexual assault counselling communications'.<sup>173</sup>

27.137 The Commissions recommend that federal, state and territory legislation relating to subpoenas and the operation of the sexual assault communications privilege should ensure that the interests of complainants in sexual assault proceedings are better protected, including by requiring:

- parties seeking production of sexual assault communications, to provide timely notice in writing to the other party and the sexual assault complainant;
- that any such written notice be accompanied by a pro forma fact sheet on the privilege and providing contact details for legal assistance;
- that subpoenas be issued with a pro forma fact sheet on the privilege, also providing contact details for legal assistance.

27.138 Education and training to improve awareness about the existence of the privilege and how it may be asserted would also assist in this regard. Bodies such as the Law Council and NASAV (the peak body for organisations who work with victims of sexual violence) may be appropriate bodies to pursue such an initiative. Judicial officers may also benefit from greater awareness of the privilege and how it may be asserted.

27.139 The release of the evaluation of the SACP Pilot may provide an opportunity for consideration by governments and law reform bodies of other measures that might be taken to improve the operation of the sexual assault communications privilege.

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172 The sexual assault victim who is counselled, the person who provides the counselling service and those present to facilitate the counselling process, such as a parent.

173 Standing Committee of Attorneys-General, *Communiqué*, 7 May 2010, 10.

**Recommendation 27–8** Federal, state and territory legislation and court rules relating to subpoenas and the operation of the sexual assault communications privilege should ensure that the interests of complainants in sexual assault proceedings are better protected, including by requiring:

- (a) parties seeking production of sexual assault communications, to provide timely notice in writing to the other party and the sexual assault complainant;
- (b) that any such written notice be accompanied by a pro forma fact sheet on the privilege and providing contact details for legal assistance; and
- (c) that subpoenas be issued with a pro forma fact sheet on the privilege, also providing contact details for legal assistance.

**Recommendation 27–9** The Australian, state and territory governments, in association with relevant non-government organisations, should work together to develop and administer training and education programs for judicial officers, legal practitioners and counsellors about the sexual assault communications privilege and how to respond to a subpoena for confidential counselling communications.

### **Expert opinion evidence and children**

27.140 There is a considerable body of research that shows that jurors and jury-eligible citizens hold a number of misconceptions about children's ability to give truthful evidence and how children react to sexual abuse.<sup>174</sup> It is said that the most common misconceptions, which apply equally in contexts of family violence, include that:

- children are easily manipulated into giving false reports of sexual abuse;
- child sexual abuse will result in physical damage and evidence;
- a typical victim would resist, cry out for help or escape the offender;
- delay in complaint is uncommon and such a delay is evidence of lying; and
- inconsistencies in a child's report is evidence of lying.<sup>175</sup>

<sup>174</sup> An extensive summary of the literature on jurors' and laypersons' misconceptions can be found in A Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153.

<sup>175</sup> Ibid, 156. The only published Australian study on juror misconceptions about children and child sexual abuse concluded that 'the most critical information about [child sexual abuse] cases is outside the experience and common knowledge of laypeople': A Cossins, J Goodman-Delahunty and K O'Brien, 'Uncertainty and Misconceptions about Child Sexual Abuse: Implications for the Criminal Justice System' (2009) 16 *Psychiatry, Psychology and Law* 435, 445.

27.141 The key question posed by the literature on jurors' and laypeople's misconceptions about child sexual abuse is whether expert witnesses are needed in child sexual assault trials 'to educate jurors about children's memory, suggestibility, and reactions to abuse'.<sup>176</sup>

27.142 Compared to the United States, Australian jurisdictions have had limited experience with admitting expert witness evidence about children. The general approach under the common law opinion rule 'has been to exclude such evidence on the grounds that the behaviour of child sexual abuse victims is within the common knowledge or ordinary experience of the jury'.<sup>177</sup>

27.143 However, many professionals recognise that some of the responses of children to sexual abuse are counterintuitive from a layperson's perspective, such as delay in complaint, secrecy, protecting the offender and maintaining an emotional bond with the offender.<sup>178</sup> Rather than the jury relying on its commonsense or collective experience, it is arguable that expert testimony about the behaviour of sexually abused children is necessary 'to restore a complainant's credibility from a debit balance because of jury misapprehension, back to a zero or neutral balance',<sup>179</sup> especially where the behaviour in question appears to a jury to be inconsistent with sexual abuse.

### Reform of the opinion rule

27.144 There has been a consistent view that legislative reform is needed to allow the admissibility of expert opinion evidence on the behavioural patterns of sexually abused children and children generally.<sup>180</sup> The first jurisdiction in Australia to legislate to overcome the limitations of the common law opinion rule was Tasmania. In 2001, a specific provision dealing with the admission of expert witness evidence in child sexual assault trials was included when Tasmania enacted the *Evidence Act 2001* (Tas).<sup>181</sup>

176 J Quas, W Thompson and K Clarke-Stewart, 'Do Jurors "Know" What Isn't So About Child Witnesses?' (2005) 29 *Law and Human Behaviour* 425, 425.

177 A Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153, 155. See *S v The Queen* (2001) 125 A Crim R 526; *R v Venning* (1997) 17 SR(WA) 261; *F v The Queen* (1995) 83 A Crim R 502; *R v C* (1993) 60 SASR 467; *Ingles v The Queen* (Unreported, Tasmanian Court of Criminal Appeal, Green CJ, Crawford and Zeeman JJ, 4 May 1993).

178 See A Cossins, 'Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us' (2008) 15 *Psychiatry, Psychology and Law* 153.

179 New Zealand Law Commission, *Evidence Code and Commentary* (1999), 67.

180 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [9.156]; Legislative Council Standing Committee on Law and Justice—Parliament of New South Wales, *Report on Child Sexual Assault Prosecutions*, Report No 22 (2002), 123; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), 329; Royal Commission into the New South Wales Police Service, *Final Report—Volume V: The Paedophile Inquiry* (1997), 1118; See A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 221–224.

181 *Evidence Act 2001* (Tas) s 79A. The Tasmanian Act does not include a provision that permits the admissibility of such evidence as an exception to the credibility rule, as is the case under the

27.145 In ALRC Report 102, the ALRC, NSWLRC and VLRC noted wide support for amending the common law opinion rule to allow the admission of expert opinion evidence about children.<sup>182</sup> The report highlighted the main problem with admitting expert opinion evidence about the development and behaviour of children—that is, if tendered for a credibility purpose, the credibility rule as well as exceptions to the credibility rule, are obstacles to admission.<sup>183</sup> For this reason, the ALRC, NSWLRC and VLRC made recommendations to amend s 79 of the uniform Evidence Acts to facilitate the admission of such evidence and to introduce a new exception to the credibility rule.<sup>184</sup>

27.146 These amendments were subsequently adopted by the Commonwealth, NSW and Victoria.<sup>185</sup> Section 79(2) of the uniform Evidence Acts confirms that for the purposes of the expert opinion exception to the opinion rule, ‘specialised knowledge’ includes ‘specialised knowledge of child development and child behaviour (including specialised knowledge of the impact of sexual abuse on children and their development and behaviour during and following the abuse).<sup>186</sup> Section 108C of the uniform Evidence Acts provides that the credibility rule does not apply to evidence given by a person concerning the credibility of another witness if the person has specialised knowledge based on the person’s training, study or experience (including specialised knowledge of child development and child behaviour) and the evidence ‘could substantially affect the assessment of the credibility of a witness’.

27.147 In 2008, Western Australia enacted provisions dealing with the opinion evidence of experts on child behaviour in child sexual offence proceedings in the *Evidence Act 1906* (WA).<sup>187</sup> This states that evidence by such an expert about ‘child development and behaviour generally’, or ‘child development and behaviour in cases where children have been the victims of sexual offences’, that is relevant is admissible notwithstanding certain other rules of evidence.

### ***Continuing problems***

27.148 Dr Anne Cossins has suggested, however, that the amendments to the uniform Evidence Acts ‘are a gateway only, rather than a complete answer to the problem of correcting juror misconceptions’.<sup>188</sup> First, the gateway represented by s 108C is narrow, because the expert opinion evidence has to ‘substantially’ affect the assessment of the credibility of the complainant in a child sexual assault trial. This may represent a relatively high bar and impose ‘a significant limitation on the admissibility

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Commonwealth, NSW and Victorian Acts: eg, *Evidence Act 1995* (Cth) s 108C; *Evidence Act 1995* (NSW) s 108C; *Evidence Act 2008* (Vic) s 108C.

182 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [9.168].

183 Ibid, [9.147].

184 Ibid, Recs 9–1, 12–7.

185 *Evidence Amendment Act 2008* (Cth); *Evidence Amendment Act 2007* (NSW); *Evidence Act 2008* (Vic). At the time of writing, Tasmania had not adopted these amendments.

186 *Evidence Act 1995* (Cth) s 79(2); *Evidence Act 1995* (NSW) s 79(2); *Evidence Act 2008* (Vic) s 79(2).

187 *Evidence Act 1906* (WA) s 36BE.

188 A Cossins, ‘Children, Sexual Abuse and Suggestibility: What Laypeople Think They Know and What the Literature Tells Us’ (2008) 15 *Psychiatry, Psychology and Law* 153, 165.

of expert evidence admitted solely for its credibility purpose'.<sup>189</sup> Secondly, expert opinion evidence can only be admitted with the leave of the court, which means that the court will need to refer to the matters listed in s 192 of the uniform Evidence Acts before giving leave—and consider any defence counsel objections about unfairness to the accused and lengthening of the trial.<sup>190</sup>

27.149 In addition, while expert opinion evidence on children's credibility may be desirable, those seeking to adduce such evidence face practical difficulties with the cost and availability of experts. Crown prosecutors have noted that it may not be possible to call expert witnesses to give evidence, because such witnesses are not available or because there is no such expert in a particular jurisdiction. For some prosecutors, it may be too costly to fly an expert from interstate. Even if expert opinion evidence is admitted, some experts may take a 'hired gun approach' to the literature and selectively choose research or misinterpret research to illustrate a particular point.<sup>191</sup>

27.150 While the uniform Evidence Acts reforms were an attempt to address one of the barriers to prosecuting child sex offences, the provisions may be insufficient to address the problem of jurors' misconceptions in child sexual assault trials.

### ***Reform options***

27.151 A number of options for further reform of the operation of the opinion rule with respect to expert evidence in child sexual assault trials have been canvassed. Barriers to the admission of such evidence could be lowered, for example, by:

- removing the word, 'substantially', from s108C(1)(b)(ii) of the uniform Evidence Acts; or
- making some categories of expert opinion evidence admissible without leave of the courts, as currently required.

27.152 The National Child Sexual Assault Reform Committee<sup>192</sup> has suggested that, because the prosecution may be unable to lead evidence from an expert witness about children's responses to sexual abuse and their reliability as witnesses, or a trial judge may refuse to give leave for such evidence to be admitted, a mandatory judicial direction, containing the same information that would be given by an expert witness, should be introduced into all Australian jurisdictions. This would counteract juror misconceptions and serve as an alternative to calling expert witnesses.<sup>193</sup>

27.153 On one view, it is clearly to the defendant's advantage for expert evidence *not* to be admitted in a child sexual assault trial, because this allows the defence to

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189 Ibid, 165–166.

190 Ibid, 166.

191 S Blackwell, 'Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand' (Paper presented at The Children and the Courts Conference, Canberra, 5 November 2005), 8.

192 The National Child Sexual Assault Reform Committee was formed in 2000 and comprises Directors of Public Prosecutions, judges, Children's Commissioners, academics, legal aid representatives, senior police officers, crime commissioners and others.

193 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 231–235.

exploit all the misconceptions associated with delay in complaint, behavioural disturbances and counterintuitive behaviour.<sup>194</sup> As it is likely that defence counsel will seek to have expert opinion evidence about the behaviour of sexually abused children declared inadmissible or excluded on the grounds that it is prejudicial or within the common knowledge of the jury, it may be more appropriate for a mandatory judicial direction to be given by the judge at the end of the trial.<sup>195</sup>

27.154 New Zealand provides an example of the type of instructions judges are required to give when a witness is a child under the age of six years of age, under reg 49 of the *Evidence Regulations 2007* (NZ):

If, in a criminal proceeding tried with a jury in which a witness is a child under the age of 6 years, the Judge is of the opinion that the jury may be assisted by a direction about the evidence of very young children and how the jury should assess that evidence, the Judge may give the jury a direction to the following effect:

- (a) even very young children can accurately remember and report things that have happened to them in the past, but because of developmental differences, children may not report their memories in the same manner or to the same extent as an adult would;
- (b) this does not mean that a child witness is any more or less reliable than an adult witness;
- (c) one difference is that very young children typically say very little without some help to focus on the events in question;
- (d) another difference is that, depending on how they are questioned, very young children can be more open to suggestion than other children or adults;
- (e) the reliability of the evidence of very young children depends on the way they are questioned, and it is important, when deciding how much weight to give to their evidence, to distinguish between open questions aimed at obtaining answers from children in their own words from leading questions that may put words into their mouths.

27.155 The National Child Sexual Assault Reform Committee has recommended three similar draft mandatory directions that summarise the findings in the psychological literature about children's memory, their reliability as witnesses, their resistance to suggestions of abuse and the importance of examining the way a child is questioned when deciding how much weight to give their evidence.<sup>196</sup>

### ***Consultation Paper***

27.156 The Consultation Paper proposed that state and territory evidence legislation should provide that: the opinion rule does not apply to evidence of an opinion of a

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194 S Blackwell, 'Expert Psychological Evidence in Child Sexual Abuse Trials in New Zealand' (Paper presented at The Children and the Courts Conference, Canberra, 5 November 2005).

195 See A Cossins, J Goodman-Delahunty and K O'Brien, 'Countering Misconceptions in Child Sexual Assault Cases with Expert Evidence and Judicial Directions' (Paper presented at Australian and New Zealand Association for Psychiatry, Psychology & Law Conference, Sydney, 25 October 2008).

196 All three recommendations address the typical juror misconceptions that have been identified in the literature: see A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 233–235.

person based on that person's specialised knowledge of child development and child behaviour; and the credibility rule does not apply to such evidence given concerning the credibility of children.<sup>197</sup>

27.157 The Consultation Paper also asked whether federal, state and territory legislation should provide for mandatory jury directions, containing prescribed information about children's abilities as witnesses or children's responses to sexual abuse,<sup>198</sup> along the lines of the New Zealand model described above.

### **Submissions and consultations**

27.158 There were few comments on the Consultation Paper proposal.<sup>199</sup> This is not surprising, as the proposal is consistent with the approach already taken in uniform Evidence Acts jurisdictions and the parallel approach in Western Australia.

27.159 Women's Legal Services NSW supported the proposal, but expressed general concerns that using expert opinion on the development and behaviour of sexually abused children may lead to problems—as such evidence about children who have been sexually abused may be used as much to attack children as to bolster their credibility.<sup>200</sup>

27.160 There was some support in submissions and consultations for the use of jury directions about children's abilities as witnesses or children's responses to sexual abuse.<sup>201</sup> The NSW ODPP, for example, stated that it is 'necessary to take further action to dispel outdated myths and preconceived notions about children and their evidence'—particularly in respect of very young children.<sup>202</sup>

27.161 Stakeholders also noted the need to keep the content of such directions consistent with current knowledge. Jury directions need to be 'based on sound understanding of child behavioural psychology' and 'reviewed over time to ensure they reflect current thinking'.<sup>203</sup>

### **Commissions' views**

27.162 There is recognition that, in at least some cases, expert evidence on the development and behaviour of children generally (and those who have been victims of sexual offences in particular) and the implications for the credibility of children as

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197 Consultation Paper, Proposal 18–9.

198 Ibid, Question 18–6.

199 The National Association of Services Against Sexual Violence and Women's Legal Services NSW agreed with Proposal 18–9: National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

200 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

201 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Office of the Director of Public Prosecutions (WA), *Consultation*, Perth, 4 May 2010. National Legal Aid opposed any mandatory jury direction: National Legal Aid, *Submission FV 232*, 15 July 2010.

202 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

203 Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

witnesses may be desirable.<sup>204</sup> As noted in the Bench Book for Children Giving Evidence in Australian Courts:

It would appear that courts in the past have overestimated the knowledge and capabilities of jurors in this context and underestimated the usefulness of expert evidence in child sexual abuse cases.<sup>205</sup>

27.163 On this basis, whatever the problems in practice, the approach to the admissibility of such evidence taken under the uniform Evidence Acts is clearly an improvement on the position in jurisdictions that have not joined the scheme. For this reason, the Commissions recommend that state and territory evidence legislation should provide that (a) the opinion rule does not apply to evidence of an opinion of a person based on that person's specialised knowledge of child development and child behaviour; and (b) the credibility rule does not apply to such evidence given concerning the credibility of children.

27.164 The intention of this proposal is that all states and territories that have not already done so should adopt provisions consistent with ss 79 and 108C of the uniform Evidence Acts. The Commissions consider it is preferable that all Australian jurisdictions join the uniform Evidence Acts scheme. Alternatively, reforms in the area of expert opinion evidence could be enacted in evidentiary provisions outside the uniform Evidence Acts—as in the *Evidence Act 1906* (WA), which already contains modification of common law rules specific to evidence by an expert on the subject of child behaviour.<sup>206</sup>

27.165 Another, complementary, approach would be to encourage the use of appropriate jury directions about children's abilities as witnesses. In the light of research that shows that jurors hold a number of misconceptions about children's ability to give truthful evidence and how children react to sexual abuse, there is a strong case for the use of jury directions when children give evidence in sexual assault proceedings. Such a jury direction would essentially summarise a consensus of expert opinion drawn from the work of psychiatrists, psychologists and other experts on child behaviour.

27.166 As the law currently stands, however, it is not permissible for a judge to give such directions to the jury, because the subject matter is not a matter for 'judicial notice'.<sup>207</sup> The Commissions, therefore, recommend that legislation authorise the

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204 The Queensland Law Reform Commission has recommended that expert evidence should be more broadly admissible on issues relating to the credibility, competence and reliability of child witnesses: Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55 (Part 2) (2000). See also, I Coyle and others, 'Out of the Mouths of Babes: The Case for an Increased Use of Expert Evidence in Rebuttal of Sexual Abuse Allegations by Child Witnesses' (2009) 33 *Criminal Law Journal* 139.

205 Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2009), 26.

206 *Evidence Act 1906* (WA) s 36BE. See also *Evidence Act 1906* (WA) s 106H, modifying the hearsay rule with respect to children's statements. *Evidence Act 1977* (Qld) s 9C provides for expert evidence to be admitted about a child witness' ability to give evidence.

207 See *Bullock v The Queen* [2010] 5 NTCCA, [11]–[17].

giving of jury directions about children's abilities as witnesses and responses to sexual abuse—including in a family violence context.

27.167 It has not been possible, in the context of this Inquiry, to develop recommendations on any particular form of jury direction, or guidance on when such a direction should be given. The Commissions recommend that model directions should be developed by judges, through an appropriate body such as the National Judicial College of Australia, and drawing on the expertise of relevant professional and research bodies—such as the Australian Institute of Criminology and the Australian Centre for the Study of Sexual Assault.

27.168 Model directions might also be incorporated in bench books for judicial officers dealing with sexual assault cases.<sup>208</sup> For example, the Australasian Institute of Judicial Administration *Bench Book for Children Giving Evidence in Australian Courts* contains comprehensive information for judicial officers on matters such as assessing the credibility of children as witnesses, judicial assumptions about child witnesses, jury misconceptions about children and child abuse.<sup>209</sup>

27.169 Finally, stakeholders also expressed some concerns about how adducing expert opinion evidence in child sexual assault cases works in practice.<sup>210</sup> The Commissions note that problems with costs or delay attributable to adducing expert opinion evidence and undue partisanship or bias on the part of expert witnesses are not limited to those arising in sexual assault proceedings. These problems have been widely discussed in law reform reports<sup>211</sup> and are not the subject of recommendations in this Inquiry.

**Recommendation 27–10** State and territory evidence legislation should provide that:

- (a) the opinion rule does not apply to evidence of an opinion of a person based on that person's specialised knowledge of child development and child behaviour; and
- (b) the credibility rule does not apply to such evidence concerning the credibility of children.

208 Such as the bench book recommended in: National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 121.

209 Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2009).

210 For example, Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Office of the Director of Public Prosecutions (WA), *Consultation*, Perth, 201.

211 Proposed solutions, in the context of civil proceedings, include the wider use of agreed or court-appointed experts and new mechanisms for the accreditation and accountability of expert witnesses. See, eg, Australian Law Reform Commission, *Managing Justice: A Review of the Federal Civil Justice System*, Report 89 (1999), ch 6; New South Wales Law Reform Commission, *Expert Witnesses*, Report 109 (2005).

**Recommendation 27–11** Federal, state and territory legislation should authorise the giving of jury directions about children’s abilities as witnesses and responses to sexual abuse, including in a family violence context.

**Recommendation 27–12** Judges should develop model jury directions, drawing on the expertise of relevant professional and research bodies, about children’s abilities as witnesses and responses to sexual abuse, including in a family violence context.

## Tendency and coincidence evidence

27.170 The following section discusses aspects of the law of evidence concerning the admissibility of ‘tendency’ and ‘coincidence’ evidence, as defined under the uniform Evidence Acts, and ‘propensity’ or ‘similar fact’ evidence at common law. These forms of evidence may include, significantly, the evidence of other complainants who have allegedly been sexually assaulted by the same defendant.

27.171 For example, evidence may be adduced to show that, because the defendant engaged in sexual activity with one child in his or her family, the defendant has a tendency to commit such acts. This evidence may have probative value in relation to allegations of sexual assault against other children in the family. Similarly, evidence may be adduced to show that a defendant engaged in sexual activity with two children in similar circumstances—for example, when another parent was absent. The evidence about one allegation may have probative value in relation to the other because it is improbable that the events were coincidental.

27.172 Tendency and coincidence evidence may also include, for example, evidence of prior convictions for sexual offences or other prior illegal sexual conduct—often referred to as ‘uncharged acts’—such as ‘grooming’ behaviours.

### Current law

27.173 Under the uniform Evidence Acts—applicable in NSW, Victoria, Tasmania and the ACT—evidence about a defendant’s prior illegal sexual conduct may be characterised as ‘tendency’ or ‘coincidence’ evidence.<sup>212</sup>

27.174 Tendency evidence is evidence ‘of the character, reputation or conduct of a person, or a tendency that a person has or had’, adduced to prove that the person ‘has or had a tendency (whether because of the person’s character or otherwise) to act in a particular way, or to have a particular state of mind’.<sup>213</sup>

27.175 Coincidence evidence is evidence that ‘2 or more events occurred’ that is adduced to prove that ‘a person did a particular act or had a particular state of mind on

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212 Uniform Evidence Acts, pt 3.6.  
213 Ibid s 97.

the basis that, having regard to any similarities in the events ... it is improbable that the events occurred coincidentally'.<sup>214</sup>

27.176 The test for admissibility under the uniform Evidence Acts is whether the tendency or coincidence evidence has significant probative value which substantially outweighs any prejudicial effect it may have on the defendant.<sup>215</sup>

27.177 At common law, evidence of these kinds is referred to as either 'propensity' or 'similar fact' evidence, depending on the purpose for which it is admitted. In jurisdictions that do not apply the uniform Evidence Acts, the admissibility of these forms of evidence is governed by the common law, as modified by statute in some jurisdictions.

27.178 At common law, as a matter of general principle, evidence of past criminal conduct, including convictions (for sexual offences or otherwise) is not admissible unless there is a 'striking similarity' or 'underlying unity' between the similar facts.<sup>216</sup> Admissibility is governed by the test in *Pfennig v The Queen*—that is, propensity or similar fact evidence is admissible if its probative value is such that there is no rational view of the evidence that is consistent with the innocence of the accused.<sup>217</sup>

27.179 Some common law evidence jurisdictions have enacted legislative provisions modifying common law rules relating to propensity or similar fact evidence:

- in Queensland, similar fact evidence must not be ruled inadmissible on the ground 'that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury';<sup>218</sup>
- in Western Australia, the *Evidence Act 1906* (WA) governs the admissibility of propensity evidence by incorporating a 'significant probative value' test and a public interest test;<sup>219</sup>
- in South Australia, propensity evidence relating to a count of sexual assault is only admissible in a joint trial if it has relevance beyond mere propensity. However, in deciding admissibility, the judicial officer is not to have regard to 'whether or not there is a reasonable explanation in relation to the evidence consistent with the innocence of the accused or whether or not the evidence may be the result of collusion or concoction'.<sup>220</sup>

### **Impact in sexual assault proceedings**

27.180 The impact of these rules of evidence depends on the type of trial and the type of evidence the prosecution seeks to adduce. If there are two or more complainants who have allegedly been sexually assaulted by the same defendant—for

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214 Ibid s 98.

215 Ibid ss 97, 98, 101.

216 *Pfennig v The Queen* (1995) 182 CLR 461.

217 Ibid, 485; see also *HML v The Queen* (2008) 235 CLR 334.

218 *Evidence Act 1977* (Qld) s 132A.

219 *Evidence Act 1906* (WA) s 31A(2).

220 *Criminal Law Consolidation Act 1935* (SA) s 278(2a).

example, two daughters of the defendant, the prosecution will often make a pre-trial application to have the counts against the defendant heard in a joint trial, rather than separate trials. As discussed in Chapter 26, the threshold question for holding a joint trial is whether each complainant's evidence will be cross-admissible in respect of the charges involving the other complainant or complainants.

27.181 If there is only one complainant, the prosecution may have evidence from other witnesses about the defendant's criminal sexual behaviour with them. Alternatively, it may wish to adduce relationship evidence to explain the nature of the relationship between the complainant and the defendant, and the context in which the sexual assault occurred.<sup>221</sup>

27.182 Three aspects of the law of evidence concerning the admissibility of tendency and coincidence evidence are problematic in sexual assault cases. These are:

- the 'striking similarities' test;
- the 'no rational view of the evidence' test; and
- excluding 'a reasonable possibility of concoction'.

#### *The 'striking similarities' test*

27.183 At common law, the cross-admissibility of the evidence of two or more complainants is, at the outset, dependent on the evidence revealing 'striking similarities'.<sup>222</sup> The cross-admissibility of evidence frequently arises in the child sexual assault context where it has been argued that the 'striking similarities' test 'has been used to create artificial distinctions in relation to sex offender behaviour'.<sup>223</sup>

27.184 This artificiality is said to arise because 'when it comes to assessing the probative value of the evidence of child complainants, there will be higher or lower degrees of similarity depending on what a judge knows about sex offending behaviour'.<sup>224</sup> For example, a trial judge who is unaware of the range of grooming and sexual practices of child sex offenders 'may look for greater degrees of similarity in the evidence compared to a judge who is aware of the variety of ways in which ... offenders gain a child's trust and affection and the different sexual practices a serial offender will engage in'.<sup>225</sup>

27.185 A lower threshold for determining probative value may be 'appropriate in child sexual assault cases where the identity of the offender is not in issue, in order to capture the range of sexual and grooming behaviours of serial offenders'.<sup>226</sup> Since most cases of sexual assault, especially in a family violence context, involve defendants known to the complainant, rather than strangers, the identity of the accused will not

221 Relationship evidence is discussed later in this chapter.

222 *Phillips v The Queen* (2006) 225 CLR 303.

223 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 202.

224 Ibid.

225 Ibid.

226 Ibid.

usually be a fact in issue. It is also argued that, when applying the ‘striking similarities’ test, many cases have failed to recognise that any sexual practices with children ‘ought to be the sufficient similarity requirement since sex offenders will engage in different sexual conduct with different children depending upon the age and sex of the child, the passivity or resistance of the child, the degree of grooming of, and the degree of access to, the child, the defendant’s relationship with the child and so on’.<sup>227</sup>

27.186 Cases such as *R v KP; Ex parte Attorney-General (Qld)*—which involved evidence of sexual assaults against two brothers by a school music teacher and friend of the family (and against two of the defendant’s own children)—illustrate how rules on the admissibility of propensity and similar fact evidence can frustrate legislative attempts to increase the number of joint trials.<sup>228</sup> This is because a decision to hold a joint trial is dependent on the cross-admissibility of each complainant’s evidence which, in turn, is dependent on finding sufficient similarities in the evidence. Recently, the culmination of the tension between cross-admissibility and joint or separate trials occurred in the High Court case of *Phillips v The Queen*. Since this decision, the applicability of the ‘striking similarities’ test has been reinforced as the standard for determining the admissibility of similar fact evidence at common law.<sup>229</sup>

27.187 Although the uniform Evidence Acts create a different regime for admitting tendency and coincidence evidence, it has been argued that the striking similarities test is still used in assessing the probative value of the evidence of two or more complainants about a defendant’s sexual conduct.<sup>230</sup> For example, the NSW Court of Criminal Appeal has noted the similarity between the approach under the *Evidence Act 1995* (NSW) and the common law.<sup>231</sup> Common law formulations, including ‘striking similarities’ have been held to ‘guide’ the reasoning process when determining whether tendency or coincidence evidence has significant probative value under ss 97 and 98 of the uniform Evidence Acts.<sup>232</sup>

#### ***The ‘no rational view of the evidence’ test***

27.188 At common law, even if the evidence of two or more witnesses has ‘striking similarities’, it can still be excluded because of its prejudicial effect. In order to prevent the admission of prejudicial propensity and similar fact evidence, the common law

227 Ibid, 195. See, eg, the facts in *AE v The Queen* [2008] NSWCCA (in which the complainant was the defendant’s step-father); *R v KP; Ex parte Attorney-General (Qld)* [2006] QCA; *R v Fletcher* (2005) 156 A Crim R 308.

228 *R v KP; Ex parte Attorney-General (Qld)* [2006] QCA. The Queensland Court of Appeal held that the evidence of the older brother about being sexually abused by the defendant was not cross-admissible in relation to the counts involving the younger brother because of lack of similarities in the defendant’s alleged sexual behaviour. The Court held that charges relating to all complainants should not have been joined.

229 *Phillips v The Queen* (2006) 225 CLR 303.

230 A Cossins, *Striking Similarities between the Common Law and the Uniform Evidence Acts: Protecting Serial Offenders and Putting Children at Risk*, unpublished (2010), 14.

231 *R v F* [2002] NSWCCA 125, [28].

232 *R v Fletcher* (2005) 156 A Crim R 308, [60]. See also *AE v The Queen* [2008] NSWCCA; *R v Milton* [2004] NSWCCA; *R v Harker* [2004] NSWCCA; *R v F* (2002) 129 A Crim R 126; *R v WRC* (2002) 130 A Crim R 89.

developed the ‘no rational view of the evidence test’,<sup>233</sup> adopted by a majority of the High Court in *Hoch v The Queen*:

to determine the admissibility of similar fact evidence, the trial judge must apply the same test as a jury must apply in dealing with circumstantial evidence, and ask whether there is a rational view of the evidence that is inconsistent with the guilt of the accused.<sup>234</sup>

27.189 The test was confirmed by a majority of the High Court in *Pfennig v The Queen*,<sup>235</sup> which held that the probative force of similar fact evidence will outweigh its prejudicial effect only if there is no rational view of the evidence that is consistent with the innocence of the accused.<sup>236</sup>

27.190 This test is now referred to as the ‘*Pfennig* test’ and is the means for determining how the probative force of the evidence and prejudicial effect should be balanced.<sup>237</sup> Where there is a rational view of the evidence consistent with the defendant’s innocence, the probative force of the evidence is automatically outweighed by its prejudicial effect, thus removing any discretion on the part of the trial judge to admit the evidence.

27.191 Probative force and prejudicial effect must also be considered under s 101(2) of the uniform Evidence Acts. In *R v Ellis*, the NSW Court of Criminal Appeal considered whether the *Pfennig* test should continue to be applied.<sup>238</sup> The fact that s 101(2) introduced a legislative formulation for balancing probative value against prejudicial effect led Spigelman CJ to conclude that it did not. He stated that the continued application of a ‘no rational view’ test is not ‘consistent with a statutory test which expressly requires a balancing process’ and that the reasoning in *Pfennig* is ‘inapplicable to a statutory test that probative value substantially outweighs prejudicial effect’.<sup>239</sup>

#### *A reasonable possibility of concoction*

27.192 It has been argued that, since the decision in *R v Ellis*, ‘the necessity to exclude the possibility of collusion or other influence is questionable’ when applying the balancing test under s 101(2) of the uniform Evidence Acts.<sup>240</sup> Recent case law

233 *Sutton v The Queen* (1984) 152 CLR 528, 564.

234 *Hoch v The Queen* (1988) 165 CLR 292, 296.

235 *Pfennig v The Queen* (1995) 182 CLR 461, 482–483.

236 McHugh J considered that the test enunciated by Mason CJ, Deane and Dawson JJ in *Pfennig* was too stringent, although His Honour recognised that ‘where the prosecution case depends entirely on propensity reasoning, the evidence will need to be so cogent that, when related to the other evidence, there is no rational explanation of the prosecution case that is consistent with the innocence of the accused’: *Ibid*, 530.

237 *R v Ellis* (2003) 58 NSWLR 700, [85]; *HML v The Queen* (2008) 235 CLR 334.

238 *R v Ellis* (2003) 58 NSWLR 700.

239 *Ibid*, [89]. The High Court granted Ellis leave to appeal but later revoked that leave, stating that it agreed with Spigelman CJ’s construction of the *Evidence Act 1995* (NSW): *Ellis v The Queen* [2004] HCA Trans 488.

240 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch’s Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), 2.

indicates, however, that *R v Ellis* has not removed the issue of concoction from the admissibility equation under the uniform Evidence Acts.

27.193 Despite expectations that the courts would continue to develop the law away from *Hoch v The Queen*,<sup>241</sup> obviating the need for legislative intervention, these expectations may have been ‘an overly optimistic view’.<sup>242</sup> It has been argued that, in sexual assault cases, s 101(2) of the uniform Evidence Acts is only likely to be satisfied ‘if a reasonable possibility of concoction can be eliminated’.<sup>243</sup>

27.194 In *R v Ellis*, Spigelman CJ accepted that there ‘may well be cases where, on the facts, it would not be open to conclude that the probative value of particular evidence substantially outweighs its prejudicial effect, unless the “no rational explanation” test were satisfied’,<sup>244</sup> and that these cases may include those where a trial judge considers that there is a reasonable possibility of concoction.<sup>245</sup>

27.195 The Tasmania Law Reform Institute (TLRI) has observed that, in practice, where a reasonable possibility of concoction is taken into account under s 101(2), this is no different from an application of the ‘no rational view of the evidence’ test, because concoction ‘weighs so heavily in the balance that the reality is that its existence means that there is no balancing to be undertaken’. The position, in the TLRI’s view, ‘effectively remains the same as that rejected … in *Ellis*’.<sup>246</sup>

27.196 When a judge takes concoction or contamination into account, he or she can be seen as performing the task of the jury, by assessing the strength of the evidence—in particular, whether or not it is true.<sup>247</sup> The TLRI noted that ‘no other exclusionary rule requires the court to determine the veracity of evidence as a basis for admission’.<sup>248</sup>

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241 As implied, eg, by Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [11.65]–[11.68].

242 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch’s Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), 38.

243 ‘[A]nd if there are sufficient similarities (striking or otherwise) between the evidence of two or more witnesses to be able to conclude that the probative value of the evidence outweighs its prejudicial effect’: A Cossins, *Striking Similarities between the Common Law and the Uniform Evidence Acts: Protecting Serial Offenders and Putting Children at Risk*, unpublished (2010), 19–20.

244 *R v Ellis* (2003) 58 NSWLR 700, [96]. In *R v Gibbs* (2004) 146 A Crim R 503, Gray J followed Spigelman CJ’s reasoning by applying the ‘no rational view of the evidence’ test to coincidence evidence.

245 A Cossins, *Striking Similarities between the Common Law and the Uniform Evidence Acts: Protecting Serial Offenders and Putting Children at Risk*, unpublished (2010), 19. See, eg, *Tasmania v S* [2004] TASSC, [11]; *L v Tasmania* (2006) 15 Tas R 381, [40]; *Tasmania v Y* (2007) 178 A Crim R 481, [40].

246 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch’s Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), 11.

247 Ibid, 39. See also, K Arenson, ‘The Propensity Evidence Conundrum: A Search for Doctrinal Consistency’ (2006) 8 *University of Notre Dame Law Journal* 31, 37.

248 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch’s Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), 39. This point was noted by McHugh J in *Pfennig v The Queen* (1995) 182 CLR 461, 517.

27.197 The application of the ‘no rational view of the evidence’ test in sexual assault trials is seen to have ‘particular consequences, since where there are two or more complainants, the probative force of the similar fact evidence is destroyed if there is a reasonable possibility of concoction between the complainants’.<sup>249</sup> The courts do not, however, apply a universal standard for measuring what amounts to a reasonable possibility of concoction.

27.198 Where two or more children give evidence about a defendant’s sexual behaviour with them, the admissibility of their evidence may depend on whether they had the opportunity to concoct their allegations. While the targeting and grooming strategies of serial sex offenders are well documented in the literature,<sup>250</sup> the rules governing the admissibility of propensity evidence are based on the belief that, if two or more complainants know each other, the possibility of concoction must be ruled out for one complainant’s evidence to be admissible in the case of another.

27.199 This assumption is based on the common law’s traditional belief that children are unreliable witnesses, prone to fantasy and highly suggestible<sup>251</sup>—a view that may still prevail despite the fact that it is not supported by the psychological literature.<sup>252</sup> Recent literature is said to show that ‘children are highly resistant to abuse suggestions and do not readily make up stories of sexual abuse even when given the opportunity to do so’.<sup>253</sup>

27.200 Further, the test for concoction does not take into account the practical effects on complainants, since in assessing the possibility of concoction the court will usually conduct a pre-trial hearing, at which the complainants may be required to give evidence.<sup>254</sup>

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249 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 184. See *Hoch v The Queen* (1988) 165 CLR 292, 397.

250 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 181–182.

251 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), 304; *Hoch v The Queen* (1988) 165 CLR 292.

252 As previously recognised by the ALRC and the Human Rights and Equal Opportunity Commission: Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), 306–307.

253 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 185.

254 This is said to conflict with ‘public policy objectives behind preventing child complainants from giving evidence on more than one occasion which has seen some jurisdictions enact provisions to prevent children being required to give evidence at committal proceedings’: *Ibid*, 185. Complainants are also likely to be cross-examined ‘more aggressively’ at a pre-trial hearing because of the absence of a jury: Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch’s Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), 14.

### Reform options

27.201 Several jurisdictions have enacted legislation to overcome problems caused in sexual assault cases by the ‘no rational view of the evidence’ test and with evidence being excluded on the basis of possible concoction.

27.202 In Queensland, s 132A of the *Evidence Act 1977* (Qld) governs the admissibility of similar fact evidence and leaves the question of concoction to the jury:

In a criminal proceeding, similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, must not be ruled inadmissible on the ground that it may be the result of collusion or suggestion, and the weight of that evidence is a question for the jury, if any.

27.203 In addition, s 597A(1AA) of the *Criminal Code* (Qld) provides that, in determining whether there should be joint or separate trials, ‘the court must not have regard to the possibility that similar fact evidence, the probative value of which outweighs its potentially prejudicial effect, may be the result of collusion or suggestion’.

27.204 In South Australia, reforms concerning the prosecution of sexual assault charges were enacted in 2008,<sup>255</sup> following a review of rape laws.<sup>256</sup> Under s 278(2a) of the *Criminal Law Consolidation Act 1935* (SA), issues of joinder, the ‘no rational view of the evidence’ test and concoction are dealt with together. The provision creates a presumption that where there are two or more counts involving complainants, the counts are to be tried together. A judge may only order separate trials if the evidence of two or more complainants is not cross-admissible.<sup>257</sup>

27.205 The ‘no rational view of the evidence’ test has been specifically abrogated in relation to determining whether evidence will be cross-admissible. Section 278(2a)(c) states that in determining admissibility for these purposes:

- (i) evidence relating to the count may be admissible in relation to another count concerning a different alleged victim if it has a relevance other than mere propensity; and
- (ii) the judge is not to have regard to—
  - (A) whether or not there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant; or
  - (B) whether or not the evidence may be the result of collusion or concoction.

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255      *Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008* (SA).

256      L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006), prepared for the Government of South Australia.

257      In contrast, the Victorian provision (discussed above in relation to a presumption of joint trials) attempts to encourage joint trials even where evidence is not cross-admissible: *Criminal Procedure Act 2009* (Vic) s 194.

27.206 In Western Australia, s 31A of the *Evidence Act 1906* (WA) deals with propensity evidence.<sup>258</sup> Section 31A(2) provides:

- (2) Propensity evidence or relationship evidence is admissible in proceedings for an offence if the court considers:
  - (a) that the evidence would, either by itself or having regard to other evidence adduced or to be adduced, have significant probative value; and
  - (b) that the probative value of the evidence compared to the degree of risk of an unfair trial, is such that fair-minded people would think that the public interest in adducing all relevant evidence of guilt must have priority over the risk of an unfair trial.
- (3) In considering the probative value of evidence for the purposes of subsection (2) it is not open to the court to have regard to the possibility that the evidence may be the result of collusion, concoction or suggestion.

27.207 Like the Queensland reforms, s 31A(3) removes the issue of concoction from the admissibility equation and leaves it to the jury when deciding the weight to be given to the evidence.<sup>259</sup> The possibility of concoction cannot be taken into account when determining whether the propensity evidence has significant probative value.<sup>260</sup> This means that the court has to take the evidence at ‘its highest’.<sup>261</sup> Nor can the possibility of concoction be taken into account when the court is applying the balancing test under s 31A(2)(b), in particular the risk of an unfair trial, because of the ‘quite clearly articulated legislative purpose’ of the provision.<sup>262</sup>

27.208 Section 31A abrogates the common law ‘no rational view of the evidence’ test. The test introduced by s 31A(2)(b) is taken directly from the balancing test suggested by McHugh J, dissenting in *Pfennig v The Queen*.<sup>263</sup> This test is much less stringent than the *Pfennig* test.<sup>264</sup> In enacting s 31A, the legislature has accepted that, because of its nature, the admission of propensity evidence will always create the risk of an unfair trial.<sup>265</sup> However, that risk must be balanced against the competing public interests in holding a joint trial in which all relevant evidence is admitted.<sup>266</sup>

27.209 The balancing test, when referring to fair-minded people, clearly envisages that the public interest in the prosecution of sexual offences ought to be taken into consideration when weighing up the risk of prejudice to the accused. These

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258 The definition of propensity evidence under s 31A is more extensive than at common law and includes tendency, relationship and character evidence.

259 *Di Lena v Western Australia* (2006) 165 A Crim R 482, [51]; *Wood v Western Australia* [2005] WASCA, [41]; *Donaldson v Western Australia* (2005) 31 WAR 122, [108].

260 *Donaldson v Western Australia* (2005) 31 WAR 122, [154].

261 *Ibid*, [153] (Roberts-Smith JA).

262 *Ibid*, [157] (Roberts-Smith JA).

263 *Pfennig v The Queen* (1995) 182 CLR 461, 528.

264 *Di Lena v Western Australia* (2006) 165 A Crim R 482, [94].

265 *Ibid*, [58].

266 The decision made under s 31A is a question of law, not an exercise of a judicial discretion and, once admitted, there is no room to exclude the evidence under the discretion at common law: *Ibid*, [60], referring to *R v Christie* [1914] AC.

considerations may be important, especially in relation to child sexual assault, since a particular complainant's evidence will often make more sense when evidence is given of the alleged serial nature of a defendant's sexual behaviour. For example, in *VIM v Western Australia*,<sup>267</sup> separate allegations of sexual assault over many years had been made by the two step-daughters of the accused, who was indicted on 44 counts. The Western Australian Court of Appeal considered that this was 'an example of the very type of case in which the legislature intended the jury to have the benefit of a full evidentiary familial picture'.<sup>268</sup>

27.210 None of the reforms enacted in Australia has addressed expressly the striking similarities test, which may still constitute a major barrier to the admissibility of tendency and propensity evidence and the ability to hold joint trials. The Western Australian reforms represent the most complete break from the common law. By articulating a particular threshold test of admissibility—that the evidence must have significant probative value—the common law striking similarities test may no longer be 'a necessary criterion for admissibility'.<sup>269</sup>

27.211 The National Child Sexual Assault Reform Committee has reviewed the effectiveness of the reforms discussed above. It concluded that the most successful appear to be those enacted in Western Australia<sup>270</sup>—although in the absence of empirical research it is not possible to determine the extent to which, for example, the number of joint trials has increased in Western Australia as a result of those reforms.

### **Consultation Paper**

27.212 In the Consultation Paper, the Commissions proposed that federal, state and territory legislation should provide that, in sexual assault proceedings, a court should not have regard to the possibility that the evidence of a witness or witnesses is the result of concoction, collusion or suggestion when determining the admissibility of tendency or coincidence evidence.<sup>271</sup>

27.213 The Consultation Paper also stated that further consideration may need to be given to the continued reliance of Australian courts on the striking similarities test for the admission of tendency, coincidence, propensity and similar fact evidence

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267 *VIM v Western Australia* (2005) 31 WAR 1.

268 *Ibid.* 168.

269 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 202. The Western Australian Court of Appeal has accepted that, in a child sexual assault trial, propensity evidence need not show 'striking similarities' or sexual interference by the defendant in a particular way: *Donaldson v Western Australia* (2005) 31 WAR 122, [149]. If the evidence in question reveals an underlying unity, system or pattern, that will be sufficient to establish that the evidence has significant probative value under s 31A(2) 'irrespective of what physical acts [were] individually involved'. In *Donaldson*, the evidence of the four complainants showed that the defendant, a swimming coach, had a particular pattern of conduct 'or a tendency ... by essentially similar means, to inveigle young girls under his charge into situations in which he then commits sexual offences upon them': [149]. This was sufficient for the evidence of the four complainants to be cross-admissible.

270 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 186–203.

271 Consultation Paper, Proposal 18–10.

(including in uniform Evidence Acts jurisdictions). The Commissions asked to what extent the ‘striking similarities’ test impedes the ordering of joint trials in relation to sex offences; and whether the Western Australian reforms in relation to the cross-admissibility of evidence should be adopted in other jurisdictions.<sup>272</sup>

### ***Submissions and consultations***

27.214 Stakeholders expressed a range of views relating to the need for reform to address the implications of the striking similarities test. The perspectives of legal stakeholders differed, however, about the extent to which the test is being applied, in practice, in uniform Evidence Acts jurisdictions. A number also emphasised the impact of the issue within the family violence context.

27.215 The NSW ODPP submitted that the test is a ‘flawed approach to establishing the modus operandi of most sexual predators, but particularly in a family violence context and other instances where there is no issue as to the identity of the offender’. The NSW ODPP noted that rather than acting with a ‘hallmark’, there is more likely to be a ‘progression or an evolution’ in the offending behaviour—for example, in the case of a father who assaults several of his children.<sup>273</sup> It stated that:

the striking similarities test does impede the ordering of joint trials. The need to satisfy the test for the purposes of relying on tendency or coincidence evidence is one thing, but if the evidence fails that test it does not follow that the evidence is not relevant and probative in other ways.<sup>274</sup>

27.216 Cossins considered that the striking similarities approach focuses on a need to find that ‘the sexual practices of the defendant with one complainant are more or less identical to his sexual practices with another complainant’ before their evidence will be considered to be tendency or coincidence evidence and cross-admissible in a joint trial.<sup>275</sup> In her opinion, in uniform Evidence Acts jurisdictions,

like the common law, it is only where there are *sufficient* similarities between the accounts given by the complainant and another witness that that witness’ evidence will be considered to have significant probative value under the [uniform Evidence Acts].<sup>276</sup>

27.217 She submitted that the striking similarities test has been applied by the NSW Court of Criminal Appeal in a number of child sexual assault cases and is problematic for three key reasons:

- (i) Because the test does not accord with information about child sex offender behaviour described in the psychological literature, it amounts to a false measure for assessing the probative value of evidence about a defendant’s sexual behaviour.

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272 Ibid, Questions 18–7, 18–8.

273 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

274 Ibid.

275 This approach, she considers, has no empirical basis and appears to ‘reflect a subjective belief that sex offenders are highly specialised’ in the type of sexual behaviour they engage in, a view that is not supported by the research literature: A Cossins, *Submission FV 112*, 9 June 2010.

276 Ibid.

- (ii) Corroborative evidence of child sexual abuse is uncommon which is likely to be one of the reasons why low conviction rates are found in child sexual assault trials. Thus the striking similarities test is likely to contribute to low conviction rates where its effect is to exclude relevant corroborative evidence which is judged to be insufficiently similar with the evidence of the complainant.
- (iii) If there is a lack of striking similarities between the evidence of two or more complainants, a joint trial is less likely to be held. This, in turn, will result in more separate trials with a decreased likelihood of serial sex offenders being convicted.<sup>277</sup>

27.218 Cossins proposed eliminating the ‘striking similarities’ test from the admissibility equation under the uniform Evidence Acts. She suggested that provisions be inserted stating that, in respect of a sexual offence, if two or more counts charging sexual offences involving different complainants are joined in the same indictment, the court must not have regard to whether that evidence has striking similarities with other evidence about the sexual conduct of the defendant, in considering its probative value.<sup>278</sup>

27.219 The need for any reform in relation to the striking similarities test, at least in NSW, was contested by other stakeholders.<sup>279</sup> The Public Defenders Office NSW submitted that NSW courts are not bound to a ‘striking similarities’ test, but rather a rational assessment of probative value under the *Evidence Act 1995* (NSW). Further, it was submitted that the distinction between the positions in NSW and Western Australia with regard to the admissibility of tendency (or propensity evidence) may not be as significant as suggested by the Consultation Paper. In particular, in NSW as in Western Australia,<sup>280</sup> ‘a distinctive system of grooming and exploitation will often have more sway than similarity of the physical acts involved’.<sup>281</sup>

27.220 Stakeholders also held divergent views on the desirability of reforms to evidence laws to ensure that the possibility of concoction does not, by itself, render inadmissible the evidence of witnesses in sexual assault proceedings. Some stakeholders, including legal professionals, supported the Consultation Paper proposal.<sup>282</sup>

27.221 The NSW ODPP stated that allegations of concoction, collusion or suggestion are better assessed by a jury than rendered inadmissible. Otherwise these matters become a significant barrier to the joinder of charges in respect of multiple complainants because:

<sup>277</sup> Ibid.

<sup>278</sup> Ibid.

<sup>279</sup> National Legal Aid, *Submission FV 232*, 15 July 2010; Public Defenders Office NSW, *Submission FV 221*, 2 July 2010.

<sup>280</sup> See, eg, *Donaldson v Western Australia* (2005) 31 WAR 122.

<sup>281</sup> Public Defenders Office NSW, *Submission FV 221*, 2 July 2010.

<sup>282</sup> National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010; Commissioner for Children (Tas), *Submission FV 62*, 1 June 2010. The Law Council stated that it ‘did not oppose’ the suggestion: Law Council of Australia, *Submission FV 180*, 25 June 2010.

- it is very difficult to exclude a reasonable possibility of concoction if the complainants are well known to each other, particularly siblings;
- this issue arises in all institutional sexual assault allegations such as involving teachers, because invariably the victims know each other as they were all at school together;
- there is not a great deal of case law in this area, because many prosecutors do not run counts together if they involve siblings because it is almost impossible to exclude the reasonable possibility of concoction ...<sup>283</sup>

27.222 Women's Legal Services NSW submitted:

The unique features of sexual assault offences and child sexual assault offences require, in our view, unique legislative solutions. These solutions must reflect the realities for many sexual assault complainants: complainants, particularly children, often know each other and often have some form of connection or relationship. This connection is most often not indicative of concoction.<sup>284</sup>

27.223 The Law Council stated that it would not oppose a provision that stated that 'the possibility' of concoction should not be a basis on which to hold tendency or coincidence evidence inadmissible—as long as the provision did not preclude concoction from being taken into account in determining admissibility under relevant tests.<sup>285</sup>

27.224 Other stakeholders opposed the proposal.<sup>286</sup> National Legal Aid observed that if 'the possibility of concoction, collusion or suggestion cannot be excluded, the probative value of the evidence is properly diminished'.<sup>287</sup>

27.225 The Public Defenders Office NSW submitted that there was insufficient cause 'for taking the radical step of pulling one area of criminal prosecution outside the uniform framework of evidentiary rules'. The Public Defenders noted that specific consideration needs to be given to whether the evidence is being put forward as tendency or coincidence evidence. That is, if the evidence is coincidence evidence 'the reduction in probative value where there is a real possibility of contamination has nothing to do with assumptions based on the common law's traditional belief that children are unreliable witnesses, prone to fantasy, and highly suggestible'. Rather, it was submitted that:

it is a realistic assessment of the difference in the force of the argument 'What are the chances of two people coming up with a similar allegation?' where the complainants know one another. Logic requires recognition that such an argument has greater force

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283 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

284 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

285 Law Council of Australia, *Submission FV 180*, 25 June 2010. That is, it should still be inadmissible where 'the evidence is, for example, overwhelming that two complainants have jointly prepared their complaints'.

286 National Legal Aid, *Submission FV 232*, 15 July 2010; Public Defenders Office NSW, *Submission FV 221*, 2 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Barrister, *Consultation*, Sydney, 10 June 2010.

287 National Legal Aid, *Submission FV 232*, 15 July 2010.

for the Crown where the complainants have never met nor heard of each other's claims.<sup>288</sup>

### ***Commissions' views***

27.226 The application of rules of evidence applying to tendency and coincidence evidence has an important impact on sexual assault proceedings, including in relation to sexual assault committed in a family violence context. These rules of evidence may render some evidence inadmissible and mean that, where two or more complainants have allegedly been sexually assaulted by the same defendant, a joint trial may not be possible.<sup>289</sup>

27.227 In ALRC 102, the ALRC, NSWLRC and VLRC highlighted the difficult task of formulating appropriate rules to deal with probative but prejudicial evidence. In relation to tendency and coincidence evidence, the Commissions recognised 'a stark contrast between the policy objectives of receiving all probative evidence, and minimising the risk of wrongful conviction'.<sup>290</sup>

27.228 In child sexual assault cases, however, it seems unfair to victims and their families that:

in so many cases the isolation of one child pitted against an adult alleged to be the perpetrator leads to acquittal of the adult, when at the same time there are other allegations of similar behaviour against the adult from other family members not before the Court, or when a history of such offending is known but excluded, or when the conduct is part of an alleged wider course of conduct, but evidence of which for one reason or another is excluded.<sup>291</sup>

27.229 In common law evidence jurisdictions, such perceived problems with the operation of rules of evidence in sexual assault proceedings have led to legislative reform. In the Commissions' view, there is no reason to recommend reform in uniform Evidence Acts jurisdictions to respond to the 'striking similarities' or 'no rational view of the evidence' (*Pfennig*) tests—as has occurred in Western Australia and South Australia. There is a case, however, for specific reform in relation to the impact on admissibility of evidence of a 'reasonable possibility of concoction'.

### ***Striking similarities***

27.230 Although there have been a number of reforms in different jurisdictions to increase the frequency of joint trials in relation to sex offences, only one common law jurisdiction (Western Australia) has abandoned striking similarities as the test for admissibility of propensity evidence.

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288 Public Defenders Office NSW, *Submission FV 221*, 2 July 2010.

289 See Ch 26.

290 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [11.82].

291 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55 (Part 2) (2000), 367—quoting a Western Australian judge.

27.231 It has been suggested that, without changes in the application of the striking similarities test, including in uniform Evidence Acts jurisdictions, reforms to increase the number of joint trials may be undermined.<sup>292</sup> The striking similarities test may also impede the prosecution's ability to adduce evidence about the defendant's sexual conduct from witnesses in trials which involve one complainant.

27.232 In *Ellis*, the NSW Court of Criminal Appeal confirmed that the tendency and coincidence rules in the uniform Evidence Acts should be construed according to their own terms and excluding prior common law principles (such as the striking similarities test).<sup>293</sup> Rather, the test for the admissibility of tendency and coincidence evidence is whether the evidence has significant probative value substantially outweighing any prejudicial effect.<sup>294</sup>

27.233 Similarity or dissimilarity are still commonly referred to in assessing probative value in applying this statutory balancing test—as are other concepts such as ‘pattern’. For example, in *R v Fletcher*,<sup>295</sup> the NSW Court of Criminal Appeal, in finding that certain evidence was not admissible, stated that there was ‘in the matter now before the Court, insufficient pattern or underlying unity; there are no striking similarities or unusual features ...’.<sup>296</sup>

27.234 The NSW cases since *Ellis* confirm the continuing role that the existence of similarities and dissimilarities has in assessing the probative value of tendency and coincidence evidence. They do not show, however, that any strict ‘striking’ similarities test continues to be applied.<sup>297</sup> The use of the concept of similarity seems unavoidable in construing the uniform Evidence Acts tendency and coincidence provisions. The coincidence rule itself refers to ‘similarities’ in the events or circumstances about which evidence is sought to be adduced.<sup>298</sup> This may not, however, prevent development of the law to recognise that evidence of patterns of behaviour or systematic activities (such as those relating to ‘grooming’) may have significant probative value, even where there is no close similarity in the physical acts involved.<sup>299</sup>

27.235 In the Commissions' view, there is insufficient reason to recommend reform in uniform Evidence Acts jurisdictions to address perceived over-reliance on ‘striking similarities’ as a test for the admissibility of tendency or coincidence evidence. The real question is whether the tendency and coincidence rules should continue to apply to

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292 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 197.

293 *R v Ellis* (2003) 58 NSWLR 700. The case concerned the possible application of the ‘no rational view of the evidence’ test.

294 Uniform Evidence Acts, ss 97, 98, 101. The TLRI has recently stated that there is no requirement under the Evidence Act 2001 (Tas) for a striking similarity: Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), Part 6, 57.

295 For example, *R v Fletcher* (2005) 156 A Crim R 308.

296 Ibid, [165]. In Victoria, under the *Evidence Act 2008* (Vic), the Court of Appeal has stated that there must be something ‘distinctive’ about evidence of an accused’s conduct for it not be excluded as coincidence evidence: *PNJ v Director of Public Prosecutions (Vic)* [2010] VSCA, [20].

297 *R v Milton* [2004] NSWCCA; *R v GAC* [2007] NSWCCA.

298 Uniform Evidence Acts, s 98.

299 As suggested by Public Defenders Office NSW, *Submission FV 221*, 2 July 2010.

sexual assault proceedings involving multiple complainants or entirely different rules developed for this particular category of evidence. The Commissions are not convinced that a case has been made out for such special rules of evidence applicable only in sexual assault proceedings. Such rules would risk introducing complexity and uncertainty in uniform Evidence Acts jurisdictions.

27.236 Further, the Commissions do not consider it would be appropriate, in the context of this Inquiry, to recommend reforms to evidence law in common law evidence jurisdictions directed to the striking similarities test. Rather, the Commissions consider it is preferable that all Australian jurisdictions join the uniform Evidence Acts scheme.

#### ***No rational view of the evidence***

27.237 The National Child Sexual Assault Reform Committee suggested reforms to overcome the effect of the ‘no rational view of the evidence’ test in jurisdictions which have not already introduced reforms to do so. The suggested reform would expressly eliminate ‘whether or not there is a reasonable explanation in relation to the evidence consistent with the innocence of the defendant’ as an issue when a court is required to decide whether to order joint or separate trials.<sup>300</sup>

27.238 The test does not apply in uniform Evidence Acts jurisdictions and has been overridden by legislation in Western Australia and South Australia. It may still apply in Queensland and the Northern Territory. The Commissions do not consider it would be appropriate, in the context of this Inquiry, to recommend specific reforms to evidence law in those two jurisdictions. Again, the Commissions consider it is preferable that all Australian jurisdictions join the uniform Evidence Acts scheme.

#### ***Reasonable possibility of concoction***

27.239 In the Commissions’ view, in sexual assault proceedings it is not appropriate for the possibility of concoction to render evidence inadmissible—for example, when the prosecution seeks to call a witness who, while not a complainant, can give evidence about the defendant’s sexual behaviour with him or her and has had contact with the complainant. This may occur in cases of sexual assault in a family violence context.

27.240 The current law appears to be that a reasonable possibility of concoction can affect the admissibility of propensity and similar fact evidence in common law evidence jurisdictions. At common law, the possibility of concoction will almost certainly render propensity and similar fact evidence inadmissible.

27.241 Under the uniform Evidence Acts, concoction is a factor that the court may consider in assessing probative value and applying the balancing test under ss 97, 98 and 101 respectively. However, it appears that case law may be evolving towards

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<sup>300</sup> A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, Rec 3.7. The recommendation is based on *Criminal Procedure Act 2004* (WA) s 133(5)–(6).

exclusion of evidence of multiple complainants where there is a possibility of concoction.<sup>301</sup>

27.242 In NSW, while some stakeholders submitted that the concoction issue does not dominate consideration of admissibility,<sup>302</sup> others considered that judicial officers tend towards excluding evidence where possible concoction is raised. Prosecutors perceived a resulting high bar to joint trial in such cases.<sup>303</sup> In practice, it is difficult to exclude a reasonable possibility of concoction where, for example, complainants are siblings.

27.243 The National Child Sexual Assault Reform Committee has made recommendations to address this barrier to the admission of tendency and coincidence (propensity and similar fact) evidence.<sup>304</sup> The Commissions agree that there is a case for reform.

27.244 The Commissions recommend that federal, state and territory legislation should provide that, in sexual assault proceedings, tendency or coincidence evidence is not inadmissible only because there is a possibility that the evidence is the result of concoction, collusion or suggestion.

27.245 In uniform Evidence Acts jurisdictions, the appropriate mechanism would be amendment of Part 3.6 of the Acts—for example, by the insertion of a new section following s 101 (which deals with restrictions on tendency evidence and coincidence evidence adduced by the prosecution). This recommendation for reform of the uniform Evidence Acts would need to be considered by the Australian and state and territory governments through SCAG.

27.246 The Commissions' preference would be for all Australian jurisdictions to join the uniform Evidence Acts scheme. Failing this, however, common law evidence jurisdictions that have not already done so should enact similar amendments in criminal procedure or evidence legislation providing that propensity evidence and similar fact evidence must not be ruled inadmissible only because there is a possibility that the evidence is the result of concoction, collusion or suggestion.

**Recommendation 27–13** Federal, state and territory legislation should provide that, in sexual assault proceedings, tendency or coincidence evidence is not inadmissible only because there is a possibility that the evidence is the result of concoction, collusion or suggestion.

301 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

302 Public Defenders Office NSW, *Submission FV 221*, 2 July 2010.

303 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010; Public Defenders and Prosecutors, *Consultation*, Sydney, 7 June 2010.

304 The Committee proposed amendments to ss 97, 98 and 101 of the uniform Evidence Acts, of general application to tendency and coincidence evidence and that other jurisdictions make similar amendments with respect to the admissibility of propensity and similar fact evidence: A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, Recs 3.8, 3.9.

## Relevance and consent

27.247 A related concern arises from the High Court's decision in *Phillips v The Queen*<sup>305</sup> (*Phillips*). *Phillips* involved a joint trial with six complainants. The prosecution called all six complainants who gave evidence about the defendant pursuing sex activity with them in circumstances where they did not consent.

27.248 The trial judge had found that the probative value of the evidence was its ability to show the 'improbability of similar lies by each of the complainants'.<sup>306</sup>

That is, one girl might deliberately make up a lie that [the appellant] dealt with her sexually without her consent; two might possibly make up a lie to that effect; but the chances or the probability that all six have made up such a lie, in my view, becomes remote in the extreme in the absence of any real risk of concoction.<sup>307</sup>

27.249 The High Court quashed the convictions based on its finding that the decision to join the charges in a single indictment was wrong in law.<sup>308</sup> The Court observed that:

Normally similar fact evidence is used to assist on issues relating only to the conduct and mental state of an accused ... But where a particular count supported by one complainant's evidence raises the issue of whether she consented to certain conduct by an accused, the issue relates much more to her mental state than his. The trial judge kept referring to 'the improbability of similar lies' on that issue. That is an expression used by Mason CJ, Wilson and Gaudron JJ in *Hoch v The Queen* ... ; however, as counsel for the appellant pointed out, they used it not on the question of whether the complainants in that case consented, but on whether the accused behaved towards them as he said he did. To tell the jury that the evidence went to the improbability of each complainant lying or being unreliable about consent was to say that a lack of consent by five complainants tended to establish lack of consent by the sixth.<sup>309</sup>

27.250 The Court held that the evidence of each complainant about whether they consented to sexual activity with the accused was not cross-admissible in relation to the counts involving the other complainants on the grounds of lack of relevance.

27.251 On one view, *Phillips* may have application to any sexual assault proceedings where there are multiple complaints of sexual assault against the same defendant and where consent is a fact in issue.<sup>310</sup> There is some case law indicating that

305 *Phillips v The Queen* (2006) 225 CLR 303.

306 Ibid, [33].

307 Ibid, [38] quoting White J, the trial judge.

308 Phillips was a serial offender who was later convicted of other counts of sexual assault while awaiting the outcome of his High Court appeal: D Hamer, 'Similar Fact Reasoning in Phillips: Artificial, Disjointed and Pernicious' (2007) 30 *University of New South Wales Law Journal* 609, 610.

309 *Phillips v The Queen* (2006) 225 CLR 303, [46].

310 See Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), Part 6, 52–58; A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 217–235.

*Phillips* may be applied to prevent joint trials being held in relation to multiple allegations against the same defendant.<sup>311</sup>

### **Consultation Paper**

27.252 The Consultation Paper asked what impact *Phillips v The Queen* has had on the prosecution of sexual assaults where there are multiple complaints against the same defendant and whether there is a need to introduce reforms to overturn the decision.<sup>312</sup>

27.253 Some stakeholders considered that reform should address the implications of the decision in *Phillips*.<sup>313</sup> The Women's Legal Service Queensland stated that, at least in Queensland, the decision had made it more difficult to conduct joint trials.<sup>314</sup> NASASV supported 'overturning the rulings' in *Phillips*. NASASV emphasised the impact of *Phillips* in the family violence context, noting that where 'victims are from the one family the impact of multiple trials is enormous' and can adversely affect the complainants' 'motivation and determination to continue through the whole process'.<sup>315</sup>

27.254 Cossins put forward a detailed case for legislative reform to address the impact of the decision in *Phillips*.<sup>316</sup> She submitted that, without such reform, the effect of the Commissions' proposal to encourage more joint trials where there are multiple complainants, by introducing a presumption of joint trial,<sup>317</sup> would be undermined.

27.255 Cossins suggested that evidence law should recognise that multiple complaints of sexual assault can be 'corroborative in nature' where there is a 'sufficient connection in the circumstances associated with the complaints'.<sup>318</sup> The provision would apply to sexual assault proceedings if two or more counts charging sexual offences involving different complainants are joined in the same indictment. It would state that, in a joint trial involving two or more counts, the evidence of one complainant about the alleged sexual acts and behaviour of the defendant or the circumstances giving rise to the sexual acts, is admissible as corroborative evidence in relation to the issue of lack of consent by another complainant, if there is a 'sufficient relationship'—in terms of the circumstances and events giving rise to the offences, between the evidence of the first and second complainants.<sup>319</sup>

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311 *R v Forbes* [2006] ACTSC; *R v MAP* [2006] QCA; *R v Hakeem* (2006) 163 A Crim R 549.

312 Consultation Paper Questions 17–8, 17–9.

313 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; A Cossins, *Submission FV 112*, 9 June 2010. National Legal Aid opposed reform to address the effects of the decision in *Phillips*: National Legal Aid, *Submission FV 232*, 15 July 2010.

314 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

315 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

316 A Cossins, *Submission FV 112*, 9 June 2010.

317 Consultation Paper, Proposal 17–4.

318 A Cossins, *Submission FV 112*, 9 June 2010. The application of any striking similarities test to such evidence would also be excluded.

319 These circumstances would include but not be limited to: (i) the proximity in time of the sexual acts; (ii) the number of occurrences of the sexual acts; (iii) the behaviour accompanying the sexual acts, including evidence of the use of intoxicating substances, pornography, force, violence or threats of force or violence; and (iv) the social context surrounding or relating to the sexual acts: *Ibid*.

### **Commissions' views**

27.256 In the Consultation Paper, the Commissions observed that the decision in *Phillips* has also been the subject of strong academic criticism.<sup>320</sup> The most stringent criticism relates to use of relevance in the High Court's reasoning in *Phillips*.

27.257 Associate Professor Jeremy Gans states, for example, that while the Court could have overturned the convictions on the basis of rules relating to the admissibility of propensity or similar fact evidence, the Court, 'having misunderstood the reasoning left to the jury, instead framed its rejection of the cross-admissibility of the multiple complaints in terms of relevance'.<sup>321</sup> That is, the Court held that 'evidence that five complainants did not consent could not rationally affect the assessment of the probability that the sixth complainant did not consent'. However, it may be argued that the jury was actually being asked to consider the improbability that all six complainants lied when they said they did not consent to the defendant's sexual acts<sup>322</sup>—quite a different premise.

27.258 David Hamer has also questioned the logic of the High Court's decision in *Phillips*, stating that:

The relevance of such evidence is clear. The fact that the defendant forced other victims to have non-consensual sex with him tends to show he has a propensity for forcing women to have non-consensual sex with him, and it increases the probability that the defendant forced the complainant to have non-consensual sex with him.<sup>323</sup>

27.259 The fact that the High Court made its ruling on the *relevance* of propensity or similar fact evidence means the case is applicable in all jurisdictions because all retain a requirement of relevance as the threshold test for admissibility.

27.260 The Commissions recognise that there are valid concerns about the effect of this aspect of the decision in *Phillips* on the conduct of sexual assault proceedings, including those involving family violence. However, the practical implications of *Phillips*, and for the prospects of joint trials in particular, remain unclear. The TLRI, in its critique of the decision, stated that:

it is not inevitable that the High Court's ruling on consent will apply. In particular, the Institute considers that the decision's potentially restrictive impact on the issue of consent can be avoided by approaching the evidence of multiple complainants as

320 See, eg, J Gans, 'Similar Facts After Phillips' (2006) 30 *Criminal Law Journal* 224, 224–245; D Hamer, 'Similar Fact Reasoning in Phillips: Artificial, Disjointed and Pernicious' (2007) 30 *University of New South Wales Law Journal* 609. See also Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), 52–58.

321 J Gans, 'Similar Facts After Phillips' (2006) 30 *Criminal Law Journal* 224, 231.

322 Ibid, 231.

323 D Hamer, 'Similar Fact Reasoning in Phillips: Artificial, Disjointed and Pernicious' (2007) 30 *University of New South Wales Law Journal* 609, 638.

tendency evidence that reveals the accused's tendency to have sexual intercourse without consent. This is relevant to the circumstances of the sexual intercourse.<sup>324</sup>

27.261 A recent Western Australian Court of Appeal decision, Owen JA stated that he did 'not read anything said in *Phillips* as meaning that where consent is in issue propensity evidence that might bear on the presence or absence of consent must necessarily be inadmissible'.<sup>325</sup>

27.262 Any proposed legislative solution to overturn the decision would be complex and risk introducing new uncertainties—as is the case with the solution proposed by Cossins and its new test of 'sufficient relationship'. The Commissions therefore do not make any recommendation in this regard.

## **Relationship evidence**

27.263 If there is only one complainant, the prosecution may want to lead evidence from other witnesses about the defendant's criminal sexual behaviour with them, or it may wish to adduce relationship evidence to explain the nature of the relationship between the complainant and the defendant, as well as the context in which the sexual assault occurred.

27.264 Evidence of uncharged acts of sexual misconduct is commonly referred to as 'relationship', 'context' or 'background' evidence and is a type of circumstantial evidence. While relationship evidence describes all conduct 'of a sexual kind' which is often referred to as 'uncharged acts', it also includes grooming behaviours that do not amount to an offence, such as the purchase of gifts and non-sexual touching.<sup>326</sup>

27.265 Relationship evidence forms part of the background against which the complainant's and the defendant's evidence are assessed.<sup>327</sup> In a sexual assault trial, relationship evidence may be relevant for a number of different reasons including to: provide a context in, or background against, which to understand the charges laid against the defendant; explain why the complainant complied with the sexual demands of the defendant without surprise; explain why the complainant failed promptly to complain; and explain the defendant's confidence in committing the sexual acts or his control over the complainant.<sup>328</sup>

27.266 Where such evidence is admissible, it 'cannot be used by the jury to reason that, if the accused committed the uncharged acts, he or she is more likely to have committed the charged acts'.<sup>329</sup> However, the distinction between relationship evidence

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324 Tasmania Law Reform Institute, *Evidence Act 2001 Sections 97, 98 & 101 and Hoch's Case: Admissibility of Tendency and Coincidence Evidence in Sexual Assault Cases with Multiple Complainants*, Issues Paper 15 (2009), 54.

325 *Stubley v Western Australia* [2010] WASCA, [2].

326 *HML v The Queen* (2008) 235 CLR 334, [492] (sexual offences against defendant's daughter).

327 *B v The Queen* (1992) 175 CLR 599, 610 (sexual offences against defendant's daughter).

328 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 235. See, eg, *R v Vonarx* [1999] 3 VR.

329 Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55 (Part 2) (2000), 371.

and tendency evidence has been described as ‘somewhat artificial’<sup>330</sup> since evidence which shows the ‘existence of a sexual relationship must surely tend to show that the accused [has a tendency] to do the sort of things the subject of the charge’.<sup>331</sup>

27.267 Nonetheless, many cases have held that evidence of uncharged sexual behaviour between a complainant and an accused is admissible.<sup>332</sup> Relationship evidence has a long history of being admitted in all types of criminal trials.<sup>333</sup>

27.268 In the last decade, however, the admissibility of relationship evidence has had a conflicted history with ‘sharp divisions’ in the High Court about when and for what purposes such evidence should be admissible.<sup>334</sup> This division saw a majority attempt to restrict the admission of such evidence at common law in *Gipp v The Queen*.<sup>335</sup> This case resulted in considerable uncertainty about the test that should be applied to admit relationship evidence.<sup>336</sup>

### Case law

27.269 It is possible that this uncertainty has been resolved by the High Court decision in *HML v The Queen (HML)*.<sup>337</sup> *HML* only applies to cases of child sexual assault, where lack of consent is not one of the issues to be decided<sup>338</sup> and in jurisdictions that have not overturned the ‘no rational view of the evidence’ (*Pfennig*) test.<sup>339</sup>

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330 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 236.

331 *R v Knuth* [1998] QCA 161, [22] (sexual offences against the defendant’s daughters).

332 See *Cook v The Queen* (2000) 22 WAR 67; *R v Nieterink* (1999) 76 SASR 56 (sexual offences against a friend of the defendant’s step-daughter); *R v Vonarx* [1999] 3 VR (sexual offences against defendant’s son); *R v Alexander* [1996] SASC 5557; *R v Beserick* (1993) 30 NSWLR 510; *B v The Queen* (1992) 175 CLR 599.

333 The reception of ‘this type of evidence has come to be routine and unsurprising’: *HML v The Queen* (2008) 235 CLR 334, [271]–[272].

334 Ibid, [328].

335 Gaudron J considered that the admissibility of propensity evidence in the form of past criminal conduct (including relationship evidence) was only warranted in a few specified situations, eg, where the defence raised specific issues such as evidence of good character or lack of surprise or failure to complain on the part of the complainant: *Gipp v The Queen* (1998) 194 CLR 106, 112. Callinan J stated that if such evidence is to be admitted ‘it must owe its admissibility to some, quite specific, other purpose, including eg, in an appropriate case, proof of a guilty passion, intention, or propensity, or opportunity, or motive’: *Gipp v The Queen* (1998) 194 CLR 106, [182]. See also *Tully v The Queen* (2006) 230 CLR 234, [144]–[145]. Kirby J stated that relationship evidence should only be ‘admissible if its probative value outweighs its prejudicial effect’: *Gipp v The Queen* (1998) 194 CLR 106, [141].

336 *HML v The Queen* (2008) 235 CLR 334, [163]. This uncertainty has been evident, eg, in the different approaches taken by the Full Court of the Supreme Court of South Australia in *R v Nieterink* (1999) 76 SASR 56 and the Court of Appeal of Victoria decision in *R v Vonarx* [1999] 3 VR.

337 Although ‘the six different judgments in the case may continue to confound rather than enlighten the law on relationship evidence’: A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 237.

338 *HML v The Queen* (2008) 235 CLR 334, [102].

339 Ibid, [54]. The case does not apply to the admission of relationship evidence under the uniform Evidence Acts, nor under *Evidence Act 1906* (WA) s 31A. The *Pfennig* test still applies in Queensland, SA and the NT.

27.270 The issues in *HML*, a case involving sexual abuse by a father of his daughter, included when and in what circumstances evidence of uncharged acts of sexual misconduct is admissible in a child sexual assault trial and what test applies to its admission.<sup>340</sup> All seven judges accepted that there are important reasons why evidence of uncharged acts of sexual misconduct by the defendant ought to be admissible in child sexual assault trials. The public policy reasons recognised for permitting the child to give evidence of uncharged acts included:<sup>341</sup>

- ‘multiple and repeated incidents over a period of time’ are typical of the sexual abuse of children (and this is particularly so in the context of sexual assault perpetrated by family members);
- the impracticality or impossibility of being able to charge every multiple incident of sexual abuse;
- the importance of legal procedure to facilitate the giving of a ‘fair and coherent account’ by the complainant of what has occurred;
- the exclusion of evidence of uncharged acts would mean that the complainant’s evidence of the charged acts of sexual misconduct would be viewed in isolation and sometimes as if the complainant was sexually abused ‘out of the blue’;
- the artificiality of attempting to ‘quarantine the charged acts’ from other incidents;
- the seriousness of child sexual assault as a crime and its historical under-enforcement which ought not to be frustrated by ‘unjustifiably restrictive court procedures’;<sup>342</sup> and
- because today’s juries are ‘better educated and more literate’, there is less need for restrictive rules for excluding relevant but prejudicial evidence.

27.271 In *HML*, all seven judges agreed that uncharged acts of sexual misconduct are likely to be relevant to the facts in issue in a child sexual assault trial, that is, whether the defendant committed the sexual acts that constitute the charges.<sup>343</sup> However, the relevance test was not considered to be a sufficient control on the admissibility of relationship evidence by Gummow, Kirby and Hayne JJ, all of whom

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<sup>340</sup> A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 237–238.

<sup>341</sup> *HML v The Queen* (2008) 235 CLR 334, [56].

<sup>342</sup> This includes ‘the social interest in convicting those guilty of crimes against small children which are both grave and difficult to prove’: *Ibid*, [331].

<sup>343</sup> For example, Hayne J stated that ‘[p]roving that the accused not only had that sexual interest but had given expression to that interest by those acts, made it more probable that he had committed the charged acts’: *Ibid*, [103]. As discussed above, the evidence may also be relevant on other grounds, such as to explain the complainant’s delay in complaint, although some of those reasons may only be directly relevant to the credibility of the complainant: *HML v The Queen* (2008) 235 CLR 334, [426].

agreed that, in addition to relevance, evidence of uncharged acts should not be admissible unless the *Pfennig* test is satisfied.<sup>344</sup>

27.272 The National Child Sexual Assault Reform Committee has noted that ‘lower courts may not find it all that easy to decide whether to apply the approach of Gummow, Kirby and Hayne JJ, or the approach of the other four judges’,<sup>345</sup> who either did not agree that the *Pfennig* test applied to relationship evidence at all,<sup>346</sup> or did not think the *Pfennig* test applied to the relationship evidence in the cases at hand, even though there may be other situations in which it would apply.<sup>347</sup>

27.273 In *HML*, Kiefel J considered that only where relationship evidence is being tendered for its tendency purpose should the *Pfennig* test be applied. This is the same approach that is taken in uniform Evidence Acts jurisdictions where the test under s 101(2) does not apply to relationship evidence which is tendered for a non-tendency purpose.<sup>348</sup>

### Reform options

27.274 The National Child Sexual Assault Reform Committee proposed that, because of the different and inconsistent approaches taken by the judges in *HML* to the admissibility of relationship evidence, the *Pfennig* test at common law should be abolished in relation to the admissibility of relationship evidence.<sup>349</sup> This would bring common law jurisdictions in line with those that do not use the test (or use the balancing test under s 101 of the uniform Evidence Acts) to admit relationship evidence—that is, Western Australia and the uniform Evidence Acts jurisdictions.

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344 *HML v The Queen* (2008) 235 CLR 334, [59] (Kirby J); [106] (Hayne J with whom Gummow J agreed). The purpose for adopting the *Pfennig* test is to place an extra control over ‘the discreditable facts’ that are admitted against an accused. Without such a control any relevant discreditable facts would be able to be tendered against an accused simply because they throw some light on the ‘context’ of the offences: *HML v The Queen* (2008) 235 CLR 334, [80]. Nonetheless, Hayne J considered that evidence of uncharged acts would usually satisfy the *Pfennig* test because ‘there will usually be no reasonable view of the evidence ... other than as supporting an inference that the accused is guilty of the offence charged’: *HML v The Queen* (2008) 235 CLR 334, [107]. Although Hayne J recognised the disadvantage to the defendant by admitting such evidence, His Honour considered that ‘its admission would work no prejudice to the accused over and above what the evidence establishes’: *HML v The Queen* (2008) 235 CLR 334, [110].

345 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 240.

346 *HML v The Queen* (2008) 235 CLR 334, [455] (Crennan J); [511]–[512] (Kiefel J).

347 See *Ibid*, [27] (Gleeson CJ); [264] (Heydon J).

348 *Ibid*, [503], [505]. In ALRC Report 102 the ALRC, NSWLRC and VLRC considered whether the balancing test under s 101(2) of the uniform Evidence Acts should be extended to apply to any evidence tendered against a defendant which discloses disreputable conduct although tendered for a non-tendency or non-coincidence purpose—such as relationship evidence: see Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [11.76]–[11.93]. The Commissions concluded that the case had not been made out for change, which would be unlikely to result in different outcomes where questions arise as to the admissibility of evidence relevant for tendency or coincidence purposes and for other purposes.

349 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, Rec 3.14.

### ***Consultation Paper***

27.275 In the Consultation Paper, the Commissions asked whether the *Pfennig* test should be applied to determine the admissibility of relationship evidence at common law.<sup>350</sup> Few stakeholders responded to this question.<sup>351</sup> The Public Defenders Office NSW confirmed that the *Pfennig* test is not applied to relationship evidence.<sup>352</sup>

27.276 Cossins provided a detailed analysis of *HML* and associated law and submitted that the application of the *Pfennig* test to relationship evidence ‘is to interpose an extra test of relevance which is both illogical and unnecessary’. Cossins submitted that a specific provision that abrogates the *Pfennig* test should be enacted ‘to ensure that relationship evidence is admissible if it passes the relevance test, with appropriate warnings to be given to the jury about how they may use the evidence’. In her view, such a provision would ensure that relationship evidence at common law ‘is not subject to the rule in *Pfennig* where the evidence is tendered for a non-tendency purpose in a child sexual assault trial’.<sup>353</sup>

### ***Commissions’ views***

27.277 In the Commissions’ view, the ‘no rational view of the evidence’ (*Pfennig*) test should not apply to relationship evidence. As discussed above, in uniform Evidence Acts jurisdictions, the *Pfennig* test does not apply, even to tendency and coincidence evidence. There is no need for further provisions to deal specifically with relationship evidence, as defined in this discussion, beyond the general relevance test and other rules set out in the uniform Evidence Acts.

27.278 Reform directed to the admissibility of relationship evidence in common law evidence jurisdictions would be problematic given the uncertainty over the meaning and practical effect of the decision in *HML*. Complex legislative drafting would be required to remove doubt about the possible application of the test to relationship evidence in Queensland, South Australia and the Northern Territory. The reform would require the development of a statutory definition of relationship evidence and deal with the purposes for which the evidence may be used, directions to the jury and so on.<sup>354</sup>

27.279 The Commissions do not consider it would be appropriate, in the context of this Inquiry, to recommend reforms to evidence law in common law evidence jurisdictions directed to relationship evidence. Rather, the Commissions consider it is preferable that all Australian jurisdictions join the uniform Evidence Acts scheme.

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350 Consultation Paper, Question 18–9.

351 The Northern Territory Legal Aid Commission responded in the affirmative: Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010.

352 Public Defenders Office NSW, *Submission FV 221*, 2 July 2010.

353 A Cossins, *Submission FV 112*, 9 June 2010.

354 See, eg. A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee.

## Evidence of recent and delayed complaint

27.280 Complaint evidence is a type of prior consistent statement which is given by a witness or the complainant about when the complainant made their first report of sexual assault. The common law recent complaint rule only allows this type of evidence to be admissible if the complaint was made at the first reasonable opportunity after the alleged sexual assault. Further, it is only admissible for credibility purposes, that is, to bolster the credit of the complainant.<sup>355</sup> At common law, evidence of recent complaint cannot be used to prove the facts in issue—that is, whether or not the complainant consented or the defendant committed the alleged sexual conduct.

27.281 By the beginning of the eighteenth century, a failure to complain immediately had evolved into a presumption of fabrication on the part of the rape complainant.<sup>356</sup> Since the rule was based on ‘the belief that a rape complainant could only be believed if she could demonstrate she had publicly denounced the perpetrator, rape complainants became a special category of witness whose credibility could be boosted by evidence of recent complaint’.<sup>357</sup>

27.282 The common law’s approach to recent complaint evidence meant that evidence of delayed complaint was also considered to be relevant to credibility but for a different purpose—to undermine the complainant’s credibility. Evidence of delayed complaint is commonly used by defence counsel to argue that a complainant has falsely accused the defendant of sexual assault. This may be especially likely in a family violence context where, for example, there has been sexual abuse of a family member over a number of years.

## Uniform Evidence Acts jurisdictions

### *Recent complaint*

27.283 The recent complaint rule is no longer applicable in uniform Evidence Acts jurisdictions. In *Papakosmas v The Queen*, the High Court held that recent complaint evidence is relevant to the facts in issue in a sexual assault trial, for example, whether the complainant consented to have intercourse with the appellant.<sup>358</sup> In a child sexual assault trial, evidence of recent complaint is relevant to whether the defendant committed the act, since consent is not a fact in issue.

27.284 Evidence of a complainant’s recent complaint is caught by the exclusionary hearsay rule under s 59 of the uniform Evidence Acts. Evidence of the complaint may nevertheless be admissible under the first-hand hearsay exception, where the

355 History of the law of recent complaint is found in D McDonald, ‘Gender Bias and the Law of Evidence: The Link between Sexuality and Credibility’ (1994) 24 *Victoria University of Wellington Law Review* 175; S Bronitt, ‘The Rules of Recent Complaint: Rape Myths and the Legal Construction of the “Reasonable” Rape Victim’ in P Easteal (ed) *Balancing the Scales: Rape, Law Reform and Australian Culture* (1998).

356 J Gobbo, *Cross on Evidence* (1970), 245.

357 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 141.

358 *Papakosmas v The Queen* (1999) 196 CLR 297, 309.

complainant is available to give evidence,<sup>359</sup> and the ‘fresh in the memory’ test is satisfied. Section 66(2) of the uniform Evidence Acts states:

- (2) If a person has been or is to be called to give evidence, the hearsay rule does not apply to evidence of the representation that is given by:
  - (a) that person; or
  - (b) a person who saw, heard or otherwise perceived the representation being made;

if, when the representation was made, the occurrence of the asserted fact was *fresh in the memory* of the person who made the representation (emphasis added).

27.285 The effect of s 66(2) was confirmed in *Papakosmas v The Queen*, in which evidence of recent complaint was held to be relevant to the issue of consent and to satisfy s 66(2).<sup>360</sup>

#### ***Delayed complaint***

27.286 In *Graham v The Queen*, the High Court was required to consider the scope of the ‘fresh in the memory’ test under s 66(2). Instead of evidence of recent complaint, a witness had given evidence about the complainant’s disclosures made six years after the alleged sexual assault. The High Court held that the witness’ evidence was *not* admissible under s 66(2) because the complainant had not told her friend she was sexually abused by her father when the events were fresh in her memory. The High Court interpreted the word, ‘fresh’ to mean ‘recent’ or ‘immediate’ so that the lapse of time ‘will very likely be measured in hours or days, not, as was the case here, in years’.<sup>361</sup>

27.287 In ALRC 102, the ALRC, NSWLRC and VLRC recommended retention of the concept of ‘fresh in the memory’ under s 66(2) with an extension of the matters to be taken into account in determining what is ‘fresh in the memory’ to address the restrictive interpretation in *Graham v The Queen*. The Commissions concluded that ‘understanding of memory processes has progressed significantly’ since the uniform Evidence Acts were first introduced and ‘the law should reflect that knowledge’.<sup>362</sup>

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359 The complainant is the person who made the previous representation and is available to give evidence about the asserted fact, the asserted fact being a fact that a person (who made a previous representation) intended to assert by the representation: s 59. In a sexual assault trial, the complainant is the Crown’s chief witness who, if competent, is available to give evidence.

360 Three of the complainants’ work colleagues were able to give evidence not only of the complainant’s crying and distressed state after emerging from the ladies’ toilets but also of her statements to them that ‘Papakosmas raped me’. This particular statement was held to fall within s 66(2) because the complainant had informed her work colleagues about being sexually assaulted by the accused almost immediately after the events in question so that the ‘fresh in the memory’ requirement was satisfied: *Papakosmas v The Queen* (1999) 196 CLR 297, 300–301.

361 *Graham v The Queen* (1998) 195 CLR 606, 608.

362 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), 253. ALRC Report 102 noted research showing that ‘while focusing primarily on the lapse of time between an event and the making of a representation about it might be justifiable in relation to memory of

27.288 ALRC 102 recommended that a new sub-section should be inserted into s 66.<sup>363</sup> This recommendation was subsequently enacted, with some re-wording, as s 66(2A):

- (2A) In determining whether the occurrence of the asserted fact was fresh in the memory of a person, the court may take into account all matters that it considers are relevant to the question, including:
  - (a) the nature of the event concerned, and
  - (b) the age and health of the person, and
  - (c) the period of time between the occurrence of the asserted fact and the making of the representation.<sup>364</sup>

### **Other modifications to the common law**

27.289 Queensland, Western Australia and South Australia have enacted provisions that address some of the problems with the recent complaint rule at common law.<sup>365</sup> Queensland has enacted a specific provision that applies to the admission of out-of-court statements in sexual assault trials. Section 4A(2) of the *Criminal Law (Sexual Offences) Act 1978* (Qld) states:

Evidence of how and when any preliminary complaint was made by the complainant about the alleged commission of the offence by the defendant is admissible in evidence, regardless of when the preliminary complaint was made.

27.290 This provision does not allow evidence of the content of the statement to be admissible, only evidence of how and when the statement was made—although it does allow this evidence to be admitted regardless of when the complaint was made. Admissibility is not dependent on the person being available for cross-examination.

27.291 However, evidence of a preliminary complaint admitted under s 4A(2) is still only relevant to the complainant’s credibility so that juries in Queensland will be instructed that they cannot use the evidence as proof of the facts in issue, such as lack

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unremarkable events, the distinct and complex nature of memory of violent crime indicates that the nature of the event concerned should be considered in deciding whether a memory is “fresh” at the relevant time. The assessment of “freshness” should not be confined to time’: Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [8.120].

363 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), Rec 8–4. In ALRC 84, the ALRC and HREOC recommended that evidence ‘of a child’s hearsay statements regarding the facts in issue should be admissible to prove the facts in issue in any civil or criminal case involving child abuse allegations, where admission of the hearsay statement is necessary and the out-of-court statement is reasonably reliable’: Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), Rec 102, [14.78]–[14.72].

364 The amending legislation in Tasmania (*Evidence Amendment Bill 2008* (Tas)) had not been passed at the time of writing.

365 For a more comprehensive review of modification to the common law relating to recent and delayed complaint evidence, see: A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 141–145.

of consent.<sup>366</sup> This means that Queensland has not abolished the common law recent complaint rule.

27.292 In Western Australia, a child-specific modification to the law on hearsay evidence was enacted in 1992.<sup>367</sup> Under s 106H of the *Evidence Act 1906* (WA), the admissibility of out-of-court statements is left to the discretion of the judge, and is dependent on the child being available for cross-examination. The aim of the provision is to allow any statement made by a child to another person to be admissible in certain criminal trials, including child sexual assault trials.

27.293 In South Australia, a child-specific hearsay exception was enacted, after the 2006 Chapman review of rape and sexual assault laws.<sup>368</sup> A substituted s 34CA of the *Criminal Law Consolidation Act 1935* (SA) was intended ‘to facilitate the proof of sexual offences against children’.<sup>369</sup> The provision abolishes the recent complaint rule because out-of-court statements admitted under this provision can be used to prove the truth of the facts asserted.<sup>370</sup>

### **Evidence of delayed complaint**

27.294 Hearsay evidence has been considered unreliable because the maker of the statement could not be cross-examined about its veracity. The position at common law is that hearsay evidence of delayed complaint will not be admissible, unless this has been amended by specific legislation.

27.295 The hearsay exception under s 66(2) of the uniform Evidence Acts overcomes this problem because the maker of the statement (the complainant) is available to give evidence and to be cross-examined about the complaint as long as he or she is competent to give evidence. The relevance of evidence of delayed complaint ‘is not to compete with the quality of the complainant’s evidence but to illustrate the context in which she made her disclosure and the reasons for any delay’.<sup>371</sup>

27.296 The psychological literature shows that delay is the most common characteristic of both child and adult sexual assault.<sup>372</sup> Significantly in the context of this Inquiry, the ‘predictors associated with delayed disclosure’<sup>373</sup> reveal differences in reporting patterns depending upon the victim’s relationship with the abuser. For

366 *R v RH* [2005] 1 Qd R; *R v GS* [2005] QCA.

367 This provision was enacted to implement the recommendations of the Western Australian Law Reform Commission, *Report on Evidence of Children and Other Vulnerable Witnesses* (1991). See also *RPM v The Queen* [2004] WASCA, [46].

368 L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006), prepared for the Government of South Australia.

369 South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007, 1449 (M Atkinson—Attorney-General, Minister for Justice, Minister for Multicultural Affairs).

370 *Criminal Law Consolidation Act 1935* (SA) s 34CA(3).

371 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 147.

372 For a review of this literature see *Ibid*, 86–97; D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review* (2003), prepared for the Commonwealth Office of the Status of Women.

373 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 89.

example, where the victim and defendant are related, research suggests there is a longer delay in complaint.<sup>374</sup> Since complainants are routinely cross-examined by defence counsel about delays in complaint in ways that suggest fabrication, ‘it is likely that evidence about a complainant’s first complaint would answer the type of questions that jurors can be expected to ask themselves’.<sup>375</sup>

27.297 In uniform Evidence Acts jurisdictions, s 66(2) will, in some cases, permit the admission of evidence of delayed complaint where the occurrence of the events was ‘fresh in the memory’ of the complainant. In other cases, the ‘fresh in the memory’ requirements will be a barrier to admissibility.

27.298 Evidence of delayed complaint may also be admissible under s 108 of the uniform Evidence Acts. The relevant part of this exception to the credibility rule<sup>376</sup> provides that the credibility rule does not apply to evidence of a prior consistent statement of a witness if evidence of a prior inconsistent statement of the witness has been admitted; or there are suggestions that evidence given by the witness has been fabricated or reconstructed or is the result of a suggestion.<sup>377</sup> That is, where delay in complaint is used to impugn the credibility of the complainant, s 108 can be used to admit evidence about the complaint including, for example, the reasons for the delay in complaint and the surrounding circumstances.

### ***Problems with the operation of s 66***

27.299 Some commentators have identified the operation of s 66 of the uniform Evidence Acts as a problem in relation to evidence of delayed complaint. This view has been summarised by the National Child Sexual Assault Reform Committee as follows:

Trial and appellate judges may consider that a complainant’s representation is unreliable because of their young age at the time it was made, or because too much time has elapsed between the events in question and the preliminary complaint. Because s 66(2A) does not actually change the ‘recent’ or ‘immediate’ requirement imposed by *Graham’s* case it is unlikely that the amendment will have the effect of admitting evidence of delayed complaint, as a matter of course.<sup>378</sup>

27.300 One option to avoid the ‘fresh in the memory’ requirement would be to adopt the Queensland approach to evidence of delayed complaint. This would ensure that evidence of the content of, and the circumstances surrounding, a sexual assault complaint was admissible, regardless of the length of time between the complaint and the alleged sexual abuse. The Queensland approach recognises that the law has considered the time lapse between the assault and the making of a complaint as ‘evidence of truthfulness and fabrication, despite the fact that delay in complaint has been consistently found to be the most typical feature’ of sexual assault.<sup>379</sup>

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374 For example, see analysis in *Ibid*, 86–90.

375 *Ibid*, 148.

376 The rule that credibility evidence about a witness is not admissible: Uniform Evidence Acts, s 102.

377 *Ibid* s 108.

378 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 150.

379 *Ibid*, 150.

27.301 Questions have been raised about whether ‘courts and judges are the appropriate forum and personnel to be making … assessments’ about the quality of a witness’ memory.<sup>380</sup> If there are issues of reliability, options for reform could be to ensure that a complainant is available to be cross-examined about their out-of-court statements and that courts are able to give appropriate warnings to the jury.

#### ***Submissions and consultation***

27.302 In the Consultation Paper, the Commissions asked whether federal, state and territory legislation should provide that, where complainants in sexual assault proceedings are called to give evidence, the hearsay rule does not apply to evidence of a preliminary complaint, regardless of when the preliminary complaint was made.<sup>381</sup>

27.303 Cossins submitted that because of ‘the different approaches in WA, Queensland, SA, Victoria and the [uniform Evidence Acts] to out-of-court disclosures made by a child about being sexually abused, there is a need to bring consistency to this area of evidence law’.<sup>382</sup>

27.304 Cossins recommended that new provisions be inserted into s 66 of the uniform Evidence Acts providing that, if a person is a complainant in a child sexual assault trial and has been or is to be called to give evidence, the hearsay rule does not apply to evidence of a preliminary complaint given by that person or a person who saw, heard or otherwise perceived the preliminary complaint being made regardless of when the preliminary complaint was made.<sup>383</sup> Common law evidence jurisdictions should, in her view, enact a provision based on that in Queensland,<sup>384</sup> with modifications to overcome present limitations regarding the admissibility of evidence of a child’s complaint of sexual abuse.<sup>385</sup>

27.305 A number of other stakeholders agreed that evidence of preliminary complaint should be more readily admissible.<sup>386</sup> The Victorian Aboriginal Legal Service submitted that the hearsay rule should not apply to evidence of a preliminary complaint, regardless of when the preliminary complaint was made. The NSW ODPP stated:

We are supportive of complaint evidence being admitted in the Crown case as part of the narrative to put the complainant’s actions in context, in line with the Queensland

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380 Ibid, 151.

381 Consultation Paper, Question 18–10.

382 A Cossins, *Submission FV 112*, 9 June 2010.

383 A preliminary complaint would be defined as any complaint other than the complainant’s first formal witness statement to a police officer or other qualified person given in relation to, or in anticipation of, criminal proceedings in relation to the alleged offence: Ibid.

384 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A.

385 A Cossins, *Submission FV 112*, 9 June 2010.

386 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

provision, in all cases. In some cases, depending on the facts it may still be appropriate to admit the evidence as hearsay.<sup>387</sup>

27.306 Other stakeholders opposed any special exception to the general rules of evidence applicable to preliminary complaints in sexual assault proceedings.<sup>388</sup> The Law Council agreed that ‘a general proposition that children often delay in making complaint does not make evidence of the complaint inherently more reliable than in-court evidence, the usual justification for exceptions to the hearsay rule’.<sup>389</sup> National Legal Aid submitted that allowing evidence of a disclosure to be admitted ‘as truth of the substance of that disclosure, in circumstances where the disclosure is lacking in detail and was made when the accuracy of the complainant’s recollection may already have been affected by the passage of time, would be improperly prejudicial to an accused’.<sup>390</sup>

#### ***Commissions’ views***

27.307 The Commission is not convinced that a strong enough case has been made for reform of s 66 of the uniform Evidence Acts to create an exception for the evidence of child or other complainants in sexual assault proceedings. The possibility of such a reform was considered, but not pursued, by the ALRC, the NSWLRC and VLRC in their 2005 report reviewing uniform evidence law.<sup>391</sup>

27.308 It has been argued that the ‘fresh in the memory’ requirement under s 66 can mean that, for example, when a jury warning is given regarding the forensic disadvantage suffered by the defendant as a result of a delay in complaint, evidence of when the complaint was made, what was said and the reasons for delay may be ‘technically inadmissible in examination-in-chief’.<sup>392</sup>

27.309 This can mean that evidence about the delay is left to the defence to raise during cross-examination, ‘leaving the jury with an inaccurate impression about the reasons for the complainant’s delayed disclosure and, unless addressed during re-examination, an incomplete account of why, when and how the complainant made her first complaint’.<sup>393</sup>

27.310 One option to address these concerns would be for legislation to provide that, where complainants in sexual assault trials are called to give evidence, the hearsay rule does not apply to evidence of a preliminary complaint, regardless of when the preliminary complaint was made. The mechanism for reform would be amendment of

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387 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

388 Law Council of Australia, *Submission FV 180*, 25 June 2010; Public Defenders and Prosecutors, *Consultation*, Sydney, 7 June 2010.

389 Law Council of Australia, *Submission FV 180*, 25 June 2010.

390 National Legal Aid, *Submission FV 232*, 15 July 2010.

391 See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [8.66]–[8.124].

392 L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006), prepared for the Government of South Australia, 114.

393 A Cossins, *Submission FV 112*, 9 June 2010.

s 66 of the uniform Evidence Acts in those jurisdictions. In other jurisdictions, reforms could be enacted in criminal procedure legislation relating to sexual offences.

27.311 Such a reform may be criticised, however, for attempting to amend an exception to the hearsay rule to address concerns primarily about attacks on the credibility of complainants in sexual assault cases. The Consultation Paper noted that evidence of a long delayed complaint is not inherently more reliable than in-court evidence (the usual justification for exceptions to hearsay rule).<sup>394</sup> It can be seen as wrong in principle to retain s 66 generally, while creating a special exception for complainants in sexual assault proceedings.

27.312 Cossins submitted that this objection to reform of s 66 fails to ‘understand the importance and relevance of evidence of a child’s preliminary or first complaint’.<sup>395</sup> In her view, it is necessary to recognise the value judgments used when assessing the relevance of such evidence. This value judgment should be:

informed by the knowledge that children typically delay disclosure of sexual abuse [which] means that evidence of a child’s *delayed* disclosure, together with the circumstances in which it was made and the trigger for the disclosure (for example, [disclosure] to the child’s mother when a child does not want to be baby-sat by the offender) satisfies the relevance test under s 55 of the [uniform Evidence Acts] because it rationally affects the assessment of the probability of the existence of a fact in issue, namely whether the accused committed the alleged sexual abuse.<sup>396</sup>

27.313 On the other hand, the hearsay rule is not concerned with the relevance of evidence, but with its reliability according to the proposition that the ‘best evidence available’ to a party should be received. The concept of ‘best available evidence’ can be seen to involve two elements—the quality of the evidence and its availability. Reasons to do with the quality of evidence led to a distinction being drawn between statements made while relevant events were ‘fresh in the memory’ and statements which were not.<sup>397</sup>

27.314 Another factor dictating against a specific recommendation for reform is that there may not have been enough time to establish whether s 66(2A) of the uniform Evidence Acts has had any impact on the admission of evidence of delayed complaint.<sup>398</sup> This amendment to the uniform Evidence Acts was intended, in part, to address ‘special difficulties’ with the ‘fresh in the memory’ criterion in sexual offence cases<sup>399</sup> and only came into operation in January 2009.

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<sup>394</sup> Consultation Paper, [18.223].

<sup>395</sup> A Cossins, *Submission FV 112*, 9 June 2010.

<sup>396</sup> Ibid.

<sup>397</sup> See Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [7.10]–[7.13].

<sup>398</sup> Law Council of Australia, *Submission FV 180*, 25 June 2010.

<sup>399</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [8.75].

27.315 The ALRC, VLRC and NSWLRC, in ALRC 102, recommended that in order to ensure the ‘maintenance of harmonisation over time and the general effectiveness of the uniform Evidence Acts’, Australian governments should consider initiating a joint review of the uniform Evidence Acts within 10 years from the tabling of the Report.<sup>400</sup> This would be an appropriate time to review the operation of s 66(2A).

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400 Ibid, Rec 2–3.



# 28. Other Trial Processes

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## Contents

Introduction	1309
Jury warnings	1309
Warnings about unreliable evidence and corroboration	1311
Statutory response to the corroboration component	1312
Statutory response to the reliability component	1312
<i>Murray</i> warning	1313
Warnings about delay in complaint	1316
<i>Longman</i> warning	1317
Uniform Evidence Acts approach	1319
Options for reform	1321
<i>Crofts</i> warning	1324
Options for reform	1327
Cross-examination	1334
Cross-examination of children and vulnerable witnesses	1334
Unrepresented defendants	1337
Other aspects of giving evidence	1343
Evidence on re-trial or appeal	1344

## Introduction

28.1 This chapter deals with the giving of jury warnings, the cross-examination of complainants and other witnesses in sexual assault proceedings and other aspects of giving evidence.

28.2 As noted in the preceding chapter, these issues have been selected because the application of law in these areas has a direct and significant impact on the experiences in the criminal justice system of women and children who have suffered sexual assault including in a family violence context—the focus of the Commissions’ Terms of Reference.

## Jury warnings

28.3 In jury trials, the judge directs the jury as to the legal rules that it must apply to the evidence, including any legal limits on the use it may make of the evidence. This task also encompasses a responsibility to give an appropriate warning or caution where acting upon particular evidence involves potential ‘dangers’.

28.4 Where a warning is required, this is usually in respect of legal matters about which the court is said to have ‘special experience’ not possessed by members of the

jury. The duty of a trial judge to give appropriate and adequate warnings stems from the overriding duty to ensure a fair trial. The failure to give an appropriate jury warning may lead to a miscarriage of justice.<sup>1</sup>

28.5 Judges are required to give a number of specific, and sometimes quite complex, jury directions in criminal trials. These reflect both common law and statutory developments in the criminal law.<sup>2</sup>

28.6 In this Inquiry, the ALRC and New South Wales Law Reform Commission (NSWLRC) only consider warnings about unreliable evidence and corroboration, and warnings about delay in complaint, in the context of sexual assault proceedings.

28.7 The Tasmania Law Reform Institute (TLRI) delivered a report on jury warnings in sexual offences cases relating to delay in complaint in 2006.<sup>3</sup> In 2009 the Victorian and Queensland law reform commissions each released completed reviews of directions and warnings given by judges to juries in criminal trials.<sup>4</sup> The NSWLRC's inquiry into jury directions is ongoing.<sup>5</sup>

28.8 The purpose of jury warnings in the context of sexual assault has changed over time. Historically, they served to protect the accused against an unfair conviction. Increasingly, however, they serve to 'counter myths about sexual assault and to ensure that complainants, as well as people charged with sexual offences, are treated fairly'.<sup>6</sup>

28.9 In a sexual assault trial, numerous complex directions and warnings 'which focus on the unique characteristics of sexual assault such as delay, one witness to the offence and a lack of corroborating evidence' may be required.<sup>7</sup> The duties of the trial judge to direct the jury in a manner which is clear, intelligible, relevant, brief and insulated from appeal, and the duty of jurors to comprehend and apply each direction are problematic to discharge.<sup>8</sup>

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1 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [18.1]–[18.2].

2 Queensland Law Reform Commission, *A Review of Jury Directions: Report*, Report 66 (2009), 50.

3 Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006).

4 Victorian Law Reform Commission, *Jury Directions: Final Report* (2009); Queensland Law Reform Commission, *A Review of Jury Directions: Report*, Report 66 (2009).

5 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008).

6 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [7.7] (footnotes omitted). For a discussion of the popular myths surrounding sexual assault, see D Lievore, *Non-Reporting and Hidden Recording of Sexual Assault: An International Review* (2003), prepared for the Commonwealth Office of the Status of Women; D Boniface, 'Ruining a Good Boy for the Sake of a Bad Girl: False Accusation Theory in Sexual Offences, and New South Wales Limitations Periods—Gone But Not Forgotten' (1994) 6 *Current Issues in Criminal Justice* 54; A Cossins, 'Complaints of Child Sexual Abuse: Too Easy to Make or Too Difficult to Prove?' (2001) 34 *Australian and New Zealand Journal of Criminology* 149.

7 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 67.

8 For a summary of both the common law and uniform Evidence Act directions, which highlights the complexity of a trial judge's task see, *R v BWT* (2002) 54 NSWLR 241, 250–251.

28.10 The Commissions recognise that community knowledge about sexual assault, especially in the family violence context, is limited and susceptible to influence by inaccurate misconceptions and myths.<sup>9</sup> As members of the judiciary and jury are also members of the community, it stands to reason that they are vulnerable to be influenced by inaccurate understandings in making an assessment of a sexual assault case.<sup>10</sup> Jury directions

go some way in providing jury members with accurate, objective information on sexual assault, and may assist in counteracting any misperceptions or adherence to rape myths in jury members or members of the judiciary.<sup>11</sup>

### **Warnings about unreliable evidence and corroboration**

28.11 Historically, sexual assault complainants<sup>12</sup> and children<sup>13</sup> were considered by the common law, as classes of witness, to be inherently unreliable.<sup>14</sup> Their unreliability was considered a matter capable of affecting the evaluation of the evidence and about which judges had special knowledge or experience beyond the jury's appreciation.<sup>15</sup>

28.12 For this reason, the common law required corroboration warnings to be given by trial judges to juries in respect of the evidence of both sexual assault complainants and child witnesses. The common law corroboration warning has two components:

- the corroboration component—the caution that, as it is dangerous to convict on a child or sexual assault complainant's 'uncorroborated' evidence, it was necessary to have corroborating evidence; and
- the reliability component—the caution that, as children and sexual assault complainants as classes of witness are unreliable, the evidence of a particular child or complainant had to be treated with care.<sup>16</sup>

28.13 Corroboration warnings about the potential unreliability of categories of witnesses are now recognised as discriminatory and based on prejudice rather than empirical evidence.<sup>17</sup>

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9 Australian Institute of Family Studies, *Submission FV 222*, 2 July 2010.

10 Ibid.

11 Ibid.

12 *Kelleher v The Queen* (1974) 131 CLR 534.

13 *Hargan v The King* (1919) 27 CLR 13.

14 For example, Brennan J in *Bromley v The Queen* (1989) 161 CLR 315 noted: 'The courts have had experience of the reasons why ... [children and sexual assault complainants] may give untruthful evidence wider than the experience of the general public, and the courts have a sharpened awareness of the danger of acting on the uncorroborated evidence of such witnesses': 324. See also *JJB v The Queen* (2006) 161 A Crim R 187; *R v TN* (2005) 153 A Crim R 129, [69].

15 Queensland Law Reform Commission, *A Review of Jury Directions: Discussion Paper*, WP 67 (2009), [7.80].

16 This analysis was put forward in Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55 (Part 2) (2000), 32.

17 For a review of the literature on suggestibility studies and the reliability of children's evidence, see A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 114–124 and the Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2009), 28–40.

### **Statutory response to the corroboration component**

28.14 All Australian jurisdictions have enacted legislation that abolishes the *requirement* that a judge warn the jury that it is dangerous to act on uncorroborated evidence. These provisions do not, however, *prohibit* a warning that it would be dangerous to convict on uncorroborated evidence.<sup>18</sup> Under such legislation, trial judges retain their general powers and obligations to give appropriate warnings ‘necessary to avoid the perceptible risk of miscarriage of justice arising from the circumstances of the case’.<sup>19</sup>

28.15 The South Australian and the Northern Territory (NT) provisions deal exclusively with the uncorroborated evidence of child witnesses,<sup>20</sup> whereas the provisions in other jurisdictions have general application to uncorroborated evidence.<sup>21</sup>

28.16 These statutory responses to the common law requirement to give a corroboration warning recognise that the typical sexual assault offence takes place in private, without other witnesses.<sup>22</sup> While corroboration for an assault may exist by way of ‘an admission, DNA evidence, medical evidence, recent complaint, or tendency evidence ... for the most part, particularly in child sexual assault matters, such evidence may be rare’.<sup>23</sup>

### **Statutory response to the reliability component**

28.17 In all Australian jurisdictions, except Queensland, a judge is prohibited from warning or suggesting to the jury that children as a class are unreliable witnesses.<sup>24</sup> This statutory response addresses the misconception that the evidence of children is inherently less reliable than that of adults.

28.18 New South Wales (NSW), Victoria, the ACT and the NT<sup>25</sup> have enacted legislation pursuant to which a judge must not warn, or suggest in any way to, the jury that it is unsafe to convict on the uncorroborated evidence of a complainant because the law regards complainants as an unreliable class of witness. These provisions mirror the

18 *Conway v The Queen* (2002) 209 CLR 203, [53].

19 *Longman v The Queen* (1989) 168 CLR 79, 86. See also *Tully v The Queen* (2006) 230 CLR 234; *Robinson v The Queen* (1999) 197 CLR 162; *Bromley v The Queen* (1989) 161 CLR 315.

20 *Evidence Act 1929* (SA) s 12A; *Evidence Act 1939* (NT) s 9C.

21 *Evidence Act 1995* (Cth) s 164(3); *Evidence Act 1995* (NSW) s 164(3); *Evidence Act 2008* (Vic) s 164(3); *Criminal Code* (Qld) s 632(2); *Evidence Act 1906* (WA) s 50; *Evidence Act 1929* (SA) s 12A; *Criminal Code* (Tas) s 136; *Evidence Act 2001* (Tas) s 164; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) ss 69, 70; *Evidence Act 1939* (NT) s 9C.

22 See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 2006, 2958 (G McBride—Minister for Gaming and Racing and Minister for the Central Coast).

23 Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 103.

24 *Evidence Act 1995* (Cth) s 165A; *Evidence Act 1995* (NSW) s 165A; *Evidence Act 2008* (Vic) s 165A; *Evidence Act 1906* (WA) s 106D; *Evidence Act 1929* (SA) s 12A; *Evidence Act 2001* (Tas) s 164(4); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 70; *Evidence Act 1939* (NT) s 9C. *Criminal Code* (Qld) s 632(2) provides only that ‘a judge is not required by any rule of law or practice to warn the jury that it is unsafe to convict the accused on the uncorroborated testimony of 1 witness’.

25 *Criminal Procedure Act 1986* (NSW) s 294AA; *Crimes Act 1958* (Vic) s 61; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 69; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(5).

prohibition on the warning that children as a class are unreliable witnesses, and prevent judges from stating or suggesting to the jury that complainants in sexual assault proceedings are unreliable witnesses as a class.<sup>26</sup>

28.19 These provisions do not prevent a judge from making any comment on evidence given in a trial that it is appropriate to make in the interests of justice—for example, warning that a particular child's or complainant's evidence, or the particular circumstances of the witness, may affect the reliability of that evidence.<sup>27</sup>

### **Murray warning**

28.20 The *Murray* warning is named after the NSW Court of Criminal Appeal case in which it was discussed.<sup>28</sup> The warning, which may be given by a trial judge pursuant to common law powers, cautions about the danger of convicting on the uncorroborated evidence of a sexual assault complainant—including a child complainant. It is frequently given in sexual assault trials, if requested by the defence,<sup>29</sup> and is generally to the effect that:

where there is only one witness asserting the commission of the crime, the evidence of that witness must be scrutinised with great care before a conclusion is arrived at that a verdict of guilty should be brought in.<sup>30</sup>

28.21 Legislation that prohibits a judge from stating or suggesting to a jury that complainants in sexual offence proceedings are unreliable witnesses as a class<sup>31</sup> may have been enacted with the parliamentary intention of relieving a trial judge from giving a *Murray* warning.<sup>32</sup> However, because those provisions are directed at warnings that refer to complainants of sexual offences as an unreliable class of witness and not whether the evidence of one witness must be scrutinised with great care, they are unlikely to prevent a trial judge from giving the *Murray* warning.<sup>33</sup>

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26 See, eg, New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 2006, 2958 (G McBride—Minister for Gaming and Racing and Minister for the Central Coast).

27 The Commissions note also that judges in the uniform Evidence Acts jurisdictions are obliged to give a warning in respect of evidence that may be unreliable, including several broadly described categories of evidence, unless there is good reason for not doing so: Uniform Evidence Acts, s 165. As s 165 concerns warnings in respect of *categories of evidence*, rather than *categories of witnesses*, it is not of immediate relevance to the present discussion.

28 *R v Murray* (1987) 11 NSWLR 12.

29 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 373–374; J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996); J Cashmore, ‘The Prosecution of Child Sexual Assault: A Survey of NSW DPP Solicitors’ (1995) 28 *Australian and New Zealand Journal of Criminology* 32, 43.

30 *R v Murray* (1987) 11 NSWLR 12, 19.

31 *Criminal Procedure Act 1986* (NSW) s 294AA; *Crimes Act 1958* (Vic) s 61; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 69; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 4(5).

32 See, eg, *Criminal Procedure Act 1986* (NSW) s 294AA; New South Wales, *Parliamentary Debates*, Legislative Assembly, 18 October 2006, 2958 (G McBride—Minister for Gaming and Racing and Minister for the Central Coast).

33 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), [7.39]; Judicial Commission of New South Wales, *Sexual Assault Handbook* (2009) <[www.judcom.nsw.gov.au/publications/benchbks/sexual\\_assault/index.html](http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/index.html)> at 14 April 2010 24 March 2010.

28.22 Criticisms of the *Murray* warning include that it:

- is ‘superfluous where the complainant’s unreliability [is] obvious or useless where the complainant [is] a skilled and convincing liar’;<sup>34</sup>
- is ‘patently obvious’;<sup>35</sup>
- is supported by a rationale that is inconsistent with the psychological literature;<sup>36</sup>
- potentially undermines a complainant’s evidence and perpetuates myths about women,<sup>37</sup> and
- may be interpreted by jurors as an invitation to acquit.<sup>38</sup>

28.23 It is open to question whether the standard directions regarding the burden and standard of proof adequately address the situation where the only evidence comes from the complainant. Some commentators argue the warning is unnecessary given the judge will direct the jury not to convict unless they are satisfied of the guilt of the accused beyond reasonable doubt.<sup>39</sup> Other sources suggest the *Murray* warning is a useful reinforcement of the direction on the standard of proof.<sup>40</sup> Another view questions what the *Murray* warning actually means and suggests that it is likely to confuse jurors as to whether there is a difference between being ‘satisfied beyond reasonable doubt’ and ‘scrutinising the evidence with great care’.<sup>41</sup>

28.24 In the Consultation Paper, the Commissions proposed that federal, state and territory legislation should prohibit a judge in any sexual assault proceedings from:

- warning a jury, or making any suggestion to a jury, that complainants as a class are unreliable witnesses; and
- warning a jury of the danger of convicting on the uncorroborated evidence of any complainant.<sup>42</sup>

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34 D Boniface, ‘The Common Sense of Jurors vs The Wisdom of the Law: Judicial Directions and Warning in Sexual Assault Trials’ (2005) 11 *University of New South Wales Law Journal* 5, 265.

35 Ibid, 267.

36 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 107–109.

37 NSW Adult Sexual Assault Interagency Committee, *A Fair Chance: Proposals for Sexual Assault Law Reform in NSW* (2004).

38 Queensland Law Reform Commission, *A Review of Jury Directions: Discussion Paper*, WP 67 (2009), [7.82].

39 New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), [7.35].

40 Judicial Commission of New South Wales, *Sexual Assault Handbook* (2009) <[www.judcom.nsw.gov.au/publications/benchbks/sexual\\_assault/index.html](http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/index.html)> at 14 April 2010.

41 J Wood, ‘Sexual Assault and the Admission of Evidence’ (Paper presented at Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, Sydney, 12 February 2003), [17]–[20].

42 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Proposal 18–11.

### ***Submissions and consultations***

28.25 There was significant support among stakeholders for the Consultation Paper proposal.<sup>43</sup>

28.26 National Legal Aid agreed with the proposal except to the extent that it provided that a trial judge be prohibited from warning a jury of the danger of convicting on the uncorroborated evidence of any complainant, on the basis that a corroboration warning may be required in a particular case.<sup>44</sup>

28.27 Dr Anne Cossins supported the proposal but considered that it did not go far enough in restricting the ability of trial judges to give the *Murray* warning, particularly in the case of child complainants.<sup>45</sup> Cossins noted that the proposal—by extending the basic terms of s 165A of the uniform Evidence Acts to all complainants—preserves the trial judge's power to give common law warnings, including the *Murray* warning. Cossins considered that, although s 165A(1)(b) appears to address the problems associated with the *Murray* warning, it does not abolish the use of the words 'scrutinised with great care' and its effect is merely that a warning or suggestion must not be given to a jury that a child's evidence requires greater scrutiny than an adult's evidence.

28.28 Cossins acknowledged that, in some circumstances, the evidence of a child will be considered to be unreliable for particular reasons but that those reasons should be grounded on up-to-date research rather than suppositions about age, memory or reliability or outdated prejudice and assumptions.

28.29 Ultimately, Cossins submitted that the power of trial judges to give common law warnings in relation to the reliability of a child witness' evidence should be abolished, and that a warning concerning a child's evidence should only be given in exceptional and particular circumstances prescribed by legislation.

### ***Commissions' views***

28.30 It is now generally accepted that judges should be prohibited from warning or suggesting to the jury that children as a class are unreliable witnesses.<sup>46</sup> In the Commissions' view, similar provisions should prohibit warnings about complainants in sexual assault cases generally.

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43 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Confidential, *Submission FV 130*, 21 June 2010; A Cossins, *Submission FV 112*, 9 June 2010.

44 National Legal Aid, *Submission FV 232*, 15 July 2010.

45 A Cossins, *Submission FV 112*, 9 June 2010.

46 Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 104.

28.31 The Commissions also consider that legislation should prohibit a judge from giving general warnings to a jury about the danger of convicting on the uncorroborated evidence of any complainant or witness who is a child. As the NSW Taskforce observed:

this would prevent a general warning being given about scrutinising the evidence of the complainant with great care, simply because he or she is alleging sexual assault. However, where there is specific evidence, which suggests that aspects of a complainant's evidence may be unreliable, a comment may still be made about needing to treat such evidence with care.<sup>47</sup>

28.32 Legislation of the kind proposed by the Commissions would preserve a trial judge's power to give a *Murray* warning in an appropriate case. The Commissions consider that judicial education should be undertaken and judicial bench books updated to assist judges to identify, with reference to recent literature on the matter, the circumstances in which it is in the interests of justice to give a warning about the danger of convicting on the uncorroborated evidence of a particular complainant or child witness.<sup>48</sup>

**Recommendation 28–1** Federal, state and territory legislation should prohibit a judge in any sexual assault proceedings from:

- (a) warning a jury, or making any suggestion to a jury, that complainants as a class are unreliable witnesses; and
- (b) giving a general warning to a jury of the danger of convicting on the uncorroborated evidence of any complainant or witness who is a child.

**Recommendation 28–2** Australian courts and judicial education bodies should provide judicial education and training, and prepare material for incorporation in bench books, to assist judges to identify the circumstances in which a warning about the danger of convicting on the uncorroborated evidence of a particular complainant or child witness is in the interests of justice.

## Warnings about delay in complaint

28.33 At common law it was assumed that 'a genuine sexual assault victim would make a complaint at the first opportunity and the failure to do so was considered relevant to the complainant's credibility'.<sup>49</sup>

<sup>47</sup> Ibid.

<sup>48</sup> Although the Australasian Institute for Judicial Administration's bench book for children giving evidence in Australian courts does not specifically address the *Murray* warning, the bench book is illustrative of how legal and psychological material may be collated in a text which is intended for use by judicial officers in court: Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2009).

<sup>49</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [18.72]

28.34 This assumption has since been discredited by research.<sup>50</sup> Delay in complaint is now known to be a typical feature of reporting sexual assault. Parliaments in a number of jurisdictions have responded to these developments by enacting legislative provisions to

require the trial judge to warn the jury that delay in complaint does not necessarily indicate that the allegation is false and that a person may have a good reason for delaying in making a complaint.<sup>51</sup>

28.35 Arguably, these legislative reforms have subsequently been undermined by the High Court decisions in *Longman v The Queen*<sup>52</sup> and *Crofts v The Queen*<sup>53</sup> which discussed what are now referred to as the *Longman* and *Crofts* warnings respectively.

### ***Longman* warning**

28.36 In *Longman*,<sup>54</sup> a complaint was made more than 20 years after the alleged offence. In general terms, the case requires that the jury be warned that, because of the passage of a number of years, it would be ‘dangerous to convict’ on the complainant’s evidence alone unless the jury is satisfied of its truth and accuracy, having scrutinised the complainant’s evidence with great care.<sup>55</sup> The rationale for the warning is that a significant delay puts the accused at a forensic disadvantage because he or she has lost the ‘means of testing the complainant’s allegations which would have been open to him [or her] had there been no delay’.<sup>56</sup>

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50 For details of this research see, Victorian Law Reform Commission, *Sexual Offences: Interim Report* (2003), [2.43]. See also, Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [18.72]–[18.73]; A Cossins, *Time Out for Longman: Myths, Science and the Common Law* (2010) Forthcoming in vol.34 (1) of Melbourne University Law Review.

51 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [18.73]. See, eg, *Crimes Act 1958* (Vic) s 61(1)(b).

52 *Longman v The Queen* (1989) 168 CLR 79.

53 *Crofts v The Queen* (1996) 186 CLR 427.

54 *Longman v The Queen* (1989) 168 CLR 79.

55 Ibid, 91. See also 108–109.

56 Ibid, 91.

28.37 The *Longman* warning has attracted a great deal of comment and criticism,<sup>57</sup> including that:

- the combined effect of *Longman* and subsequent High Court cases<sup>58</sup> has been to ‘give rise to an irrebuttable presumption that the delay *has* prevented the accused from adequately testing and meeting the complainant’s evidence’<sup>59</sup> and, as a result, trial judges are required to give the warning irrespective of whether the accused has in fact been prejudiced or suffered a forensic disadvantage;
- warning the jury in the terms that it would or may be ‘dangerous or unsafe’ to convict ‘risks being perceived as a not too subtle encouragement by the trial judge to acquit’,<sup>60</sup> thereby encroaching improperly on the fact-finding task of the jury;
- the actual length of delay which necessitates the giving of a *Longman* warning is unclear;<sup>61</sup>
- a practice has developed of giving the *Longman* warning to ‘appeal-proof’ trial judges’ directions even if it is unnecessary in the particular case;<sup>62</sup> and
- the warning is given even where there is corroboration of the complainant’s evidence.<sup>63</sup>

28.38 The *Longman* warning also raises a range of other issues in relation to perpetuating myths and misconceptions about sexual assault and discriminatory attitudes towards women and children. For example, at common law, the warning focuses on the evidence of the complainant, rather than the forensic disadvantage

57 See, eg, Victorian Law Reform Commission, *Jury Directions: Final Report* (2009); Queensland Law Reform Commission, *A Review of Jury Directions: Report*, Report 66 (2009); New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008); L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006), prepared for the Government of South Australia; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006); Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005); Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005); Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004); Legislative Council Standing Committee on Law and Justice—Parliament of New South Wales, *Report on Child Sexual Assault Prosecutions*, Report No 22 (2002). See also A Cossins, *Time Out for Longman: Myths, Science and the Common Law* (2010) Forthcoming in vol.34 (1) of Melbourne University Law Review.

58 *Dyers v The Queen* (2002) 210 CLR 285; *Doggett v The Queen* (2001) 208 CLR 343; *Robinson v The Queen* (1999) 197 CLR 162; *Crampton v The Queen* (2000) 206 CLR 161.

59 *R v BWT* (2002) 54 NSWLR 241, [14]–[15].

60 *Ibid*, [34].

61 *Ibid*, [95]. See, eg, *R v Heuston* (2003) 140 A Crim R 422.

62 Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 89–90. See also, New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), [7.49]–[7.54]; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), [2.1.1]–[2.2.1], [2.3.1]–[2.3.2].

63 A Cossins, *Time Out for Longman: Myths, Science and the Common Law* (2010) Forthcoming in vol.34 (1) of Melbourne University Law Review.

suffered by the defendant.<sup>64</sup> Also, the warning continues to link delay in complaint with the complainant's credibility and reflects discredited assumptions as to the reliability of memory, particularly that of children.<sup>65</sup>

### **Uniform Evidence Acts approach**

28.39 In ALRC Report 102, the ALRC, NSWLRC and Victorian Law Reform Commission (VLRC) identified two options for reform to address the concerns raised in relation to the *Longman* warning: to legislate to abolish the warning in its entirety; or to legislate to clarify, modify or limit its operation.<sup>66</sup>

28.40 Ultimately the ALRC and the VLRC, but not the NSWLRC, recommended that:

the uniform Evidence Acts be amended to provide that where a request is made by a party, and the court is satisfied that the party has suffered significant forensic disadvantage as a result of delay, an appropriate warning may be given.

The provision should make it clear that the mere passage of time does not necessarily establish forensic disadvantage and that a judge may refuse to give a warning if there are good reasons for doing so.

No particular form of words need to be used in giving the warning. However, in warning the jury, the judge should not suggest that it is 'dangerous to convict' because of any demonstrated forensic disadvantage.<sup>67</sup>

28.41 The recommendation was subsequently enacted as s 165B of the *Evidence Act 1995* (Cth), *Evidence Act 1995* (NSW) and *Evidence Act 2008* (Vic).<sup>68</sup>

28.42 In its 2008 consultation paper on jury directions, the VLRC considered whether s 165B of the uniform Evidence Acts provided a satisfactory approach to warning the jury in relation to the forensic disadvantage because of delay and whether such a warning continues to be necessary, or the matter ought to be left to counsel to address.<sup>69</sup> The VLRC concluded that s 165B of the *Evidence Act 2008* (Vic) appropriately deals with *Longman* warnings:

Section 165B provides that the judge must be satisfied that the accused has suffered forensic disadvantage because of the delay before giving the jury a warning. The

64 Ibid.

65 See Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), [2.1.22].

66 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [18.100]. See [18.101]–[18.102] for the principal arguments in support of each of these options.

67 Ibid, [18.116]–[18.129], Rec 18–3. See also [18.130]–[18.146] for the NSWLRC's views in relation to this recommendation.

68 Differences between these provisions include that in s 165B(2) of the Commonwealth and Victorian Acts, application must be made by 'the defendant', while in s 165B(2) of the NSW Act application must be made by 'a party'. Also, the NSW Act is alone in providing a non-exhaustive list of factors that may be regarded as establishing a significant forensic disadvantage, see *Evidence Act 1995* (NSW) s 165B(7). No such provision has been enacted in Tasmania, although it is a uniform Evidence Acts jurisdiction. For further discussion see, Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), [3.3.1]–[3.3.22].

69 As discussed in the final report: Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), 105.

judge is probably better placed than the jury to make this threshold assessment. If the judge makes this determination he or she must inform the jury of the nature of the disadvantage and instruct them to take it into account when considering their verdict.

Section 165B of the *Evidence Act* is activated by a request from counsel for a warning. The trial judge has a discretionary power to refuse to give a warning which has been requested when satisfied that ‘there are good reasons for not doing so’. This approach is consistent with our recommendations concerning all directions other than those which are mandatory.<sup>70</sup>

28.43 Cossins has identified a number of weaknesses and limitations in the operation of s 165B of the uniform Evidence Acts.<sup>71</sup> The limitations arise, in her view, because:

- s 165B ‘does not affect any other power of the judge to give any warning to, or to inform, the jury’,<sup>72</sup> meaning that trial judges are still able to give a *Longman* warning; and
- the *Longman* warning is mandatory in nature but s 165B warnings are dependent on an application by ‘a party’<sup>73</sup> or ‘the defendant’.<sup>74</sup>

28.44 The National Child Sexual Assault Reform Committee has identified a number of issues that may arise in practice as a result.<sup>75</sup> These are that:

- a trial judge could give both *Longman* and s 165B warnings;<sup>76</sup>
- a trial judge may be persuaded to give the *Longman* warning instead of a s 165B warning to ‘appeal-proof’ the case;<sup>77</sup> and
- in the federal and Victorian jurisdictions, the defendant must request the s 165B warning before it can be given, and it is doubtful whether the defence would make such a request if the more advantageous *Longman* warning can be given in the alternative.

<sup>70</sup> Ibid, 105–106, Rec 37: ‘The issue of delay in complaint in criminal trials should be governed by a provision in the legislation, substantially adopting s 165B of the *Evidence Act 2008*, in lieu of s 61 of the *Crimes Act 1958*’.

<sup>71</sup> A Cossins, *Time Out for Longman: Myths, Science and the Common Law* (2010) Forthcoming in vol.34 (1) of Melbourne University Law Review.

<sup>72</sup> Uniform Evidence Acts, s 165B(5).

<sup>73</sup> *Evidence Act 1995* (NSW) s 165B.

<sup>74</sup> *Evidence Act 1995* (Cth) s 165B; *Evidence Act 2008* (Vic) s 165B.

<sup>75</sup> A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 78.

<sup>76</sup> The Committee contends this may occur where the prosecution makes an application for a s 165B warning to be given and the defence reminds the judge of the *mandatory* nature of the *Longman* warning. The Committee also contends that in this situation, it would be more likely that the judge will refuse to give the s 165B warning (pursuant to *Evidence Act 1995* (NSW) s 165B(3)) and give the *Longman* warning instead.

<sup>77</sup> The Committee explains that a s 165 warning is less advantageous to a defence case than the *Longman* warning. A defendant who is convicted by a jury who has been directed in the terms of *Longman* would therefore be unlikely to assert on appeal that the trial judge failed to give a s 165B warning. By comparison, a defendant who is convicted by a jury who has been directed in terms of a s 165B warning is more likely to assert on appeal that the conviction should be overturned because the trial judge failed to warn the jury in the terms of *Longman*.

### Options for reform

28.45 The Queensland Law Reform Commission (QLRC) and the TLRI have recommended the enactment of legislative provisions to override the *Longman* warning in terms which are broadly consistent with the uniform Evidence Acts approach.<sup>78</sup>

28.46 South Australia has pursued an alternative reform option by enacting s 34CB of the *Evidence Act 1929* (SA). Section 34CB of the *Evidence Act 1929* (SA) was enacted with the clear intention of abolishing the *Longman* warning.<sup>79</sup> Arguably, however, the drafting abolishes the trial judge's obligation to give the *Longman* warning, without limiting the power to give the warning, providing that a 'rule of law or practice obliging a judge in a trial of a charge of an offence to give a warning of a kind known as a *Longman* warning is abolished'.<sup>80</sup>

28.47 As a result, s 34CB of the *Evidence Act 1929* (SA) differs from s 165B of the uniform Evidence Acts to the extent that it abolishes the trial judge's obligation to give the *Longman* warning.

28.48 In practice, however, the provisions may differ little in the extent to which they regulate the trial judge's general power to give a *Longman* warning.<sup>81</sup> The key distinction which emerges between s 165B of the uniform Evidence Acts and the South Australian provision is that under the uniform Evidence Acts, a judge may be obliged to give a *Longman* warning—irrespective of whether a s 165B warning is requested—whereas a judge under s 34CB of the *Evidence Act 1929* (SA) is not obliged to give a *Longman* warning.

28.49 Other points of difference between s 165B of the uniform Evidence Acts and s 34CB of the *Evidence Act 1929* (SA) include that:

- a judge under the uniform Evidence Acts is not obliged to give a s 165B direction to the jury if it is not requested,<sup>82</sup> whereas a judge under s 34CB of the *Evidence Act 1929* (SA) must do so if the court is of the opinion 'that the period of time that has elapsed between the alleged offending and the trial has resulted in a significant forensic disadvantage to the defendant';<sup>83</sup>

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78 Queensland Law Reform Commission, *A Review of Jury Directions: Report*, Report 66 (2009), Rec 15–1; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), Rec 2. At the time of writing, neither recommendation had been implemented.

79 South Australia, *Parliamentary Debates*, House of Assembly, 25 October 2007, 1449 (M Atkinson—Attorney-General, Minister for Justice, Minister for Multicultural Affairs).

80 A Cossins, *Time Out for Longman: Myths, Science and the Common Law* (2010) Forthcoming in vol.34 (1) of Melbourne University Law Review, 35.

81 Cf Uniform Evidence Acts, s 165B(5).

82 Ibid s 165B(2).

83 *Evidence Act 1929* (SA) s 34CB(2).

- a judge under the uniform Evidence Acts provision has a discretion to refuse to give a warning relating to delay where the defendant is forensically disadvantaged if there are good reasons for doing so,<sup>84</sup> whereas no such discretion is available to a judge under s 34CB of the *Evidence Act 1929* (SA); and
- the uniform Evidence Acts do not explicitly require that the direction given must be specific to the circumstances of the particular case, whereas the South Australian provision makes this explicit.<sup>85</sup>

28.50 The National Child Sexual Assault Reform Committee has proposed an alternative provision to address the inadequacies of s 165B of the uniform Evidence Acts.<sup>86</sup> The Committee proposed that the defendant should have to show—on the balance of probabilities—‘actual forensic disadvantage’ before the court is required to give a s 165B warning.<sup>87</sup> The Committee also proposes that s 165B should prescribe the exact wording of the warning and prohibit any other form of words being used.<sup>88</sup> Section 165B should, in the Committee’s view, require the trial judge to give reasons for not giving a warning and explicitly abrogate the court’s power to give a *Longman* warning.

### ***Consultation Paper***

28.51 In the Consultation Paper, the Commissions proposed that federal, state and territory legislation should provide that:

- (a) if the court, on application by the defendant, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence;
- (b) the judge need not comply with (a) if there are good reasons for not doing so; and
- (c) no particular form of words needs to be used in giving the warning pursuant to (a), but in warning the jury, the judge should not suggest that it is ‘dangerous to convict’ because of any demonstrated forensic disadvantage.

28.52 The Commissions also asked what issues arise in practice pursuant to s 165B of the uniform Evidence Acts and whether the abrogation of the trial judge’s obligation and power to give a *Longman* warning under s 165B(5) is sufficiently explicit.

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<sup>84</sup> Uniform Evidence Acts, s 165B(3).

<sup>85</sup> *Evidence Act 1929* (SA) s 34CB(3)(a).

<sup>86</sup> A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 79–82.

<sup>87</sup> *Ibid*, Rec 2.1.

<sup>88</sup> The proposed wording would require the judge to inform the jury that they ‘may’ take the forensic disadvantage into account in determining whether the prosecution has proved its case beyond reasonable doubt. Uniform Evidence Acts s 165B(2) provides the court must ‘inform the jury of the nature of that disadvantage and the *need* to take the disadvantage into account when considering the evidence’ (emphasis added).

### ***Submissions and consultations***

28.53 Many stakeholders supported the Consultation Paper proposal.<sup>89</sup> Some members of the NSW legal profession observed that s 165B of the uniform Evidence Acts works satisfactorily in practice and does not lead to trial judges giving *Longman* warnings in addition to, or instead of, s 165B warnings.<sup>90</sup>

28.54 National Legal Aid noted that the *Longman* warning has a strong effect on trial outcomes and that, before the uniform Evidence Acts were enacted, research suggested that judicial misdirection in relation to the *Longman* warning was a common ground of criminal appeal and a common basis for successful criminal appeals in NSW.<sup>91</sup> Nonetheless, National Legal Aid considered that it is appropriate that *Longman* warnings be given where the defendant is at a forensic disadvantage in, for example, locating witnesses, testing or adducing evidence, where there has been substantial delay.<sup>92</sup>

28.55 Cossins did not support the Consultation Paper proposal, because it would not abolish the *Longman* warning or the power of trial judges to give the warning. In her view, there is ‘no reason to think that [the proposal] will change the practice of giving the warning, particularly since trial judges know that the failure to give a *Longman* warning is an obvious and common ground of appeal’.<sup>93</sup> Cossins questioned the grounds on which a trial judge can refuse to give a *Longman* warning, if requested by the defence, and argued that very clear words of abrogation need to be included to remove the power to give a common law warning.<sup>94</sup>

28.56 In Cossins’ view, the preferred reform would replace *Longman* with an alternative warning and specify a particular form of words to describe the disadvantages suffered by the defendant because of delay in complaint. This alternative warning should only be given where the defendant can show that he or she has suffered an actual forensic disadvantage as a result of a delay in complaint. It is necessary, Cossins argues, to restrict the form of words used by the trial judge.<sup>95</sup>

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89 National Legal Aid, *Submission FV 232*, 15 July 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Confidential, *Submission FV 130*, 21 June 2010.

90 Barrister, *Consultation*, Sydney, 10 June 2010; NSW Legal Assistance Forum, *Consultation*, Sydney, 10 May 2010.

91 National Legal Aid, *Submission FV 232*, 15 July 2010.

92 Ibid.

93 A Cossins, *Submission FV 112*, 9 June 2010.

94 Dr Cossins refers to *Crimes Act 1958* (Vic) s 61(1E) and *Evidence Act 1929* (SA) s 34B as examples of clear abrogation. Those parts of *Crimes Act 1958* (Vic) s 61 which affect *Longman* warnings were displaced by *Evidence Act 2008* (Vic) s 165B.

95 A Cossins, *Submission FV 112*, 9 June 2010.

### ***Commissions' views***

28.57 In the Commissions' view, s 165B of the uniform Evidence Acts provides a satisfactory approach to the problems raised by the *Longman* warning. In forming this view, the Commissions recognise that delay in complaint is a typical feature of reporting sexual assault and that the mere passage of time ought not to 'count against' a complainant in sexual offence proceedings.

28.58 Provisions consistent with s 165B should be adopted by all jurisdictions because a jury could fail to appreciate that delay can cause forensic disadvantage to a defendant. Where (and only where) a significant forensic disadvantage is identified and has an evidentiary basis, the court ought to inform the jury of the nature of that disadvantage and the need to take it into account when considering the evidence.

28.59 The Commissions acknowledge that, in some cases, the existence of a very long delay may satisfy the court that the defendant has suffered a significant forensic disadvantage such as to require a s 165B warning, but also consider that the provision makes it clear that the mere passage of time does not necessarily establish forensic disadvantage.

**Recommendation 28–3** State and territory legislation should provide, consistently with s 165B of the uniform Evidence Acts, that:

- (a) if the court, on application by the defendant, is satisfied that the defendant has suffered a significant forensic disadvantage because of the consequences of delay, the court must inform the jury of the nature of the disadvantage and the need to take that disadvantage into account when considering the evidence;
- (b) the judge need not comply with (a) if there are good reasons for not doing so; and
- (c) no particular form of words needs to be used in giving the warning pursuant to (a), but in warning the jury, the judge should not suggest that it is 'dangerous to convict' because of any demonstrated forensic disadvantage.

### ***Crofts warning***

28.60 The *Crofts* warning requires the trial judge to warn the jury that delay in complaint can be used to impugn the credibility of the complainant.

28.61 The *Crofts* warning originates from a jury direction mandated by the High Court in *Kilby v The Queen*.<sup>96</sup> In *Kilby v The Queen*, the High Court observed that evidence of recent complaint is not evidence of the facts alleged, but goes to the credibility of the complainant as it demonstrates consistency of conduct. However, the court also

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96        *Kilby v The Queen* (1973) 129 CLR 460.

held as a corollary that where there has been a failure to make a complaint at the earliest available opportunity, this fact may be used to impugn the credibility of the complainant.<sup>97</sup> *Kilby v The Queen* therefore endorsed a court direction to juries that delay or absence of complaint can be used as a factor in determining a complainant's credibility—known as the *Kilby* direction.

28.62 Legislation was subsequently passed in a number of Australian jurisdictions to require the judge to warn the jury that a delay in making a complaint of sexual assault does not necessarily mean that the allegation is false.<sup>98</sup> Although such provisions were designed to remove stereotypes as to the unreliability of evidence given by sexual assault complainants, their protective effects have arguably been negated by the High Court decision in *Crofts v The Queen*.<sup>99</sup>

28.63 In *Crofts v The Queen*, the complainant reported that she had been sexually assaulted by a family friend over a period of six years, and made a complaint six months after the last assault. The trial judge directed the jury, as required by s 61(1)(b) of the *Crimes Act 1958* (Vic), that delay in complaint did not necessarily indicate that the allegation of sexual assault was false and that there were good reasons why a complainant might delay making a complaint.

28.64 The High Court held that s 61(1)(b) does not preclude the court from giving a *Kilby* direction or from commenting that delay in complaint of sexual assault may affect the credibility of the complainant. It considered that the purpose of s 61(1) and like provisions is to 'restore the balance' and rid the law of stereotypical notions as to the unreliability of sexual assault complainants, but not to immunise complainants from critical comment where necessary in order to secure a fair trial for the accused.

28.65 The Court held that a *Kilby* direction must be given where the delay is 'substantial'. Two qualifications were placed on this requirement: first, the direction need not be given where the facts of the case and the conduct of the trial do not suggest the need for a direction to restore the balance of fairness (for example, where there is an explanation for the delay); and secondly, the warning must not be expressed in terms that suggest a stereotyped view that sexual assault complainants are unreliable.<sup>100</sup>

28.66 As a result, subject to the two qualifications, where a trial judge gives the jury the statutory direction that delay in complaint does not necessarily indicate that the allegation is false and that there may be good reasons why a victim of sexual assault hesitates in complaining about it,<sup>101</sup> the judge should also consider giving the direction

97 Ibid, 472.

98 *Criminal Procedure Act 1986* (NSW) s 294; *Crimes Act 1958* (Vic) s 61(1)(b); *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4); *Evidence Act 1906* (WA) s 36BD; *Criminal Code* (Tas) s 371A; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 71.

99 *Crofts v The Queen* (1996) 186 CLR 427.

100 This history is taken from Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [18.147]–[18.151].

101 *Criminal Procedure Act 1986* (NSW) s 294; *Evidence Act 1906* (WA) s 35BD; *Criminal Code* (Tas) s 371A; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 71; *Sexual Offences (Evidence and Procedure) Act 1983* (NT). Under *Crimes Act 1958* (Vic) s 61(1)(b) the judge is not required to warn the

that ‘delay in complaint may be taken into account in evaluating the evidence of the complainant and in determining whether or not to believe the complainant’.<sup>102</sup>

28.67 As with the *Longman* warning, the *Crofts* warning has attracted a great deal of comment and criticism.<sup>103</sup> Major criticisms of the *Crofts* warning include that:<sup>104</sup>

- It has produced uncertainty about when a judge is to direct the jury that it is entitled to take into account delay in assessing the complainant’s credibility.<sup>105</sup> As a result, to limit the risk of a successful appeal on the basis of a potential miscarriage of justice, trial judges ‘as a general rule’ direct in this way irrespective of whether the complainant is the sole witness and even where reasons have been advanced for the delay in complaint.<sup>106</sup>
- It requires trial judges to give competing and apparently contradictory statutory and common law warnings. That is, ‘to balance the explanation that evidence of a failure to complain of an assault, at the earliest reasonable opportunity, does not necessarily mean that the complaint was untrue ... with a direction that the jury can take that delay into account as reducing the complainant’s credibility, is also problematic’.<sup>107</sup> The unnecessary complexity may confuse jurors and render the warnings meaningless.<sup>108</sup>
- The near mandatory nature of the requirement to direct the jury that it is entitled to take delay into account in assessing the complainant’s credibility risks ‘undermining the purpose of the legislative provisions which was to avoid misconceptions about the behaviour of victims of sexual abuse’.<sup>109</sup>
- The premise on which the *Crofts* warning is given reflects discredited assumptions as to the nature of sexual assault and the behaviour of sexual assault complainants. It may be misleading and unfairly disadvantageous to a complainant to give a *Crofts* warning ‘if there is no evidentiary basis for suggesting a nexus between delay and fabrication of the complaint’.<sup>110</sup>

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jury that delay in complaint does not necessarily indicate that the allegation is false. *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4) differs from all the other provisions.

<sup>102</sup> New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), [7.66].

<sup>103</sup> See, the list of reports cited in relation to *Longman* above.

<sup>104</sup> See also, Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), [3.123]; Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [18.152]–[28.258].

<sup>105</sup> See, eg, Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), [3.122]; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), [2.1.6]; Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [7.88].

<sup>106</sup> See, eg, *R v Markuleski* (2001) 52 NSWLR 82, [175], [187].

<sup>107</sup> J Wood, ‘Sexual Assault and the Admission of Evidence’ (Paper presented at Practice and Prevention: Contemporary Issues in Adult Sexual Assault in New South Wales, Sydney, 12 February 2003).

<sup>108</sup> Criminal Justice Sexual Offences Taskforce (Attorney General’s Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), 97.

<sup>109</sup> Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), [3.123].

<sup>110</sup> Ibid.

## Options for reform

28.68 A number of law reform bodies have considered the *Crofts* warning, the existing statutory responses to the warning and the appropriateness of those statutory responses. The recommendations and proposals made by these bodies are briefly discussed below.

28.69 The VLRC's 2004 report, *Sexual Offences*,<sup>111</sup> recommended an amendment to s 61 of the *Crimes Act 1958* (Vic) which was subsequently enacted as s 61(1)(b)(ii), in this Report, referred to as the 's 61 Victorian amendment'. This provides that the judge

must not warn, or suggest in any way to, the jury that the credibility of the complainant is affected by the delay unless, on the application of the accused, the judge is satisfied that there is *sufficient evidence* tending to suggest that the credibility of the complainant is so affected to justify the giving of such a warning.<sup>112</sup>

28.70 In ALRC Report 102, the ALRC, NSWLRC and VLRC concluded that the problems created by the *Crofts* warning should be dealt with in offence-specific legislation and by judicial and practitioner education on the 'nature of sexual assault, including the context in which sexual offences typically occur, and the emotional, psychological and social impact of sexual assault'.<sup>113</sup>

28.71 Also in 2005, the NSW Criminal Justice and Sexual Offences Taskforce recommended an amendment in similar terms to the s 61 Victorian amendment.<sup>114</sup> That recommendation was subsequently enacted in the *Criminal Procedure Act 1986* (NSW). Section 294(2) requires the judge to warn the jury that absence of complaint or delay in complaining does not necessarily indicate that the allegation that the offence was committed is false.

28.72 Following the 2006 Chapman inquiry into sexual assault laws in South Australia,<sup>115</sup> s 34M of the *Evidence Act 1929* (SA) was enacted. Section 34M(1) abolishes the *Kilby* and *Crofts* directions.

28.73 Section 34M(2) states that:

no suggestion or statement may be made to the jury that a failure to make, or a delay in making, a complaint of a sexual offence is of itself of probative value in relation to the alleged victim's credibility or consistency of conduct.

28.74 Evidence relating to how and why the complainant made his or her complaint, and to whom, is admissible.<sup>116</sup> If such evidence is admitted, the judge must direct the jury that it is admitted to inform the jury as to how the allegation first came to light; as evidence of the consistency of conduct of the alleged victim; and it is not admitted as

<sup>111</sup> Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).

<sup>112</sup> *Crimes Act 1958* (Vic) s 61(1)(b)(ii) (emphasis added).

<sup>113</sup> Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [18.172]–[18.173].

<sup>114</sup> Criminal Justice Sexual Offences Taskforce (Attorney General's Department (NSW)), *Responding to Sexual Assault: The Way Forward* (2005), Rec 37.

<sup>115</sup> L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006), prepared for the Government of South Australia.

<sup>116</sup> *Evidence Act 1929* (SA) s 34M(3).

evidence of the truth of what was alleged. The judge must direct that there may be varied reasons why the alleged victim of a sexual offence made a complaint of the offence at a particular time or to a particular person but that, otherwise, it is a matter for the jury to determine the significance (if any) of the evidence in the circumstances of the particular case.<sup>117</sup>

28.75 In 2006, the TLRI criticised the s 61 Victorian amendment on the basis that it could be interpreted as simply enacting *Crofts*.<sup>118</sup> The view of the TLRI was that the *Criminal Code* (Tas) should be amended so as to prohibit entirely trial judges giving the *Crofts* warning.<sup>119</sup> That recommendation has not been implemented.

28.76 In its 2008 consultation paper on jury directions, the NSWLRC asked whether s 294(2) of the *Criminal Procedure Act 1986* (NSW) is sufficient to address ‘the issue of what (if any) warning judges should give the jury on the impact of delay on the complainant’s credibility’.<sup>120</sup> The NSWLRC considered the competing arguments in respect of s 294(2). On the one hand, it is considered that to prevent a judge from warning a jury that ‘delay in complaining is relevant to the victim’s credibility unless there is sufficient evidence to justify such a warning’,<sup>121</sup> is ‘simply a reiteration of the High Court’s ruling in *Crofts*’.<sup>122</sup> On the other hand, reinforcing the ‘sufficient evidence’ requirement may serve to prevent judges from

indiscriminately giving the *Crofts* direction for the main purpose of ‘appeal-proofing’ the case, particularly in cases where there was in fact no delay, or where there are indisputably good reasons for a delay.<sup>123</sup>

28.77 In its 2009 report on jury directions, the VLRC noted that s 61 of the *Crimes Act 1958* (Vic) ‘acknowledges that there may be cases where the credibility of the complainant is affected by delay in making a complaint’. In order to avoid that acknowledgment being used to justify a mandatory warning ‘the legislation describes the circumstances in which a warning may be given and its content’.<sup>124</sup>

28.78 The main issue the VLRC identified was in relation to the ‘extent to which the judge should be involved in giving the jury directions about the credibility of the

<sup>117</sup> Ibid s 34M(4). See also s 34M(5): ‘It is not necessary that a particular form of words be used in giving the direction under subsection (4)’. For a discussion of concerns which arise in respect of s 34M of the *Evidence Act 1929* (SA), see Law Reform Commission of Western Australia, *Court Intervention Programs*, Consultation Paper (2008), [18.276].

<sup>118</sup> Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), 24. That is, the Victorian amendment makes provision for the trial judge to warn the jury where he or she is ‘satisfied that there exists sufficient evidence in the particular case to justify such a warning. The facts of *Crofts* itself, as viewed by the High Court, arguably satisfy this condition’: Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), 24. See also, New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), 151.

<sup>119</sup> Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), 33.

<sup>120</sup> New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), Issue 7.8.

<sup>121</sup> *Criminal Procedure Act 1986* (NSW) s 294(2).

<sup>122</sup> New South Wales Law Reform Commission, *Jury Directions*, Consultation Paper 4 (2008), [7.75].

<sup>123</sup> Ibid, [7.76].

<sup>124</sup> Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), [3.125]–[3.126].

complainant'.<sup>125</sup> The VLRC questioned whether a threshold assessment about 'sufficient evidence' by the judge on the question of credibility 'can be justified when it is the task of the jury to assess the credibility of witnesses and decide whether they accept or reject their evidence'.<sup>126</sup> The VLRC's final view was that:

the trial judge should not be obliged to give the jury directions about delayed complaint but should have a discretionary power to give appropriate directions to correct statements by counsel that conflict with the evidence or are based upon stereotypical assumptions about reporting of sexual offences.<sup>127</sup>

28.79 The VLRC recommended that legislation should provide that the issue of the effect of any delay in complaint, or absence of complaint, on the credibility of the complainant should be a matter for argument by counsel and for determination by the jury and that:

- (i) Subject to subsection (ii), save for identifying the issue for the jury and the competing contentions of counsel, the trial judge must not give a direction regarding the effect of delay in complaint, or absence of complaint, on the credibility of the complainant, unless satisfied it is necessary to do so in order to ensure a fair trial.
- (ii) If evidence is given, or a question is asked, or a comment is made that tends to suggest that the person against whom the offence is alleged to have been committed either delayed making or failed to make a complaint in respect of the offence, the judge must tell the jury that there may be good reasons why a victim of a sexual offence of that kind may delay making or fail to make a complaint in respect of the offence.<sup>128</sup>

28.80 The National Child Sexual Assault Reform Committee criticised the s 61 Victorian amendment because it did 'not abolish the *Crofts* warning, nor specify what amounts to "sufficient evidence"'.<sup>129</sup> The Committee recommended that new provisions be introduced in each jurisdiction, except Queensland and South Australia, to abolish the *Crofts* warning.<sup>130</sup>

28.81 In Queensland, s 4A of the *Criminal Law (Sexual Offences) Act 1978* (Qld) provides that the *Crofts* warning cannot be given,<sup>131</sup> although the judge may make such other comments on the complainant's evidence as may be appropriate in the interests of justice, including on any remarks made by a party that might be based on erroneous or

125 Ibid, [3.135].

126 Ibid, [5.88].

127 Ibid, [5.94].

128 Ibid, Rec 38.

129 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 101. See also, *Crimes Act 1958* (Vic) s 61(2) 'nothing in subsection (1) prevents a judge from making any comment on evidence given in the proceeding that it is appropriate to make in the interests of justice'. Other commentators also consider that the words 'sufficient evidence' do 'not make clear the standard of persuasion or standard of proof required': H Donnelly, 'Delay and the Credibility of Complainants in Sexual Assault Proceedings' (2007) 19(3) *Judicial Officers' Bulletin* 17, 19.

130 A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 106, Recs 2.2, 2.3.

131 'The judge must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a preliminary or other complaint': *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4).

poorly based stereotypical assumptions about complainants.<sup>132</sup> The main criticism of this response is that ‘it does not allow the judge to make any comment that might be warranted in the light of comments by the parties, especially defence counsel’.<sup>133</sup> This means, for example, where defence counsel have raised the issue of delay, the judge may be prevented from commenting that there may be good reasons for delay in complaint. Section 4A may produce less fair outcomes for complainants—particularly where little evidence is adduced by the prosecution about the reason for the complainant’s delay in complaint—than the current s 61 of the *Crimes Act 1958* (Vic) approach to jury warnings.<sup>134</sup>

28.82 To address this concern, the QLRC’s discussion paper proposed an amendment to s 4A to give judges the power to ‘give appropriate directions to correct statements by counsel that conflict with the evidence or are based upon stereotypical assumptions about reporting of sexual offences’.<sup>135</sup> In its final report, the Commission considered that any amendment ‘should not permit the re-introduction into Queensland of directions and warning based on outdated and discredited assumptions’ and considered that no further amendment to the *Criminal Law (Sexual Offences) Act 1978* (Qld) was warranted.<sup>136</sup>

#### **Consultation Paper**

28.83 In the Consultation Paper the Commissions asked whether warnings about the effect of delay on the credibility of complainants are necessary in sexual assault proceedings.<sup>137</sup>

28.84 The Commissions also proposed two options for reform.<sup>138</sup> The first was for federal, state and territory legislation modelled on the VLRC’s recommendation in its 2009 report on jury directions,<sup>139</sup> discussed above.

28.85 The second and alternative option was for federal, state and territory legislation modelled on elements of the Queensland provision<sup>140</sup> including the amendment proposed by the QLRC,<sup>141</sup> and the Victorian provision.<sup>142</sup>

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132 Queensland Law Reform Commission, *A Review of Jury Directions: Report*, Report 66 (2009), [15.102].

133 Ibid, [15.67]; Tasmania Law Reform Institute, *Warnings in Sexual Offences Cases Relating to Delay in Complaint*, Final Report 8 (2006), [3.4.5].

134 Note that *Crimes Act 1958* (Vic) s 61(1)(b)(i) provides that the judge ‘must inform the jury that there may be good reasons why a victim of sexual assault may delay or hesitate in complaining about it’. See also A Cossins, *Alternative Models for Prosecuting Child Sex Offences in Australia* (2010), prepared for the National Child Sexual Assault Reform Committee, 102–103; L Chapman, *Review of South Australia Rape and Sexual Assault Law: Discussion Paper* (2006), prepared for the Government of South Australia, 114.

135 Queensland Law Reform Commission, *A Review of Jury Directions: Discussion Paper*, WP 67 (2009), Proposal 7–2.

136 Queensland Law Reform Commission, *A Review of Jury Directions: Report*, Report 66 (2009), [15.100]–[15.101].

137 Consultation Paper, Question 18–12.

138 Ibid, Proposal 18–13.

139 Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), Rec 38.

140 *Criminal Law (Sexual Offences) Act 1978* (Qld) s 4A(4).

28.86 This proposal would provide that, in sexual assault proceedings, the judge: must inform the jury that there may be good reasons why a victim of a sexual assault may delay or hesitate in complaining about the assault; must not warn or suggest in any way to the jury that the law regards the complainant's evidence to be more reliable or less reliable only because of the length of time before the complainant made a complaint; maintains a discretion to give appropriate directions to correct statements by counsel that conflict with the evidence or are based upon stereotypical assumptions about reporting of sexual offences; and maintains a discretion to comment on the reliability of the complainant's evidence in the particular case.<sup>143</sup>

### **Submissions and consultations**

28.87 Some stakeholders<sup>144</sup> considered that warnings about the effect of delay on the credibility of the complainants are unnecessary or inappropriate in sexual assault proceedings, including because:

- delay is the norm rather than the exception, and is even greater when the offender is a family member or intimate partner of the victim;<sup>145</sup>
- there are different schools of thought about how delay affects a victim's testimony;<sup>146</sup> and
- delay may occur for a range of reasons, including the adjournment of the criminal proceedings.<sup>147</sup>

28.88 Other stakeholders considered that warnings about the effect of delay on credibility of complainants are necessary in some cases, for example to ensure the jury is aware that delay is common in reporting sexual offences and the reasons why this is so.<sup>148</sup>

28.89 Some stakeholders supported the Consultation Paper proposal modelled on a recommendation of the VLRC.<sup>149</sup> Where stakeholders took this view they generally considered that the alternative proposal, modelled on Queensland and Victorian

141 Queensland Law Reform Commission, *A Review of Jury Directions: Discussion Paper*, WP 67 (2009), Proposal 7–2.

142 *Crimes Act 1958* (Vic) s 61(1).

143 See, Consultation Paper, Proposal 18–13(b).

144 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

145 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

146 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

147 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

148 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

149 National Legal Aid, *Submission FV 232*, 15 July 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

legislation, may confuse juries if the warning is given without an evidentiary basis,<sup>150</sup> or expressed the view that the jury should continue to be directed in the terms of *Crofts*.<sup>151</sup>

28.90 Another group of stakeholders supported the alternative proposal.<sup>152</sup> Professor Julie Stubbs preferred this option because, in her view, it is more likely to result in consistent handling of the issue by judicial officers.<sup>153</sup>

28.91 The Public Defenders Office NSW opposed both alternatives on the basis that significant restrictions have been recently introduced in NSW by virtue of s 294(2)(c) of the *Criminal Procedure Act 1986* and there is ‘no justification for further erosion of the rights of the accused in this area’.<sup>154</sup>

28.92 Cossins also opposed both alternatives. In response to the first option, modelled on a recommendation of the VLRC, Cossins commented that leaving it to counsel to comment on the issue of delay removes the authoritative voice of the trial judge informing juries that there are good reasons why a victim may delay. Further, ‘it is a clumsy way of getting rid of the *Crofts* warning’ because it is likely that either the evidence, or counsel, will suggest to the jury that the complainant delayed or failed to make a complaint and, in those circumstances, the judge must tell the jury that there may be good reasons for the delay. In response to the second option, the proposal modelled on Queensland and Victorian legislation, Cossins commented that that proposal retains the ability of the trial judge to give a *Crofts* warning.

28.93 Cossins submitted instead that legislation should clearly abrogate the *Crofts* warning;<sup>155</sup> permit a warning by the judge to the jury that delay in making a complaint of sexual assault does not necessarily mean that the allegation is false;<sup>156</sup> and require trial judges to instruct the jury about the specific reasons why the complainant delayed his or her complaint, where those reasons are admitted into evidence in the trial.<sup>157</sup>

#### *Commissions’ views*

28.94 As discussed above, since 2004 many different law reform bodies have considered the *Crofts* warning and the most appropriate statutory response to the warning. No clear consensus about the best option for reform has emerged from these deliberations.

150 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

151 National Legal Aid, *Submission FV 232*, 15 July 2010.

152 J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010.

153 J Stubbs, *Submission FV 186*, 25 June 2010.

154 Public Defenders Office NSW, *Submission FV 221*, 2 July 2010.

155 For example, in the terms of s 34M of the *Evidence Act 1929* (SA).

156 Cossins refers to this as a ‘61-type direction’, referring to *Crimes Act 1958* (Vic) s 61.

157 A Cossins, *Submission FV 112*, 9 June 2010.

28.95 The views of stakeholders, in response to the Consultation Paper proposals, are also disparate and difficult to reconcile. It is clear, however, that the credibility of sexual assault complainants should not be determined by stereotypical assumptions, including those based on the timing of complaints.<sup>158</sup>

28.96 In dealing with this issue, the Commissions reiterate the views expressed in ALRC Report 102:

While there may be cases in which delay in complaint accompanies fabrication, there is nothing inherent in delay that makes it likely that the complainant is being untruthful. On the contrary, delay in reporting sexual assault is well within the spectrum of expected responses to sexual assault. Rather than balancing the statutory direction explaining that there are reasons why a sexual assault complainant might delay in reporting an assault, the *Crofts* warning undermines the purport of those legislative provisions and unfairly disadvantages the prosecution.

Further, in an oath against oath trial, as sexual assault cases almost invariably are, the credibility and reliability of the complainant's evidence is likely to be one of the central issues. Given that this is the case, it is questionable whether there is any need for the judge to give a warning or make a comment in relation to the credibility of the complainant. In cases where there is evidence to support the suggestion that the delay in complaint bears some relation to the credibility of the complainant, such matters should be the subject of counsel's address, rather than the subject of a judicial warning.<sup>159</sup>

28.97 Whether, in a particular case, evidence of delay in complaint *could* substantially affect the assessment of the credibility of the complainant is a matter for the court to determine.<sup>160</sup> This is the standard which the court must apply in determining whether credibility evidence is admissible under s 103 of the uniform Evidence Acts. It is imperative that judicial officers and legal practitioners receive appropriate education, training and assistance to ensure that their reasoning in determining this question is not based on stereotypical assumptions about sexual assault complainants.

28.98 However, whether, in a particular case, delay does *in fact* affect the complainant's credibility is a matter for the jury. The assessment is not one about which a judicial officer has 'special experience' not possessed by members of the jury. The issue of any delay in complaint, or absence of complaint, on the credibility of the complainant should be a matter for argument by counsel and for determination by the jury.

28.99 In the Commissions' view, federal, state and territory legislation should adopt provisions modelled on the recommendations of the 2009 VLRC report on jury directions.<sup>161</sup> The advantages of this approach include that it: better acknowledges the adversarial nature of the criminal trial process and is more consistent with the roles of judge and jury; is consistent with the simplification of the law; and overcomes the

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158 Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), [5.86].

159 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [18.170]-[18.171].

160 Uniform Evidence Acts, ss 101A-103.

161 Victorian Law Reform Commission, *Jury Directions: Final Report* (2009), Rec 38.

problem of juries having to understand and apply directions about delay which appear contradictory and which may suggest to the jury that the evidence of the complainant has no probative value.<sup>162</sup>

**Recommendation 28–4** Federal, state and territory legislation should provide that, in sexual assault proceedings:

- (a) the effect of any delay in complaint, or absence of complaint, on the credibility of the complainant should be a matter for argument by counsel and for determination by the jury;
- (b) subject to paragraph (c), except for identifying the issue for the jury and the competing contentions of counsel, the judge must not give a direction regarding the effect of delay in complaint, or absence of complaint, on the credibility of the complainant, unless satisfied it is necessary to do so in order to ensure a fair trial; and
- (c) if evidence is given, a question is asked, or a comment is made that tends to suggest that the victim either delayed making, or failed to make, a complaint in respect of the offence, the judge must tell the jury that there may be good reasons why a victim of a sexual offence may delay making or fail to make a complaint.

## Cross-examination

28.100 Cross-examination is a feature of the adversarial process and is designed, among other things, to allow the defence to confront and undermine the prosecution's case by exposing deficiencies in a witness' testimony, including the complainant's testimony. Under the common law, the uniform Evidence Acts and other legislation, limitations have been placed on inappropriate and offensive questioning under cross-examination. It has been argued, however, that the effect of these provisions in practice has not provided a sufficient degree of protection for complainants in sexual assault proceedings. The following section:

- briefly discusses the cross-examination of children and other vulnerable witnesses in sexual assault cases; and
- examines issues concerning cross-examination where the defendant is not represented by a lawyer.

### Cross-examination of children and vulnerable witnesses

28.101 Cossins has documented inquiries relating to the prosecution of child sex offences, and children as witnesses within the criminal justice system over the last 14

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162 Ibid, [3.137].

years.<sup>163</sup> She found that cross-examination is one of the most difficult parts of testifying for children; children are subject to complex, developmentally inappropriate and repetitive questioning and questioning deliberately designed to confuse and create inconsistencies; and the powers of judicial officers to intervene to prevent improper questioning are either ‘exercised sparingly’ or sometimes have no effect on defence counsel questioning.<sup>164</sup>

28.102 Unless they have a cognitive impairment, adults are much less vulnerable than children during cross-examination. Nonetheless, they can be subject to the same types of leading, repetitive, aggressive, intimidating and humiliating questions as children. There is, however, much less information available about the impact of cross-examination on adult sexual assault complainants, particularly recent information. Because of the extent of juror misconceptions about how women and children respond to sexual assault, cross-examination is likely to play a central role in confirming the pre-existing attitudes and beliefs of jurors.<sup>165</sup>

### ***Improper questioning***

28.103 The Commonwealth, NSW and ACT uniform Evidence Acts impose a positive duty on the court to intervene to disallow improper (‘disallowable’) questions.<sup>166</sup> Under this provision a court ‘must’ disallow a question that:

- is misleading or confusing; or
- is unduly annoying, harassing, intimidating, offensive, oppressive, humiliating or repetitive; or
- is put to the witness in a manner or tone that is belittling, insulting or otherwise inappropriate; or
- has no basis other than a stereotype (for example, a stereotype based on the witness’s sex, race, culture, ethnicity, age, or mental, intellectual or physical disability).<sup>167</sup>

28.104 When recommending, in ALRC Report 102, that such a duty should be enacted, the ALRC, the NSWLRC and the VLRC considered the duty was necessary to: protect vulnerable witnesses from improper questioning; ensure ‘the best evidence

163 A Cossins, ‘Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?’ (2009) 33 *Melbourne University Law Review* 68, 73.

164 Ibid, 73–74; quoting Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), 314. See also C Eastwood and W Patton, *The Experiences of Child Complainants of Sexual Abuse in the Criminal Justice System* (2002).

165 The *Heroines of Fortitude* report highlighted the experience of Indigenous women under cross-examination in sexual offence proceedings: J Bargen, *Heroines of Fortitude: The Experiences of Women in Court as Victims of Sexual Assault, Gender Bias and the Law Project* (1996), 99–103.

166 Uniform Evidence Acts, s 41. Such provisions were previously enacted under *Criminal Procedure Act 1986* (NSW) s 275A, which also imposed a positive duty on the court ‘to intervene in relation to a range of improper questions, irrespective of whether or not the other party raised an objection’: See A Cossins, ‘Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?’ (2009) 33 *Melbourne University Law Review* 68, 93.

167 *Evidence Act 1995* (Cth) s 41(1); *Evidence Act 1995* (NSW) s 41(1).

is received by the court'; and overcome judges' long standing reluctance to intervene in cross-examination.<sup>168</sup>

28.105 The Commonwealth, NSW and ACT provisions apply to all witnesses, not just vulnerable ones.<sup>169</sup> The equivalent provision in Victoria is specific to vulnerable witnesses, defined to include persons: under the age of 18 years; who have a cognitive impairment or an intellectual disability; or whom the court considers to be vulnerable, having regard to the characteristics of the witness and the context in which the questions are put.<sup>170</sup>

28.106 Apart from South Australia,<sup>171</sup> no other Australian jurisdiction places a positive duty on the court to disallow improper questions.<sup>172</sup>

### ***Further reform***

28.107 Perceived problems with the reluctance of judicial officers to intervene to protect witnesses in criminal trials and to control cross-examination have led to proposals for reform. For example, Cossins and the National Child Sexual Assault Reform Committee have set out a range of recommendations aimed at enabling children to give their best evidence in sexual assault trials. These include recommendations to:

- prohibit suggestive questions or statements that are designed to persuade the child to agree with the proposition or suggestion put to them;
- prohibit asking the same question or making the same statement more than once;
- prohibit questions or statements made by the defence that directly accuse the child of lying or being a liar;
- place restrictions on the use of prior inconsistent statements by the defence; and
- introduce court-appointed intermediaries (social workers, psychologists or other relevant professionals) trained in child cognition, language and development to assess defence questions during the cross-examination of a child complainant.<sup>173</sup>

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168 Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, *Uniform Evidence Law*, Report 102, NSWLRC Report 112, VLRC FR (2005), [5.114].

169 The VLRC did not agree that s 41 should apply to all witnesses. Rather, it concluded that 'a specific duty in relation to vulnerable witnesses offers the best prospect of changing the culture of judicial non-intervention': *Ibid*, [5.123].

170 *Evidence Act 2008* (Vic) s 41(4). The Victorian and Tasmanian Acts provide a discretion to disallow improper questions put to any witness in cross-examination: *Evidence Act 2008* (Vic) s 41(1). See also *Evidence Act 2001* (Tas) s 41. See also *Crimes Act 1914* (Cth) s 15YE in relation to cross-examination of children in proceedings for sexual offences.

171 *Evidence Act 1929* (SA) s 25(4).

172 See *Evidence Act 1977* (Qld) s 21(2); *Evidence Act 1906* (WA) s 26(3); *Evidence Act 2001* (Tas) s 41(2); *Evidence Act 1939* (NT) s 16(2).

173 A Cossins, 'Cross-Examination in Child Sexual Assault Trials: Evidentiary Safeguard or an Opportunity to Confuse?' (2009) 33 *Melbourne University Law Review* 68, 99–101.

28.108 Such matters, as with duties to disallow improper questioning, are aspects of vulnerable witness protection. The Standing Committee of Attorneys-General (SCAG) is developing, through the National Working Group on Evidence, proposed amendments to the uniform Evidence Acts dealing with vulnerable witness provisions. Model provisions are expected to be drafted later in 2010.

28.109 The Terms of Reference instruct the ALRC, in undertaking this Inquiry, to be ‘careful not to duplicate … the work being undertaken through SCAG on the harmonisation of uniform evidence laws, in particular the development of model … vulnerable witness protections’. For this reason, the Commissions do not make any proposals for reform of these aspects of vulnerable witness protection.

### Unrepresented defendants

28.110 Every Australian jurisdiction, with the exception of Tasmania, has enacted legislation to place restrictions on the cross-examination of complainants in sexual offence proceedings by unrepresented defendants.<sup>174</sup>

28.111 In some jurisdictions this protection is only afforded to child complainants and child witnesses.<sup>175</sup> In other jurisdictions it has application beyond sexual offences, and applies to a broader range of legal proceedings or wider class of witness. In Western Australia, the court’s power to prohibit personal cross-examination by the defendant is discretionary (albeit for a wider class of witness across a range of criminal proceedings).<sup>176</sup>

28.112 The NSWLRC explored the issue of cross-examination by an unrepresented accused in detail.<sup>177</sup> It canvassed the competing interests of the rights of the accused to a fair trial—the critical consideration being the ability to test the evidence against them—and the rights of the complainant (that is, the need to reduce the potential distress and humiliation to complainants caused by personal cross-examination).

28.113 In regard to this last area, the NSWLRC drew attention to the particular nature of sexual offences, the nature of the evidence that needs to be elicited from the complainant, the length of cross-examination, and its focus on issues of credibility and consent. To be personally cross-examined by the defendant was seen as having a negative impact on the complainant’s ability to answer questions, thus affecting the quality and nature of the evidence received. This is likely to be amplified in those cases where the complainant and the defendant have, or have had, an intimate or family relationship.<sup>178</sup> The VLRC and QLRC, who dealt with this issue as part of broader

<sup>174</sup> See *Crimes Act 1914* (Cth) ss 15YF–15YG; *Criminal Procedure Act 1986* (NSW) s 294A; *Criminal Procedure Act 2009* (Vic) s 356; *Evidence Act 1977* (Qld) ss 21N–21S; *Evidence Act 1906* (WA) s 25A; *Evidence Act 1929* (SA) s 13B; *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5.

<sup>175</sup> See *Crimes Act 1914* (Cth) ss 15YF–15YG.

<sup>176</sup> *Evidence Act 1906* (WA) s 25A(1).

<sup>177</sup> New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003).

<sup>178</sup> Raised in submissions to *Ibid*, [2.11].

inquiries, also emphasised the negative effect of personal cross-examination on child complainants and child witnesses.<sup>179</sup>

28.114 In order to ‘strike a balance’ between the rights of the accused to test the evidence against them, and the importance of limiting the traumatic experience of complainants in sexual offence proceedings, most jurisdictions prohibit personal cross-examination. However, jurisdictions differ as to:

- whether this protection applies to witnesses other than sexual assault complainants or alleged victims and whether it applies in other legal proceedings; and
- who asks the questions on behalf of the unrepresented defendant and whether that person has any role or responsibility in providing advice to the defendant.

#### ***Which witnesses are protected?***

28.115 In some jurisdictions, protection from cross-examination by an unrepresented defendant is limited to the cross-examination of a complainant in sexual offence proceedings,<sup>180</sup> or to child complainants and child witnesses in sexual offence proceedings,<sup>181</sup> while in others it applies to a wider range of proceedings and witnesses:

- In Victoria, the protection applies to ‘protected witnesses’ in sexual offence proceedings and offences that would amount to family violence within the meaning of the *Family Violence Protection Act 2008* (Vic).<sup>182</sup>
- In Queensland, the protection applies to witnesses under 16 years of age, witnesses with an ‘impairment of the mind’ and alleged victims in a ‘prescribed special offence’ (this covers rape and sexual assault along with a range of other offences) or, subject to conditions, victims of a ‘prescribed offence’.<sup>183</sup>
- In the ACT, the protection applies to the complainant or a ‘similar act witness’ in a sexual offence proceeding, a serious violent offence proceeding, and to a less serious violent offence proceeding where the witness and the accused have

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<sup>179</sup> Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.122]. See also Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55 (Part 2) (2000), 272–273.

<sup>180</sup> *Criminal Procedure Act 1986* (NSW) s 294A prohibits personal cross-examination by an unrepresented accused in ‘prescribed sexual offence proceedings’ which are defined in s 3; *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5.

<sup>181</sup> *Crimes Act 1914* (Cth) s 15YF prohibits the cross-examination of a child complainant (that is the child who is alleged to be the victim of the offence) and s 15YG prohibits the cross-examination of a child witness (other than the child complainant) unless the court grants leave to do so. Both of these sections apply to sexual offence proceedings as specified in s 15Y. These protections apply to committal proceedings and other proceedings related to the prosecution of the prescribed offences: s 15Y(2).

<sup>182</sup> *Criminal Procedure Act 2009* (Vic) s 354. ‘Protected witness’ is defined broadly and includes the complainant, a family member of the complainant, a family member of the accused person, and any other witness that the court declares protected.

<sup>183</sup> ‘Prescribed special offence’ and ‘prescribed offence’ are defined in *Evidence Act 1977* (Qld) s 21M(3).

been in an intimate relationship<sup>184</sup> or the court considers that the witness has some particular vulnerability.<sup>185</sup>

- In South Australia, the protection applies to children or witnesses who are the alleged victims of a ‘serious offence’, or an offence of contravening or failing to comply with a domestic violence restraining order or a restraining order.<sup>186</sup>
- The provision in Western Australia is discretionary, but it is open to the court to ‘forbid’ such personal cross-examination for any witness in a criminal proceeding.<sup>187</sup>

### ***Who asks the questions?***

28.116 In the Commonwealth, NSW and ACT jurisdictions, the defendant’s cross-examination questions are to be asked on their behalf by ‘a person appointed by the court’. The role of the appointed person is simply to ask the questions. In NSW and the ACT it is made clear that this appointed person ‘must not independently give the accused person legal or other advice’.<sup>188</sup>

28.117 In Western Australia, South Australia and the NT, the defendant’s cross-examination questions are either put by the court or a person appointed by the court.<sup>189</sup> In Western Australia and the NT the questions must be ‘repeated accurately’ by the judge or other appointed person.<sup>190</sup> In South Australia, however, the legislation makes it clear that only those questions ‘determined by the judge to be allowable’ will be asked of the witness.<sup>191</sup>

28.118 In Victoria<sup>192</sup> and Queensland,<sup>193</sup> the person who asks the questions must be a legal practitioner and has a more active legal role in asking the questions. In Victoria the court ‘must order Victoria Legal Aid to provide legal representation’ to the accused for the purpose of cross-examining the protected witness.<sup>194</sup> The legal practitioner provided by Victoria Legal Aid ‘must act in the best interests of the accused person if

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184 ‘Intimate relationship’ is defined in *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38B(2)–(4).

185 Ibid s 38D(1). The protection also applies to a child or person with a disability who is giving evidence in a sexual or violent offence proceeding (i.e. where they are not the complainant who is already protected): *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D(2).

186 *Evidence Act 1929* (SA) s 13B(5).

187 *Evidence Act 1906* (WA) s 25A.

188 *Criminal Procedure Act 1986* (NSW) s 294A(4); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D(5). The NSW legislation does not accord with the conclusion of the NSWLRC which had recommended that the person appointed to conduct the cross-examination should be the legal representative for the accused for the purposes of that cross-examination: see New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [5.38], Rec 7.

189 *Evidence Act 1906* (WA) s 25A(1)(c); *Evidence Act 1929* (SA) s 13B(2)(b); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5(1)(b).

190 *Evidence Act 1906* (WA) s 25A(1)(c); *Sexual Offences (Evidence and Procedure) Act 1983* (NT) s 5(1)(b).

191 *Evidence Act 1929* (SA) s 13B(2)(b).

192 *Criminal Procedure Act 2009* (Vic) s 357.

193 *Evidence Act 1977* (Qld) s 21O(2)(b).

194 *Criminal Procedure Act 2009* (Vic) s 357(2).

the accused person does not give any instructions to that legal practitioner'.<sup>195</sup> In Queensland, the lawyer appointed to ask the questions on behalf of the accused is 'the person's legal representative for the purposes only of the cross-examination'.<sup>196</sup>

28.119 In all the jurisdictions where this alternative mode of cross-examination is conducted, the judge is required to explain to the jury that this is a 'standard' or 'routine' procedure, and that they are not to draw any adverse inferences from this practice, nor are they to give the witness' evidence any greater or lesser weight.<sup>197</sup>

28.120 A key difference of approach in the jurisdictions—and in the literature on this issue—is whether the person appointed to ask the cross-examination questions on behalf of the accused should be legally trained and in a position to provide the accused with legal advice in the context of the cross-examination only.

28.121 The NSWLRC's report on this issue canvassed whether it was necessary for the person to be a legal practitioner. Reasons for not having a legal practitioner included the fact that the person has 'already decided against legal representation' and that it is not a necessary requirement.<sup>198</sup> Ultimately, the NSWLRC concluded that a legal practitioner should cross-examine the complainant as 'this is not only in the interests of the accused, but also of the administration of justice, particularly since sexual offences are such serious charges'.<sup>199</sup>

28.122 The approach in NSW, which involves the appointment of a person who is not necessarily legally trained and is specifically not to provide legal advice, has been held to be valid.<sup>200</sup> It has, however, been criticised, including by judicial officers.<sup>201</sup> The NSWLRC and the VLRC both recommended that the appointed representative should be legally trained and in a position to provide legal advice for the purposes of cross examination. This is the approach that has been enacted in Victoria.<sup>202</sup>

#### ***Submissions and consultations***

28.123 In the Consultation Paper, the Commissions proposed that federal, state and territory legislation should: prohibit an unrepresented defendant from personally cross-examining any complainant or other witness in sexual assault proceedings; and provide that any person conducting such cross-examination is a legal practitioner representing

195 Ibid s 357(4). Where an accused refuses this representation, the court must warn them that they will not be allowed to adduce evidence from another witness that contradicts the evidence of the protected witness where the protected witness has not been given the opportunity to respond to that contradictory evidence: *Criminal Procedure Act 2009* (Vic) s 357(5). The ACT also makes this explicit in its legislation: *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D(4)(b). This is known as the rule in *Browne v Dunn*: *Browne v Dunn* (1893) 6 R 67.

196 *Evidence Act 1977* (Qld) s 21P.

197 *Criminal Procedure Act 1986* (NSW) s 294A(7); *Criminal Procedure Act 2009* (Vic) s 358; *Evidence Act 1977* (Qld) s 21R; *Evidence Act 1929* (SA) s 13B(4); *Evidence (Miscellaneous Provisions) Act 1991* (ACT) s 38D(7); *Evidence Act 1939* (NT) s 21A(3).

198 New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [5.6].

199 See *Ibid* [5.19]–[5.20].

200 See *Clark v The Queen* (2008) 185 A Crim R 1; *R v MSK* (2004) 61 NSWLR 204.

201 For example, by the trial judge (Sully J) in *R v MSK* (2004) 61 NSWLR 204.

202 *Criminal Procedure Act 2009* (Vic) s 357.

the interests of the defendant.<sup>203</sup> There was no objection to the proposal that restrictions on the cross-examination of complainants in sexual offence proceedings by unrepresented defendants should apply in all Australian jurisdictions. The Commissioner for Children (Tas), for example, submitted further that Tasmania should legislate to prohibit ‘personal cross-examination of child witnesses by an unrepresented accused in all cases, not just those of a sexual nature’.<sup>204</sup>

28.124 Stakeholders expressed different views, however, on who should ask questions on the defendant’s behalf. While some stakeholders agreed that the person asking the questions should be a legal practitioner,<sup>205</sup> most stakeholders who responded to the second aspect of the proposal opposed the requirement that the questioner be a legal practitioner or expressly supported the NSW model, under which questions may be asked by any person appointed by the court.<sup>206</sup>

28.125 The Law Society of NSW, for example, observed that ‘it is not appropriate for a legal practitioner to undertake the role of questioner’ in NSW because a person appointed by the court is limited to asking the complainant only the questions that the accused person requests,<sup>207</sup> and is therefore ‘acting merely as a mouthpiece’ for the defendant.

The limited terms of engagement impact on a practitioner’s ability to act in the client’s interests, and to prepare and conduct a full interrogation of the witness. Acting in such a capacity conflicts with a practitioner’s legal, professional and ethical obligations to the client and the court.<sup>208</sup>

28.126 The Law Council of Australia agreed that the person conducting a cross-examination should be a person appointed by the court to act as the defendant’s ‘mouthpiece’ and ‘not representing his or her interests of the defendant’.<sup>209</sup>

#### ***Commissions’ views***

28.127 The Commissions recommend that federal, state and territory legislation prohibit an unrepresented defendant from personally cross-examining any complainant, child witness or other vulnerable witness in any sexual assault proceeding.

28.128 The widely accepted rationale for prohibiting an unrepresented defendant from personally cross-examining any complainant in sexual assault proceedings is to avoid causing unnecessary distress or humiliation to complainants.<sup>210</sup> Only Tasmania currently has no express restrictions on cross-examination of complainants by unrepresented defendants in sexual assault proceedings. As discussed above, existing

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203 Consultation Paper, Proposal 18–14.

204 Commissioner for Children (Tas), *Submission FV 62*, 1 June 2010.

205 National Legal Aid, *Submission FV 232*, 15 July 2010; Barrister, *Consultation*, Sydney, 10 June 2010.

206 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010.

207 *Criminal Procedure Act 1986* (NSW) s 294A(3).

208 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

209 Law Council of Australia, *Submission FV 180*, 25 June 2010.

210 N Friedman and M Jones, *Children Giving Evidence of Sexual Offences in Criminal Proceedings: Special Measures in Australian States and Territories* (2005), 168.

prohibitions vary in relation to the categories of witness covered. In the Commissions' view, it is also important to protect child witnesses and other witnesses defined as vulnerable.

28.129 The Commissions consider that it is inappropriate to have the judicial officer ask questions on behalf of the accused. Such an approach (which exists in the NT and Western Australia) places a judicial officer in a difficult position in determining the admissibility of the questions and may raise perceptions of bias.<sup>211</sup>

28.130 There are differences of opinion about who should ask questions on behalf of the defendant and the extent to which legal representation should be provided. On one hand, the critical advantages of legal practitioner involvement include: benefits associated with the professional duty the lawyer owes to the court and the client; the skills that lawyers bring to this work in terms of understanding the rules of evidence; the public interest in testing the evidence presented by the witness, and in addressing the imbalance between the prosecution and the unrepresented defendant.<sup>212</sup>

28.131 On the other hand, there are practical problems in requiring legal representation to be provided by legal aid commissions or otherwise and, in effect, forcing legal representation for these purposes onto a defendant. There may also be ethical problems for legal practitioners required to ask questions on behalf of a defendant. For these reasons, the Commissions do not recommend that legislation require any person conducting cross-examination on behalf of an unrepresented defendant to be a legal practitioner.

28.132 In the Commissions' view, an unrepresented defendant in sexual assault proceedings should be permitted to examine the complainant through a person appointed by the court to ask questions on behalf of the defendant. Such a person need not be a legal practitioner and should not independently give the defendant legal or other advice.

28.133 As discussed above, SCAG is developing, through the National Working Group on Evidence, proposed amendments to the uniform Evidence Acts dealing with vulnerable witness provisions. Model provisions are expected to be drafted later in 2010 and may deal with aspects of this issue.<sup>213</sup>

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211 Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004), [4.141]; New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [5.11]–[5.12], [5.21]; Queensland Law Reform Commission, *The Receipt of Evidence by Queensland Courts: The Evidence of Children*, Report 55 (Part 2) (2000), 291–292.

212 See New South Wales Law Reform Commission, *Questioning of Complainants by Unrepresented Accused in Sexual Offence Trials*, Report No 101 (2003), [5.7]–[5.10].

213 Australian Government Attorney-General's Department, *Submission FV 166*, 25 June 2010.

**Recommendation 28–5** Federal, state and territory legislation should:

- (a) prohibit an unrepresented defendant from personally cross-examining any complainant, child witness or other vulnerable witness in sexual assault proceedings; and
- (b) provide that an unrepresented defendant be permitted to cross-examine the complainant through a person appointed by the court to ask questions on behalf of the defendant.

## Other aspects of giving evidence

28.134 Leaving aside the specific issue of cross-examination, some jurisdictions provide ‘alternative’ or ‘special’ arrangements for the giving of evidence by complainants or other witnesses in sexual offence proceedings. Aspects of these arrangements were discussed in Chapter 26, in relation to the use of pre-recorded evidence.

28.135 These regimes provide a range of measures dealing with the giving of contemporaneous evidence by closed circuit television (CCTV) or video-link, the use of screening to restrict contact between the witness and the defendant, and the exclusion of persons from the court.<sup>214</sup> All jurisdictions also permit a complainant in sexual offence proceedings to have a support person present with them while they give evidence.<sup>215</sup>

28.136 There are some variations among jurisdictions. In most jurisdictions, the giving of evidence by way of alternative or special arrangements ‘may’ be ordered by the court.<sup>216</sup> In other cases, the arrangements are something to which, subject to exceptions, the complainant is entitled,<sup>217</sup> or are mandatory (especially in the case of evidence given by children).<sup>218</sup>

28.137 Some methods for giving evidence by complainants, such as the use of CCTV, are broadly used. However, not all jurisdictions expressly permit, for example, the use of screens or planned seating arrangements,<sup>219</sup> or require evidence of the complainant in sexual offence proceedings to be given in closed court.<sup>220</sup>

214 For example, *Criminal Procedure Act 1986* (NSW) s 294B; *Criminal Procedure Act 2009* (Vic) s 13.

215 For example, *Criminal Procedure Act 1986* (NSW) s 294C; *Criminal Procedure Act 2009* (Vic) s 360(c).

216 For example, *Evidence Act 1906* (WA) s 106R; *Evidence (Children and Special Witnesses) Act 2001* (Tas) s 8.

217 For example, *Criminal Procedure Act 1986* (NSW) s 294B; *Evidence Act 1929* (SA) s 13.

218 For example, *Crimes Act 1914* (Cth) s 15YI.

219 For example, Tasmania.

220 For example, while a court in Victoria may direct that only persons specified by the court be permitted to be present while the witness is giving evidence, in NSW, proceedings must be held in closed court when the complainant gives evidence: *Criminal Procedure Act 1986* (NSW) s 291; *Criminal Procedure Act 2009* (Vic) s 360(d).

28.138 In the Consultation Paper, the Commissions asked whether there are significant gaps or inconsistencies among Australian jurisdictions in relation to ‘alternative’ or ‘special’ arrangements for the giving of evidence by complainants or other witnesses in sexual offence proceedings.<sup>221</sup>

28.139 The Magistrates’ Court and Children’s Court of Victoria noted that, in Victoria, special hearings are not available in summary proceedings and, that in terms of consistency of policy, it is not clear why ‘child complainants in Children’s Court rape prosecutions should not be able to have their evidence visually recorded, and if necessary replayed on appeal’. The definition of a sexual offence for the purpose of accessing alternative arrangements was also criticised for not extending to all offences in which the offending conduct is of a sexual nature.<sup>222</sup>

28.140 The SCAG National Working Group on Evidence is expected to include consideration of ‘alternative’ or ‘special’ arrangements for the giving of evidence by vulnerable witnesses.<sup>223</sup> The Commissions do not, therefore, make any proposals for reform of these aspects of vulnerable witness protection.

### **Evidence on re-trial or appeal**

28.141 Chapter 26 noted that some jurisdictions provide that pre-recorded audiovisual evidence of complainants in sexual offence proceedings may be admissible in evidence in a re-trial or appeal.<sup>224</sup>

28.142 Such provisions may also apply to a recording of a complainant’s evidence at trial. For example, the *Criminal Procedure Act 2009* (Vic) provides that such a recording ‘is admissible in evidence as if its contents were the direct testimony of the complainant’, including, unless the relevant court otherwise orders, in ‘any new trial of, or appeal from, the proceeding’.<sup>225</sup>

28.143 NSW has introduced broader provisions relating to evidence in re-trials of sexual offence proceedings.<sup>226</sup> The *Criminal Procedure Act 1986* (NSW) provides that if a person is convicted of a prescribed sexual offence and, on an appeal against the conviction, a new trial is ordered, the prosecutor may tender as evidence in the new trial ‘a record of the original evidence of the complainant’, despite the rule against hearsay evidence.<sup>227</sup> While the original evidence might include any pre-recorded evidence used in the trial,<sup>228</sup> it covers ‘all evidence given by the complainant in the proceedings from which the conviction arose’, including court transcripts of

221 Consultation Paper, Question 18–13.

222 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010. On 26 June 2010, the application of div 4 of the *Criminal Procedure Act 2009* (Vic) was extended to include the summary offences of obscene, indecent, and threatening language, offensive or indecent behaviour and indecent exposure.

223 Australian Government Attorney-General’s Department, *Submission FV 166*, 25 June 2010.

224 For example, *Criminal Procedure Act 1986* (NSW) pt 5 div 3; *Criminal Procedure Act 2009* (Vic) s 374.

225 *Criminal Procedure Act 2009* (Vic) s 379.

226 *Criminal Procedure Act 1986* (NSW) pt 5 div 3 inserted by the *Criminal Procedure Amendment (Evidence) Act 2005* (NSW).

227 *Criminal Procedure Act 1986* (NSW) s 306B.

228 Such as a recording of a police interview: *Ibid* s 306U.

evidence.<sup>229</sup> If a record of the original evidence of the complainant is admitted in proceedings, the complainant is not compellable to give any further evidence in the proceedings, including for the purpose of any examination in chief, cross-examination or re-examination.<sup>230</sup>

28.144 The problem addressed by the provision was described as being that:

Not surprisingly, some complainants who have given evidence that resulted in a conviction decide they simply cannot return to give evidence again if a new trial is ordered on appeal. Significant time will have passed and the complainant will have tried as best as possible to put the matter out of their mind.<sup>231</sup>

28.145 Similar, but more limited, provisions have been enacted in other jurisdictions. For example, in South Australia, an ‘official record’ of the evidence of a vulnerable witness may be admitted as evidence in later proceedings, at the discretion of the court. Where such evidence is admitted it ‘may relieve the witness, wholly or in part, from an obligation to give evidence in the later proceedings’.<sup>232</sup>

#### ***Submissions and consultations***

28.146 In the Consultation Paper, the Commissions asked whether federal, state and territory legislation should permit prosecutors to tender a record of the original evidence of the complainant in any re-trial ordered on appeal.<sup>233</sup> The Commissions suggested that such legislation might be modelled on that in NSW.

28.147 Stakeholders who addressed the question generally expressed support for such reform.<sup>234</sup> The National Association of Services Against Sexual Violence noted that such provisions alleviate ‘the need to apply more stress on a victim and re-traumatise them by having to repeat evidence, often years after the event. It prevents them from being able to get on with their lives and can effectively put their lives “on hold”’.<sup>235</sup> The Women’s Legal Service Queensland noted concerns that, if the jury on re-trial do not see the complainant, re-trials simply using records of the original evidence ‘may just become yet another acquittal’.<sup>236</sup>

#### ***Commissions’ views***

28.148 In the Commissions’ view it would be desirable to harmonise federal, state and territory approaches to the use in re-trials, of records of the original evidence of the complainant—including pre-recorded or recorded audiovisual evidence. The NSW

229 Ibid s 306B.

230 Ibid s 306C.

231 New South Wales, *Parliamentary Debates*, Legislative Assembly, 3 March 2005, 14649 (B Debus—Attorney General and Minister for the Environment).

232 *Evidence Act 1929 (SA)* s 13D.

233 Consultation Paper, Question 18–14.

234 For example, National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

235 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

236 Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010.

legislation, discussed above, provides the most comprehensive model on which to base reform.

28.149 The Commissions note that the SCAG National Working Group on Evidence work is expected to include consideration of using audiovisual records of a witness to give evidence in a re-trial.<sup>237</sup>

**Recommendation 28–6** Federal, state and territory legislation should permit prosecutors to tender a record of the original evidence of the complainant in any re-trial ordered on appeal.

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237 Australian Government Attorney-General's Department, *Submission FV 166*, 25 June 2010.

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**Part H**

**Overarching Issues**

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# **29. Integrated Responses**

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## **Contents**

Introduction	1349
Integrated responses	1349
Terminology	1350
Integrated responses in the context of family violence	1352
Integrated responses in the context of child protection	1360
Essential elements of integrated responses	1369
Common principles and objectives	1370
Inter-agency collaboration	1373
Victim support services	1378
Legal advice and representation	1385
Victims' compensation	1388
Maintaining momentum	1395

## **Introduction**

29.1 This chapter examines integrated responses across Australia to issues of family violence and child maltreatment, including the essential elements of such responses: common policies and objectives; inter-agency collaboration; and the provision of victim support, including legal services and victims' compensation. Information sharing, which underpins effective integrated responses, is discussed in Chapter 30. Specialisation—in particular specialised courts—which may also be a feature of integrated responses, is discussed in Chapter 32.

### **Integrated responses**

29.2 'Integrated responses' to family violence have flourished since a pioneering model, the Domestic Abuse Intervention Project, was established in Duluth, Minnesota in 1981 (the Duluth Model). This model is based on four key principles: the need for coordination and cooperation between agencies; the need for collaboration between partners; a focus on victim safety; and the need for offenders to be held accountable for their actions.<sup>1</sup> The Duluth model features offender programs, community awareness-raising and training, and case management. It works in tandem with, and monitors,

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1 Domestic Abuse Intervention Programs, *Duluth Model on Public Intervention* <[www.theduluthmodel.org/duluthmodelonpublic.php](http://www.theduluthmodel.org/duluthmodelonpublic.php)> at 11 January 2010.

criminal justice services. A similar model was adopted in Hamilton, New Zealand in 1991.<sup>2</sup>

## **Terminology**

### ***Integration***

29.3 ‘Integration’ is sometimes considered synonymous with the terms ‘coordination’, ‘cooperation’ and ‘collaboration’. These latter terms tend to indicate degrees of integration. Agencies that coordinate service delivery ‘might share information and dovetail their processes but they do so essentially in order to each pursue their own goals more efficiently’.<sup>3</sup> Integration, on the other hand, requires

agencies to decide on and articulate common goals and agree on ways to pursue those goals. Integration of services is more than coordinated service delivery—it is a whole new service. Co-location of agencies, agreed protocols and codes of practice, joint service delivery, agencies reconstituting or realigning their core business to confront the challenges posed by a broadened conception of the problem: these are the key indicators of an integrated response.<sup>4</sup>

29.4 Cooperation, coordination and integration may be conceptualised as part of a scale of integration, as set out below:

<b>Autonomy</b>	<b>Cooperative links</b>	<b>Coordination</b>	<b>Integration</b>
Parties/agencies act without reference to each other, although the actions of one may affect the other(s).	Parties establish ongoing ties, but formal surrender of independence does not occur. A willingness to work together for some common goals. Communication emphasised. Requires goodwill and some mutual understanding.	Planned harmonisation of activities between the separate parties. Duplication of activities and resources is minimised. Requires agreed plans and protocols or appointment of an external coordinator or (case) manager.	Links between the separate parties draw them into a single system. Boundaries between parties begin to dissolve as they become effectively work units of sub groups within a single larger organisation.

*Source:* M Fine, P Kuru and C Thomson, *Coordinated and Integrated Human Service Delivery Models: Final Report* (2005) Social Policy Research Centre, University of NSW, 4.

29.5 According to this scale, most of the ‘integrated responses’ described in this chapter are more accurately characterised as forming cooperative links or coordination, rather than integration.

29.6 Integration may occur at different levels, including national, state government or local level, and between individual consumers and staff. The degree of integration may

2 J Mulroney, *Trends in Interagency Work* (2003), prepared for the Australian Domestic and Family Violence Clearinghouse, 3.

3 Domestic Violence and Incest Resource Centre, *Developing an Integrated Response to Family Violence in Victoria: Issues and Directions* (2004), 11.

4 Ibid.

be loose—where there are independent decentralised organisations ‘interacting as the occasion arises’: or tight, where there are centralised independent organisational units acting in a coordinated or collaborative way.<sup>5</sup>

29.7 There are also different models of integration. A report produced for the NSW Cabinet Office and Premier’s Department in 2005 identified 10 different models of service delivery, including ‘one stop shops’ (involving co-location of services), ‘case management’ (integrated delivery of services focusing on client outcomes) and ‘inter-agency collaboration’.<sup>6</sup> The report noted that most projects tend to combine elements of these different conceptual models.

### ***Integrated responses***

29.8 The term ‘integrated responses’ is typically used in the literature to refer specifically to inter-agency models of collaboration, often based on the Duluth model. They may be distinguished from ‘whole of government’ responses to family violence, which are government policy frameworks that span a range of departments and agencies. Whole of government responses may form an element of an integrated response (as discussed below), but they do not necessarily exhibit other features of an integrated response such as mechanisms for inter-agency collaboration and service delivery.

29.9 Features of an integrated response may include:

- common policies and objectives, potentially including pro-arrest and prosecution policies;<sup>7</sup>
- inter-agency collaboration and information sharing, which may include: coordinated leadership across services and resources; sharing of resources and protocols; and inter-agency tracking and management of family violence incidents;
- the provision of victim support;
- commitment to ongoing training and education;<sup>8</sup>
- ongoing data collection and evaluation, with a view to system review and process improvements;<sup>9</sup> and
- specialised family violence courts, lists, and offender programs for those who engage in family violence.<sup>10</sup>

29.10 While a comprehensive integrated response has all of these features, not all features are required for a project to be considered an integrated response. Both

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5 Ibid, 5.

6 Ibid.

7 Pro-arrest and pro-prosecution policies are discussed in Chs 8 and 9.

8 Discussed in Ch 31.

9 Discussed in Ch 31.

10 Statewide Steering Committee to Reduce Family Violence, *Reforming the Family Violence System in Victoria* (2007), 19. Specialisation is discussed in Ch 32.

comprehensive, and more limited, integrated responses in the family violence and child protection contexts in Australia are discussed below.

### **Integrated responses in the context of family violence**

29.11 Integrated responses to family violence in Australia have flourished in the past decade. The most comprehensive responses operate in the smaller jurisdictions of the ACT and Tasmania, combining both policy and operational elements. In Victoria, a broader policy response has been initiated, with funding for smaller-scale local partnerships as part of an Integrated Family Violence Service program. In other Australian jurisdictions, the focus has been on small-scale projects. The following is a brief overview of the large-scale projects, and notable smaller-scale projects, in each Australian jurisdiction.<sup>11</sup>

#### ***Australian Capital Territory***

29.12 The Family Violence Intervention Program (FVIP) is a coordinated criminal justice response established in 1998, following recommendations of the ACT Community Law Reform Committee in 1995.<sup>12</sup> It includes most of the key elements of the Duluth model. Its focus is the criminal justice system in the context of family violence. The FVIP operates within the context of an overarching ACT Government policy framework oriented towards the safety of women and children.<sup>13</sup>

29.13 The FVIP has no legislative basis and operates under protocols established in 1998 and under a 2006 Memorandum of Agreement. The key agencies involved are the Australian Federal Police (ACT Policing); Office of the Director of Public Prosecutions (ODPP); ACT Magistrates Court; ACT Corrective Services; Domestic Violence Crisis Service (DVCS); Office for Children, Youth and Family Support; the Department of Justice and Community Safety; and the Office of the Victims of Crime Coordinator.

29.14 At the policy level, the FVIP is steered by a coordinating committee chaired by the Victims of Crime Coordinator (acting as the Domestic Violence Project Coordinator).<sup>14</sup> The role of the committee is to act as the forum for discussion about strategic planning and coordination, as well as policy and procedural frameworks.

29.15 The core components of the FVIP are:

- pro-charge, pro-arrest policies with a presumption against bail;

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11 Descriptions of these projects are usefully compiled by the Australian Domestic Violence Clearinghouse in its Good Practice Database: see Australian Domestic and Family Violence Clearinghouse, *Good Practice Database* <[www.austdvclearinghouse.unsw.edu.au/good\\_practice.html](http://www.austdvclearinghouse.unsw.edu.au/good_practice.html)> at 11 January 2010.

12 Community Law Reform Committee of the Australian Capital Territory, *Domestic Violence*, Report 9 (1995).

13 ACT Government, *Justice, Options and Prevention: Working to Make the Lives of ACT Women Safe* (2003).

14 The Domestic Violence Project Coordinator is a statutory appointment under the *Domestic Violence Agencies Act 1986* (ACT), and the Victims of Crime Coordinator is a statutory appointment under the *Victims of Crime Act 1994* (ACT).

- early provision of victim support (by DVCS);
- pro-prosecution policies;
- coordination and case management; and
- an offender program as a sentencing option.<sup>15</sup>

29.16 Under the FVIP, police are encouraged to lay charges and arrest offenders when they are called to an incident. They are trained in evidence collection methods particular to family violence and equipped with Family Violence Investigation Kits. DVCS workers are contacted to attend all family-violence related incidents and offer victim support services at the time of the incident, as well as ongoing victim support. The police identify all family violence incidents and these are transferred to a specialist list for family violence matters in the Magistrates Court.

29.17 The ODPP is responsible for prosecuting offences and their policy is to continue prosecutions even where victims are reluctant or give unfavourable evidence. Evidence is disclosed earlier, in line with a practice direction, and all pre-trial matters are managed by a single magistrate, although trials are heard by other magistrates in the court. If a person is found guilty, the usual result is the imposition of a good behaviour bond with a number of conditions, and may include a mandated referral to a behaviour change program for offenders run by ACT Corrective Services.

29.18 The FVIP was implemented in phases, and a key feature is the periodic evaluation of the program. The evaluations indicate that the FVIP has helped to establish better relations between agencies; has contributed to victim safety and protection; has contributed to offender accountability by ensuring incidents are charged and processed in court; and has implemented practices to improve and develop the program.<sup>16</sup>

#### **New South Wales**

29.19 In New South Wales, integrated responses to family violence have tended to be localised, smaller-scale and focused on service delivery. These projects include:

- Mt Druitt Family Violence Response and Support Strategy;
- Canterbury Bankstown Inter-Agency Domestic Violence Response Team;
- Green Valley Domestic Violence Service;
- Domestic Assault Response Team (Tuggerah Lakes);
- Domestic Violence Intervention Response Team (Brisbane Waters);
- Staying Home Leaving Violence (Bega and East Sydney);
- Operation Choice (Shoalhaven and Lake Illawarra);

15 See Australian Domestic and Family Violence Clearinghouse, *Good Practice Database* <[www.austdvclearinghouse.unsw.edu.au/good\\_practice.html](http://www.austdvclearinghouse.unsw.edu.au/good_practice.html)> at 11 January 2010.

16 See Urbis Keys Young, *Evaluation of the ACT Family Violence Intervention Program Phase II* (2001).

- Manning/Great Lakes Police and Women's Refuge Partnership Against Domestic Violence Project; and
- Domestic Violence Intervention Court Model (Wagga Wagga and Campbelltown) (discussed in Chapter 32).<sup>17</sup>

29.20 Some of these, such as the Domestic Violence Intervention Response Team, involve police referring victims to victim support workers. The Green Valley project refers victims of family violence to a specialist team of family violence, drug and alcohol and child protection workers located within NSW Health, and also facilitates applications for housing.

29.21 The Wyong and Tuggerah Lakes Domestic Assault Response Team (DART) combines police and Community Services caseworkers. When police apply for a protection order in relation to family violence, the DART is alerted and performs an extensive background check on the parties, including any child protection interventions and outcomes and current or pending Family Court orders. The police conduct home visits or contact victims and, if children are involved, a DART caseworker also comes to explain child protection issues and make appropriate referrals. In joint meetings between Community Services and police, high-risk families are identified for support through 'intensive case management'.<sup>18</sup>

29.22 In 2007, an independent review emphasised the need for coordination in the delivery of services in relation to family violence in NSW.<sup>19</sup> This has led to the establishment of both a centralised Violence Prevention Coordination Unit (VPCU) within the NSW Department of Premier and Cabinet, and an expert advisory committee, the Premier's Council on Preventing Violence against Women. The VPCU and the Premier's Council are currently developing a Strategic Framework for addressing family violence in NSW, which is likely to strengthen inter-agency responses.<sup>20</sup>

### ***Northern Territory***

29.23 In the Northern Territory, the Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council (NPY Women's Council) has established the Cross Borders Domestic Violence Service, which covers a remote area crossing the borders of the Northern Territory, South Australia and Western Australia. It provides access to

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17 The projects are listed in NSW Ombudsman, *Domestic Violence: Improving Police Practice* (2006), 47. The Commissions are aware that other arrangements may apply informally, such as a protocol for expediting information exchange in family violence matters on the Katoomba and Lithgow circuit of the Local Court, which developed from a court users' meeting.

18 Ibid, 50–51. Child protection is discussed in Chs 19–20.

19 ARTD Consultants, *Report on Coordinating NSW Government Action Against Domestic and Family Violence* (2007), prepared for the Department of Premier and Cabinet (NSW).

20 Office For Women's Policy (NSW), *Discussion Paper on NSW Domestic and Family Violence Strategic Framework* (2008).

medical and legal services, and also focuses on the development of inter-agency protocols.<sup>21</sup>

### ***Queensland***

29.24 In 2009, Queensland released a whole of government strategy for addressing family violence.<sup>22</sup> This focused on five areas of reform: prevention; early identification and intervention; connected victim support services; perpetrator accountability; and system planning and coordination.<sup>23</sup> It also included a focus on improving integrated responses.<sup>24</sup> As part of the Queensland Government's 2009–10 program of action, one key measure is to test an enhanced integrated response in Rockhampton comprising: case management services for those with multiple support needs; a specialised court program; enhanced legal services; offender programs; community awareness raising and capacity building of the service sector.<sup>25</sup>

29.25 A long-running integrated response in Queensland is the Gold Coast Domestic Violence Integrated Response (GCDVIR), a community-based program that has been operating since 1996. It has a coordinating committee with representatives from family violence centres and shelters; police; the Gold Coast Hospital; the Southport Magistrates Court; Legal Aid; the offenders' program service provider; and government departments for corrective services, justice, child safety, community services, and housing.

29.26 The GCDVIR has developed a number of programs, including:

- the Police Fax Back Project;
- Domestic Violence Court Assistance Program: a secure and specially designed family violence office at the Southport Magistrates Court, staffed by the Domestic Violence Prevention Centre Gold Coast Inc (DVPC), which provides victim support, information and advocacy;
- Mandated Men's Program: a 24-week court-ordered family violence program for offenders, run collaboratively by Community Correction Southport and DVPC;
- the Safety First Project: a service where basic information and a comprehensive risk assessment about women leaving refuges is faxed to the DVPC for quicker access to its services;

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21 Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council, *NPYWC Domestic Violence Service* (2010) <[www.waru.org/organisations/npywc/npy\\_domestic.php](http://www.waru.org/organisations/npywc/npy_domestic.php)> at 30 January 2010.

22 Queensland Government, *For Our Sons and Daughters: A Queensland Government Strategy to Reduce Domestic and Family Violence 2009–2014* (2009).

23 Ibid, 8–9.

24 Ibid, 11.

25 Queensland Government, *For Our Sons and Daughters: A Queensland Government Strategy to Reduce Domestic and Family Violence Program of Action 2009–2010* (2009), 5. The specialised court in Rockhampton is described in Ch 32.

- inter-agency protocols on communication and inter-agency training; and
- development of family violence resources.<sup>26</sup>

29.27 Townsville and Thuringowa in northern Queensland have developed an integrated response to family violence, known as Dovetail. Government partners include Centrelink, Corrective Services, Department of Child Safety, Department of Communities and Department of Housing. Dovetail partners also include the legal sector—Family Court, Legal Aid, Legal Services, Townsville Magistrates Court—as well as the police; city councils; and non-government services, including the North Queensland Domestic Violence Resource Service, Salvation Army, and women's services.<sup>27</sup>

29.28 These agencies commit to key principles and goals, including the development of protocols for all services, and monitoring of the legislation and family violence systems. Agencies meet regularly and monitor relevant programs, which include fax-back protocols with the police; court support; and offender programs.

29.29 The Logan River Valley Integrated Community Response to Domestic Violence Group Fax-Back Project also provides a fax-back process in that region.<sup>28</sup>

#### ***South Australia***

29.30 The South Australian Government, as part of its Women's Safety Strategy and Keeping them Safe—Child Protection Agenda, piloted the Family Safety Framework (FSF) in Holden Hill, the South Coast Local Service area and the Far North Local Service Area between late 2007 and 2008.

29.31 The FSF involves an inter-agency agreement on key principles and is focused on targeting high risk families for risk assessment by a local Family Safety Meeting, attended by a range of agencies. The sharing of information in that meeting is governed by a specially developed Information Protocol, and an Action Plan is prepared for each referral. The agencies involved in the Protocol include the police, a range of government departments, and non-government family violence services. No additional funding was allocated to agencies.

29.32 The FSF was evaluated in November 2008 and was found to have achieved improved responses to victims and their children and enhanced victim safety and reduced re-victimisation.<sup>29</sup> In October 2009, the FSF was expanded to three other regions.<sup>30</sup>

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26 Domestic Violence Prevention Centre Gold Coast, *Domestic Violence Prevention Centre Gold Coast* <[www.domesticviolence.com.au/GoldCoastPartnerships.htm#overview](http://www.domesticviolence.com.au/GoldCoastPartnerships.htm#overview)> at 2 February 2010.

27 Northern Queensland Domestic Violence Resource Service, *Dovetail* <[www.nqdvrs.org.au/Dovetail.htm](http://www.nqdvrs.org.au/Dovetail.htm)> at 11 January 2010.

28 Australian Domestic and Family Violence Clearinghouse, *Good Practice Database* <[www.austdvclearinghouse.unsw.edu.au/good\\_practice.html](http://www.austdvclearinghouse.unsw.edu.au/good_practice.html)> at 11 January 2010.

29 J Marshall, E Ziersch and N Hudson, *Family Safety Framework: Final Evaluation Report* (2008), prepared for the Office of Crime Statistics and Research (SA).

30 Office for Women (SA), *Women's Safety Strategy* <[www.officeforwomen.sa.gov.au/index.php?section=970](http://www.officeforwomen.sa.gov.au/index.php?section=970)> at 2 February 2010.

**Tasmania**

29.33 Tasmania has implemented ‘Safe at Home’, an integrated whole of government criminal justice response to family violence. Safe at Home comprises 16 funded initiatives across the Departments of Justice; Police and Public Safety; Health and Human Services; and Premier and Cabinet. Part of the response included the reforms that led to the *Family Violence Act 2004* (Tas). The Department of Justice is responsible for its implementation; a Statewide Steering Committee chaired by the Department of Premier and Cabinet is responsible for high level issues including resource distribution; and an Inter-Departmental Committee chaired by the Department of Justice is responsible for operational planning and development, supported by Regional Coordinating Committees.<sup>31</sup>

29.34 In respect of police, initiatives include a Family Violence Response and Referral Line, which operates 24 hours a day, seven days a week and refers callers either to police, counselling or support services; specialist Victim Safety Response Teams (VSRT) in each policing district; and specialist police prosecutors. Police attending family violence incidents play a key role in identifying the presence of family violence; administering risk assessment tools; and entering a Family Violence Management System report which is quality assured by a VSRT or supervising Sergeant. Operational police also issue police-initiated Family Violence Orders, apply for Family Violence Orders, determine bail, and prepare oppositions to bail. Police are also responsible for notifying Children and Family Services if a child is affected by family violence.<sup>32</sup>

29.35 There are weekly Integrated Case Coordination (ICC) meetings attended by relevant agencies to consider all new and ‘active’ family violence cases in each policing district, supported by an ICC database linking police and Department of Justice databases.<sup>33</sup>

29.36 Victim support is provided by a Court Support and Liaison Service, a Child Witness Service and a Special Needs Liaison Service, which provide support to victims, children and people with special needs such as drug and alcohol problems. In addition, there is a specialist Children and Young Person’s Program counselling service. For offenders, there is a Family Violence Offender Intervention Program.

29.37 Specific additional funding has been provided for legal aid, the Tasmanian Magistrates Court and the Department responsible for child protection. There has also been specific funding for alternative accommodation for offenders removed from their homes,<sup>34</sup> and for the Ya Pulingina Kani Aboriginal Advisory Group, to advise on the most culturally appropriate ways to manage Indigenous offenders and provide support to victims.

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31 Successworks, *Review of the Integrated Response to Family Violence: Final Report* (2009), 19–20.

32 Ibid, 12.

33 Funding has been provided for an Integrated Case Coordination Management System as the next stage: Ibid, 13.

34 Ibid, 15. However, this funding was returned from the contracted non-government service provider as the service was unsuccessful.

29.38 The Safe at Home initiative was independently reviewed in June 2009.<sup>35</sup> The review found evidence that the objectives were being achieved, but made 37 recommendations for improvement, including: the adoption of family safety as a unifying paradigm; a strengthened risk assessment program; a Victims' Rights Charter; case management for high-risk offenders; establishment of a specialist family violence court and use of specialist prosecutors; and improved support for child witnesses.

### ***Victoria***

29.39 In 2002, the Victorian Government established a Statewide Steering Committee to Reduce Family Violence, including representatives from police, government departments, family violence services, the courts, peak bodies for family violence, support organisations for sexual assault victims, the No to Violence Male Family Violence Prevention Association, legal services and the Victorian Health Promotion Foundation.<sup>36</sup> This Committee advised on the need for, and developed a model for, an integrated response in Victoria. The Government also established an Indigenous Family Violence Task Force in 2002, which reported in 2003.<sup>37</sup>

29.40 Since 2005, the Victorian Government has invested \$140 million in whole of government policies to address violence against women.<sup>38</sup> These initiatives include:

- reforms to family violence and sexual offences legislation, based on the recommendations in two reports of the Victorian Law Reform Commission;<sup>39</sup>
- a new Code of Practice and five-year strategy plan for the Victorian police in respect of family violence;<sup>40</sup>
- the establishment of specialist family violence courts, as well as sexual assault lists and prosecution teams and multi-disciplinary sexual assault centres;
- the provision of counselling and offender treatment programs in the context of family violence and sexual assault;
- the establishment and funding of a child witness service;
- funding for the Department of Human Services to develop partnerships with community and local organisations to provide integrated services such as housing, counselling and treatment programs (known as the Integrated Family Violence Service program);

35 Ibid.

36 Department of Human Services (Vic), *Changing Lives—A New Approach to Family Violence in Victoria* (2007).

37 Victorian Indigenous Family Taskforce, *Final Report* (2003).

38 Office of Women's Policy (Vic), *Right to Respect: Victoria's Plan to Prevent Violence Against Women 2010–2020* (2009), 4. These strategies involve the Minister for Housing and Minister for Local Government; the Minister for Women's Affairs; the Attorney-General; the Minister for Police and Emergency Services; and the Minister for Community Services and Children.

39 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006); Victorian Law Reform Commission, *Sexual Offences: Final Report* (2004).

40 Victoria Police, *Living Free from Violence, Upholding the Right: Victoria Police Strategy to Reduce Violence Against Women and Children 2009–2014* (2009); Victoria Police, *Code of Practice for the Investigation of Family Violence* (2005).

- the development of a comprehensive risk assessment framework and tools;<sup>41</sup> and
- ten-year plans to: address Indigenous family violence;<sup>42</sup> prevent violence against women;<sup>43</sup> and the forthcoming *Strategic Framework for Family Violence Reform 2010–2020* to build on existing reforms for the handling of family violence.

29.41 The Integrated Family Violence Service program includes common risk assessment tools, protocols, and accreditation and funding for specialist family violence services according to a Code of Practice.<sup>44</sup>

29.42 One notable multi-agency local project in Victoria is the Violence Against Women Integrated Services Partnership project in Warrnambool. The key focus of this partnership has been the establishment of protocols responding to family violence with the police, the Magistrates' Court, Accident and Emergency Department at South West Healthcare, Emma House Domestic Violence Services and the Salvation Army. These partners refer victims, with their consent, to Emma House, through a fax-back service. Services such as counselling, referrals to mental health and sexual assault services, and a children's worker are provided. The Salvation Army provides emergency accommodation for offenders; the Warrnambool Magistrates' Court operates a special family violence list to enable victim support on-site; the RSPCA provides emergency accommodation for pets; and the partnership meets monthly to discuss broader strategic issues.<sup>45</sup>

#### ***Western Australia***

29.43 In Western Australia, an integrated response is developing through whole of government strategic plans to address family violence, developed and implemented by a Senior Officers' Group, consisting of senior state and Australian Government departmental representatives as well as the community sector. As part of the 2004–08 plan, the Western Australian Government developed specialist Family Violence Courts and protocols between the police and child protection authorities.<sup>46</sup>

29.44 The 2009–13 plan commits to a range of initiatives, including a focus on prevention and early intervention strategies; and a 'statewide integrated response' for victims of family violence, including an accessible, integrated 24-hour response throughout the state.<sup>47</sup>

41 Government of Victoria, *Family Violence Risk Assessment and Risk Management: Supporting an Integrated Family Violence Service System* (undated).

42 Aboriginal Affairs Victoria, *Strong Culture, Strong Peoples, Strong Families: Towards a Safer Future for Indigenous Families and Communities*, 2nd ed (2008).

43 Office of Women's Policy (Vic), *Right to Respect: Victoria's Plan to Prevent Violence Against Women 2010–2020* (2009).

44 Children Youth and Families (Vic), *Integrated Family Violence* (2008).

45 Australian Domestic and Family Violence Clearinghouse, *Good Practice Database* <[www.austdvclearinghouse.unsw.edu.au/good\\_practice.html](http://www.austdvclearinghouse.unsw.edu.au/good_practice.html)> at 11 January 2010.

46 Department for Child Protection (WA), *WA Strategic Plan for Family and Domestic Violence 2009–2013* (2009).

47 Ibid.

29.45 There are two notable local multi-agency projects in Western Australia. The first inter-agency model adopted in Western Australia was the Armadale Domestic Violence Intervention Project (ADVIP), established in 1993. It includes representatives from the police, women's refuges, community corrections, the hospital and Curtin University. Fortnightly Core Group meetings are held to discuss problems in specific cases and to coordinate interventions in particular cases, while monthly meetings of the Inter-agency Safety Committee focus on broader systemic issues.<sup>48</sup> An accountability audit has been conducted of the ADVIP.<sup>49</sup>

29.46 Domestic Violence Advocacy Support Central in Perth provides a 'one stop shop' for family violence services, through the co-location of refuge, legal, family support, police and counselling services. The agencies involved include Orana Women's Refuge, Legal Aid, Police and Department for Community Development, with visiting sessions from Centrecare and the Domestic Violence Children's Counselling Service.<sup>50</sup>

### **Integrated responses in the context of child protection**

29.47 In the child protection context, a number of the states and territories have established inter-agency models to deliver coordinated services to children and young people who have been abused, or who are at risk of abuse. Each state and territory has developed specific investigative models based on its own child protection legislation and discrete definitions of abuse and neglect. These deal with the way in which abuse of children and young people is reported, referrals to other agencies, information exchange between agencies, the conduct of investigations and interviews, and how services are delivered. While some of these processes are legislatively based, practical guidance is often provided through a variety of protocols, inter-agency guidelines and memorandums of understanding (MOUs).

29.48 In addition, the Family Court of Australia has developed a case management model, the Magellan project—which is discussed further below—to address the needs of children and families where serious allegations of sexual or physical abuse are raised during parenting disputes in the Family Court.<sup>51</sup>

#### ***Intake process***

29.49 In several jurisdictions—including South Australia, the ACT and the Northern Territory—reports of child abuse are directed to a centralised intake service or hotline.<sup>52</sup> In Victoria, Queensland and Western Australia, reports are directed to the

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48 E Pence, S Mitchell and A Aoina, *Western Australian Safety and Accountability Audit of the Armadale Domestic Violence Intervention Project* (2007), prepared for the Department for Communities (WA).

49 Ibid.

50 Legal Aid Western Australia, *Domestic Violence Advocacy Support Central* (2006) <[www.legalaid.wa.gov.au/annualreport/section1/7dvasc.html](http://www.legalaid.wa.gov.au/annualreport/section1/7dvasc.html)> at 2 February 2010.

51 The Magellan project was initiated by Nicholson CJ of the Family Court and Dessau J: D Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (2007), prepared for the Family Court of Australia, 14.

52 See, eg, Department for Families and Communities (SA), *Reporting Child Abuse* (2010) <[www.dfc.sa.gov.au/pub/default.aspx?tabid=485](http://www.dfc.sa.gov.au/pub/default.aspx?tabid=485)> at 12 April 2010; Department of Health and Human

district child protection department office closest to the child's location, from which they are then referred to the police and/or an inter-agency team.<sup>53</sup>

29.50 In Victoria, reports can either be made to the child protection agency or the community-based Child and Family Information Referral Support Teams (Child FIRST). Where the initial assessment reveals safety concerns for the child, the matter is referred to the child protection agency. Where the concerns are more about a child's wellbeing, the matter will be referred to Child FIRST (or another community service organisation).<sup>54</sup> A similar community-based intake model has recently been adopted in Tasmania.<sup>55</sup>

29.51 In NSW, mandatory reporters who work in one of the six government agencies where there is a Child Wellbeing Unit (CWU)<sup>56</sup> may make a report to their CWU. With the assistance of the specially trained staff at the CWU, the reporter will apply the Mandatory Reporters Guidance assessment tool to determine whether their concerns for the safety of the child meet the legislative threshold for intervention. Where the tool indicates that there is a 'risk of significant harm', the CWU will make a report to the Child Protection Helpline. If, on the other hand, the tool indicates that the matter does not satisfy the threshold, and the CWU does not have concerns about accumulated harm, CWU staff and the reporter will work together to determine where best to refer the child and the family for appropriate support and assistance.

#### ***Initial assessment and referral to police***

29.52 The systems in place for initial assessment of a report and its referral to the police and/or the inter-agency team differ in each state and territory. In a number of jurisdictions, there is a positive obligation on the child protection agency to refer a report immediately to the police where the report contains allegations of harm that may involve a criminal offence.<sup>57</sup>

29.53 Generally, the initial assessment involves obtaining more detailed information about the child who is the subject of the report, and making an assessment of the degree of harm that the child has suffered, or the degree of risk of harm, to determine whether the report satisfies the reporting threshold. The criteria for referring cases to the police vary between jurisdictions, and sometimes even within jurisdictions. A criticism of some child protection systems has been that there is inconsistency in the

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Services (Tas), *Making a Notification to the Child Protection Intake* (2010) <[www.dhhs.tas.gov.au/service\\_information](http://www.dhhs.tas.gov.au/service_information)> at 12 April 2010 although in Tasmania, reports may also be made to community based Gateway Services.

53 See, eg, Department of Communities (Qld), *Reporting Child Abuse* (2010) <[www.childsafety.qld.gov.au/child-abuse/report/index.html](http://www.childsafety.qld.gov.au/child-abuse/report/index.html)> at 12 April 2010.

54 Department of Human Services, Children, Youth and Families (Vic), *Reporting Concerns about Children or Young People: A Guide for Professionals* (2007) <[www.cyf.vic.gov.au](http://www.cyf.vic.gov.au)> at 12 April 2010.

55 *Children, Young Persons and Their Families Act 1997* (Tas) pt 5B, as amended by *Children, Young Persons and Their Families Amendment Act 2009* (Tas).

56 These have been created within NSW Health (Area Health Services and the Children's Hospital at Westmead), NSW Police, the Department of Education and Training, the Department of Housing, the Department of Ageing, Disability and Home Care and the Department of Juvenile Justice.

57 See, eg, *Child Protection Act 1999* (Qld) s 14(2).

assessment of reports between district offices or different entry points. For example, in a review of the Victorian child protection service, the Victorian Ombudsman stated:

Evidence obtained during my investigation shows that the degree of tolerance of risk to children, referred to as the ‘threshold’, varies across the state according to the local office’s ability to respond. I located many examples of cases where I consider that the risk of harm to children was unacceptable and the department had not intervened.<sup>58</sup>

29.54 To address this issue, a number of jurisdictions have developed and implemented diagnostic assessment tools to ensure that assessments are performed accurately and consistently across the various entry points.<sup>59</sup>

#### ***Police response to reports***

29.55 The police must investigate allegations of abuse or neglect when there is a reason to believe that a criminal offence may have been committed. Invariably this involves interviewing the child or young person. The child or young person must also usually submit to an interview by community services caseworkers to assess whether there are legislative grounds for making an application to the court for a care and protection order, and to determine what family, social support and medical services should be provided.

29.56 Across the states and territories, there are different models of police responses to reports of child abuse and neglect. Essentially these can be divided into three types:

- inter-agency teams, involving police and other agencies;
- joint investigations between police and other agencies; and
- specialised police units.

29.57 Five states and territories have inter-agency teams, as follows:

- New South Wales—Joint Investigation Response Team (JIRT);
- Queensland—Suspected Child Abuse and Neglect (SCAN);
- Western Australia—ChildFirst Assessment and Interview Team (CAIT);
- Northern Territory—Child Abuse Taskforce (CAT); and
- Victoria—Sexual Offences and Child Abuse Investigation Team (SOCIT).

29.58 All inter-agency teams include, as core members, the child protection agency and the police in each state and territory, but some jurisdictions also include other agencies or persons. For example:

- JIRT includes the health department as a core team member (although it is not co-located with the others);

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58 Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009), [170].

59 See, eg. NSW Health, NSW Police, Department of Community Services (NSW), *NSW Joint Investigative Response Team (JIRT) Review*, unpublished (2006), [7.2].

- SCAN includes the health and education departments as core team members, as well as Indigenous representatives and other agencies as required;
- CAIT has included the health and justice departments in training programs;
- CAT includes Indigenous representatives and other agencies as required;
- SOCIT includes sexual assault counsellors as core team members, and forensic medical officers as required.

29.59 Inter-agency teams have the potential to increase the types of services and support that victims receive in addition to child protection and police assistance; and to allow access to greater information and resources by the child protection agency and the police.

29.60 Some inter-agency teams, such as SCAN in Queensland, have a legislative basis. Part 3 of the *Child Protection Act 1999* (Qld) sets out the membership and responsibilities of the core members of SCAN and states that its purpose is to enable a coordinated response to the protection needs of children, by facilitating:

- information sharing between members;
- planning and coordination of actions; and
- responding in a holistic and culturally responsive way to children's protection needs.<sup>60</sup>

29.61 The JIRT program in NSW is policy-based. It provides services exclusively to children and young people aged under 18 years. The roles and responsibilities of each of the agency members are outlined in an MOU between them, which provides:

The role of the NSW Police is to detect and investigate alleged child abuse and neglect. Where appropriate they are to initiate legal proceedings against identified offenders.

The role of [Community Services] is to receive and assess reports of risk of harm to children and young people. [Community Services] also ensure the safety of children and their ongoing care. Where appropriate they initiate Children's Court proceedings.

The role of Health is to identify and report risk of harm to children and young people. They provide treatment, crisis and ongoing counselling as well as medical examinations.<sup>61</sup>

29.62 Caseworkers with the NSW child protection agency and police officers, who are specially trained in interviewing child victims, are jointly responsible for investigating allegations of abuse to determine whether a care and protection order is warranted and whether a criminal offence may have been committed.

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60 *Child Protection Act 1999* (Qld) s 159J.

61 The original MOU was signed in 1997 and was revised in August 2006 following an inter-agency review of JIRT in 2006: see NSW Health, NSW Police, Department of Community Services (NSW), *NSW Joint Investigative Response Team (JIRT) Review*, unpublished (2006).

29.63 A joint response from the three agencies means that a victim is interviewed once and the information is shared among the agencies so that appropriate services are provided to the child or young person and their family members. Not having to repeat his or her story to officers from different agencies significantly reduces trauma and distress to the abuse victim.

29.64 Queensland and Victoria on occasions also organise joint investigations, sometimes between the child protection agency and the police or, in Victoria, between the child protection agency and the Sexual Offences and Child Abuse units.

#### ***Submissions and consultations***

29.65 In the course of the Inquiry, a number of issues were raised in relation to the operation of inter-agency teams, for example, that the police may not always be aware of the impact of their actions in collecting evidence of abuse when matters of family violence or child abuse are raised in family law proceedings. In the Consultation Paper, the Commissions asked whether the existing inter-agency arrangements were effective in practice to ensure that victims are better protected, and that professionals in each part of the system understand the consequences of their actions for other parts of the system.

29.66 A number of stakeholders suggested that parties to inter-agency arrangements, including the police, should receive ongoing training to ensure that each party clearly understands the impact of their actions for other parts of the system, and to ensure that inter-agency teams work effectively.<sup>62</sup> One stakeholder noted that high staff turnover was a problem and that inter-agency arrangements could not rely on particular individuals to make them work.<sup>63</sup> Legal Aid NSW commented that such arrangements have assisted professionals in different parts of the system to a limited extent to understand each others' work and its consequences, but noted that there was scope for an improved level of cooperation.<sup>64</sup>

29.67 The Queensland Government's view was that effective relationships between agencies are best achieved by fostering local agency connections supported by a centrally led agenda.<sup>65</sup>

#### ***Commissions' views***

29.68 In Chapter 30, the Commissions express the view that information-sharing protocols and MOUs are important, but cannot stand alone, and are dependent on the knowledge and involvement of officers and staff. Simply putting protocols in place is not sufficient. In the same way, integrated response arrangements are not simply formal arrangements between agencies. They must be given an ongoing profile among court and agency officers; they must form the basis of an ongoing and responsive

62 Confidential, *Submission FV 184*, 25 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Commissioner for Children (Tas), *Submission FV 62*, 1 June 2010.

63 F Hardy, *Submission FV 126*, 16 June 2010.

64 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

65 Queensland Government, *Submission FV 229*, 14 July 2010.

relationship between the parties and must be supported and implemented in practice. Therefore, the Commissions recommend, below, that integrated responses include a set of common policies and objectives; mechanisms for inter-agency collaboration—including information-sharing protocols, regular inter-agency meetings and liaison officers—and provision for victim support. Chapter 31 acknowledges the importance of ongoing training and education programs.

### ***The Magellan project***

29.69 The Magellan project involves special management of cases where serious allegations of sexual or physical abuse of children are raised during parenting disputes in the Family Court of Australia.<sup>66</sup> Once a case is identified as suitable for the Magellan pathway, it is dealt with by a small, designated team of judges, registrars and family consultants. The Magellan project relies on a collaborative and coordinated set of processes and procedures, with significant resources directed to each case in the early stages.<sup>67</sup> A crucial aspect is strong inter-agency coordination, in particular with state and territory child protection agencies, which helps to ensure that problems are dealt with efficiently and that information sharing is of high quality. An independent children's lawyer is appointed to every Magellan case. Formal protocols for information sharing between child protection agencies and federal family courts apply.

29.70 A pilot program of 100 cases was conducted in Victoria from June 1998 to December 2000,<sup>68</sup> after which the project was rolled out by the Family Court in all states and territories, except Western Australia.

29.71 The Magellan approach commences when a Form 4 is filed with an application for parenting orders.<sup>69</sup> The application is referred to the Family Court Magellan Registrar to be considered for inclusion in the Magellan list.<sup>70</sup> If the court is made aware of allegations of sexual or physical abuse that it deems 'serious', it can request the intervention of the relevant child protection agency as a party under s 91B of the *Family Law Act 1975* (Cth). The state or territory agency then assesses the allegations of abuse and reports its findings to the Family Court. This report (the Magellan Report) is the key mechanism for sharing information and includes information about the history of abuse in the family, any previous notifications, and subsequent action by the child protection agency. It is a significant factor in encouraging parties to settle matters, as such reports often either support or contradict a party's assertion of abuse.<sup>71</sup>

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66 The project was initiated by Nicholson CJ of the Family Court and Dessau J: D Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (2007), prepared for the Family Court of Australia, 14.

67 Ibid, 21.

68 T Brown, R Sheehan, M Frederico and L Hewitt, *Resolving Family Violence to Children: An Evaluation of Project Magellan* (2001).

69 Family Court of Australia, *Form 4—Notice of Child Abuse or Family Violence* <[www.familylawcourts.gov.au](http://www.familylawcourts.gov.au)> at 9 February 2010.

70 Family Court of Australia, *Fact Sheet: Magellan Program* <[www.familycourt.gov.au](http://www.familycourt.gov.au)> at 17 October 2009.

71 D Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (2007), prepared for the Family Court of Australia, 83.

In non-Magellan cases, the child protection agency does not make a report, and merely proffers information it has in respect of the child.<sup>72</sup>

29.72 A team of Magellan judges, registrars and family consultants at each family law registry manages the cases. Generally, the aim is to complete Magellan cases within six months from the case being listed. Early steps in a Magellan case include:

- making appropriate interim orders to protect the child until the matter comes on for trial;
- ordering a Magellan report from the respective state or territory child protection agency including whether it intends to intervene in the Family Court proceedings, whether it has previously investigated these or other allegations, the conclusion and the reasons for the conclusion of the investigation, and any recommendations or other relevant information;
- ordering a subpoena of the child protection agency file;
- ordering the appointment of an independent children's lawyer; and
- ordering a detailed family report, where appropriate, analysing the family dynamics and the needs of the children.

#### *Reviews of the Magellan project*

29.73 The Magellan project was reviewed in 2001 and 2007. Both reviews noted the information-sharing and cooperative arrangements between government agencies and the courts significantly reduced friction between the child protection and family law systems.

29.74 The 2001 review found that:

- the child protection services and family court interface was much improved—the time taken by the child protection service to submit a report fell from an average of 42 days to 32 days, meaning that the reports were undertaken well within the time frame set up for their completion;
- the substantiation rate by child protection staff rose from 23% to 48%;
- disputes were resolved far more quickly, with the average time being taken falling from 17.5 months to 8.7 months;
- the average number of court events fell from an average of five to three events;
- far fewer cases proceeded to a judicial determination—only 13% proceeded this far, compared with 30% previously;
- court orders broke down less frequently—previously some 37% of final orders broke down, while 5% broke down in the new program;

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72 Ibid, 146.

- the amount Victoria Legal Aid spent on all parties per case averaged over all cases in the pilot program was \$13,770 per case—well under the cap allowed for legal aid expenditure on family law cases and compared to the \$19,867 in the non-Magellan comparison group of cases;
- the proportion of highly distressed children fell from 28% to 4%; and
- the parental and legal practitioner levels of satisfaction were high.<sup>73</sup>

29.75 The 2007 review—conducted by Dr Daryl Higgins—also concluded that the Magellan project encourages a greater involvement of child protection agencies in the family law system.<sup>74</sup> In particular:

- Magellan cases were investigated by child protection agencies in 80% of cases, compared to 26.3% of non-Magellan cases; and
- the child protection agency planned to give evidence at trial in 22.5% of cases, compared to 1.3% of non-Magellan cases.<sup>75</sup>

29.76 Both reviews indicate that the interactions of the family law and child protection systems have improved as a result of the project and its method of intensive and coordinated case management of child abuse cases.

29.77 Higgins found that child protection agency compliance with subpoenas in Magellan cases was generally high, and that this was a result of the funded role of independent children’s lawyers in:

- gathering information about the proceedings and facilitated discussions between parents where appropriate;
- procuring funding for family reports in cases where the Family Court’s internal family consultants were not used;
- approaching relevant experts to give evidence in proceedings, ascertaining their availability to give evidence and providing them with documentation relating to the matter; and
- liaising between the parties to ensure that experts selected were not opposed.<sup>76</sup>

#### *Federal Magistrates Court*

29.78 The Federal Magistrates Court (FMC) has no current involvement with the Magellan project. The FMC has adopted provisions for the transfer of more complex matters that are filed in the FMC to the Family Court. This includes matters identified for the Magellan list. The court has adopted a benchmark of two days for hearing a family law matter itself or transferring the proceedings to the Family Court. With the

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73 T Brown et al, *Resolving Family Violence to Children: An Evaluation of Project Magellan* (2001), 132.

74 D Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia’s Magellan Case-Management Model* (2007), prepared for the Family Court of Australia, 12.

75 Ibid, 70 (table 5.10) and 214 (table 8.3).

76 Ibid, 78, 107.

implementation of a common registry for the Family Court of Australia and the FMC, the transfer of matters between the courts appears to have become less of an issue for complex child abuse cases which are part of the Magellan project.

#### ***Submissions and consultations***

29.79 In the Consultation Paper, the Commissions asked whether the gap between the family law and child protection systems could be resolved by collaborative arrangements, such as the Magellan project, and whether the principles of the Magellan project could be applied in the FMC.<sup>77</sup>

29.80 There was some support for extending the principles of the Magellan project to the FMC,<sup>78</sup> although the Australian Government Attorney-General's Department noted that any such extension would have resource implications.<sup>79</sup> Legal Aid NSW was of the view that the Magellan principles could be applied in the FMC, including the appointment of a nominated judicial officer and registrar to case manage matters, the determination of interim and final applications in a more reasonable time frame, and the development of protocols between the courts and agencies. The submission expressed the view, however, that a Magellan report—summarising the child protection agency file—was insufficient and that child protection agencies should be more closely involved in the management of Magellan cases.<sup>80</sup>

29.81 The Chief Justice of the Family Court and the Chief Federal Magistrate stated, however:

As the Family Court deals with the most complex disputes, it is appropriate for Magellan and ‘Magellan-type’ cases ... to be dealt with by the Family Court. There are doubts about the effectiveness of Magellan type principles in a high volume court like the FMC.<sup>81</sup>

29.82 The Queensland Law Society was of the view that, given the resource implications for the FMC, Magellan matters should remain with the Family Court.<sup>82</sup> The Law Society of NSW suggested that the proposed integration of the two courts may eliminate this issue.<sup>83</sup> In the interim, protocols between the two courts should ensure that cases involving serious abuse are transferred to the Family Court Magellan

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77 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Questions 14–15, 14–16 and 14–17.

78 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

79 Australian Government Attorney-General's Department, *Submission FV 166*, 25 June 2010.

80 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

81 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

82 Queensland Law Society, *Submission FV 178*, 25 June 2010.

83 R McClelland (Attorney-General), ‘Rudd Government to Reform Federal Courts’ (Press Release, 5 May 2009).

list.<sup>84</sup> One stakeholder expressed the view that it was important to clarify when cases should be transferred from the FMC to the Family Court.<sup>85</sup>

#### ***Commissions' views***

29.83 The Commissions note the positive outcomes associated with the Magellan project reflected in the two reviews discussed above. While there was some support for extending the principles of the Magellan project to the FMC, the majority of stakeholders were of the view that Magellan matters—where serious allegations of sexual or physical abuse of children are raised during parenting disputes—should be referred to and dealt with by the Family Court of Australia, applying the full range of Magellan project initiatives. In particular, the Commissions note the views of the Chief Justice of the Family Court and the Chief Federal Magistrate that the Magellan principles might not be effective in a high volume court like the FMC. The Commissions are not, therefore, recommending that the full range of Magellan project principles be formally applied in the FMC.

29.84 On the other hand, collaborative relationships between courts and agencies involved in family law and child protection matters are important to ensure that child abuse is identified and responded to in an appropriate way. This applies in the FMC, as well as in the Family Court. In Chapter 30, the Commissions note that the FMC has protocols in place with child protection agencies in a number of jurisdictions—NSW and Queensland. These arrangements are intended to facilitate cooperation and sharing of information to ensure that the protective needs of children are met.<sup>86</sup> In that chapter, the Commissions recommend that the federal family courts, including the FMC, and child protection agencies develop protocols to provide a framework for the exchange of information in those jurisdictions that do not yet have such arrangements in place. The Commissions also recommend that parties to such protocols should receive ongoing training to ensure that the arrangements are effectively implemented.<sup>87</sup>

29.85 The Commissions note, in addition, the arrangements for the transfer of more complex matters, including Magellan matters, that are filed in the FMC to the Family Court of Australia and that the court has adopted a benchmark of two days for hearing a family law matter itself or transferring the proceedings to the Family Court. In the Commissions' view, these arrangements and the benchmarked timeframe for transfer to the Family Court are appropriate.

#### **Essential elements of integrated responses**

29.86 Integrated responses offer clear benefits for service delivery to victims, including—importantly for this Inquiry—improving the experience of victims involved in multiple proceedings across different legal frameworks. For example, fax-back protocols between police and victim support services, and co-location of services,

84 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

85 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

86 Family Court of Australia, *Protocol between the Department of Child Safety Queensland, the Family Court of Australia and the Federal Magistrates Court of Australia* (2007), 1.1.

87 Rec 30–17.

facilitate victims' access to a range of options and referrals. Another benefit is that such responses enable networks to be formed across services and government departments at a local level, fostering collaboration and communication between key players in different legal frameworks, and providing ongoing improvements to practice and understanding.

29.87 As discussed above, a number of Australian jurisdictions have either implemented, or are in the process of implementing, various forms of integrated responses. Some of these are quite comprehensive, while others are smaller in scale, for example, liaison arrangements between police and victim support services.

29.88 In the course of the Inquiry, the Commissions sought feedback on what key features were required to ensure the success of an integrated response. The elements that emerged most clearly from consultations and submissions, which are discussed below, are: common principles and objectives; mechanisms for inter-agency collaboration; and provision of victim support, including legal representation. Information sharing, which is another essential element of integrated responses, is discussed separately in Chapter 30. Specialised courts and offender programs, which may also be features of integrated responses, are discussed in Chapter 32.

### **Common principles and objectives**

29.89 One of the first steps in developing any integrated response is for key players to agree upon shared principles and objectives, which are sometimes set out in legislation.<sup>88</sup> The Safe at Home program in Tasmania is based on the following principles:

- family violence is a crime and where evidence exists that it has been committed arrest and prosecution will occur;
- police are responsible for providing immediate intervention to secure victim safety and manage the risk that the offender might repeat or escalate the violence;
- the safety of victims is paramount;
- the victim does not determine the response of the justice system;
- wherever possible, victims should be able to choose to remain in or return (as soon as possible) to their own homes; and
- the criminal justice response to family violence should be seamless and the roles and responsibilities of each participating agency and service should be clear.<sup>89</sup>

29.90 The objectives of the Program are to:

- achieve a reduction in the level of family violence in the medium to long term;

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<sup>88</sup> See, eg, *Family Violence Protection Act 2008 (Vic)* s 1.

<sup>89</sup> Successworks, *Review of the Integrated Response to Family Violence: Final Report* (2009), 10.

- improve safety for adult and child victims of family violence; and
- change the offending behaviour of those responsible for the violence.<sup>90</sup>

29.91 Principles and objectives are sometimes set out in state and territory strategic plans or responses to family violence. For example, similar principles and objectives have been stated as part of the *NSW Strategy to Reduce Violence against Women*; Queensland's whole of government response to family violence, released in July 2009;<sup>91</sup> South Australia's statement on the Women's Safety Agenda;<sup>92</sup> and Western Australia's strategic plan for family violence.<sup>93</sup> At the time of writing, both Victoria and the Northern Territory were preparing similar strategic plans. It is likely that these will also include shared principles and objectives, as in other state and territory plans or strategies.

29.92 Ensuring a shared understanding of the nature of family violence is a foundational step in ensuring integration. In Chapters 5 and 6, the Commissions recommend a common definition of family violence across state and territory family violence legislation, the *Family Law Act* and other legislation.<sup>94</sup> In addition, in Chapter 18, the Commissions examine the need for a common approach to risk assessment for family violence based on that common definition. The Commissions consider the Victorian framework for common risk assessment to be a good model, and suggest that other state and territory governments consider the development of similar frameworks to assess and manage the risk of family violence in their jurisdictions.

29.93 In the Commissions view, this shared understanding of the nature of family violence and shared approach to risk assessment must then be reflected in the objectives and principles that underpin state and territory strategic plans and inter-agency programs. In the Consultation Paper, the Commissions proposed that integrated responses should be underpinned by common policies and objectives.<sup>95</sup>

#### ***Submissions and consultations***

29.94 The Sydney Women's Domestic Violence Court Advocacy Service submitted that:

A common set of domestic and family violence policies and objectives be adopted Australia-wide, emphasising the criminal nature of domestic and family violence; the safety of victims and accountability for perpetrators; and the need for a coordinated and integrated response to domestic and family violence which emphasises victim support.<sup>96</sup>

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90 Ibid.

91 Queensland Government, *For Our Sons and Daughters: A Queensland Government Strategy to Reduce Domestic and Family Violence 2009–2014* (2009).

92 South Australian Government, *Our Commitment to Women's Safety in South Australia* (2005)

93 Department for Child Protection (WA), *WA Strategic Plan for Family and Domestic Violence 2009–2013* (2009), 7.

94 Rec 5–1.

95 Consultation Paper, Proposal 19–1(a).

96 Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010.

29.95 The joint submission from Domestic Violence Victoria and others noted that the Victorian family violence integrated model is based on a whole of government approach in which five ministers—the Attorney-General, the Minister for Housing and Local Government, the Minister for Police and Emergency Services, the Minister for Community Services, and the Minister for Women’s Affairs and Children and Early Childhood Development—and their departments work within a single policy framework. The Family Violence Ministers Group meets quarterly, provides leadership and oversees family violence reforms:

Multi-ministerial responsibility provides a holistic approach to addressing the issue and encourages mutual accountability. Within this model Victoria has benefited from high-level leadership and the weight this carries in driving reform.<sup>97</sup>

29.96 The National Association of Services Against Sexual Violence noted that in the ACT a ‘Wraparound’ Charter had been developed to provide an underpinning set of standards for the FVIP and expressed the view that the Charter and program represented best practice in this area.<sup>98</sup>

29.97 The NPY Women’s Council Domestic and Family Violence Service noted that it was particularly important to the work of that Service that Western Australia, South Australia and the Northern Territory have common policies and objectives.<sup>99</sup>

29.98 The Aboriginal Family Violence Prevention and Legal Service Victoria (AFVPLS Victoria) stated that integrated family violence responses were critical. Importantly, any such response required dedicated Aboriginal and Torres Strait Islander strategies and services to be developed, but then incorporated into mainstream strategy. Developing dedicated strategies and services provides an opportunity for Indigenous communities to participate and lead change. The submission indicated, however, that incorporating such strategies and services into the mainstream was likely to strengthen the response of mainstream agencies to Indigenous victims of family violence.<sup>100</sup>

#### *Commissions’ views*

29.99 Where organisations work together to develop and deliver integrated responses to family violence—whether this involves just two organisations or many more—there is value in coming to an agreement about the principles and objectives that are to underpin the response. In Chapters 5 and 6, the Commissions discuss the importance of developing a shared understanding of what amounts to family violence across the different legal frameworks considered in this Report, to help close gaps between the systems. The Commissions are also of the view that developing common principles and objectives when integrating the work of different agencies and organisations in

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97 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

98 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

99 Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women’s Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

100 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

response to family violence will help to ensure that all the parties involved in the integrated response understand what they are working together to achieve.

29.100 The Commissions note that the process of developing common principles and objectives should involve all the agencies and organisations that are to be involved in the integrated response, including those working with Aboriginal and Torres Strait Islander communities, CALD communities and the disability sector. As noted by the AFVPLS Victoria, the development process itself is an important point of contact and empowerment for those involved. It may also provide a basis for ongoing and active collaboration between the parties, which is essential to the success of any integrated response. Inter-agency collaboration is discussed further below.

29.101 The Commissions note that there are a number of ways in which the Australian, state and territory governments may foster the development and dissemination of common principles and objectives to underpin integrated responses to family violence. These include developing strategic plans and creating regional, state and territory or national steering committees. Any such process should, however, involve close consultation with relevant stakeholders to ensure that the principles and objectives of any particular integrated response mechanism accurately reflect and respond to the diversity of local conditions and needs.

**Recommendation 29–1** The Australian, state and territory governments, in establishing or further developing integrated responses to family violence, should ensure that any such response is based on common principles and objectives, developed in consultation with relevant stakeholders.

### **Inter-agency collaboration**

29.102 Inter-agency collaboration is an essential feature of integrated responses. The need for collaboration between agencies, including the courts, is one of the most important issues raised in this Inquiry. In particular, the need to share information in appropriate circumstances to ensure that people do not fall into gaps between the family law, family violence and child protection systems is discussed in detail in Chapter 30. That discussion canvasses issues including the impact of privacy legislation on the sharing of agency information; information sharing protocols and MOUs; and the development of a national database.

29.103 In this chapter, the Commissions consider other issues that arise in relation to inter-agency collaboration. These include the advantages and challenges of collaboration, as well as some of the methods of collaboration.

#### *Advantages of collaboration*

29.104 The way government services are delivered tends to follow the structure of government. For example, services for child protection are typically delivered by a different department from that responsible for crime and justice. Similarly, the delivery of legal services reflects both jurisdictional divisions and different governing legal frameworks.

29.105 These divisions are convenient for those administering the services, but are less convenient for those receiving services. For these reasons, there has been an increasing trend towards coordination and integration of services, by either co-locating or by integrating services delivered to a particular category of ‘client’.<sup>101</sup> The advantages of integration have been described as follows:

In essence there are three main sets of arguments for improved integration: improved access for consumers; increased efficiency, achieving more from the use of limited resources; and enhanced effectiveness, resulting in enhanced outcomes for consumers and funders.<sup>102</sup>

29.106 More specifically in the context of this Inquiry, the advantages of inter-agency collaboration include:

- ensuring that victims of family violence are referred to appropriate services wherever and whenever they are brought into contact with government agencies or services;
- minimising elements of duplication or inefficiencies arising from the delivery of multiple services by multiple agencies, such as through the sharing of information;
- increasing the capacity of services and legal systems to manage complex cases through networks of information and services, and improving the decisions made by agencies and courts as a result;
- ensuring that victims of family violence do not fall into gaps between agencies and legal systems working in isolation from each other; and
- avoiding or reducing the prospect of conflict between measures or policies adopted by different agencies.

#### *Challenges of collaboration*

29.107 Despite these advantages, caution needs to be exercised in the promotion of inter-agency collaboration for its own sake. While inter-agency collaboration has a number of advantages,

what is required ... is not the promotion of the goal of service integration as an end in itself, but a more differential approach. Clear evidence of the nature and extent of problems in particular spheres of service provision together with evidence of the value of specific initiatives to address these difficulties is necessary before an ongoing commitment is made to new initiatives.<sup>103</sup>

29.108 Not all services need to be integrated for all people, and services may have such different approaches or philosophies that they ought not to be integrated. For this

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101 M Fine, K Pancharatnam and C Thomson, *Coordinated and Integrated Human Service Delivery Models: Final Report* (2005), prepared for the Social Policy Research Centre, University of New South Wales, 2.

102 Ibid.

103 Ibid, 3–4.

reason, recommendations and suggestions for specific inter-agency collaboration are discussed in the specific contexts in which they arise in this Report.

29.109 It is also important to recognise a number of challenges of inter-agency collaboration. One of these is the need for adequate resourcing, training and support. Inter-agency collaboration ‘costs before it pays’: it requires resourcing for staff and support systems, services, and start up costs.<sup>104</sup> There is also often a need for cultural change within organisations and the development of trust between organisations. Staff may experience a certain amount of pressure, and be required to undertake ‘tasks of greater complexity requiring more training and expertise, time and effort, if their resources do not expand’.<sup>105</sup> Another key challenge is ensuring that the mechanisms of collaboration are flexible enough to meet the respective needs of the different partners, and yet stable enough to endure.

#### ***Methods of collaboration***

29.110 As discussed above, there are different mechanisms of collaboration. At the level of policy, agencies may collaborate in establishing overarching policy bodies or steering committees and agreeing upon common principles and objectives.

29.111 At an operational level, key ways in which agencies may collaborate include:

- developing inter-agency networks and contact points, including placing liaison officers from one agency in another agency;
- sharing information obtained by agencies;
- sharing knowledge by agencies (such as joint training);
- referring victims to different agencies;
- developing protocols for communication and working together; and
- establishing collaborative decision making mechanisms, such as joint case management conferences.

29.112 Collaboration between agencies and other actors is discussed at various points in this Report. For example, information sharing between agencies—including the courts—and the development of protocols that set out procedures for working together and for exchanging information are discussed in Chapter 30. The need for joint training is discussed in Chapter 31. Joint case management, including the Magellan project is discussed above. Cooperation between federal family courts and state and territory courts dealing with family violence is discussed in Chapters 15 to 17. Cooperation in the context of child protection and family law is discussed in Chapter 19 and in the context of child protection and the criminal law, in Chapter 20.

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104 Ibid, 6.

105 Ibid.

***Submissions and consultations***

29.113 The joint submission from Domestic Violence Victoria and others noted that the Victorian integrated response is supported by the Family Violence Statewide Steering Committee, which convenes quarterly and provides advice to ministers. The Committee includes representatives from both government and non-government sectors, such as the police, courts, family violence crisis and recovery services, community legal services and men's behaviour change programs. The Committee focuses on the development of integrated, multi-agency responses to family violence.

29.114 The submission noted that close collaboration and consultation with non-government service providers is important to ensure that the work of the Committee is informed by the expertise of individuals working in the community, so that it is grounded in practical experience. In addition, these stakeholders submitted that it was critical to include those working with the most vulnerable individuals, for example, Indigenous women, CALD women, and women with disabilities. The submission also noted the importance of clear information sharing arrangements and inter-agency protocols.

29.115 National Legal Aid noted in relation to the inter-agency agreement and MOU between the Family Court of Western Australia, the Department of Child Protection (DCP) and Legal Aid WA, that:

To facilitate the operation of the MOU, DCP has located a DCP worker at the Family Court. The worker represents the values, practices and concerns of DCP in problem solving and client management processes, increasing the court and DCP's knowledge and understanding of each other, their respective roles and their shared responsibility for the welfare of children.<sup>106</sup>

29.116 National Legal Aid also noted that the MOU commits the parties to share information and resources as far as is practicable and permissible pursuant to provisions of the relevant legislation in order to achieve the best possible outcomes for children. It also commits the parties to ensuring that information and training are provided to agency staff to ensure the workability of the arrangements and to meeting regularly to monitor the operation of the MOU and to address any case management issues that are identified.<sup>107</sup>

29.117 As noted above, the AFVPLS Victoria was supportive of integrating dedicated Aboriginal and Torres Strait Islander strategies and services into the mainstream in order to strengthen the response of mainstream agencies to Indigenous victims of family violence. The submission also indicated that, in Victoria, there was a need to better integrate broader criminal justice initiatives with family violence initiatives because the two are often interrelated. In addition, the submission expressed strong support for Aboriginal and Torres Strait Islander liaison officers to be placed in federal family courts.<sup>108</sup>

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106 National Legal Aid, *Submission FV 232*, 15 July 2010.

107 Ibid.

108 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

***Commissions' views***

29.118 In Chapter 30 the Commissions discuss the importance of establishing information-sharing arrangements between agencies and organisations to facilitate communication and a more integrated approach—based on common objectives and principles—in the family law, family violence and child protection systems. However, as discussed above, such arrangements, protocols and MOUs cannot stand alone and are dependent on the knowledge and involvement of officers and staff. Simply putting such arrangements in place is not sufficient. They must be given an ongoing profile among court and agency officers; they must form the basis of an ongoing and responsive relationship between the parties and must be supported and implemented in practice.

29.119 In Chapter 30, the Commissions recommend ongoing training for parties to protocols and MOUs to ensure that the arrangements are well known and understood and that the arrangements are effectively implemented.<sup>109</sup>

29.120 The Commissions also note stakeholder feedback that other mechanisms are important to support effective collaboration. Consultations and submissions noted the importance of personal contact between officers and staff in agencies and organisations working together, in particular, the importance of regular meetings. Such meetings provide an opportunity for parties to discuss the advantages and challenges of the relationship, and to address operational issues on an ongoing basis.

29.121 Finally, stakeholders noted that designated contact people within agencies, and the use of liaison officers from one agency placed in another agency or organisation were of assistance. Such individuals provide an accessible and knowledgeable point of contact, and establish bridges between agencies and organisations that can help them to understand each other and work together more effectively.

**Recommendation 29–2** The Australian, state and territory governments, in establishing or further developing integrated responses to family violence, should ensure ongoing and responsive collaboration between agencies and organisations, supported by:

- (a) protocols and memorandums of understanding;
- (b) information-sharing arrangements;
- (c) regular meetings; and
- (d) where possible, designated liaison officers.

<sup>109</sup> Recs 30–16 and 30–17.

### **Victim support services**

29.122 Victim support is also an important element of integrated responses, because victim support workers play a pivotal role in ‘integrating’ the system for victims by helping them to navigate between the different legal frameworks. In addition, and as discussed in detail in Chapter 26, relevant and timely support for victims of sexual assault may help to reduce attrition rates in the criminal law context.<sup>110</sup> Victims who are supported make better decisions and are more likely to use both the legal system and available government services. In consultations, stakeholders repeatedly emphasised the importance of victim support services as the key mechanism of integration from the point of view of victims.

29.123 In each state and territory, victim support services offer some or all of the following:

- assistance to understand the legal process and court procedures;
- tours of courts to familiarise clients;
- support during court attendance;
- information on the responsibilities and rights of witnesses and victims;
- information on the status and progress of proceedings;
- liaison between clients and prosecutors or police;
- provision of, or referral to, appropriate welfare, health, counselling and other support services;
- assistance with victims’ compensation claims; and
- assistance with the preparation of victim impact statements.

29.124 Victim support may be provided at different points of entry into the legal system. Support may be offered at, or soon after, a family violence incident, for example, where the police have been called to attend. Support may also be provided later by telephone or at centres where victims call for advice and information. Support is also important in the lead up to a court appearance and on the occasions the victim attends court.

29.125 The ACT’s model of victim support delivery was widely recognised among stakeholders as a leading model, although not necessarily feasible in larger jurisdictions.

29.126 In the ACT, the DVCS has an MOU with the Australian Federal Police (AFP). This provides that police should offer the services of DVCS at the time of a family violence incident to all parties present at the incident, except those taken into

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110 See, in particular, Rec 26–2.

custody. Approximately 85% of people accept this suggestion.<sup>111</sup> DVCS crisis workers are informed by the police if the parties wish to use their services, and typically arrive at the scene where police brief the workers. The MOU is implemented and administered by a management committee constituted jointly by the AFP and DVCS. As noted above, ‘fax-back protocols’ also operate in other areas and enable close collaboration between police and victim support services, and early delivery of victim support.

29.127 The DVCS is also an approved crisis support organisation under the *Domestic Violence Agencies Act 1986* (ACT).<sup>112</sup> Under s 18 of that Act, a police officer or staff member of the AFP,<sup>113</sup> on suspicion of past or future commission of a ‘domestic violence offence’, may disclose ‘any information that is likely to aid the organisation in rendering assistance to the person or to any children of the person’. The DVCS also offers 24-hour telephone support and court support (although not court advocacy) services. It also acts as an advocate with government agencies including child protection agencies.

29.128 Another aspect of victim support is court assistance schemes. In NSW, for example, the Legal Aid Commission operates 33 Women’s Domestic Violence Court Assistance Schemes. Support workers can provide information about protection orders, act as a support person in court, explain the court process, and refer victims to other services. Victim support workers are also provided as part of the Domestic Violence Intervention Court Model (DVICM) in NSW. Notably, an independent evaluation indicated that victim support was by far the most successful element of the DVICM.<sup>114</sup>

29.129 While court support workers cannot themselves provide legal advice, they may be able to organise lawyers to provide legal advice in a particular case.<sup>115</sup> The Women’s Family Law Support Service also provides court support and information at the Sydney and Melbourne registry of the Family Law Courts,<sup>116</sup> and a similar service—the Women’s Information Service Family Court Support—is provided in South Australia.

29.130 Victim support is a key aspect of the Victorian specialised family violence courts, discussed in Chapter 32. An on-site victim support worker is available during the court days allocated to family violence hearings. In a joint submission with a number of other stakeholders, Domestic Violence Victoria noted that:

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111 Domestic Violence Crisis Service (ACT), *Domestic Violence Crisis Service (ACT)* <[www.dvcs.org.au/domesticviolencb.html#CrisisIntervention](http://www.dvcs.org.au/domesticviolencb.html#CrisisIntervention)> at 14 April 2010.

112 See Domestic Violence (Crisis Support Organisation) Approval 1992, 8 July 1992, authorised under s 17 of the *Domestic Violence Agencies Act 1986* (ACT).

113 A branch of the AFP, ACT Policing, is responsible for policing in the ACT.

114 L Rodwell and N Smith, *An Evaluation of the NSW Domestic Violence Intervention Court Model* (2008), prepared for the NSW Bureau of Crime Statistics and Research.

115 Legal Aid NSW, *Women’s Domestic Violence Court Assistance Schemes* <[www.legalaid.nsw.gov.au/asp/index.asp?pgid=728](http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=728)> at 2 February 2010.

116 Richard Chisholm noted in his 2009 report that this service had proved particularly invaluable to victims of family violence: R Chisholm, *Family Courts Violence Review* (2009), 151, fn 161.

In Victoria a number of regions are currently establishing Crisis Advocacy Response Services (CARS). This multi-agency model is premised upon a sexual assault crisis model and offers women the opportunity to explore the full range of options for safety without necessarily being dislocated from their home and community. The CARS model typically involves participation by family violence agencies, the central statewide crisis intake and referral agency and Victoria Police. This twenty-four-hour, seven-day-per-week program differs from the ACT's Family Violence Intervention Project (FVIP) model in that a support worker does not accompany the police to the incident. Instead they meet soon after (within forty minutes) at a safe place (eg police station, hospital, motel or safe unit) where the woman is provided with a focussed intervention at the point of crisis. She is provided with face-to-face crisis counselling, information about legal options, information about material aid, referrals, advocacy and support. Preliminary findings through a CARS pilot in metropolitan Melbourne demonstrate that a majority of women assisted have been able to return home with an exclusion order in place and a range of support options available to them.<sup>117</sup>

29.131 The importance of victim support has also been recognised in the United Kingdom's national strategy for reducing family violence, which includes as a core element the funding of Independent Domestic Violence Advisors (IDVAs) and Independent Sexual Violence Advisors (ISVAs). The role of these advisors is to 'help victims navigate their way through various systems; for example, the criminal justice system ... the civil court system, and other systems such as housing, health, and education'.<sup>118</sup> They are especially associated with the specialised family violence courts in the United Kingdom and Multi-Agency Risk Assessment Conferences (MARACs), which provide multi-agency responses to very high-risk victims.

29.132 In 2009, an independent evaluation of IDVAs in the United Kingdom found:

The IDVA role offers a unique opportunity to provide independent, objective advice to victims about their options, and one that is not duplicated by any other worker. IDVAs navigate multiple systems and are crucial contributors to multi-agency initiatives, especially MARACs. Their specialist skills and ability to provide both individual and institutional advocacy are very highly valued.<sup>119</sup>

29.133 The evaluation found strong support for the work of the advisors in court support, citing one victim as follows:

To have that support, it just gives you the strength to go and give evidence. I could have backed out many times because I was afraid to stand up and go against my ex-husband but having [the Advisor] there, she gave me the strength to go on with it. It is a hard thing to do, but having someone there to talk to you and listen to you, to reassure you everything will be ok, it did really help.<sup>120</sup>

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<sup>117</sup> Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

<sup>118</sup> A Robinson, *Evaluation of Independent Sexual Violence Advisors (ISVAs) and Independent Domestic Violence Advisors (IDVAs)* (2009), prepared for the Home Office (UK), 15.

<sup>119</sup> Ibid, 4.

<sup>120</sup> Ibid, 16.

29.134 The evaluation also noted that partner agencies

were quick to comment on the importance of providing support to victims, as they were sympathetic to the stress involved in a court case. In fact, IDVA support was viewed as a necessary precursor to having successful court outcomes; for example, reducing retraction, giving better evidence, and obtaining convictions.<sup>121</sup>

#### ***Submissions and consultations***

29.135 The Magistrates' Court and Children's Court of Victoria expressed the view that it was important to have victim support services available at various stages in the legal process, in particular, when a victim first attends court to apply for a protection order. The submission also noted the importance of support for respondents, stating that victims will not be safe unless steps are taken to address the respondents' underlying issues, which may include alcoholism, drug addiction, mental health and accommodation issues.<sup>122</sup>

29.136 A number of stakeholders underlined the importance of victim information and support in reducing the attrition rate in sexual assault cases, including those arising in a family violence context.<sup>123</sup>

29.137 The Sydney Women's Domestic Violence Court Advocacy Service noted that in the United States, Canada, the United Kingdom and New Zealand, victim advocates are an integral feature of domestic violence courts. The submission noted that the most critical feature of the specialised family violence courts in Manitoba, Canada is reported to be the in-house Women's Advocacy Program, consisting of three social workers and one lawyer with 'access to all information including that provided to the court and who provide information, support and advocacy for family violence victims and have particular regard to safety plans and safety measures for victims'. The Service submitted that:

State and territory governments should, to the extent feasible, make victim advocates available at family and domestic violence-related court proceedings, and enable advocates access to all relevant information including that provided to the court.

In this regard, SWDVCAS agrees with the Commissions' statement that the NSW Domestic Violence Court Advocacy Service is a useful precedent for productively mainstreaming across all courts dealing with domestic and family violence.<sup>124</sup>

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121 Ibid.

122 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

123 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010. The importance of victim support in the context of sexual assault cases is discussed in detail in Chapter 26.

124 Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010.

29.138 The joint submission from Domestic Violence Victoria and others noted that:

While provision of Magistrates' and Family Court support is recognised as an important, indeed best practice element of the work undertaken by family violence refuge and outreach services as part of their case management practice, many agencies are unable to meet demand for court support to their clients due to funding constraints that do not allow agencies to release staff to attend court hearings. While some agencies do have dedicated court support staff, DV Vic, the peak body for specialist family violence services in Victoria, has heard of numerous instances of agencies unable to provide this service, or forced to cease an existing service to its clients due to lack of capacity.<sup>125</sup>

29.139 In addition, even where integrated systems are more navigable for women generally, the submission noted that some high risk groups still have difficulty accessing services. In Victoria, funding for Intensive Case Managers has gone some way to addressing this issue. Based regionally, Intensive Case Managers provide extra support for women with disabilities and women from CALD communities to assist them to access services. The submission expressed the view that, where such positions are well resourced, they have the potential to greatly enhance an integrated system.<sup>126</sup>

29.140 The Julia Farr Association also noted that it was important to ensure that

there is adequate provision of augmented victim support for people living with disability who may require additional communication, advocacy and decision-making support because of their circumstances.<sup>127</sup>

29.141 The AFVPLS Victoria discussed the importance of dedicated Aboriginal and Torres Strait Islander victim support services, in particular, after hours crisis support for victims, including children:

Significant problems remain with respect to contact between ATSI people and police. Appropriate support at the point of crisis intervention is more likely to lead to safer outcomes in the short and long term. Significant decisions are required to be made at the point of crisis when women are traumatised and generally ill-equipped to make considered decisions. Mistrust of police and legal processes by ATSI women compound these difficulties. Attendance of workers with police at family violence incidents should be trialled. In large rural areas this may not be practical however offering an ATSI family violence victim the option to contact a dedicated ATSI crisis service by telephone would be an improvement. The service could assist in communicating/negotiating with police.<sup>128</sup>

29.142 The submission noted that, anecdotally, Aboriginal and Torres Strait Islander women were not accessing mainstream after hours crisis support services in Victoria in significant numbers:

It is the experience of FVPLS Victoria that ATSI women are more likely to seek assistance in relation to family violence and sexual assault from an ATSI service.

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125 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

126 Ibid.

127 Julia Farr Association, *Submission FV 103*, 4 June 2010.

128 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

Culturally appropriate and trusted legal representation is key to ATSI women engaging with and sustaining legal processes. The role of paralegal support workers working alongside solicitors and providing broader holistic support to women who are experiencing multiple layers of disadvantage has also proved highly successful at FVPLS Victoria. ATSI women must be given options as to whether they prefer to access an ATSI or mainstream service.<sup>129</sup>

29.143 The submission noted that the Australian Government did not provide funding for the Family Violence Prevention Legal Service (FVPLS) program in metropolitan areas, so that Indigenous women and children in urban areas had to rely on mainstream services. FVPLS Victoria noted that it had secured state government funding for metropolitan services but that no formal agreement between the state and federal governments had been reached about funding the service.

29.144 The NPY Women's Council Domestic and Family Violence Service noted that:

The clients that the Service works with are often under immense pressure from the perpetrator's family, the community and sometimes even their own family to drop the charges. Clients often are blamed for the perpetrator being in gaol and want to get the perpetrator out of gaol to stop that blame. Clients need ongoing support from the time charges are laid, when the matter is heard in court and even while the perpetrator is serving a gaol sentence.<sup>130</sup>

29.145 Another stakeholder also emphasised the need for specialised Aboriginal and Torres Strait Islander, CALD and disability victim support services.<sup>131</sup>

29.146 The Shoalcoast Community Legal Centre discussed the domestic violence intervention service operating out of the Shoalhaven Local Area Command, sponsored by the YWCA NSW. The submission noted that it was very expensive and difficult to sustain a service in which victim support workers are available 24 hours a day to accompany police to family violence incidents. The submission expressed the view that a more sustainable model is one in which police are trained to deal appropriately with incidents and victim support is provided at other points in the process.<sup>132</sup>

29.147 One stakeholder noted that there was a degree of service duplication across NSW and that this situation required review and analysis to determine which existing services were working effectively and where better integration and other improvements could be made.<sup>133</sup>

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129 Ibid.

130 Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010.

131 Berry Street Inc, *Submission FV 163*, 25 June 2010.

132 Shoalcoast Community Legal Centre, *Submission FV 141*, 24 June 2010.

133 Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

29.148 There was significant support expressed for the proposal that court support services for victims of family violence should be available at federal family courts.<sup>134</sup> A number of stakeholders noted that funding would be necessary to support such a service.<sup>135</sup> FVPLS Victoria suggested that, in relation to specialised support services in federal family courts for Indigenous women, this could be implemented through the FVPLS program or through a national Aboriginal and Torres Strait Islander women's legal service.<sup>136</sup>

#### ***Commissions' views***

29.149 There is strong evidence that victim support provided at the time of, or shortly after, an incident to which the police are called, in the lead up to a court appearance and at court, and at other key times during the legal process is an important measure that can improve the ability of victims to navigate between legal frameworks, make better decisions and achieve better outcomes. There is also evidence to suggest that appropriate support can help reduce attrition rates in sexual assault cases.

29.150 In the Commissions' view, one of the most practical methods of improving the interaction in practice of the family law, family violence and child protection frameworks is through strengthening and supporting victim services. Although extra resourcing would be required, it is likely that this would ultimately be one of the most cost-effective measures for improving victim satisfaction and safety.

29.151 There is much to be said for the delivery of victim support at the time the police are called out to an incident, although the Commissions note stakeholder comments about the difficulties of sustaining such services. A number of fax-back protocols have been initiated between police and victim support services that ensure that victims are put in contact with appropriate services soon after an incident occurs. This may be a more cost-effective practice in some jurisdictions.

29.152 Victim support is also particularly important leading up to and during court appearances. The Commissions note that, while victim support workers are a feature of specialised courts, this service need not be limited to such courts. Indeed, this is one element that the Commissions believe could be productively mainstreamed across other courts. The NSW Domestic Violence Court Assistance Scheme provides a useful precedent. The family court support schemes in NSW, Victoria and South Australia could also be extended nationally across the family court system.

29.153 The Commissions note stakeholder feedback on the difficulties faced by victims from vulnerable communities and sectors and acknowledge the pressing need for specialised Indigenous, CALD and disability victim support services. The

134 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

135 Berry Street Inc, *Submission FV 163*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010.

136 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

Commissions recommend that federal, state and territory governments prioritise the provision of, and access to, culturally appropriate support services for victims of family violence, including enhanced support for victims in high risk and more vulnerable groups.

**Recommendation 29–3** The Australian, state and territory governments should prioritise the provision of, and access to, culturally appropriate victim support services for victims of family violence, including enhanced support for victims in high risk and vulnerable groups.

### Legal advice and representation

29.154 One important practical aspect of victim support is access to legal advice and representation in both family violence and family law proceedings. The role of legal representation and, in particular, the role of legal aid, in ensuring this access was discussed in detail in Richard Chisholm's report, *Family Courts Violence Review* (the Chisholm Review).<sup>137</sup> Chisholm recommended that careful consideration should be given in the funding and administration of legal aid to the serious implications arising from parties, especially children, being legally unrepresented.<sup>138</sup>

29.155 The National Council to Reduce Violence against Women and their Children also highlighted the importance of ensuring that

adequate funding for legal aid and advocacy services is provided by the Australian Government, over and above State/Territory funding, to recognise the significant focus given to domestic and family violence in the 2006 amendments to the *Family Law Act 1975*.<sup>139</sup>

29.156 The Commissions have heard that the limited availability of legal aid and community legal services often result in family violence victims being unable to obtain legal advice and representation, or needing to obtain separate representation for family law and protection order proceedings.

### Submissions and consultations

29.157 In a joint submission, Domestic Violence Victoria and others noted that funding shortfalls in the area of family violence legal services mean that the most vulnerable members of the community—including victims of family violence and their children—are not able to access legal advice and representation. The submission noted that in Victorian family violence protection matters, particularly in the specialised courts, it is community legal centre (CLC) lawyers that usually represent applicants, while Victoria Legal Aid generally assists the respondent:

137 R Chisholm, *Family Courts Violence Review* (2009), 168–172.

138 Ibid, Rec 4.5.

139 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 119.

The most recent Victorian data suggests that in 40% of intervention cases, the police are the applicant. This therefore means that CLC duty lawyers are largely responsible for representing the other 60% of applicants. In addition, CLCs will often provide legal assistance, where capacity allows, to affected family members in police applications.<sup>140</sup>

29.158 The submission also noted that legal aid and CLC lawyers not only provide legal advice and assistance in relation to protection order proceedings, but also provide or refer the client to legal assistance for family law matters.<sup>141</sup> The submission included an extract from the *Federation of Community Legal Centres (Victoria) State Budget Submission 2010–2011*:

In 2005, Darebin and Central Highlands CLCs were funded to establish full-time family violence applicant duty lawyer positions servicing the Family Violence Court Division at Ballarat and Heidelberg Magistrates Courts. In July 2007, the Victorian Government and Victoria Legal Aid provided funding to 10 CLCs across Victoria to establish 6 full-time and 4 half-time specialist family violence lawyer positions. These funding initiatives have been welcome, however many CLCs continue to provide family violence duty lawyer services without any dedicated funding, or without sufficient funding relative to demand ...

Additional family violence duty lawyer positions, supported by 0.5EFT administration support, will cost \$150,000 per position in recurrent funding. New positions should be focussed on the un-funded and underfunded services with the highest demand.<sup>142</sup>

29.159 Legal Aid NSW also noted the importance of providing victims with access to duty lawyers, and the need for lawyers to be better educated about working with family violence victims.<sup>143</sup> The Magistrates' Court and Children's Court of Victoria stated that the issues that arise in family violence protection order proceedings can be complex—often involving family law and criminal law matters—and that legal advice for both victims and respondents was important.<sup>144</sup>

29.160 The Sydney Women's Domestic Violence Court Advocacy Service (WDVCAS) agreed that access to legal services for both victims and defendants was crucial and noted that in NSW:

Legal Aid funds the Domestic Violence Solicitor Scheme (DVSS) which operates in conjunction with WDVCAS at a number of NSW Local Courts. The DVSS uses private solicitors who are rostered to attend court on AVO list days to represent WDVCAS clients in private ADVO applications at mentions and at hearings through a grant of legal aid, and to provide legal advice to women in police initiated ADVOs. The DVSS solicitor can also provide advice on ancillary legal matters, for example, family law matters. At courts with a WDVCAS, but where there is no DVSS, the

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<sup>140</sup> Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

<sup>141</sup> Ibid.

<sup>142</sup> Ibid.

<sup>143</sup> Legal Aid NSW, *Submission FV 219*, 1 July 2010.

<sup>144</sup> Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

WDVCAS Coordinator is generally able to refer eligible clients to private solicitors who are willing to represent the client for the grant of legal aid.<sup>145</sup>

29.161 The WDVCAS submitted that all victims of family violence in NSW should be provided with access to legal advice in family-violence related court proceedings, through the expansion of Legal Aid's DVSS. The Service also submitted that victims in other states and territories be provided with access to legal advice through a service similar to the DVSS.<sup>146</sup>

29.162 The AFVPLS Victoria noted that, in Victoria, legal services are not well incorporated into the family violence integrated strategy and that this could be improved.<sup>147</sup>

29.163 A number of stakeholders indicated the need for specific legal services for Indigenous women victims of family violence.<sup>148</sup> The Immigrant Women's Support Service noted the importance of providing interpreting and translating services for all legal appointments.<sup>149</sup>

#### ***Commissions' views***

29.164 In *Equality before the Law: Justice for Women* (ALRC Report 69), the ALRC highlighted the need for specialised legal advice and representation for Indigenous women noting that:

Most Aboriginal and Torres Strait Islander legal services do not currently benefit women and men equally. This is a result of the combined effect of two common practices. First, most services implement a policy of not acting for either party in a matter between two Indigenous clients. Second, most legal services give priority to defending criminal cases over other matters. On their face these practices appear gender neutral, but their effect is to indirectly discriminate against Indigenous women. Like most groups of women, Indigenous women often need legal assistance in relation to matters of family violence and family law. For most Indigenous women such disputes are with other Indigenous people. The outcome of precluding women from receiving assistance for such matters is that Indigenous women are disadvantaged compared to Indigenous men and compared to other women.<sup>150</sup>

29.165 In relation to women from CALD communities the ALRC stated that:

People of non-English speaking background are particularly in need of legal assistance. For many the Australian legal system differs markedly from that in their country of origin. Those from countries with a civil law system may not be aware of the way the Australian system works and the role of lawyers where the parties have to present all the evidence and arguments. For those reasons and because of language

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145 Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010.

146 Ibid.

147 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

148 See, eg, H McGlade, *Submission FV 84*, 2 June 2010.

149 Migrant Women's Emergency Support Service trading as Immigrant Women's Support Service, *Submission FV 61*, 1 June 2010.

150 Australian Law Reform Commission, *Equality Before the Law: Justice for Women (Part 1)*, Report 69 (1994), Rec 5.2.

difficulties, many women of non-English speaking background find it difficult or even impossible to represent themselves even in very routine matters.<sup>151</sup>

29.166 The Commissions consider that access to legal advice and representation is crucial to ensuring an effective response to family violence. In Chapter 31, the Commissions express the view that lawyers engaging with issues of family violence should be provided with targeted education and training to help them to better assist victims and recommend that Australian law societies and institutes review continuing professional development requirements to ensure that legal issues concerning family violence are appropriately addressed.<sup>152</sup>

29.167 In addition, the Commissions support the recommendations of both the National Council and the Chisholm Review in relation to the provision of legal advice and representation. The Commissions recommend that federal, state and territory governments should prioritise the provision of, and access to, legal services for victims of family violence, including enhanced support for victims in high risk and more vulnerable groups such as Indigenous women, women with disabilities and women from CALD communities.

**Recommendation 29–4** The Australian, state and territory governments should prioritise the provision of, and access to, legal services for victims of family violence, including enhanced support for victims in high risk and vulnerable groups.

### **Victims' compensation**

29.168 Family violence often has a significant impact on the financial security of victims.<sup>153</sup> Victims of family violence may incur medical, counselling, legal and housing expenses, and may have been subject to economic abuse as an element of family violence.<sup>154</sup> Financial compensation assists victims to meet expenses and may play a practical role in improving victim safety by providing, for example, access to funds to meet relocation expenses or to change locks.<sup>155</sup>

29.169 In the Consultation Paper, the Commissions identified statutory victims' compensation schemes—funded by state and territory governments—as the principal

151 Ibid, [4.27].

152 Rec 31–4.

153 The Australian Domestic and Family Violence Clearinghouse are presently conducting a study on women's financial security both before and after abusive relationships. See R Braaf and I Barrett Meyering, 'When Does It End? The Continuation of Family Violence Through the Court Process, Financial Outcomes for Women and Good Practice' (Paper presented at Family Violence: Towards Best Practice Conference, Brisbane, 1–3 October 2009).

154 See Access Economics, *The Cost of Domestic Violence to the Australian Economy, Part I* (2004), esp ch 5.

155 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 98.

method of financial redress for most victims of family violence.<sup>156</sup> However, the Australian Domestic and Family Violence Clearinghouse has identified a key problem with victims' compensation in the context of family violence:

like the criminal law, [victims' compensation schemes] are premised on a 'stranger violence model'. The schemes assume that the victim does not know the assailant, that the violence is a random act and that the victim is not dependent on the assailant. ... As such, many schemes have historically included—and in some cases continue to include—specific requirements that discriminate against women who experience domestic violence.<sup>157</sup>

29.170 The Commissions identified a number of provisions in victims' compensation legislation that did not adequately recognise the nature and dynamics of family violence and, as a consequence, have the potential to discriminate unfairly against victims of family violence. These provisions relate to the following areas:

- criminal acts and injuries;
- related acts or injuries; and
- advantage or benefit to the offender.

#### ***Criminal acts and injuries***

29.171 Generally speaking, legislation links victims' compensation to the commission of specific criminal acts of violence and the suffering of criminal injuries. This typically has the effect of under-compensating victims of family violence, for several reasons. First, acts of family violence may not be recognised as criminal,<sup>158</sup> and in some jurisdictions only specified offences can trigger compensation.<sup>159</sup> Secondly, there is a need to prove each discrete 'incident' and 'injury', which poses problems in the context of the patterns of abuse that typically constitute family violence.<sup>160</sup>

29.172 Another issue is that, generally, the definition of 'injury' emphasises physical injury and does not include the psychological harms typical of family violence. In addition, this restrictive definition does not necessarily recognise the 'differing impact of violence and sexual abuse on the variety of cultures and communities that make up Australian society'.<sup>161</sup>

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156 Consultation Paper, 928–929.

157 I Barrett Meyering, *Victim Compensation and Domestic Violence: A National Overview* (2010), prepared for the Australian Domestic and Family Violence Clearinghouse, 5.

158 C Forster, 'Good Law or Bad Lore? The Efficacy of Criminal Injuries Compensation Schemes for Victims of Sexual Abuse: A New Model of Sexual Assault Provisions' (2004) 32 *University of Western Australia Law Review* 264, 265.

159 Breaches of protection orders are not included in some jurisdictions, such as Victoria, Queensland and the ACT: *Victims of Crime Assistance Act 1996* (Vic) s 3; *Victims of Crime Assistance Act 2009* (Qld) s 25(8); *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 3. The Queensland and ACT Acts allow for criminal acts to be prescribed in regulations, but none are presently prescribed.

160 The nature and dynamics of family violence are discussed in Part B of this Report.

161 C Forster, 'The Failure of Criminal Injuries Compensation Schemes for Victims of Intra-Familial Abuse: The Example of Queensland' (2002) 10 *Torts Law Journal* 143, 164.

29.173 These limitations have been addressed in NSW and the Northern Territory, where the victims' compensation legislation defines domestic violence as a specific injury.<sup>162</sup> The NSW legislation also defines 'sexual assault' as a specific compensable injury.<sup>163</sup> Further, victims of family violence can elect to claim a specific (listed) physical, psychiatric or psychological injury, or claim for 'domestic violence injuries' or an injury of 'sexual assault'.<sup>164</sup> In Victoria, awards may be granted not only in respect of 'injuries', but also in respect of 'significant adverse impacts',<sup>165</sup> including 'grief, distress, [or] trauma'.<sup>166</sup> In Queensland the definition of adverse impacts in relation to sexual offences is more specific and extensive.<sup>167</sup>

29.174 In the Consultation Paper, the Commissions proposed that state and territory victims' compensation legislation should:

- (a) provide that evidence of a pattern of family violence may be considered in assessing whether an act of violence or injury occurred;
- (b) define family violence as a specific act of violence or injury, as in the *Victims Support and Rehabilitation Act 1996* (NSW) and the *Victims of Crime Assistance Regulation* (NT); or
- (c) extend the definition of injury to include other significant adverse impacts, as is done in respect of some offences in ss 3 and 8A of the *Victims of Crime Assistance Act 1996* (Vic) and s 27 of the *Victims of Crime Assistance Act 2009* (Qld).<sup>168</sup>

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<sup>162</sup> *Victims Support and Rehabilitation Act 1996* (NSW) s 5(2), Dictionary, sch 1 cls 6, 7A; *Victims of Crime Assistance Regulations* (NT) regs 5, 22. Regulation 4 defines sexual offences as violent acts for the purposes of the governing Act.

<sup>163</sup> *Victims Support and Rehabilitation Act 1996* (NSW) s 5(2), Dictionary, sch 1 cls 6, 7A.

<sup>164</sup> Ibid sch 1 cls 6, 7A, Table. The most serious category also includes cases of unlawful sexual intercourse in which: serious bodily injury is inflicted; two or more offenders are involved; or in which the offender uses an offensive weapon. The standard amount for the most serious category of sexual assault is \$25,000–\$50,000.

<sup>165</sup> These provisions were inserted by the *Victims of Crime Assistance (Amendment) Act 2000* (Vic), which commenced on 1 January 2001.

<sup>166</sup> *Victims of Crime Assistance Act 1996* (Vic) s 3.

<sup>167</sup> *Victims of Crime Assistance Act 2009* (Qld) s 27. These include: a sense of violation; reduced self-worth or perception; lost or reduced physical immunity; lost or reduced physical capacity, including the ability to have children; increased fear or increased feelings of insecurity; adverse effects of others reacting adversely to the person; adverse impact on lawful sexual relations; and adverse impact on feelings. This provision was introduced in 1995: *Criminal Offence Victims Regulation 1995* (Qld) regs 1A(1), (3).

<sup>168</sup> Consultation Paper, Proposal 19–4. The Queensland Government has repealed its *Criminal Offence Act 1995* and enacted the *Victims of Crime Assistance Act 2009* (VOCA), after comprehensive research and consultation. The legislative scheme will be reviewed in five years, and the Queensland Government is not proposing any major reform until the new scheme is reviewed. The Commissions are also aware that, at the time of writing, the Victorian Department of Justice is conducting a broad review of existing victims of crime compensation in Victoria, including the assistance scheme under the *Victims of Crime Assistance Act 1996* and under the *Sentencing Act 1991*.

### ***Submissions and consultations***

29.175 A large number of submissions supported this proposal.<sup>169</sup> The Australian Domestic and Family Violence Clearinghouse noted its support for

all the above options, particularly option (b). The experience of New South Wales indicates that the introduction of an offence based award for domestic violence can significantly improve women's access to compensation. Based on previous discussion with stakeholders, we understand that there is strong support within the women's and community legal sector for the introduction of similar provisions in Victoria.<sup>170</sup>

29.176 This was confirmed in submissions from Domestic Violence Victoria and others, and the AFVPLS Victoria.<sup>171</sup> However, Women's Legal Services NSW expressed concern that 'including a list of "adverse effects" in legislation could result in more restrictive interpretations, rather than broadening the range of matters to be taken into account when assessing injuries'.<sup>172</sup>

### ***Related acts or injuries***

29.177 All Australian jurisdictions also have provisions deeming that related acts of violence or related injuries should be treated as one claim, or reducing the amount available for related acts or injuries.<sup>173</sup> These provisions have been criticised for failing to adequately recognise the continuing and repetitive pattern of family violence.<sup>174</sup>

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169 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; WESNET—The Women's Services Network, *Submission FV 217*, 30 June 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

170 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

171 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

172 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010.

173 *Victims Support and Rehabilitation Act 1996* (NSW) s 5(3), (4); *Victims of Crime Assistance Act 1996* (Vic) s 4; *Victims of Crime Assistance Act 2009* (Qld) s 25(4); *Victims of Crime Act 2001* (SA) s 23(2); *Criminal Injuries Compensation Act 1985* (WA) s 33; *Victims of Crime Assistance Act 2006* (NT) s 5(3); *Victims of Crime (Financial Assistance) Act 1983* (ACT) s 4(2).

174 See, eg. C Forster, 'The Failure of Criminal Injuries Compensation Schemes for Victims of Intra-Familial Abuse: The Example of Queensland' (2002) 10 *Torts Law Journal* 143, 158.

29.178 The scope of these provisions varies across the jurisdictions. In Queensland, South Australia and the Northern Territory, the definition of related acts encompasses acts committed by the same person or group of persons, so all incidents within a pattern of family violence are likely to be deemed a single act.<sup>175</sup> Moreover, the interpretation by courts of whether an act is ‘related’ varies both within, and between, the jurisdictions.<sup>176</sup> In 2009, for example, the Supreme Court of New South Wales ruled that over 500 sexual assaults committed over 11 years by a member of a foster family were not ‘related’ acts for the purpose of compensation legislation.<sup>177</sup> In Victoria and Queensland, there are provisions requiring that the applicant be given an opportunity to object to the treatment of claims as related.<sup>178</sup>

29.179 In the Consultation Paper, the Commissions proposed that state and territory victims’ compensation legislation should provide that:

- acts are not ‘related’ merely because they are committed by the same offender; and
- applicants should be given the opportunity to object if multiple claims are treated as ‘related’, as in s 4(1) of the *Victims of Crime Assistance Act 1996* (Vic) and s 70 of the *Victims of Crime Assistance Act 2009* (Qld).

#### ***Submissions and consultations***

29.180 This proposal received strong support.<sup>179</sup> For example, the Wirringa Baiya Aboriginal Women’s Legal Centre Inc submitted that:

It is grossly unfair and unjust that a victim of multiple acts of violence should be disadvantaged by the fact that her offender happens to be the same person, as opposed to another applicant who was the victim of different acts of violence committed by different offenders.<sup>180</sup>

175 *Victims of Crime Assistance Act 2009* (Qld) s 25(4); *Victims of Crime Act 2001* (SA) s 23; *Victims of Crime Assistance Regulations* (NT) reg 5(3).

176 This is reviewed in C Forster, ‘The Failure of Criminal Injuries Compensation Schemes for Victims of Intra-Familial Abuse: The Example of Queensland’ (2002) 10 *Torts Law Journal* 143, 156.

177 *JM v Victims Compensation Fund Corporation* [2009] NSWSC 1300.

178 *Victims of Crime Assistance Act 1996* (Vic) s 4(1); *Victims of Crime Assistance Act 2009* (Qld) s 70. In Victoria, this applies unless the Tribunal considers that they should not be treated as related.

179 National Legal Aid, *Submission FV 232*, 15 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; WESNET—The Women’s Services Network, *Submission FV 217*, 30 June 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; J Evans, *Submission FV 60*, 31 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

180 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010.

29.181 Similarly, the AFVPLS Victoria submitted that:

Victim's assistance legislation must acknowledge and appropriately compensate the often repetitive nature of family violence and sexual assault offending. At present, too much discretion and uncertainty prevails ... Specific legislation or practice directions are required to clarify determination of family violence/or sexual assault applications where there are multiple acts of violence and which recognises the serious impact of long term multiple offending upon victims.<sup>181</sup>

#### ***Advantage or benefit to the offender***

29.182 In Victoria, Western Australia and the Northern Territory, victims' compensation schemes may exclude claims on the basis that the offender might benefit from the claim.<sup>182</sup> This has the effect of excluding most victims of family violence—especially where the victim continues to reside with the offender—and fails to take into account the fact the compensation award may be used to leave the offender.<sup>183</sup>

29.183 However, in jurisdictions such as Victoria and Queensland, where compensation is generally paid on the basis of expenses incurred, the potential for awards to benefit the offender is limited. Another option may be to restrict offenders' access to funds.<sup>184</sup> For example, in Queensland, prior to the replacement of its legislation in 2009, the administrative unit referred cases to the Public Trustee where victims might be at risk of psychological or emotional abuse by an offender who stood to benefit from an award.<sup>185</sup>

29.184 The Commissions proposed in the Consultation Paper that state and territory victim's compensation legislation should not exclude claims on the basis that the offender might benefit from the claim.<sup>186</sup>

#### ***Submissions and consultations***

29.185 A significant number of submissions supported this proposal.<sup>187</sup> For example, Domestic Violence Victoria and others, in a joint submission noted:

181 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

182 *Victims of Crime Assistance Act 1996* (Vic) s 54(e); *Criminal Injuries Compensation Act 1985* (WA) s 36; *Victims of Crime Assistance Act 2006* (NT) s 41.

183 L Jurevic, 'Between a Rock and a Hard Place: Women Victims of Domestic Violence and the Western Australian Criminal Injuries Compensation Act' (1996) 3(2) *Murdoch University Electronic Journal of Law* <<http://www.murdoch.edu.au/elaw/issues/v3n2/jurevic.html>>, [75]–[76].

184 K Whitney, 'The Criminal Injuries Compensation Acts: Do They Discriminate Against Female Victims of Violence?' (1997) 1 *Southern Cross University Law Review* 92, 98.

185 Queensland Government, *Victims of Crime Review Report* (2008), 35.

186 Consultation Paper, Proposal 19–9.

187 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; WESNET—The Women's Services Network, *Submission FV 217*, 30 June 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Canberra Rape Crisis Centre, *Submission*

Excluding claims on this basis fails to reflect the nature and dynamics of family violence, particularly where the victim has an ongoing relationship with the offender. Financial circumstances are a critical factor in women's decisions about whether to leave or stay in violent relationships. Many women choose to remain in violent situations rather than risk homelessness, uprooting their children and living in poverty.<sup>188</sup>

29.186 Other submissions, however, stressed the importance of ensuring that the offender does not have access to the compensation.<sup>189</sup> National Legal Aid submitted that

if victims continue their relationship with perpetrators, they may suffer further violence, with the compensation being taken from them forcibly by the perpetrator and used for such purposes as the purchase of drugs and alcohol.<sup>190</sup>

#### ***Commissions' views***

29.187 The Commissions consider that victims' compensation schemes are an important element of victim support, assisting victims to meet medical, legal and other expenses. Compensation also allows victims to take safety measures, such as changing locks, where the victim remains in the same home; or securing emergency accommodation, where the victim leaves.

29.188 In the Commissions' view, victims' compensation legislation across Australia can be improved to ensure that victims of family violence are not disadvantaged. First, the Commissions recommend that victims' compensation legislation should define an 'act of violence' or injury to include family violence. The Commissions make recommendations in Chapter 5 in relation to the definition of family violence.

29.189 Secondly, the Commissions agree with stakeholders that to treat all incidents of family violence as if they constituted a 'single' incident discriminates unfairly against victims of family violence. Legislation should provide that acts are not related merely because they are committed by the same person. Further, legislation should allow a victim to object if claims are to be treated as 'related'.

29.190 Lastly, the Commissions are of the view that excluding compensation on the basis that it would advantage or benefit the offender discriminates against victims of

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*FV 172*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 128*, 22 June 2010; Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 81*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

<sup>188</sup> Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

<sup>189</sup> National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010; Confidential, *Submission FV 96*, 2 June 2010.

<sup>190</sup> National Legal Aid, *Submission FV 232*, 15 July 2010.

family violence who remain in relationships with offenders. However, the Commissions note that a range of mechanisms is available, including making payments on the basis of expenses incurred, to ensure that offenders cannot access victims' compensation awards. The Commissions' view is that victims' compensation legislation should make provision for such mechanisms, rather than exclude claims on the basis that compensation would benefit the offender.

**Recommendation 29–5** State and territory victims' compensation legislation:

- (a) should define an 'act of violence' to include family violence and ensure that evidence of a pattern of family violence may be considered;
- (b) should not provide that acts are 'related' merely because they are committed by the same offender, and should provide that victims have the opportunity to object if claims are to be treated as related; and
- (c) should ensure that victims' compensation claims are not excluded on the basis that the offender might benefit from the claim. (Other measures should be adopted to ensure that offenders do not have access to victims' compensation award.)

### Maintaining momentum

29.191 In the course of the Inquiry, stakeholders commented that it was often a challenge to sustain the momentum and resourcing of integrated responses. Such responses often depend on the energy, enthusiasm and expertise of the people originally involved, and sustaining integrated responses when those people move on is a key challenge.

29.192 One key aspect for retaining momentum is leadership. The Commissions have heard from stakeholders that committed leadership is necessary to drive integrated responses forward. One model, used in the ACT, provides for a statutory position of coordinator. The ACT Victims of Crime Coordinator chairs the FVIP in the role of Domestic Violence Project Coordinator under the *Domestic Violence Agencies Act 1986* (ACT).<sup>191</sup> This model has the benefit of ensuring that one person has statutory responsibility and access to resources for driving the integrated response forward, and ensuring a degree of continuity and victim-focused leadership.

29.193 A separate issue is whether integrated responses themselves should have a legislative basis. The FVIP, like other integrated responses in Australia, does not have a legislative basis. In the Consultation Paper, the Commissions sought feedback from stakeholders on whether legislative support for integrated responses is desirable and, if so, what such legislation should address.

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191 *Domestic Violence Agencies Act 1986* (ACT) pt 3.

***Submissions and consultations***

29.194 The Domestic Violence Prevention Council (ACT) expressed the view that enshrining the ACT FVIP in legislation is critical to its continued development. The submission stated that the program should be convened by a statutory office holder and that the legislation should make provision for reporting obligations including key outcomes and interventions.<sup>192</sup> A number of other stakeholders agreed that integrated responses should be recognised in legislation and coordinated by statutory office holders.<sup>193</sup>

29.195 The Education Centre Against Violence was of the view that responsibility for coordinating integrated responses should be placed with a statutory office holder or agency head and that clear governance structures and accountability mechanisms should be put in place.<sup>194</sup>

29.196 The National Association of Services Against Sexual Violence submitted that one agency should be given overall responsibility for coordinating an integrated response to family violence, but was unsure whether this needed to be a statutory office holder:

The ACT experience is that the AFP currently performs the coordinating function and does so well. All stakeholders communicate and meet regularly to ensure processes are efficient. An overarching program development group with decision makers from each stakeholder undertakes this role. This ensures that there is ‘buy-in’ from all agencies.<sup>195</sup>

***Commissions’ views***

29.197 The Commissions have come to the view in the course of the Inquiry, and as discussed in detail above, that the success of integrated responses to family violence relies to a large extent on strong and visionary leadership, shared principles and objectives, clear inter-agency arrangements, and an ongoing and responsive relationship between the parties. All of these elements can be put in place without a legislative basis.

29.198 In addition, the Commissions’ view is that enshrining integrated responses to family violence in legislation may restrict the flexibility of such arrangements. Integrated responses need to be sensitive to the needs and strengths of existing institutions and frameworks in a particular area, and these contextual factors may change over time. Legislation may restrict the capacity of integrated responses to evolve as part of an ongoing process of feedback. The Commissions’ view is that integrated responses to family violence are better established and maintained on an administrative, rather than a legislative, basis and so make no specific recommendation in relation to this matter.

192 Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

193 Queensland Law Society, *Submission FV 178*, 25 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

194 Education Centre Against Violence, *Submission FV 90*, 3 June 2010.

195 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010. The Canberra Rape Crisis Centre agreed: Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

# **30. Information Sharing**

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## **Contents**

Introduction	1397
Benefits of and impediments to information sharing	1398
Information flow to the family law system	1399
Notification of family violence and child protection matters	1399
Registration of child protection orders in family courts	1405
Non-publication provisions	1407
Seeking information from child protection agencies	1410
Information flow to the family violence system	1416
Notification of parenting orders	1416
Non-publication provision	1421
Access to federal family court records	1423
Information sharing between agencies	1427
Privacy laws	1427
Proposed reform of the privacy principles	1429
Serious threat to life, health or safety	1430
Required or authorised by or under law	1431
Secrecy laws	1435
Shared databases	1436
Strategies to improve information sharing	1443
Information sharing protocols and MOUs	1443
A national register	1450

## **Introduction**

30.1 A central theme of this Inquiry is ‘seamlessness’—the idea that the laws and procedures with which victims of family violence engage should work together to protect and assist them. One of the issues identified in the course of this Inquiry was that, in some circumstances, important information was not being shared among courts and agencies, and that this was having a negative impact on victims.

30.2 This chapter considers ways to improve information flow between critical elements of the family violence system, including courts, relevant government agencies and other people and institutions involved in the family violence, family law and child protection systems. These include improving the way information is collected from parties and shared between courts—including the establishment of a national register of relevant court orders—some changes to confidentiality and privacy legislation, and the development of information sharing protocols and memorandums of understanding.

The intention is to avoid, as far as possible, victims falling into gaps between the various systems due to lack of relevant information.

30.3 Information sharing is one element of an integrated response to family violence. Integrated responses more generally, including inter-agency collaboration, are discussed further in Chapter 29.

### **Benefits of and impediments to information sharing**

30.4 Information sharing has been identified as an ongoing challenge in ensuring the safety of victims of family violence in proceedings in federal family courts and state and territory courts. As noted in the 2009 report of the National Council to Reduce Violence against Women and their Children (*Time for Action*):

obstacles to information-sharing by stakeholders in the family law system remain a significant impediment to ensuring that women and their children are safe. Evidence of violence is collected on a case-by-case basis via subpoenas to different organisations, but confidentiality guidelines and legislative limitations on disclosure restrict access to child-protection records, civil and criminal law records and education and medical records. With the exception of the Family Court of Australia's Magellan Case Management project, there is a 'factual vacuum' as there are few formal agreements and communication channels between organisations able to provide this evidence, and neither the Family Court of Australia nor associated socio-legal services have the power to investigate allegations of abuse.<sup>1</sup>

30.5 The National Council recommended that information-sharing systems and protocols should be developed and supported by all organisations in response to sexual assault and family violence. It also considered that such protocols should give primacy to the safety of women and children.<sup>2</sup>

30.6 In March 2010, the Queensland Department of Communities released a consultation paper on the *Domestic and Family Violence Protection Act 1989* (Qld). The Department noted that:

Legislation generally allows information to be shared with consent. Also provisions may allow for information sharing without consent in emergency or high risk situations. The balance must be struck between protecting people's privacy and enhancing victim safety.<sup>3</sup>

30.7 The consultation paper noted that the benefits of information sharing include, for example: the capacity to provide a holistic approach in service provision; assisting non-government organisations to undertake their functions more effectively; and alleviating the inconvenience associated with victims having to supply the same information on a number of occasions to different service providers.

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1 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 104.

2 Ibid, Rec 6.2.1.

3 Department of Communities (Qld), *Review of the Domestic and Family Violence Protection Act 1989: Consultation Paper* (2010), 34.

30.8 The paper noted, however, that increased information sharing could result in a reluctance to report family violence due to concerns about how information would be used. It was therefore important to ensure that information was shared appropriately and stored securely. In addition, it was important to ensure that those sharing information were sensitive to any cultural issues that may arise—for example, where the information related to Indigenous people or people from culturally and linguistically diverse backgrounds.<sup>4</sup>

30.9 In the following sections, the Commissions consider ways to harness the benefits of information flow between the family law, family violence and child protection systems, while balancing the concerns identified by the Queensland Department of Communities.

## Information flow to the family law system

30.10 As discussed in Chapter 15, the *Family Law Act 1975* (Cth) sets out detailed considerations to which a family court must have regard in deciding whether to make a particular parenting order. The ‘paramount consideration’ in this regard is ‘the best interests of the child’.<sup>5</sup> Pursuant to s 60CC, the primary considerations for determining what is in a child’s best interests are:

- (a) the benefit to the child of having a meaningful relationship with both of the child’s parents; and
- (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.<sup>6</sup>

30.11 Section 60CC also sets out a lengthy list of ‘additional considerations’. Two of the additional considerations have particular relevance in the context of allegations of family violence:

- any family violence involving the child or a member of the child’s family;<sup>7</sup> and
- any family violence order that applies to the child or a member of the child’s family, provided the order is a final order or its making was contested.<sup>8</sup>

30.12 There are a number of ways that information about these matters may be brought to the attention of the court including where information is supplied by the parties, or by other professionals working with the parties. Information may also be shared between different courts or between agencies and organisations and the courts. All of these mechanisms are considered further, below.

## Notification of family violence and child protection matters

30.13 One of the ways that information about these issues is channelled into the family law system is by way of application forms completed by the parties to a particular

4 Ibid, 36.

5 *Family Law Act 1975* (Cth) ss 60CA, 65AA.

6 Ibid s 60CC(2).

7 Ibid s 60CC(3)(j).

8 Ibid s 60CC(3)(k).

matter. Section 60CF(1) of the *Family Law Act* provides that if a party to parenting proceedings is aware that a family violence protection order applies to a child, or a member of the child's family, that party must inform the court of that order. Further, a person who is not a party to the proceedings but is aware of a protection order that applies to a child or a member of the child's family, may inform the court of the order.<sup>9</sup>

30.14 The *Family Law Rules 2004* (Cth) specify that a party must file a copy of any family violence protection order when a case starts or as soon as practicable after the order is made.<sup>10</sup> This accommodates situations where parenting proceedings before the Family Court and protection order proceedings before a state or territory court are running concurrently, as well as where protection order proceedings have been finalised before Family Court proceedings begin. If a copy of the protection order is not available, the party must file a written notice containing an undertaking to file the order within a specified time, as well as details of the order.<sup>11</sup>

30.15 Section 67Z of the *Family Law Act* requires a party to a parenting proceeding who alleges that a child has been abused, or is at risk of being abused, to file a *Notice of Child Abuse or Family Violence* (Form 4). Once the form has been filed, the Registry Manager is required to inform the relevant child protection agency. Pursuant to s 60K of the Act, once a Form 4 has been filed, the court is required to undertake certain action, including dealing with the application promptly and considering the need for any interim or procedural orders.<sup>12</sup>

30.16 Form 4 includes definitions of 'abuse' in relation to a child and 'family violence'—as set out in s 4(1) of the *Family Law Act*—and provides space for a party to describe acts or omissions that are alleged to comprise the abuse or family violence.<sup>13</sup> However, there is no designated space on the form for a party to list any relevant family violence protection or child protection orders that have been obtained.

30.17 Part F of the initiating application for proceedings in the Family Court, Federal Magistrates Court and Family Court of Western Australia—*Initiating Application (Family Law)*—requests information about 'any ongoing cases in this or any other court' or 'any existing orders, agreements, parenting plans or undertakings to this or any other court' about 'family law, child support, family violence or child welfare issues' that involve any of the parties or children listed in the application.<sup>14</sup> The form is accompanied by notes to assist applicants to fill out the application, but these do not expand on what information is required in Part F.

9 Ibid s 60CF(2).

10 *Family Law Rules 2004* (Cth) r 2.05.

11 *Federal Magistrates Court Rules 2001* (Cth) sch 3 applies r 2.05 of the *Family Law Rules* to proceedings in the Federal Magistrates Court.

12 Questions have been raised, however, about how often these forms are filed in practice: see, eg, R Chisholm, *Family Courts Violence Review* (2009), 70.

13 Family Court of Australia, *Form 4—Notice of Child Abuse or Family Violence* <[www.familylawcourts.gov.au](http://www.familylawcourts.gov.au)> at 9 February 2010, pts G, H.

14 Family Court of Australia, *Initiating Application (Family Law)* <[www.familycourt.gov.au](http://www.familycourt.gov.au)> at 9 February 2010, 6.

30.18 The 2009 Family Law Council advice recommended that the federal family courts consider revising Form 4, including making it more user-friendly.<sup>15</sup> In addition, the Council recommended that:

The Attorney-General propose an amendment to the [Family Law Act] to place a positive obligation on the parties to inform the court about any relevant orders or arrangements in place under child welfare laws.<sup>16</sup>

30.19 Some commentators argue, however, that the notification of involvement in other jurisdictions should not be left to the parties—parties may fail to disclose through ignorance, neglect or malice. Instead, they suggested that there should be greater communication between the courts and child protection agencies.<sup>17</sup>

30.20 The Chisholm Review also considered the process for identifying family violence and child abuse in the context of family law proceedings, and expressed support for a more pro-active approach that would shift the onus for providing relevant information away from the parties:

Experience has shown that [the current] system is not working. This Report suggests that because of this, and because issues of family violence and other risk factors are so common in parenting cases brought to the courts, it would be better to have a system of risk identification and assessment that applies to all parenting cases. This approach would reflect the best available thinking about these issues, and would reinforce a lot of measures that are already being taken by the courts to identify and deal with issues of violence as early as possible.<sup>18</sup>

30.21 The Australian Government Attorney-General's Department has indicated that a framework for screening and assessment for family violence across the family law system is under development.<sup>19</sup> This issue is discussed further in Chapter 18.

30.22 In relation to application forms, the Commissions suggested in the Consultation Paper that the *Initiating Application (Family Law)* should more clearly seek information about existing protection orders obtained under state and territory family violence legislation or pending proceedings for such orders.<sup>20</sup> The Commissions also asked what changes to the *Initiating Application (Family Law)* would make it clear to parties that they are being asked to disclose ongoing child protection proceedings and existing child protection orders.<sup>21</sup> In addition, the Commissions suggested including a question on the form seeking further information about any significant safety concerns, including in relation to any children party to the proceedings.<sup>22</sup>

15 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Rec 10.

16 Ibid, Rec 7.1.

17 F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38, 53–54.

18 R Chisholm, *Family Courts Violence Review* (2009), Recs 2.3, 2.4.

19 Australian Government Attorney-General's Department, *Submission FV 166*, 25 June 2010.

20 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Proposal 8–2.

21 Ibid, Question 14–6.

22 Ibid, Proposal 14–1.

### ***Submissions and consultations***

30.23 A number of submissions expressed support for the proposal that the *Initiating Application (Family Law)* should more clearly seek information about existing family violence protection orders.<sup>23</sup> Others expressed the view that the *Initiating Application (Family Law)* should also seek information in relation to child protection orders.<sup>24</sup>

30.24 Legal Aid NSW suggested that the application form should also include questions about the nature of the violence; involvement by state and territory child protection agencies; involvement by the police; and whether the other party was, or had been, in prison, or was on remand, in relation to family violence. Legal Aid NSW was of the view that this would assist the court's assessment of risk.<sup>25</sup> The Aboriginal Family Violence Prevention and Legal Service (Victoria) was of the view that it would be helpful to require that orders be attached to the application, or to seek consent so that the court could obtain copies of the orders.<sup>26</sup>

30.25 However, a number of submissions raised concerns about using the existence of family violence protection orders as evidence of family violence in the family courts, noting that it may be more difficult to achieve orders by consent in the state and territory courts if those orders could be used for collateral purposes.<sup>27</sup> It was suggested that the *Initiating Application* should clearly seek information about whether the protection orders were achieved by full consent, consent without admissions or in a contested hearing.<sup>28</sup>

30.26 The Australian Government Attorney-General's Department noted that Part B of the Parenting Questionnaire<sup>29</sup>—which is completed by the parties once a matter is

23 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; A Harland, *Submission FV 80*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010; P Easteal, *Submission FV 40*, 14 May 2010; C Humphreys, *Submission FV 04*, 23 August 2009.

24 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

25 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

26 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

27 Confidential, *Submission FV 164*, 25 June 2010; P Parkinson, *Submission FV 104*, 5 June 2010.

28 Confidential, *Submission FV 164*, 25 June 2010.

29 Family Court of Australia, *Parenting Questionnaire* <[http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Family+Court+of+Australia+forms/FCOA\\_form\\_Questionnaire\\_Parenting](http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Family+Court+of+Australia+forms/FCOA_form_Questionnaire_Parenting)> at 12 July 2010.

going to trial—clearly asks whether there are any past or current family violence protection orders that affect the party or the party’s children.<sup>30</sup> The Questionnaire also asks whether the party, or any person with whom a child resides or has contact, has been involved in any child welfare proceedings.

30.27 In their submission, the Chief Justice of the Family Court of Australia and the Chief Federal Magistrate expressed the view that the inclusion of a general question in the *Initiating Application (Family Law)* asking whether an applicant had concerns for the safety of the applicant or the applicant’s children may assist clients, especially unrepresented clients, to provide appropriate notification of family violence or child protection issues to the court.<sup>31</sup> A number of other submissions agreed with this proposal.<sup>32</sup> Women’s Legal Services NSW noted that the same question should be included on the Response to an *Initiating Application*.<sup>33</sup>

30.28 The Australian Government Attorney-General’s Department noted, however, that s 60Z of the *Family Law Act* requires the parties to notify the court of any concerns that a child has been abused or is at risk of abuse. The Department’s view was that the use of the qualifier ‘significant’ in the Commissions’ proposal might deter parties from notifying the court of relevant concerns.<sup>34</sup>

30.29 A number of submissions—while supporting clarification of the *Initiating Application*—noted that other initiatives were also necessary. Some supported, in addition to clearer application forms, the establishment of a national register of orders,<sup>35</sup> discussed further below, and the establishment of a risk identification and assessment system as recommended by the Chisholm Review,<sup>36</sup> discussed in Chapter 18.

### **Commissions’ views**

30.30 The Commissions are of the view that a range of mechanisms should be used to collect information relevant to parenting proceedings in the family courts. The

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30 Australian Government Attorney-General’s Department, *Submission FV 166*, 25 June 2010.

31 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

32 Wurringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Solomums Australia for Family Equity, *Submission FV 200*, 28 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Confidential, *Submission FV 96*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; P Easteal, *Submission FV 40*, 14 May 2010.

33 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

34 Australian Government Attorney-General’s Department, *Submission FV 166*, 25 June 2010. See also: Confidential, *Submission FV 96*, 2 June 2010.

35 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

36 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010.

Commissions support, for example, the development of a risk screening and assessment process across the family court system, discussed in Chapter 18, and the establishment of a national register, discussed below.

30.31 The forms filed by parties to parenting proceedings in family courts are, however, another important source of information. The Commissions' view is that these forms—both the *Initiating Application (Family Law)* and the *Response to the Initiating Application (Family Law)*—should seek information from the parties in relation to past or present family violence protection or child protection orders, as well as past, pending or ongoing proceedings in relation to such orders. The Commissions note, for example, that the Parenting Questionnaire<sup>37</sup> seeks information about past or current family violence protection orders. More detailed information—such as that suggested by Legal Aid NSW and discussed above—should be collected as part of screening and risk assessment processes discussed in Chapter 18.

30.32 Currently, the *Initiating Application (Family Law)* includes one general question seeking information on existing orders and one general question seeking information on ongoing cases about family law, child support, family violence or child welfare. In comparison, some state and territory protection order application forms ask separately for details about, for example, children's court orders, protection orders, and family court orders. The Commissions support this more detailed approach in which questions are asked, or tick boxes provided, in relation to each different order and each different kind of case.

30.33 The Commissions acknowledge that some caution must be exercised in using family violence protection orders as evidence of family violence in the family court system in some circumstances, and this issue is discussed in detail in Chapter 17. However, it is important that the family court system be aware that such orders exist so as to avoid, as far as possible, the making of inconsistent parenting orders.

30.34 In addition, the Commissions are of the view that the *Initiating Application (Family Law)* and *Response* should include a more general question which targets concerns or fears the party has for their safety, or for the safety of their child. The question should focus on safety, rather than upon the notion of 'child abuse' which is the current focus of the *Notice of Child Abuse or Family Violence* (Form 4). The Commissions agree with the Australian Government Attorney-General's Department that the question should not set the threshold too high by use of the term 'significant', but should simply enquire about any safety concerns a party may have.

30.35 Form 4 does not include a designated space for parties to note existing orders. However, if a separate question seeking information about family violence protection and child protection orders is included in the *Initiating Application (Family Law)*, another question about protection orders in Form 4 would involve unnecessary duplication. The Commissions do not, therefore, propose any change to Form 4 in this respect.

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37 Family Court of Australia, *Parenting Questionnaire* <[http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Family+Court+of+Australia+forms/FCOA\\_form\\_Questionnaire\\_Parenting](http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Family+Court+of+Australia+forms/FCOA_form_Questionnaire_Parenting)> at 12 July 2010.

**Recommendation 30–1** The *Initiating Application (Family Law)* and *Initiating Application (Family Law) Response* forms should clearly seek information about past and current family violence protection and child protection orders obtained under state and territory family violence and child protection legislation and past, pending or current proceedings for such orders.

**Recommendation 30–2** The *Initiating Application (Family Law)* and *Initiating Application (Family Law) Response* forms should be amended to include a question seeking more general information, for example, ‘Do you have any fears for the safety of you or your child or children that the court should know about?’

### Registration of child protection orders in family courts

30.36 One mechanism for bridging the information gap between the child protection and family law systems is s 70C of the *Family Law Act*, which enables the registration of ‘state child orders’—that is, orders dealing with residence and contact.<sup>38</sup> Section 70D provides a similar mechanism for the registration of a child protection order made in another state. A registered order has the same force and effect as if it were an order made under the *Family Law Act*.<sup>39</sup> The operation of this provision with respect to orders of the NSW Children’s Court has been described as follows:

if a New South Wales Children’s Court made an order that a child live with X, that order could be registered in the Family Court of Australia or the Federal Magistrates Court, in New South Wales or elsewhere, and then enforced as if it were an order of that court. The same applies to an order that a child should spend time with X (orders of the kind formerly referred to in the *Family Law Act* as ‘contact’ or ‘access’ orders).<sup>40</sup>

30.37 To register a relevant child protection order, a sealed copy of the order is filed in a family court registry.<sup>41</sup> The effect of the registration is to invoke the enforcement mechanisms of the *Family Law Act*. Chisholm considered the operation of the registration provision and suggested that ‘there would be no difficulty in [a child protection agency] making an application for any of these various forms of enforcement of a Children’s Court order registered in a family law court’.<sup>42</sup>

30.38 Section 69ZK of the *Family Law Act* provides that the family courts must not make an order under the Act in relation to a child who is under the care of a person under a child welfare law, unless the order is expressed to come into effect when the child ceases to be under care; or the order is made with the written consent of a child

38 *Family Law Act 1975* (Cth) s 4: the definition of ‘State child order’ includes orders determining with whom a child under 18 years of age is to live or spend time with, or that provides for contact, access or custody.

39 *Ibid* s 70E.

40 R Chisholm, *The Child Protection–Family Law Interface* (2009), 31.

41 *Family Law Rules 2004* (Cth) r 23.01A.

42 R Chisholm, *The Child Protection–Family Law Interface* (2009), 34.

welfare officer. Chisholm suggested that, even where a child protection order is registered, s 69ZK means that the family courts could only make enforcement orders in relation to a child in care, if the state child welfare officer of the relevant state or territory had given written consent to the institution or continuation of the proceedings. The Review noted that, although such written consent could be given as part of the application to register the child order, the absence of a delegated power to give consent may cause difficulty.<sup>43</sup>

30.39 In the Consultation Paper the Commissions asked whether the registration of child protection orders under ss 70C and 70D is a useful strategy that enhances the safety of children, and whether the absence of a delegated power to provide the consent required by s 69ZK was of concern.<sup>44</sup>

#### ***Submissions and consultations***

30.40 The Chief Justice of the Family Court and the Chief Federal Magistrate noted in their submission that there is no statistical information available on how often child protection orders are registered pursuant to ss 70C and 70D. They expressed the view, however, that the capacity to register orders is important as it minimises the need to rely on parties disclosing the orders.<sup>45</sup> The Magistrates' Court and the Children's Court of Victoria also noted that the registration process was useful.<sup>46</sup>

#### ***Commissions' views***

30.41 The Commissions note that the registration of child protection orders in the family courts appears to be a useful mechanism. The Commissions' view is that, while the current registration system is useful, it would be more effective if the courts had access to the orders, without having to rely on parties or child protection agencies to register them. Accordingly, the Commissions recommend below that these orders should be included as a matter of course in the proposed national register.<sup>47</sup> The current proposal in relation to the national register involves the registration and inter-state recognition of family violence protection orders. In the Commissions' view, many of the arguments relating to the automatic registration and recognition of family violence orders might also be made in relation to child protection orders and it would be sensible to extend the registration and recognition arrangements to include them.

30.42 As no other major issues were identified by stakeholders in relation to the registration of child protection orders in the family courts, the Commissions make no further recommendations in relation to this matter.

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43 Ibid, 35.

44 Consultation Paper, Question 14–11.

45 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

46 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

47 Rec 30–18.

### Non-publication provisions

30.43 Family violence legislation in every state and territory prohibits the publication of certain information about persons involved in, or associated with, protection order proceedings. However, the legislation across the jurisdictions differs as to:

- whether non-publication is the default position or is triggered by a court order;
- whether a harm threshold must be met before a court makes an order for non-publication;
- whether the non-publication provisions apply indefinitely or only until such time as a court has disposed of the proceedings; and
- the exceptions that permit publication in some circumstances.

30.44 In some states and territories, the prohibition on publication of certain aspects of protection order proceedings applies by default. Under the Queensland family violence legislation, for example, it is an offence to publish an account of proceedings that identifies, or is likely to identify the aggrieved person, a named person, the respondent, the applicant, the appellant, a witness or a child concerned in the proceedings.<sup>48</sup>

30.45 In comparison, under the Tasmanian family violence legislation, a prohibition on publication only applies following a court order to this effect. However, a court *must* make an order prohibiting the publication of material which may disclose the identity of a child affected by protection order proceedings.<sup>49</sup>

30.46 In New South Wales (NSW), a prohibition on publication also applies where there is a court order to this effect. A default prohibition applies in relation to information about children.<sup>50</sup> The Northern Territory family violence legislation sets out a harm threshold that must be satisfied before a court can make a non-publication order in relation to a protected person or witness in a proceeding—that is, the court must be satisfied that publication would expose the person to risk of harm.<sup>51</sup> There is, however a default prohibition in relation to publishing identifying information about children.<sup>52</sup>

### Exceptions allowing communication of information

30.47 Many of the prohibitions on publication in state and territory family violence legislation include exceptions where publication is with the consent of the person to whom the information relates, or the consent of the court.<sup>53</sup>

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48 *Domestic and Family Violence Protection Act 1989* (Qld) s 82(1).

49 *Family Violence Act 2004* (Tas) s 32(2).

50 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45.

51 *Domestic and Family Violence Act 2007* (NT) s 26.

52 *Ibid* s 123.

53 See, for example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(4)(b).

30.48 The Queensland family violence legislation includes exceptions for publication with the court's or the magistrate's 'express permission', or where publication is permitted by regulation.<sup>54</sup> There is also an exception for the communication of transcripts of evidence or other documents to persons concerned in proceedings in a court or to the police for use in such proceedings.<sup>55</sup>

30.49 The Australian Capital Territory (ACT) family violence legislation includes a detailed list of exceptions, including an express exception for information provided to a federal family court under s 60CF of the *Family Law Act* ('informing the court of relevant family violence orders'), discussed above.<sup>56</sup> Other exceptions in the ACT legislation include: where information is communicated in accordance with an order of the Magistrates Court or the written permission of a magistrate; and the provision of information to the child protection agency to allow it to exercise its care and protection powers.<sup>57</sup> A court may also make an order to allow publication if it is in the public interest, will promote compliance with the protection order, or is necessary or desirable for the proper functioning of the Act.<sup>58</sup>

30.50 In the Consultation Paper, the Commissions asked a range of questions about the non-publication provisions in state and territory family violence legislation, including whether the provisions were unduly restricting the flow of information from state and territory courts to the federal family courts,<sup>59</sup> and whether state and territory courts should be required to provide details of protection orders and related proceedings to those courts.<sup>60</sup> The Commissions also asked whether there should be express exceptions in the non-publication provisions to allow information to be available in other court proceedings, for example, in the federal family courts.<sup>61</sup>

### ***Submissions and consultations***

30.51 A number of submissions stated that these provisions do not appear to be a problem in practice.<sup>62</sup> The Queensland Law Society commented, however, that the Queensland Police Service often referred to the provisions in response to subpoenas and expressed the view that the provisions should be reviewed to ensure that they did not restrict information flow to the police and child protection agencies where necessary.<sup>63</sup> One stakeholder—while expressing support for allowing information to

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54      *Domestic and Family Violence Protection Act 1989* (Qld) s 82(1)(b).

55      Ibid s 82(3).

56      *Domestic Violence and Protection Orders Act 2008* (ACT) ss 111, 112.

57      Ibid, sch 2, 2.2.

58      Ibid s 112(3).

59      Consultation Paper, Question 10–17.

60      Ibid, Question 10–19.

61      Ibid, Question 10–18.

62      Queensland Law Society, *Submission FV 178*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

63      Queensland Law Society, *Submission FV 178*, 25 June 2010. At the time of writing, the *Domestic and Family Violence Protection Act 1989* (Qld) was under review by the Queensland Government. See Department of Communities (Qld), *Review of the Domestic and Family Violence Protection Act 1989: Consultation Paper* (2010).

flow to police or others involved in court proceedings—noted that the safety of victims of violence and their children should remain a key priority.<sup>64</sup>

30.52 A number of stakeholders expressed the view that state and territory courts should be required to provide details of protection order proceedings to the federal family courts where there is a related family law matter.<sup>65</sup> The Domestic Violence Prevention Council (ACT) stated that provision of this information to the federal family courts should not be dependent upon a request from one party or the discretion of the other party. The Council noted that one solution would be for federal family courts to have regard to the proposed national register of family violence protection orders.<sup>66</sup>

30.53 On the other hand, the Office of the Privacy Commissioner stated in its submission that prohibitions on publication of identifying information about individuals involved in protection order proceedings are an important privacy protection. The Office did not support modifying the general prohibition on publication and expressed the view that other mechanisms that limit the disclosure of personal information to those who legitimately require it should be used to improve information sharing.<sup>67</sup>

#### *Commissions' views*

30.54 Limiting general publication—by, for example, the media—of identifying information relating to protection order proceedings is important to protect the privacy interests of the parties and others, in particular, children, involved in the proceedings. Stakeholders indicated that the existing non-publication provisions in state and territory family violence legislation did not appear to be unduly restricting the disclosure of information to the federal family courts.

30.55 In the Commissions' view, however, such provisions should clearly set out where disclosure to other courts and agencies that legitimately require access to the information is allowed. This provides clarity for those being asked to disclose the information, and ensures that any disclosure is consistent with the family violence legislation and with relevant privacy legislation, as the disclosure will be 'authorised by law'.<sup>68</sup>

30.56 The *Domestic Violence and Protection Orders Act 2008* (ACT) provides an instructive starting point. In particular, the ACT legislation makes clear that disclosure of identifying information to the federal family courts under s 60CF of the *Family Law Act* does not breach the non-publication provision. Other important exceptions in this legislation relate to disclosure:

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<sup>64</sup> Confidential, *Submission FV 184*, 25 June 2010.

<sup>65</sup> Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

<sup>66</sup> Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

<sup>67</sup> Office of the Privacy Commissioner, *Submission FV 147*, 24 June 2010.

<sup>68</sup> Privacy legislation and the exception for disclosure that is 'required or authorised by law' is discussed further below.

- to the child protection agency, to allow the exercise of the agency's care and protection powers; and
- where a court is of the view that publication is in the public interest, will promote compliance with the protection order, or is necessary or desirable for the proper functioning of the Act.

The provision also provides a certain amount of flexibility by allowing disclosure on the basis of a court order or the written permission of the magistrate.

30.57 The Commissions are of the view that non-publication provisions in state and territory legislation should be reviewed to ensure that they expressly allow disclosure of information about protection orders and related proceedings—including identifying information—in appropriate circumstances. The exceptions to such provisions should expressly include disclosure of protection orders to the federal family courts under s 60CF of the *Family Law Act*.

30.58 The Commissions note the proposed development of a national register of state and territory family violence protection orders, which is discussed further below. State and territory family violence legislation may need to be amended to allow protection orders to be included in the national register, and this will provide an opportunity for the states and territories to consider the need for other exceptions. The Commissions' view is that the proposed national register should be designed to ensure that this information is readily available to the federal family courts and others, such as child protection agencies and the police.

**Recommendation 30–3** Non-publication provisions in state and territory family violence legislation should expressly allow disclosure of information in relation to protection orders and related proceedings that contains identifying information in appropriate circumstances, including disclosure of family violence protection orders to the federal family courts under s 60CF of the *Family Law Act 1975* (Cth).

### **Seeking information from child protection agencies**

30.59 In each state and territory, the child protection legislation contains provisions for protecting the confidentiality of information collected by child protection agencies or for precluding such information from being admissible in another proceeding.<sup>69</sup> The federal family courts may seek information from child protection agencies either at the request of parties by subpoena—issued under pt 15.3 of the *Family Law Rules*—or by

69 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29; *Children, Youth and Families Act 2005* (Vic) ss 41, 129–130; *Child Protection Act 1999* (Qld) ss 186–8; *Children and Community Services Act 2004* (WA) ss 23, 124F, 141, 240–241; *Children's Protection Act 1993* (SA) ss 13, 52L; *Children, Young Persons and Their Families Act 1997* (Tas) ss 16, 103; *Children and Young People Act 2008* (ACT) ss 846, 868–71; *Care and Protection of Children Act 2007* (NT) ss 150, 195, 221.

exercising the courts' express power to seek information and documents from state and territory agencies set out in s 69ZW of the *Family Law Act*.

### **Subpoenas**

30.60 The power of a federal family court to compel production of documents from a child protection agency under a subpoena was examined by the High Court in *Northern Territory of Australia v GPAO*.<sup>70</sup> The specific issue was whether under the former *Family Law Rules 1984* (Cth) O 28 r 1 the court could compel production of documents subject to s 97(3) of the *Community Welfare Act* (NT). Section 97(3) provided that:

A person who is, or has been, an authorized person shall not, except for the purposes of the Act, be required to—

- (a) produce in a court a document that has come into his possession or under his control; or
- (b) disclose or communicate to a court any matter or thing that has come under his notice, in the performance of his duties or functions under this Act.

30.61 A majority of the court held that the provisions of the *Family Law Act* did not override s 97(3) of the *Community Welfare Act* and that the provision was binding on the Family Court by operation of s 79 of the *Judiciary Act 1903* (Cth).<sup>71</sup> Section 79 provides that:

The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

30.62 The High Court found that the provisions of the *Family Law Act* and the *Family Law Rules* did not 'otherwise provide' in the terms of s 79.<sup>72</sup> Thus, the child protection agency could not be compelled by subpoena to produce the documents to the Family Court.

30.63 By way of contrast, in Queensland s 187 of the *Child Protection Act 1999* (Qld) allows disclosure of information if the disclosure is related to a child's protection or welfare; or is otherwise required or permitted under law. This provision allows disclosure of information held by the Department of Communities to the federal family courts. Section 190 of the *Child Protection Act* specifically regulates the production of documents held by the Department where required by a party to a court proceeding. Section 190 states that any such request must include information about the people to whom the request relates; the circumstances to which it relates—these must be relevant to the court proceedings; and state the period to which it relates. Section 190(4) provides that a person must not, directly or indirectly, disclose or make use of information obtained other than for a purpose connected with the proceeding.

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70       *Northern Territory of Australia v GPAO* (1999) 196 CLR 553.

71       Ibid, 592.

72       Ibid, 589.

### ***Power to require the production of documents or information***

30.64 Section 69ZW of the *Family Law Act* provides that the court may make an order in child-related proceedings requiring a prescribed state or territory agency to provide the court with the documents or information specified.<sup>73</sup> These must be documents recording, or information about, one or more of:

- (a) any notifications to the agency of suspected abuse of a child to whom the proceedings relate or of suspected family violence affecting the child;
- (b) any assessments by the agency of investigations into a notification of that kind or the findings or outcomes of those investigations;
- (c) any reports commissioned by the agency in the course of investigating a notification.<sup>74</sup>

30.65 An order under s 69ZW overrides any inconsistent state and territory law,<sup>75</sup> but the agency does not have to comply with the order in relation to:

- (a) documents or information not in the possession or control of the agency; or
- (b) documents or information that include the identity of the person who made a notification.<sup>76</sup>

30.66 Once information is provided in response to the order, the court must admit into evidence any such information on which it intends to rely.<sup>77</sup> There is qualified protection for the identity of the person who made the notification—if the person does not consent, the court can only disclose their identity if satisfied that it ‘is critically important to the proceedings and that failure to make disclosure would prejudice the proper administration of justice’.<sup>78</sup>

### ***Protocols relating to information sharing***

30.67 Information sharing protocols are in place between child protection agencies in a number of jurisdictions—such as NSW and Queensland—and the federal family courts, dealing with a range of issues including requests for information by way of subpoena and under s 69ZW.<sup>79</sup> The Queensland protocol sets out the relevant law, discussed above, and the procedures that apply where a party to a family court proceeding requests the court to issue a subpoena to the Department of Child Safety (now the Department of Communities). The Protocol includes safeguards in relation to

<sup>73</sup> The agencies that have been prescribed in *Family Law Regulations 1984* (Cth) sch 9 are the child protection agencies and the police in each state and territory.

<sup>74</sup> *Family Law Act 1975* (Cth) s 69ZW(2).

<sup>75</sup> Ibid s 69ZW(4).

<sup>76</sup> Ibid s 69ZW(3).

<sup>77</sup> Ibid s 69ZW(5).

<sup>78</sup> Ibid s 69ZW(6). The agency must be notified and given an opportunity to respond in such circumstances: s 69ZW(7).

<sup>79</sup> Family Court of Australia, *Protocol between the Family Court of Australia and the NSW Department of Community Services* (2005); Federal Magistrates Court of Australia, *Protocol between the Federal Magistrates Court of Australia and the NSW Department of Community Services* (2009); Family Court of Australia, *Protocol between the Department of Child Safety Queensland, the Family Court of Australia and the Federal Magistrates Court of Australia* (2007).

subpoenaed documents, for example, that the Registry Manager of the Family Court must ensure that any file inspections are carried out under supervision and that photocopying does not occur unless ordered by the court.<sup>80</sup>

30.68 The Protocol also regulates the disclosure of information in response to an order made under s 69ZW and includes safeguards in relation to such documents, for example, that documents that are not admitted into evidence should be destroyed.<sup>81</sup>

30.69 In consultations, the Commissions heard that there were significant problems associated with information flow from state and territory child protection agencies to family courts in some jurisdictions. The Commissions understand, for example, that the decision in *Northern Territory of Australia v GPAO* has had an impact on the attitude of some jurisdictions to the exercise of the court's power under s 69ZW, although the decision itself concerned the power to require production of documents by way of subpoena.

30.70 In the Consultation Paper, the Commissions asked how best to facilitate the information flow between child protection agencies and the family courts. The Commissions proposed, as a minimum, that protocols be developed between federal family courts and state and territory child protection agencies including procedures for responding to subpoenas issued by federal family courts and for dealing with requests for documents and information under s 69ZW of the *Family Law Act*.

### ***Submissions and consultations***

#### ***Subpoenas***

30.71 A number of stakeholders expressed the view that state and territory legislation should be amended to address the issues raised in *Northern Territory v GPAO* and to facilitate child protection agencies providing information to the family courts.<sup>82</sup> Some also suggested that the *Family Law Act* and *Rules* be amended to require that information be provided.<sup>83</sup>

30.72 Legal Aid NSW noted that the experience of legal practitioners in relation to the production of documents in response to subpoenas appeared to vary in different regions of NSW, noting that while some Community Service Centres (CSCs) were unresponsive, there had been better production in the last two years in a number of regions. Strategies to promote a cooperative response to the subpoena process included ensuring that subpoenas were clear about the information sought, and follow-up telephone contact between the CSC and the practitioner about what was required and what was available.<sup>84</sup>

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80 Family Court of Australia, *Protocol between the Department of Child Safety Queensland, the Family Court of Australia and the Federal Magistrates Court of Australia* (2007), [6.4].

81 Ibid, [6.3].

82 Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

83 Confidential, *Submission FV 184*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

84 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

30.73 One stakeholder commented that resources were required to support child protection agencies to enable them to respond to requests for information.<sup>85</sup>

30.74 The Aboriginal Family Violence Prevention and Legal Service Victoria stated that the Department of Human Services in Victoria usually responded to subpoenas on time, but noted that child protection agencies in other jurisdictions provided more limited information.<sup>86</sup> The Queensland Law Society stated that the protocol between the family courts and the Queensland Department of Communities was working well, and that the Department complies appropriately with requests for information by way of subpoena as well as orders under s 69ZW.<sup>87</sup>

30.75 The Queensland Commission for Children and Young People and Child Guardian expressed support for the development of protocols between the federal family courts and child protection agencies, but stated that the power to compel the production of documents by way of subpoena should also be strengthened to ensure that child protection agencies are required to comply.<sup>88</sup>

### **Section 69ZW**

30.76 The Chief Justice of the Family Court of Australia and the Chief Federal Magistrate stated in their submission that s 69ZW is an important mechanism to provide access to information held by state and territory child protection agencies. The submission noted that the provision generally worked well, but that ‘for reasons that are unclear, section 69ZW has not yet been able to produce similar results in NSW’.<sup>89</sup>

30.77 The submission suggested that relationship building between courts and agencies and perhaps direct access to a contact point in child protection agencies for court staff and independent children’s lawyers would assist. One way to achieve this might be to involve state and territory agencies in the Pathways networks across Australia. The submission also expressed some support for nationally consistent protocols to deal with requests for information under s 69ZW and by way of subpoena, but noted that it remained important to ensure that the enabling legislation was clear.<sup>90</sup>

30.78 A number of other stakeholders also expressed support for the development of protocols between federal family courts and state and territory child protection agencies that include procedures for responding to subpoenas issued by federal family courts and for dealing with requests for documents and information under s 69ZW of the *Family Law Act*.<sup>91</sup>

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85 C Humphreys, *Submission FV 04*, 23 August 2009.

86 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

87 Queensland Law Society, *Submission FV 178*, 25 June 2010.

88 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

89 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

90 Ibid.

91 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June

### **Commissions' views**

30.79 It appears that there are a number of legislative and administrative barriers preventing the federal family courts from accessing important information held by child protection agencies in some jurisdictions. Some of these barriers stem from the High Court's decision in *Northern Territory of Australia v GPAO*.<sup>92</sup> In the Commissions' view, states and territories should review and amend, where necessary, their child protection legislation to ensure that the legislation is not preventing child protection agencies from disclosing relevant information to the federal family courts in appropriate circumstances.

30.80 The Commissions note that s 69ZW provides that where the federal family courts request the specified information—notifications of suspected abuse of a child or family violence affecting a child and related assessments and reports—from prescribed agencies, state or territory laws have no effect to the extent that they would hinder or prevent an agency complying with the order.<sup>93</sup> While it would be possible to include a similar provision in relation to requests for information by way of subpoena, in the Commissions' view a more nuanced outcome could be achieved through the amendment of state and territory legislation to allow information to flow in appropriate and controlled circumstances. The Queensland child protection legislation provides a model in this regard.

30.81 Administrative measures are also necessary to ensure that child protection agencies are aware of, and responsive to, requests for information. The Commissions recommend that federal family courts and state and territory child protection agencies in all states and territories develop protocols that include procedures for dealing with requests for documents and information under s 69ZW and for responding to subpoenas issued by federal family courts.

30.82 The Commissions note that simply putting protocols in place is not sufficient. These arrangements must be given an ongoing profile among departmental and court officers; they must form the basis of an ongoing and responsive relationship between the agencies and the courts; and they must be supported and implemented in practice. The Commissions also recommend, below, that these protocols include comprehensive information sharing arrangements.<sup>94</sup>

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2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Justice for Children, *Submission FV 177*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 82*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

<sup>92</sup> *Northern Territory of Australia v GPAO* (1999) 196 CLR 553.

<sup>93</sup> *Family Law Act 1975* (Cth) s 69ZW(4).

<sup>94</sup> Recs 30–16, 30–17.

**Recommendation 30–4** State and territory child protection legislation should not prevent child protection agencies from disclosing to federal family courts relevant information about children involved in federal family court proceedings in appropriate circumstances.

**Recommendation 30–5** Federal family courts and state and territory child protection agencies should develop protocols for:

- (a) dealing with requests for documents and information under s 69ZW of the *Family Law Act 1975* (Cth); and
- (b) responding to subpoenas issued by federal family courts.

## Information flow to the family violence system

### Notification of parenting orders

30.83 With the exception of the ACT, the family violence legislation in each of the states and territories includes provisions for the state and territory courts to gain access to information about parenting orders.<sup>95</sup> However, the legislation differs in relation to the procedure by which the information is obtained. Most commonly, the legislation imposes obligations on persons who apply for a protection order, or a variation of such an order, to inform the court of any relevant parenting order, or any pending application for a parenting order, of which the person is aware.<sup>96</sup> On the other hand, the Victorian family violence legislation places an obligation on a court that decides to make a family violence protection order—where one of the parties is the parent of a child—to enquire whether a parenting order or a child protection order is in force.<sup>97</sup>

30.84 The application forms for protection orders in most states and territories ask whether a child is the subject of a current order under the *Family Law Act*, or whether there are pending proceedings for such an order.<sup>98</sup> Queensland's *Protection Order Application* asks whether a court has made any other orders involving the parties, or if there are other proceedings that are yet to be decided in another court. Individual check boxes are then set out for current and non-current: children's court orders; Queensland domestic violence orders; interstate or New Zealand domestic violence orders; family

95 The *Domestic Violence and Protection Orders Act 2008* (ACT) does not directly require an applicant for a protection order or any other person to inform the court about a family law contact order. Section 31 does, however, include a requirement for courts to consider any relevant family law contact order of which they are aware.

96 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 42; *Domestic and Family Violence Act 2007* (NT) s 90; *Domestic and Family Violence Protection Act 1989* (Qld) s 46B; *Intervention Orders (Prevention of Abuse) Act 2009* (SA)s 20; *Family Violence Act 2004* (Tas) s 15; *Restraining Orders Act 1997* (WA) s 66.

97 *Family Violence Protection Act 2008* (Vic) s 89.

98 This is the case, eg, in NSW, Victoria, Queensland, WA and Tasmania.

court orders and any other orders. The form also asks the parties to attach copies of the orders.<sup>99</sup>

30.85 However, some forms—for example, in the ACT—ask about pending or finalised proceedings without specifically asking whether there are existing family court orders. The application form for a protection order in the Magistrates Court of South Australia does not seek information about family court orders or pending proceedings for such orders, although this information is sought on the *Affidavit to Support an Application for a Domestic Violence Restraining Order*. In addition, few application forms for variation of protection orders request information about relevant family law orders.<sup>100</sup>

### **Consultation Paper**

30.86 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should provide mechanisms for courts exercising jurisdiction under such legislation to be informed about existing parenting orders or pending proceedings for such orders. The Commissions suggested that this might be achieved by requiring parties to proceedings for a protection order to inform the court about any such parenting orders or proceedings; requiring courts making protection orders to inquire as to any such parenting orders or proceedings; or both of the above.<sup>101</sup>

30.87 The Commissions also proposed that application forms for protection orders in all states and territories, including applications for variation of protection orders, should clearly seek information about existing parenting orders or pending proceedings for such orders.<sup>102</sup>

### **Submissions and consultations**

30.88 Submissions and consultations indicated that it was important to ensure that information about parenting orders should flow to state and territory courts and suggested a number of ways that this could be achieved. National Legal Aid, and a number of other stakeholders,<sup>103</sup> supported the proposal to require parties to proceedings for a protection order to inform the court about any parenting orders or

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99 Magistrates Court of Queensland, *Protection Order Application* <[www.communityservices.qld.gov.au/violenceprevention/legislation/dom-violence-orders.html](http://www.communityservices.qld.gov.au/violenceprevention/legislation/dom-violence-orders.html)> at 9 February 2010, [24].

100 Exceptions include the applications for variation of protection orders in Victoria and Tasmania.

101 Consultation Paper, Proposal 8–3.

102 Ibid, Proposal 8–4.

103 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 183*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; C Humphreys, *Submission FV 04*, 23 August 2009.

proceedings and to require courts making protection orders to inquire as to any parenting orders or proceedings.<sup>104</sup> The submission noted, however, that it was not sufficient to rely on the parties to inform the courts about existing parenting orders and suggested that protocols should be put in place to allow state and territory courts to access the family courts' database containing this information.<sup>105</sup> Other parties suggested this information should be captured on a central national register.<sup>106</sup>

30.89 In their submission, the Chief Justice of the Family Court and the Chief Federal Magistrate noted that the Commonwealth Courts Portal (CCP)—an initiative of the Family Court of Australia, the Federal Court of Australia and the Federal Magistrates Court of Australia—provides secure web-based access to information about cases before these courts. The submission stated that the Family Court's Policy Advisory Committee has considered extending access to the CCP to relevant organisations including possibly state and territory police, state and territory children's courts, child protection agencies and the Child Support Agency and expressed support for a limited trial.<sup>107</sup> This issue is discussed further, below.

30.90 One stakeholder submitted that requiring vulnerable parties, for example those from non-English speaking backgrounds, those with intellectual disabilities, or low levels of literacy to inform the court about parenting orders—particularly where they were self-represented—would be too difficult. This stakeholder was of the view that the obligation should lie with the court.<sup>108</sup> A number of other stakeholders agreed.<sup>109</sup>

30.91 The Magistrates' Court and the Children's Court of Victoria also noted that most parties to proceedings under family violence legislation are unrepresented and may only get limited legal advice, if any, during the proceedings. The submission expressed the view that, in these circumstances, it would not be appropriate to impose a legal obligation on the parties to inform the court about parenting orders or proceedings. The Courts submitted that the best approach would be to ensure that the relevant questions are asked on application forms and to impose an obligation on courts to inquire as to any parenting orders or proceedings.

30.92 The Magistrates' Court and the Children's Court of Victoria noted, in addition, that a national register, including family law orders affecting children as well as family violence protection orders would assist. Pending the establishment of such a register,

104 National Legal Aid, *Submission FV 232*, 15 July 2010.

105 This position was also supported by Confidential, *Submission FV 184*, 25 June 2010.

106 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

107 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

108 Confidential, *Submission FV 81*, 2 June 2010.

109 NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Disability Services Commission (WA), *Submission FV 138*, 23 June 2010; A Harland, *Submission FV 80*, 2 June 2010.

the Courts suggested that it would be useful to establish protocols between the federal family courts and the state and territory courts to ensure that copies of current family court orders are provided to state and territory courts.<sup>110</sup>

30.93 The submission from the NSW Local Court highlighted s 42(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which provides:

- (1) A person who applies for, or for a variation of, a final apprehended violence order or interim court order must inform the court of:
  - (a) any relevant parenting order of which the person is aware, or
  - (b) any pending application for a relevant parenting order of which the person is aware.

The court is required to inform the applicant of the obligation of the applicant under this subsection.

30.94 The provision imposes an obligation on the parties to inform the court of any parenting order or pending application, but also requires the court to bring this obligation to the parties' attention. The submission also noted that the application form for a protection order in NSW has a section for the applicant to indicate whether there are parenting orders in place.<sup>111</sup>

30.95 There was general support for ensuring that application forms for protection orders in all states and territories clearly seek information about existing parenting orders, or pending proceedings for such orders.<sup>112</sup> One submission noted that the Queensland *Protection Order Application* form, discussed above, would provide a suitable model.<sup>113</sup>

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110 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

111 Local Court of NSW, *Submission FV 101*, 4 June 2010.

112 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; WESNET—The Women's Services Network, *Submission FV 217*, 30 June 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 183*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; Confidential, *Submission FV 125*, 20 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Confidential, *Submission FV 77*, 2 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; P Easteal, *Submission FV 40*, 14 May 2010; C Humphreys, *Submission FV 04*, 23 August 2009.

113 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

***Commissions' views***

30.96 It is clearly important that state and territory courts making protection orders are aware of existing parenting orders. This information is central to ensuring that proceedings for protection orders are conducted on an informed basis. The most common approach in state and territory family violence legislation is to impose a legal obligation on parties to inform the court about existing parenting orders. However, stakeholders have indicated that it is not helpful to impose an obligation of this kind on parties—where failure to provide the information is likely to involve a sanction of some kind—given that many will be unrepresented, and some will be more vulnerable, such as those from culturally and linguistically diverse backgrounds and persons with a disability.

30.97 Accordingly, the Commissions are not recommending placing a legal obligation on the parties to provide information about parenting orders. However, application forms for protection orders should ask—clearly and specifically—about the existence of parenting orders or pending proceedings for such orders. In the Commissions' view, including clear, specific questions on application forms is a more effective method of eliciting information from parties, than imposing a legal obligation on them. In addition, the Commissions recommend that states and territories should amend their family violence legislation to place an obligation on courts to ask for the required information.

30.98 The Commissions also recommend that parenting orders should be included on the national register and that state and territory courts exercising jurisdiction under family violence and child protection legislation should have access to the register.<sup>114</sup> In addition, the Commissions recommend that state and territory courts should be given access to the Commonwealth Courts Portal. This will ensure that those courts have timely access to accurate and up-to-date information about cases that are before the federal family courts, the outcomes of those cases and orders made by the courts.<sup>115</sup>

**Recommendation 30–6** State and territory family violence legislation should require courts exercising jurisdiction under that legislation to inquire about existing parenting orders under the *Family Law Act 1975* (Cth), or pending proceedings for such orders.

**Recommendation 30–7** Application forms for family violence protection orders in all states and territories, including applications for variation of protection orders, should clearly seek information about existing parenting orders under the *Family Law Act 1975* (Cth), or pending proceedings for such orders.

<sup>114</sup> Rec 30–18.

<sup>115</sup> Rec 30–8.

### Non-publication provision

30.99 Section 121 of the *Family Law Act* makes it an offence to publish any account of any proceedings under the Act that identifies a party to the proceedings; a person who is related to, or associated with a party to the proceedings; or a witness in the proceedings.<sup>116</sup> The provision sets broad parameters for when information will be taken as identifying a person. These include any of the following particulars, where they are sufficient to identify a person to a member of the public, or a section of the public:

- the person's name, title, pseudonym or alias;
- the address of any premises at which the person resides or works, or the locality in which premises are situated;
- the person's physical description or style of dress;
- any employment or occupation in which the person engages;
- the person's relationship to identified relatives, friends or businesses;
- the person's recreational interests or political, philosophical or religious beliefs; and
- any real or personal property in which the person has an interest or with which the person is otherwise associated.

30.100 There are a number of exceptions to the publication offence in s 121—most relevantly, for disclosures to persons concerned in proceedings in ‘any court’ for use in connection with those proceedings.<sup>117</sup> Other exceptions include, for example, disclosures made to legal professional disciplinary boards; disclosures made to bodies providing, or considering whether to provide, legal aid; notices or reports published pursuant to a court direction; and publications intended primarily for use by members of the legal profession. Accounts of proceedings may also be published with court approval.

30.101 The impact of the publication offence in s 121 on the communication of information for the purpose of protection order proceedings under state and territory family violence legislation will depend on the interpretation of the terms an ‘account of proceedings’ and dissemination ‘to the public or to a section of the public’. In *Hinchcliffe v Commissioner of Police of the Australian Federal Police*, Kenny J of the Federal Court gave a narrow interpretation to both of these terms.<sup>118</sup> Kenny J commented that an ‘account of proceedings’ requires a narrative, description, retelling or recitation of something about, or that has happened in, the proceedings. This is not

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116 The offence is punishable by a maximum penalty of imprisonment for one year. The *International Covenant on Civil and Political Rights* entitles all persons to a ‘fair and public hearing’. However, the Covenant provides that suits of law need not be made public in proceedings concerning matrimonial disputes or the guardianship of children: *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 14.

117 *Family Law Act 1975* (Cth) s 121(9)(a).

118 *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, [54].

made out merely because some allegations made in the proceedings are reiterated outside the court.

30.102 Kenny J noted with approval the ruling in *Re Edelsten; Ex Parte Donnelly*,<sup>119</sup> that dissemination ‘to the public or to a section of the public’ should be taken as a reference to a ‘widespread communication with the aim of reaching a wide audience’.<sup>120</sup> This does not encompass communications to close personal associates or members of a group with an interest that is substantially greater than, or different from, the interest of other members of the public.

30.103 In the Consultation Paper, the Commissions asked whether the prohibition on publication set out in s 121 of the *Family Law Act* unduly restricted communication about family law proceedings to those involved in protection order proceedings, including the police.<sup>121</sup>

#### ***Submissions and consultations***

30.104 In its submission, Legal Aid NSW noted that s 121 was designed to prevent the publication of the facts of a case in the media, rather than the use of Family Court proceedings in the state and territory courts. The submission noted, however, that where a party seeks to adduce evidence contained in family or expert reports in child abuse or assault cases brought in the state and territory courts, requests for these reports are dealt with on their merits by the family courts, the interests of children being the primary consideration. The submission noted that such reports are provided for use in other proceedings about 50% of the time.<sup>122</sup>

30.105 The Chief Justice of the Family Court and the Chief Federal Magistrate stated in their submission that they were not aware of any examples of the prohibition on publication in s 121 of the *Family Law Act* unduly restricting communication about family law proceedings to persons involved in protection order proceedings.<sup>123</sup> The Queensland Law Society suggested that s 121 could be clarified to make clear that sharing information with the police or with child protection agencies did not amount to ‘publication’.<sup>124</sup>

30.106 The Law Council of Australia stated that, in practice, s 121 does not unduly restrict the flow of family court information to the state and territory courts. A number of other stakeholders agreed.<sup>125</sup> The Council noted that the exception in s 121(9)(a)—which allows the communication, to persons concerned in proceedings in any court, of

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119 *Re Edelston; Ex parte Donnelly* (1988) 18 FCR 434.

120 *Hinchliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, [54].

121 Consultation Paper, Question 10–11.

122 Legal Aid NSW, *Submission FV 219*, 1 July 2010.

123 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

124 Queensland Law Society, *Submission FV 178*, 25 June 2010.

125 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010.

any pleading, transcript of evidence or other document for use in connection with those proceedings—allows the use of this information in protection order proceedings.<sup>126</sup>

#### **Commissions' views**

30.107 The Commissions note that s 121 of the *Family Law Act* does not appear to be unduly restricting communication about family law proceedings to state and territory courts hearing protection order matters. Section 121 of the *Family Law Act* is primarily aimed at preventing widespread publication of family court proceedings that include identifying information in the media. In the Commissions' view this general prohibition is appropriate.

30.108 There are a number of ways in which information can be shared between the federal family courts, state and territory courts, the police and child protection agencies. Section 121 allows communication of information to police involved in proceedings in any court. Section 67Z of the *Family Law Act* requires the Registry Manager of the Family Court to 'as soon as practicable, notify a prescribed child welfare authority' where a *Notice of Child Abuse or Family Violence* (Form 4) is filed. In addition, those with a 'proper interest' may have access to federal family court files with the permission of the court.<sup>127</sup>

30.109 Finally, Justice Kenny's view that dissemination 'to the public or to a section of the public' should be taken as a reference to a 'widespread communication with the aim of reaching a wide audience',<sup>128</sup> means that s 121 will not apply to disclosures between courts and agencies with a legitimate interest in the matter. It is on this basis that state and territory courts, for example, might be given access to the Commonwealth Courts Portal.

30.110 In the Commissions' view, the exception to allow disclosure to persons concerned in any court proceedings for use in connection with those proceedings sufficiently enables the sharing of information for the purpose of protection order proceedings under state and territory family violence legislation. The Commissions are not, therefore, recommending that s 121 be amended.

#### **Access to federal family court records**

30.111 Information included in federal family court records may also be relevant to proceedings under state and territory family violence laws. This information is wider than the details of current or prior parenting orders and may include, for example, the reasons for making these orders—such as interviews with or assessments of parents or children, including family consultant assessments and clinicians' reports—and injunctions granted under the *Family Law Act*.

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126 Law Council of Australia, *Submission FV 180*, 25 June 2010.

127 *Family Law Rules 2004* (Cth) r 24.13(1). This issue is discussed further, below.

128 *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, [54].

30.112 The *Family Law Rules 2004* (Cth) specify a limited range of people who may search the court record relating to a case, or inspect or copy a document forming part of the record as follows:

- (a) the Attorney-General;
- (b) a party, a lawyer for a party, or an independent children's lawyer, in a case;
- (c) with the permission of the court, a person with a proper interest:
  - (i) in the case; or
  - (ii) in information obtainable from the court record in the case;
- (d) with the permission of the court, a person researching the court record relating to the case.<sup>129</sup>

30.113 In considering whether to give permission to a person seeking to obtain access to a part of the court record other than court documents, the court must consider:

- (a) the purpose for which access is sought;
- (b) whether the access sought is reasonable for that purpose;
- (c) the need for security of court personnel, parties, children and witnesses;
- (d) any limits or conditions that should be imposed on access to, or use of, the record.<sup>130</sup>

30.114 The only situation in which the *Family Law Act* expressly provides for details of injunctions or orders to be provided to other courts is where a federal family court has made an order or granted an injunction that is inconsistent with an existing protection order.<sup>131</sup>

30.115 The Family Law Council made a submission to the ALRC's 2008 inquiry into Australian privacy laws,<sup>132</sup> commenting on the challenge of information sharing in the context of family violence. It noted that:

In many cases information held by one part of the system is not available to another part because of privacy considerations. Decisions are therefore made in the absence of a complete picture of the family circumstances. This lack of transparency often leads to misguided decisions being taken or problems being ignored. This is particularly so when decisions have to be made on an urgent basis and there is no time for the leisurely process of subpoenas or information orders to be sought.<sup>133</sup>

30.116 The Council advised that it was considering whether police officers should have access to the family courts' databases to ensure that they had relevant information available when dealing with situations of family violence. One of the examples that the

<sup>129</sup> *Family Law Rules 2004* (Cth) r 24.13(1).

<sup>130</sup> *Ibid* r 24.13(3).

<sup>131</sup> *Family Law Act 1975* (Cth) s 68P. Discussed in detail in Ch 17.

<sup>132</sup> Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008).

<sup>133</sup> Family Law Council, *Submission to the Australian Law Reform Commission Review of Australian Privacy Law* (2007).

Council provided was where a court has ordered that a supervisor be present when a parent spends time with a child:

Without access to information on the child related orders, police might attend a scene and remove the person responsible for supervising a parent spending time with a child without also removing the child ... At the moment, police must rely on seeing the physical orders when they attend the scene.<sup>134</sup>

30.117 It was noted in ALRC 108 that, pursuant to r 24.13 of the *Family Law Rules*, police officers are already able to obtain access to information held by the Family Court where the officer can demonstrate a ‘proper interest’ in the court record.<sup>135</sup> Accordingly, the ALRC did not recommend legislative change in this regard.

#### ***Submissions and consultations***

30.118 The Chief Justice of the Family Court of Australia and the Chief Federal Magistrate stated in their submission that there were no known examples of individuals or agencies seeking access to records for the purpose of protection order proceedings not being provided with the requested documentation in a timely fashion. The submission stated that the existing provisions provided sufficient flexibility to enable information to be exchanged, subject to appropriate safeguards.<sup>136</sup>

30.119 In addition, the submission noted that access to the Commonwealth Courts Portal (CCP) is currently available to registered litigants and legal practitioners and that, as noted above, the Family Court’s Policy Advisory Committee is actively considering extending access to the CCP to relevant agencies and organisations including state and territory police, state and territory children’s courts, child protection agencies and the Child Support Agency.<sup>137</sup>

30.120 The Queensland Law Society expressed the view that the records of proceedings under the *Family Law Act* were generally accessible in a timely fashion to those involved in family violence proceedings in Queensland, noting that:

Typically, magistrates do not want to be burdened with very long affidavits filed in family law proceedings, a great proportion of which are irrelevant to an application for a protection order. Magistrates certainly do want to be aware of existing current orders, particularly those impacting on children, provided that they are relevant. In the matters which are contested, parties ensure that these matters are properly brought to the attention of magistrates.<sup>138</sup>

30.121 The Magistrates’ Court and Children’s Court of Victoria stated, however, that:

In our experience, the process for obtaining family law orders from the federal family law courts in a timely fashion is unreliable. We believe that legislation requiring

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134 Ibid.

135 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), [35.108].

136 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

137 Ibid.

138 Queensland Law Society, *Submission FV 178*, 25 June 2010.

federal family courts to provide copies of orders to state courts would assist in producing more reliable processes. We also support the development of a national database for family law, family violence and child protection orders relating to children that can be accessed by police as well as courts.<sup>139</sup>

30.122 A number of other stakeholders also indicated that there were problems gaining access to federal family court records<sup>140</sup> and suggested that there needed to be improvements in the legislation or procedures that regulate the provision of access.<sup>141</sup>

#### ***Commissions' views***

30.123 In the Commissions' view, there is adequate flexibility in the provisions in the *Family Law Rules* to allow those with a 'proper interest' to access information for the purpose of protection order proceedings under state and territory family violence legislation. The Commissions do not, therefore, recommend that the *Rules* be amended. However, there appear to be some issues with the provision of access to family court records in practice. This could be resolved in a number of ways, for example, by developing information sharing protocols between the relevant courts, government agencies and private sector organisations. This issue is discussed further, below.

30.124 The Commissions note, however, that state and territory courts are most interested in having reliable and timely access to information about existing family court orders and proceedings for such orders. This need could effectively be addressed by providing state and territory courts with access to the CCP, which includes information about outcomes of cases and orders made. The Commissions note that the Family Court's Policy Advisory Committee is considering extending access to the CCP to relevant agencies and organisations. The Commissions' view is that state and territory courts dealing with family violence and child protection matters—and others with a 'proper interest' in such matters, including police and child protection agencies—should have access to the CCP to ensure that they can reliably confirm in a timely way whether there are existing related orders in place or pending proceedings for such orders.

30.125 The Commissions are also of the view that, in the future, this information should also be included on the proposed national register. This issue is discussed further below.<sup>142</sup>

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139 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

140 Confidential, *Submission FV 184*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

141 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

142 Rec 30–18.

**Recommendation 30–8** Federal family courts should provide state and territory courts dealing with family violence and child protection matters—and others with a proper interest in such matters, including police and child protection agencies—with access to the Commonwealth Courts Portal to ensure that they have reliable and timely access to relevant information about existing federal family court orders and pending proceedings for such orders.

## Information sharing between agencies

30.126 Information flow to the federal family courts and the state and territory courts is important to ensure that the courts are making orders based on all the relevant information, and that the potential for inconsistent orders is minimised. It is also important that information is shared appropriately among relevant government agencies and private sector organisations—for example, private sector service providers, child protection agencies and the police—to ensure the safety of victims of family violence and their children.

30.127 In the following section, the Commissions examine the legislative framework that regulates the sharing of information among government agencies and private sector organisations—that is, privacy and secrecy laws—and consider what changes are necessary to allow information to flow in appropriate circumstances. Barriers to information sharing are not, however, always legislative in nature. Often the obstacles are cultural, or arise from an excess of caution based on a lack of understanding of the relevant rules, and the Commissions also consider ways to promote a culture of appropriate and effective information sharing.

### Privacy laws

30.128 The handling of personal information is regulated by privacy legislation at the federal, state and territory level. The principal piece of federal legislation regulating privacy in Australia is the *Privacy Act 1988* (Cth), which applies to Australian and ACT Government agencies and private sector organisations.<sup>143</sup> The Act contains a set of 11 Information Privacy Principles (IPPs) that apply to government agencies, and 10 National Privacy Principles (NPPs) that apply to private sector organisations.

30.129 Of particular relevance to this Inquiry are IPPs 10 and 11, which impose limits on the manner in which Australian Government agencies use and disclose personal information. IPP 10 provides that a ‘record-keeper’ in an Australian Government agency who has possession or control of personal information shall not use the information for any other purpose unless:

- the individual concerned has consented to use of the information for that other purpose;

143 Section 6 of the *Privacy Act 1988* (Cth) defines ‘agency’ to include ‘a federal court’.

the record-keeper believes on reasonable grounds that use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person;

use of the information for that other purpose is required or authorised by or under law;

use of the information for that other purpose is reasonably necessary for enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue; or

the purpose for which the information is used is directly related to the purpose for which the information was obtained.<sup>144</sup>

30.130 IPP 11 governs disclosure of personal information. The exceptions in IPP 11 closely reflect those in IPP 10. Similar, but not identical, limitations on use and disclosure apply to many state and territory government agencies under state and territory privacy laws and administrative obligations.

30.131 *Time for Action* noted that privacy laws can contribute to a lack of communication and collaboration between government and non-government organisations, which impedes systems working together effectively:

While privacy laws generally allow the sharing of information between government agencies and other specified organisations where there is a serious and imminent threat to a person's safety ... many service providers report inconsistencies in the way privacy laws and principles are applied, suggesting the need for clarification of, and/or education for, relevant agencies about privacy laws and principles.<sup>145</sup>

30.132 It appears from some reviews of child protection systems in Australia that there is confusion among agencies about the impact of privacy rules that has created obstacles to information sharing. In a recent report, the Victorian Ombudsman noted

a number of mistaken beliefs held by child protection staff about their responsibilities under the *Information Privacy Act*. Unfounded beliefs included that the department should not release the identity of reporters to Victoria Police when issues of physical and sexual abuse against children were alleged ...

The department has not provided child protection workers with sufficient training, advice or resources to ensure an appropriate level of privacy compliance.<sup>146</sup>

30.133 In NSW, the privacy principles in the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW) have been modified with respect to government agencies (and some private sector entities) that participate in the Domestic Violence Intervention Court Model.<sup>147</sup> The amending orders provide that government agencies that participate in the scheme

<sup>144</sup> Ibid s 14, IPP 10.

<sup>145</sup> National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 154 (citations omitted).

<sup>146</sup> Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009), [78]–[79].

<sup>147</sup> *Privacy Code of Practice (General) Amendment (Domestic Violence Intervention) 2010* (NSW); *Health Records and Information Privacy Code of Practice Amendment (Domestic Violence Intervention) 2010* (NSW).

are not required to comply with the Act in relation to the collection, use and disclosure of personal information about alleged perpetrators, victims and other family members. Agencies must, however, comply with codes of practice particular to the scheme.

30.134 Information sharing guidelines have been recommended as a way to clarify information sharing procedures between the relevant agencies.<sup>148</sup> Numerous reviews have also recommended that specific training be provided to ensure that agencies and their officers understand what information may (or must) be shared, with whom and under what circumstances.<sup>149</sup>

### Proposed reform of the privacy principles

30.135 In its report on privacy, *For Your Information: Australian Privacy Law and Practice* (2008) (ALRC Report 108), the ALRC recommended that a uniform set of privacy principles should apply to private sector organisations and federal, state and territory government agencies.<sup>150</sup> The ALRC expressed the view that the use and disclosure of personal information should be permitted:

- with the consent of the individual to whom the information relates;
- for a secondary purpose that is related to the primary purpose of collection—or, if the information is sensitive personal information, *directly* related to the primary purpose of collection—where the individual to whom the information relates would reasonably expect the information to be used or disclosed in that way;
- where the agency or organisation reasonably believes that the use or disclosure is reasonably necessary to lessen or prevent a serious threat to an individual's life, health or safety; or public health or public safety;
- where the use or disclosure is required or authorised by or under law;
- where the agency or organisation reasonably believes that the use or disclosure is necessary for certain law enforcement and regulatory purposes, including 'the prevention, detection, investigation or remedying of seriously improper conduct or prescribed conduct'; and
- for research purposes.<sup>151</sup>

148 Community Development and Justice Standing Committee—Parliament of Western Australia, *Inquiry into the Prosecution of Assaults and Sexual Offences* (2008), 169–171; R Layton, *Review of Child Protection in South Australia* (2002), [7.9]–[7.13].

149 NSW Health, NSW Police, Department of Community Services (NSW), *NSW Joint Investigative Response Team (JIRT) Review*, unpublished (2006), 19–20; Child Safety Directors' Network—SCAN Subcommittee, *2007–2008 SCAN System Review* (2008), 2; and Northern Territory Police Territory Intelligence Division, *Strategic Intelligence Assessment Child Abuse 2009–2014* (2009), 23–24.

150 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008).

151 *Ibid*, Model Unified Privacy Principle 5.

30.136 Generally, personal information should be used and disclosed only for the purpose for which it was collected, that is, the primary purpose of collection or a related purpose. Where sensitive personal information is collected, it should only be used for the primary purpose of collection or a directly related purpose that the person would reasonably expect.

30.137 The information can be used for other purposes with the consent of the individual to whom the information relates. An example of information being used for another purpose with the consent of the individual is the NSW Police Yellow Card Referral Program. The Program requires police to ask victims of family violence at the time of an incident if they would like their details forwarded to a victim support agency for follow up. The Yellow Card is signed by the victim, indicating express consent for disclosure of their personal information. The Yellow Card is then forwarded to a support agency via a Domestic Violence Liaison Officer.

### **Serious threat to life, health or safety**

30.138 In ALRC Report 108, the ALRC noted that all states and territories have laws in place that expressly allow or require disclosure of personal information in certain circumstances, for example, where a child is at risk of physical or sexual abuse. However, the ALRC also noted reports that sometimes a child was seriously injured or killed by a parent where disclosure of information about the parent's behaviour to appropriate service providers could have helped to prevent the injury or death.<sup>152</sup> Reviews into child deaths have also highlighted the need for increased collaboration and information sharing in order to protect children from serious harm.<sup>153</sup>

30.139 The ALRC was concerned that the existing exception for the use and disclosure of information where necessary to prevent or lessen a serious *and imminent* threat to the life or health of an individual, was too narrow. In the ALRC's view there were compelling policy reasons for information to be used and disclosed, for example, where a child's life, health or safety was at risk of harm in the medium to long term, not only where the threat of harm was imminent. In such circumstances, agencies and organisations should be able to take early preventative action to stop a threat from escalating to the point of materialisation.

30.140 The ALRC recommended, therefore, that the requirement that the threat be imminent should be removed,<sup>154</sup> noting that an analysis of whether a threat was 'serious' would involve consideration of the relative likelihood that the harm would occur, as well as the gravity of the potential outcome.

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152 Ibid, [69,103].

153 Victorian Child Death Review Committee, *Annual Report of Inquiries into the Deaths of Children Known to Child Protection*, 2009, 47; NSW Ombudsman, *The Death of Ebony: The Need for an Effective Interagency Response to Children at Risk* (2009), 53; NSW Ombudsman, *The Death of Dean Shillingsworth: Critical Challenges in the Context of Reforms to the Child Protection System* (2009), 14.

154 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), Rec 25–3.

30.141 In June 2010, in response to these recommendations, the Australian Government released exposure draft Australian Privacy Principles for comment.<sup>155</sup> The draft largely reflected the ALRC's recommendations, including allowing the use or disclosure of personal information where an agency or organisation reasonably believes the use or disclosure is necessary to lessen or prevent a serious threat to an individual's life, health or safety, or public health or safety. In light of stakeholder concerns about the possible breadth of the exception, the exposure draft principles stated that this exception should only apply where it is unreasonable or impracticable to obtain the individual's consent to the use or disclosure.<sup>156</sup>

### Required or authorised by or under law

30.142 Privacy principles across Australia also generally provide exceptions for the use and disclosure of personal information where it is required or authorised by or under law.<sup>157</sup> The exposure draft Australian Privacy Principles provide for the use or disclosure of personal information where it is required or authorised by or under an Australian law, or an order of a court or tribunal.<sup>158</sup> 'Australian law' is defined to include federal, state and territory legislation.<sup>159</sup>

### Family violence legislation

30.143 Some state and territory family violence laws include information-sharing provisions that are designed to ensure that the use and disclosure of relevant information does not contravene privacy laws on the basis that the use or disclosure is authorised by law.

30.144 Under the Tasmanian family violence legislation, for example, 'personal information custodians'—within the meaning of the *Personal Information Protection Act 2004* (Tas)—are permitted (but not required) to collect, use, disclose or otherwise deal with personal information where this is done in good faith for the purpose of furthering the objects of the *Family Violence Act 2004* (Tas).<sup>160</sup> Section 3 of that Act states the objects as follows: 'In the administration of this Act, the safety, psychological wellbeing and interests of people affected by family violence are the paramount considerations'.

30.145 Section 70A of the *Restraining Orders Act 1997* (WA) provides for 'interested parties' to share prescribed information if the parties agree that this is necessary to ensure the safety of a person who is the subject of a protection order or the wellbeing of a child who is affected by such an order. 'Interested parties' are defined as:

- the Commissioner of Police;

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155 Exposure Draft Australian Privacy Principles 2010 (Cth).

156 Ibid cl 7(2)(c).

157 *Privacy Act 1988* (Cth), IPPs 10.1(c) and 11.1(d) and NPP 2.1(g).

158 Exposure Draft Australian Privacy Principles 2010 (Cth) cl 7(2)(b).

159 Ibid, cl 15.

160 *Family Violence Act 2004* (Tas) s 37.

- the Chief Executive Officer of the agency assisting the Minister administering the *Restraining Orders Act*—presently the Attorney-General;
- the Chief Executive Officer of the agency assisting the Minister administering pt 8 of the *Sentence Administration Act 2003* (WA)—presently the Minister for Corrective Services; and
- the Chief Executive Officer for child welfare.<sup>161</sup>

30.146 ‘Prescribed information’ includes, among other matters:

- the name, address, telephone number, age and ethnicity and other details of the victim, a child of the victim, or a person bound by a protection order;
- a description of any offence relevant to the granting of the protection order and an abridged description of the circumstances of its commission;
- any information about the grounds on which the protection order was granted; and
- the status of the investigation and prosecution of any offence relevant to the granting of the protection order by a police officer.<sup>162</sup>

30.147 Persons who provide information under s 70A ‘in confidence and good faith’ are protected from any civil or criminal liability, or breach of professional ethics or standards, in respect of the provision of the information.<sup>163</sup>

30.148 In the ACT, a more restricted information-sharing scheme is established under s 18 of the *Domestic Violence Agencies Act 1986* (ACT). This section enables police officers who suspect the past or future commission of a ‘domestic violence offence’ to disclose to approved crisis support organisations ‘any information that is likely to aid the organisation in rendering assistance to the person or to any children of the person’. Crisis support organisations are approved by the Minister pursuant to disallowable legislative instruments.

30.149 In some situations, agencies are required to share information relevant to family violence proceedings. For example, the South Australian family violence legislation requires South Australian Government agencies, and persons providing services to those agencies, to make available to police officers, on request, information that ‘could reasonably be expected to assist in locating a defendant to whom an intervention order is to be served’.<sup>164</sup>

#### ***Child protection legislation***

30.150 Currently, each state and territory child protection law provides for the exchange of information between police and the child protection agency, and between

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161 *Restraining Orders Act 1997* (WA) s 70A(1).

162 *Restraining Orders Regulations 1997* (WA) reg 15.

163 *Restraining Orders Act 1997* (WA) s 70A(4).

164 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 38.

the police and other nominated persons or agencies, although there is great diversity in how these provisions are framed.<sup>165</sup>

30.151 The *Children and Young People Act 2008* (ACT), for example, permits information to be shared between ACT Policing, the child protection agency and other persons where it is in the best interests of the child or young person and for the purpose of performing a function under the Act.<sup>166</sup> In NSW, the child protection agency is able to provide information to prescribed bodies and to request information from them where the information relates to:<sup>167</sup>

- the safety, welfare and wellbeing of a particular child or young person or class of children or young persons;<sup>168</sup>
- an unborn child who is the subject of a pre-natal report;
- the family of an unborn child the subject of a pre-natal report; or
- the expected date of birth of an unborn child that is the subject of a pre-natal report.<sup>169</sup>

30.152 The list of prescribed bodies is extensive and includes: NSW Police; government agencies; schools; hospitals; fostering agencies; child care services; out-of-home care services; adoption agencies; and any other organisation which is responsible for or supervises the provision of health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly to children. The NSW child protection agency is also authorised to exchange information with certain Commonwealth agencies including the Family Court, the Federal Magistrates Court, Centrelink and the Department of Immigration and Citizenship.<sup>170</sup>

30.153 The Act makes it clear that these provisions override any provision contained in any other law, including privacy law, which prohibits or restricts the disclosure of that information.<sup>171</sup> A prescribed body therefore cannot refuse to release information to the child protection agency on the basis that the privacy law prohibits it from doing so.

30.154 In NSW and the Northern Territory, police and the child protection agency have a mutual obligation to share information on request where they believe that the information will assist the other in providing for the safety, welfare or wellbeing of the child to whom the information relates. The situation varies in other states and territories. The police are compelled to provide information at the request of the child protection agency in Queensland, South Australia, Tasmania and the ACT. Except for

165 See, eg *Children and Young People Act 2008* (ACT) ch 25; *Care and Protection of Children Act 2007* (NT) ss 34, 38; *Child Protection Act 1999* (Qld) pt 4; *Children, Young Persons and Their Families Act 1997* (Tas) pt 5A.

166 *Children and Young People Act 2008* (ACT) ch 25.

167 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 248(6), *Children and Young Persons (Care and Protection) Regulation 2000* (NSW) reg 7.

168 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 248(1).

169 *Ibid* s 248(1A).

170 *Ibid* s 245I.

171 *Ibid* s 248(5).

NSW and the Northern Territory, the child protection agency in other jurisdictions retains discretion as to whether to supply information to the police.

30.155 A shortcoming of the NSW information sharing provisions, identified by the Wood Inquiry, was the inability of human service and justice agencies (including the police), and those agencies and non-government agencies, to share information directly without needing to use the child protection agency as a hub.<sup>172</sup>

30.156 This was addressed by the addition of a new Chapter 16A into the *Children and Young Persons (Care and Protection) Act 1998* (NSW) that allows prescribed bodies to share information relating to the safety, welfare or wellbeing of children and young persons.<sup>173</sup> The following principles apply to information sharing under this chapter:

- (a) agencies that have responsibilities relating to the safety, welfare or well-being of children or young persons should be able to provide and receive information that promotes the safety, welfare or well-being of children or young persons,
- (b) those agencies should work collaboratively in a way that respects each other's functions and expertise,
- (c) each such agency should be able to communicate with each other agency so as to facilitate the provision of services to children and young persons and their families,
- (d) because the safety, welfare and well-being of children and young persons are paramount:
  - (i) the need to provide services relating to the care and protection of children and young persons, and
  - (ii) the needs and interests of children and young persons, and of their families, in receiving those services,

take precedence over the protection of confidentiality or of an individual's privacy.<sup>174</sup>

30.157 These provisions place a positive onus on prescribed bodies to take reasonable steps to coordinate decision making and delivery of services regarding children and young persons.<sup>175</sup> Information sought by an agency must relate directly to that agency's work in relation to the safety, welfare and wellbeing of a particular child or young person or class of children or young people.<sup>176</sup> A prescribed body will be required to comply with a request for information when it believes this will assist the requesting body in providing for the safety, welfare and wellbeing of the child and/or young person to whom the information relates.<sup>177</sup> Where there are inconsistencies between the Act and other legislation governing privacy, the provisions contained in

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<sup>172</sup> J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [24.98], [24.173].

<sup>173</sup> Amended by the *Children's Legislation (Wood Inquiry Recommendations) Act 2009* (NSW).

<sup>174</sup> *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245A(2).

<sup>175</sup> Ibid s 245A(1).

<sup>176</sup> Ibid s 245D(2).

<sup>177</sup> Ibid s 245D(3).

Chapter 16A take precedence.<sup>178</sup> The legislation does, however, place a number of limitations on the obligation to provide information. For example, a prescribed body is not required to disclose information if the agency believes it would impact on a criminal investigation or coronial inquest, endanger a person's life or is not in the public interest.<sup>179</sup>

30.158 As in NSW, Tasmanian child protection legislation also makes provision for the police to share information with an extensive list of prescribed agencies other than the child protection agency.<sup>180</sup> In Queensland, the list is limited to the departments of health, housing and homelessness, community care services, accredited schools, persons providing services to children or families and the Mater Misericordiae Hospital.<sup>181</sup>

30.159 In the Northern Territory, police can request information from a list of prescribed persons, including employees of government agencies, schools, health practitioners and hospitals where they are conducting an inquiry into a child's physical, psychological or emotional wellbeing or a child protection investigation. The prescribed person must comply with the police request.<sup>182</sup>

30.160 Information sharing guidelines are one mechanism to explain to agencies and organisations how legislative provisions operate and to clarify information-sharing procedures between the relevant entities.<sup>183</sup> For example, guidelines can set down processes for requesting and providing information. As recommended in several reviews of child protection systems, they can also highlight the importance of sharing information (between police, the child protection agency and other relevant agencies) early in the investigation process.<sup>184</sup>

### Secrecy laws

30.161 While privacy laws impose obligations on agencies with respect to the handling of personal information, secrecy laws impose obligations on individual public service officers with respect to the handling of personal and other information held by government. Frequently, secrecy laws impose criminal sanctions for the unauthorised disclosure of government information.

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178 Ibid s 245H.

179 Ibid s 245D(4).

180 *Children, Young Persons and Their Families Act 1997* (Tas) s 53B. An information sharing entity is defined broadly under s 3(1). See also Department of Health and Human Services (Tas), *Guidelines: Information Sharing for Providers of Family and Disability Support* (2010) <[www.dhhs.tas.gov.au](http://www.dhhs.tas.gov.au)> at 14 April 2010.

181 *Child Protection Act 1999* (Qld) s 159M.

182 *Care and Protection of Children Act 2007* (NT) s 34.

183 Community Development and Justice Standing Committee–Parliament of Western Australia, *Inquiry into the Prosecution of Assaults and Sexual Offences* (2008), 169–171. See also R Layton, *Review of Child Protection in South Australia* (2002), [7.9]–[7.13].

184 NSW Health, NSW Police, Department of Community Services (NSW), *NSW Joint Investigative Response Team (JIRT) Review*, unpublished (2006), 16; Department of Child Safety (Qld), *Progress in Reforming the Queensland Child Protection System* (2006), 60.

30.162 In 2009, the ALRC conducted a review of Commonwealth secrecy laws, with a focus on the increased need to share information within and between governments and with the private sector.<sup>185</sup> The ALRC recommended that Australian Government agencies should review Commonwealth secrecy offences to determine whether criminal sanctions are warranted for the unauthorised disclosure of government information.<sup>186</sup> The ALRC also recommended that secrecy offences should generally include an exception for disclosures in the course of an officer's functions or duties.<sup>187</sup> This exception would ensure that where disclosures are required or authorised by or under another law—for example, state and territory family violence legislation or child protection legislation—or where an officer disclosed information in accordance with an information sharing protocol or memorandum of understanding, the officer would not breach the relevant secrecy law.

### **Shared databases**

30.163 A number of reviews have identified the utility of shared information and data collection systems between, for example, police and child protection agencies.<sup>188</sup> Several models exist both in Australia, such as the Client Relationship Information System in Victoria,<sup>189</sup> and overseas.

30.164 A database called ‘Wellnet’ has been established in NSW to improve sharing of information about at-risk children between Child Wellbeing Units (CWUs), and to provide limited information about children and young people known to the child protection agency. There are CWUs in NSW Health, the NSW Police Force, the Department of Education and Training, and the Department of Human Services. Wellnet allows CWU officers to search for a child or young person to determine whether they are being case managed by the child protection agency or if other CWUs have received notification of concerns. The database also assists officers to better support vulnerable children and young people, allows cumulative risk to be recognised and reported, and records information about services required and/or provided to families, thereby assisting in the identification of service gaps.

30.165 As part of its ‘Every Child Matters’ program, the United Kingdom has established an online directory called ContactPoint, which contains basic information on every child in the nation and allows authorised practitioners in different services (including health, education, welfare and the police) to find out who else is working with the same child or young person. Its aim is to assist services to work together as a team and deliver more timely and coordinated support, and thus decrease service

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185 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report 112 (2009).

186 Ibid, Rec 11–1.

187 Ibid, Rec 10–2.

188 NSW Health, NSW Police, Department of Community Services (NSW), *NSW Joint Investigative Response Team (JIRT) Review*, unpublished (2006), 19–20; Child Safety Directors’ Network—SCAN Subcommittee, *2007–2008 SCAN System Review* (2008), 2; and Northern Territory Police Territory Intelligence Division, *Strategic Intelligence Assessment Child Abuse 2009–2014* (2009), 23–24.

189 But note the criticisms made by the Victorian Ombudsman: Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009), 11–12, 26–30.

delivery duplication.<sup>190</sup> Regulations outline what information can be held, who can (or must) provide the information, how long it can be retained, who can be granted access and how accuracy will be maintained.<sup>191</sup> There are also ‘shielding’ provisions to hide the contact details of people who are at increased risk of significant harm, such as victims of family violence.

#### **Consultation Paper**

30.166 In the Consultation Paper, the Commissions sought feedback on whether privacy or secrecy laws were unduly impeding agencies from disclosing information which may be relevant to protection order proceedings or family law proceedings.<sup>192</sup> The Commissions proposed that privacy principles at the federal, state and territory level should be amended, where necessary, to permit the use or disclosure of personal information where an agency reasonably believes it is necessary to lessen or prevent a serious threat to an individual’s life, health or safety—rather than a serious and imminent threat<sup>193</sup>—as recommended by ALRC Report 108.<sup>194</sup>

30.167 The Commissions also proposed that:

- state and territory family violence legislation should expressly authorise agencies to use or disclose information for the purpose of ensuring the safety of a victim of family violence or the wellbeing of an affected child;<sup>195</sup> and
- state and territory child protection legislation should expressly authorise agencies to use or disclose information for the purpose of making accurate assessments of the needs of children and families and to ensure that appropriate programs are delivered in a timely and coordinated way.<sup>196</sup>

30.168 The Commissions suggested a number of parties to whom information should be able to be disclosed under information sharing provisions.<sup>197</sup> The Commissions also proposed the development of information sharing guidelines to assist agencies to understand their roles and responsibilities.<sup>198</sup> Finally, the Commissions proposed the establishment of a shared database containing basic information about a child or family that authorised agencies could access to see which other agencies were dealing with a particular child or family.<sup>199</sup>

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190 Children Act 2004 (UK) s 12; see also Department of Children, Schools and Families (UK), *Contact Point: Lessons Learned from the Early Adopter Phase* (2009).

191 Children Act 2004 Information Database (England) Regulations 2007 (UK).

192 Consultation Paper, Question 10–20.

193 Ibid, Proposal 10–11.

194 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), Recommendation 25–3.

195 Consultation Paper, Proposal 10–12.

196 Ibid, Proposal 13–5.

197 Ibid, Proposal 10–13.

198 Ibid, Proposal 13–5.

199 Ibid, Proposal 13–5.

### ***Submissions and consultations***

30.169 Stakeholders expressed support for amending privacy principles at federal, state and territory level to permit the use or disclosure of personal information where an agency reasonably believes it is necessary to lessen or prevent a serious threat to an individual's life, health or safety.<sup>200</sup>

30.170 There was general support for ensuring that family violence and child support legislation expressly allowed relevant agencies to exchange information, to keep children and families safe and to ensure timely and coordinated service provision.<sup>201</sup> A number of stakeholders commented that careful consideration and consultation should occur in developing these provisions to ensure that they covered all necessary and relevant parties, in particular, non-government service providers such as family violence advocacy and support services;<sup>202</sup> and independent children's lawyers.<sup>203</sup> A number of stakeholders commented that, in sharing information among government agencies and non-government service providers, it was important to ensure that the safety of victims and their families was not compromised by the inappropriate release of information.<sup>204</sup>

200 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Office of the Privacy Commissioner, *Submission FV 147*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 105*, 6 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

201 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Better Care of Children, *Submission FV 72*, 24 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

202 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 184*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

203 Queensland Law Society, *Submission FV 178*, 25 June 2010.

204 J Stubbs, *Submission FV 186*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010.

30.171 The Sydney Women's Domestic Violence Court Advocacy Service (WDVCAS) agreed, noting with approval s 18 of the ACT *Domestic Violence Agencies Act*, which allows police to share information with approved crisis support organisations where the police believe on reasonable grounds that a domestic violence offence has been, or is likely to be, committed. The information is shared to allow the organisations to provide assistance to the parties. WDVCAS also noted that the NSW Police Yellow Card Referral Program was a useful initiative that could be more widely used.<sup>205</sup>

30.172 Guidelines were also seen as important to ensure that agencies understood their roles and responsibilities under information sharing laws.<sup>206</sup>

30.173 The Office of the Privacy Commissioner expressed the view, however, that if privacy principles at the federal, state and territory level were amended as suggested above, this would allow agencies to share information in appropriate circumstances and that further provisions in state and territory legislation were unnecessary. The Office stated that:

Guidelines developed by the Office provide that a 'serious' threat must reflect significant danger, and could include a potentially life threatening situation or one that might reasonably result in other serious injury or illness. In the case of family violence involving controlling behaviour over a number of years, the degree of seriousness to allow disclosure of information may be considered to have been met where a series of incidents result in significant and demonstrable harm.

It should also be noted that threats to health under the exception are not limited to physical harm but would also include threats to an individual's psychological wellbeing. The exception may therefore be relied on to disclose information where there is the threat of serious psychological harm that may be experienced as a result of ongoing domestic violence or fear for safety.<sup>207</sup>

30.174 There was also support for shared child protection databases,<sup>208</sup> although some stakeholders noted that the privacy concerns around such databases would need to be carefully managed.<sup>209</sup> The Tasmanian Department of Premier and Cabinet stated

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205 Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010.

206 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

207 Office of the Privacy Commissioner, *Submission FV 147*, 24 June 2010.

208 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

209 F Hardy, *Submission FV 126*, 16 June 2010.

that the development of a shared database in that jurisdiction was not a current priority.<sup>210</sup>

#### ***Commissions' views***

30.175 As noted above, *Time for Action* identified privacy laws as one of the obstacles to an integrated and effective response to family violence. Many stakeholders consulted in this Inquiry agreed that they encounter difficulties sharing information because of actual or perceived limits imposed by privacy and secrecy laws.

30.176 Implementation of the model use and disclosure principle set out in ALRC Report 108 would address some of the issues identified. In particular, the Commissions recommend that Australian, state and territory governments ensure that the privacy principles applicable in each jurisdiction permit the use or disclosure of personal information where agencies and organisations reasonably believe it is necessary to lessen or prevent a serious threat to an individual's life, health or safety. Given the high level of involvement of private sector service providers in the areas of family violence and child protection, this exception should apply to both government agencies and private sector organisations. The threat should not have to be imminent. Agencies and organisations should be able to share information in order to intervene early in family violence and child protection situations to prevent a serious threat from manifesting.

30.177 As noted above, in *Secrecy Laws and Open Government in Australia* (ALRC Report 112) the ALRC recommended that secrecy laws should generally include an exception for disclosures in the course of an officer's functions or duties.<sup>211</sup> The recommendations in ALRC Report 112 were limited to Commonwealth secrecy laws, because that was the extent of the terms of reference for that Inquiry. In the Commissions' view, however, the principles underlying the ALRC's recommendation that Commonwealth secrecy laws should include an express exception for disclosure in the course of an officer's functions and duties establishes a principle of wider application.

30.178 If this approach were adopted by Australian, state and territory governments it would ensure that, where an officer disclosed information, for example, in accordance with the provisions of state and territory family violence or child protection legislation, or in accordance with an information sharing protocol or memorandum of understanding—discussed further below—the officer would not breach the relevant secrecy law. The Commissions therefore endorse the relevant recommendations in ALRC Report 112 in relation to Commonwealth secrecy laws,<sup>212</sup> and recommend that state and territory governments consider amending secrecy laws that regulate the disclosure of government information to include an express exception to allow the disclosure of information in the course of an officer's functions and duties.

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210 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

211 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report 112 (2009), Recs 7–1 and 10–2.

212 Ibid, Recs 7–1 and 10–2.

30.179 The Commissions note the views of the Office of the Privacy Commissioner that the recommended amendment to the privacy principles to remove the ‘imminence’ requirement will be sufficient to ensure that information can be shared appropriately in the family violence and child protection contexts. The Commissions consider, however, that it would also assist those working in these areas to have an express provision allowing information to be shared to ensure the safety of victims of family violence, children and young people. In particular, the Commissions recommend in Chapter 20 that child protection legislation should authorise the disclosure to the police of the identity of a ‘reporter’ under the legislation in connection with the investigation of a serious offence alleged to have been committed against a child or young person; or where necessary to safeguard or promote the safety, welfare or wellbeing of a child or young person.<sup>213</sup>

30.180 Where sensitive personal information is disclosed for a purpose other than the primary purpose of collection, this should generally be done on the basis of consent. As noted above, the NSW Police Yellow Card Referral Program is an example of this. It is also important for agencies and organisations to have a clear basis for sharing information in situations that do not necessarily involve a risk to safety, for example, in order to ensure timely and effective service delivery, or to ensure the wellbeing of a child, as opposed to the safety of a child.

30.181 Where seeking consent is not reasonable or practicable, legislative provisions should clearly indicate those agencies with which, and the specific circumstances in which, information can be shared, for example what information can be disclosed by the police to child protection agencies. Given the high level of involvement of private sector service providers in the areas of family violence and child protection, provision should also be made in legislation to allow information to be shared with specified private sector organisations in some circumstances. The Commissions note that the approach adopted in the ACT *Domestic Violence Agencies Act*—which allows police to share information with approved crisis support organisations in some circumstances—is one possible model.

30.182 Provisions such as this mean that information can be shared without breaching privacy laws, because the information sharing is ‘required or authorised by law’, and without breaching secrecy laws, where those laws include an exception for disclosure in the course of an officer’s functions or duties. The Commissions reiterate, however, that, as a general rule, information should only be used for the purpose it is collected or a related purpose that the individual would expect. Whenever reasonable and practicable, the person’s consent should be sought if the information is to be used or disclosed for a purpose other than the one for which it was collected, where the purpose is not related to the original purpose of collection and the person would not expect the information to be used or disclosed in this way.

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213 Rec 20–1.

30.183 The Commissions do not intend to specify the exact content of the information sharing provisions. Each jurisdiction will need to consider what information sharing arrangements are necessary and appropriate and, in particular, which private sector organisations should be included in the arrangements.

30.184 The Commissions note that databases in some jurisdictions facilitate the sharing of information between agencies working together, particularly in the area of child protection. Such databases provide a useful mechanism to help ensure that agencies are aware of the fact that other agencies are working with a particular child or family, and to prevent the duplication of services. It would be logical, for example, to establish a shared database where family violence or child protection legislation expressly provides for the disclosure of certain information from one agency to another, as discussed above. The Commissions note, however, that such databases raise significant privacy concerns. The Commissions recommend, therefore, that in developing any such databases federal, state and territory governments should ensure that appropriate privacy safeguards are put in place.

30.185 The Commissions' recommendations set out below are intended to ensure that legislative provisions do not prevent the sharing of information in circumstances where there is a risk to an individual's life, health or safety. In addition, the Commissions recommend that family violence and child protection legislation should clearly set out which agencies and organisations may use and disclose information and in what circumstances. This will provide clarity for individual officers and staff and will ensure that where information is shared it does not breach privacy or secrecy laws.

**Recommendation 30–9** The Australian, state and territory governments should ensure that privacy principles regulating the handling of personal information in each jurisdiction expressly permit the use or disclosure of information where agencies and organisations reasonably believe it is necessary to lessen or prevent a serious threat to an individual's life, health or safety.

**Recommendation 30–10** The Australian, state and territory governments should consider amending secrecy laws that regulate the disclosure of government information to include an express exception to allow the disclosure of information in the course of a government officer's functions and duties.

**Recommendation 30–11** State and territory family violence legislation should expressly authorise the use or disclosure of personal information for the purpose of ensuring the safety of a victim of family violence or an affected child.

**Recommendation 30–12** State and territory child protection legislation should expressly authorise agencies to use or disclose personal information for the purpose of ensuring the safety of a child or young person.

**Recommendation 30–13** State and territory family violence legislation and child protection legislation should expressly provide for information sharing among specified agencies in specified circumstances, and should include provision to allow information to be shared with specified private sector organisations.

**Recommendation 30–14** The Australian, state and territory governments should develop guidelines to assist agencies and organisations working in the family violence and child protection systems to better understand the rules relating to the sharing of information.

**Recommendation 30–15** The Australian, state and territory governments should ensure that, in developing any database to allow the sharing of information between agencies and organisations in the family violence or child protection systems, appropriate privacy safeguards are put in place.

## Strategies to improve information sharing

### Information sharing protocols and MOUs

30.186 The NSW Ombudsman has noted that it is:

important to recognise that the formal arrangements being developed in relation to information exchange present only part of the challenge. Both government and non-government agencies alike need to appreciate that effective child protection practice is contingent on agencies understanding the need to be proactive in obtaining information from other agencies and in passing it on. From our review of child protection practice over a number of years we have seen an emphasis on the risks associated with the disclosure of confidential information at the expense of recognising the very significant child protection risks which can arise from the failure to pass on vital information. Therefore, while the recent legislative amendments represent an opportunity to improve practice in relation to the exchange of information, we believe this will not occur without a corresponding cultural shift that promotes information exchange as part of good child protection practice.<sup>214</sup>

30.187 As noted by the NSW Ombudsman, barriers to information sharing are not always legislative in character. Often the obstacles are administrative and cultural. The following section considers ways to promote a culture of effective information sharing within the legislative framework discussed above. One strategy is to put in place information sharing protocols and memorandums of understanding (MOUs) between elements in the family law, family violence and child protection systems to clarify and formalise what information can be shared, with whom, and in what circumstances.

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214 NSW Ombudsman, *The Death of Dean Shillingsworth: Critical Challenges in the Context of Reforms to the Child Protection System* (2009), 15.

30.188 A number of these arrangements exist in the child protection area, but they are less common in the family violence context. Western Australia has a number of protocols in place to assist with information sharing in matters involving family violence between the Family Court of Western Australia, the Magistrates Court (in particular, the specialist Family Violence Court), the Department of the Attorney-General, the Department of Corrective Services and Legal Aid Western Australia. The parties entered into the protocols in February 2009.<sup>215</sup>

30.189 The protocols acknowledge that ‘as far as is practicable, and permissible under the relevant statutory provisions, the parties should share and exchange information and resources in individual cases’ where to do so would assist in achieving the parties’ common commitment to protecting victims of violence and providing the best possible outcomes for children.<sup>216</sup>

30.190 The protocols make provision for the exchange of information between courts which share common clients. In order to ascertain the existence of a common client, officers from the Magistrates Court may access information from the Family Court of Western Australia, and officers from the Family Court of Western Australia and family consultants may access information from the Magistrates Court’s database.<sup>217</sup> Where a common client is established, the protocols permit, on written request, inspection of the relevant court records.<sup>218</sup> The protocols also specify processes for liaison between a family consultant in the Family Court of Western Australia and the case management coordinator in the Family Violence Court.<sup>219</sup>

30.191 Where a family violence service worker (employed by the Attorney-General’s Department) is concerned that a child who is the subject of parenting order proceedings in the Family Court of Western Australia may be at risk, the worker may advise the family consultant that there is information or documentation available that may be relevant to the assessment of risk for the child.<sup>220</sup> Further, where a family violence service worker has referred a client to the Family Court of Western Australia to file applications for parenting orders, or becomes aware that such an application is likely to be filed, the worker must notify the court that the service has information that may be of use to the court. The judicial officer dealing with the file may then make appropriate inquiries with the service and request any relevant information or documentation.<sup>221</sup>

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215 Family Court of Western Australia and others, *Information Sharing Protocols between the Family Court of Western Australia, Magistrates Court of Western Australia, Department of the Attorney-General, Department of Corrective Services and Legal Aid Western Australia in Matters Involving Family Violence* (2009).

216 Ibid, cls 1.2.1, 1.2.2.

217 Ibid, cl 2.2.

218 Ibid, cl 2.3.

219 Ibid, cl 3.1.

220 Ibid, cl 4.1.1.

221 Ibid, cl 4.2.

30.192 In Tasmania—in response to police concerns about victim safety where protection orders operate alongside family court orders—a protocol has been negotiated between the police, the Magistrates Court of Tasmania and the Tasmanian Registry of the Family Court. Under the protocol, if a family court contact order poses a risk to the safety of a victim of family violence, the police prosecutor alerts the magistrate of this concern. The magistrate can suspend the order for a period of days and make a protection order. The Magistrates Court file with the grounds for suspension is transferred to the Family Court for review of the contact order within the period of suspension. A review of the *Family Violence Act 2004* (Tas) by Urbis recommended that the effectiveness of this protocol be evaluated over time,<sup>222</sup> but no such evaluation appears to have taken place.

30.193 A number of state and territory child protection agencies have protocols or MOUs with the Family Court and the Federal Magistrates Court.<sup>223</sup> These govern the handling of child protection matters and are designed to ‘assist cooperation, clarify procedures and improve decision-making in cases that may occur in either or both Commonwealth, state and territory jurisdictions’.<sup>224</sup> Such documents ‘represent deliberate statements of policy and agreed procedures, but do not in any way change the law’.<sup>225</sup> The form and content of the protocols and MOUs are different in each state and territory, largely reflecting the differences in the state and territory child protection laws.<sup>226</sup>

30.194 The table below sets out the MOUs and protocols in place throughout Australia to facilitate the exchange of information between child protection agencies and the family law system. At the time of writing, Families South Australia and the Family Court are believed to be finalising an MOU. The Commissions also understand that the Family Court is negotiating in similar terms with the Department of Health and Human Services in Tasmania and the Victorian Department of Human Services.

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222 Urbis, *Review of the Family Violence Act 2004* (2008), prepared for the Department of Justice (Tas), [3.5].

223 Family Court of Australia, *Protocol between the Family Court of Australia and the NSW Department of Community Services* (2005); Federal Magistrates Court of Australia, *Memorandum of Understanding between the Federal Magistrates Court of Australia and the NSW Department of Community Services* (2007); Federal Magistrates Court of Australia, *Protocol between the Federal Magistrates Court of Australia and the NSW Department of Community Services* (2009); Family Court of Australia, *Protocol between the Department of Child Safety Queensland, the Family Court of Australia and the Federal Magistrates Court of Australia* (2007); *Memorandum of Understanding between the Family Court of Western Australia, the Department for Child Protection, Legal Aid Western Australia* (2008).

224 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [3.13].

225 R Chisholm, *The Child Protection–Family Law Interface* (2009), 41.

226 See D Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia’s Magellan Case-Management Model* (2007), prepared for the Family Court of Australia, 156.

<b><i>Information sharing protocols and MOUs</i></b>	
NSW	Protocol between Legal Aid NSW and DoCS [now Community Services]—dealings with independent children's lawyers in family law matters; MOU between the Family Court and DoCS; MOU between the Federal Magistrates Court (FMC) and DoCS; Protocol between the FMC and DoCS.
Victoria	Unsigned draft <sup>227</sup> —although the Department of Human Services is currently in discussion with the Family Court and Victoria Legal Aid regarding dealings with independent children's lawyers in family law matters.
Queensland	MOU between federal family courts and the Department of Child Safety.
Western Australia	MOU between the Family Court of Western Australia, Department of Child Protection and Legal Aid WA.
South Australia	Arrangements under negotiation.
Tasmania	Arrangements under negotiation.
ACT	MOU between Department of Disability, Housing and Community Services, Department of Education and Training, ACT Health and the Department of Justice and Community Safety.
Northern Territory	None.

30.195 The majority of the protocols and MOUs examined aim to meet the protective needs of children. The Western Australian MOU takes a more expansive approach and aims ‘to provide the best possible outcomes for children’.<sup>228</sup>

30.196 In its report in 2002, the Family Law Council noted that the principles and procedures in the existing protocols and MOUs were at times difficult to translate into practice. While the arrangements played an important role in providing better coordination between the courts exercising jurisdiction under the *Family Law Act* and the state and territory child protection agencies, they were not a ‘panacea for

227 Protocol between Victorian Department of Human Services and Family Court of Australia (unsigned, dated 19 April 1995).

228 Family Court of Western Australia and others, *Information Sharing Protocols between the Family Court of Western Australia, Magistrates Court of Western Australia, Department of the Attorney-General, Department of Corrective Services and Legal Aid Western Australia in Matters Involving Family Violence* (2009).

addressing all the problems associated with the interaction between the State and Federal systems concerned with the resolution of child protection concerns'.<sup>229</sup> Other commentators agree that the protocols are insufficient to develop a seamless connection between the state and territory child protection systems and federal family courts.<sup>230</sup> Higgins has observed that the mere fact that an MOU is in place does not necessarily lead to a more cooperative approach to the exchange of information.<sup>231</sup>

30.197 In the Consultation Paper, the Commissions proposed that there should be formal information sharing arrangements established between courts hearing protection orders, the federal family courts, police, relevant government agencies and private sector organisations.<sup>232</sup> In particular, the Commissions proposed that such arrangements should be established between federal family courts and child protection agencies.<sup>233</sup> The Commissions also asked for stakeholder feedback on the best way to ensure that these arrangements are well known and understood by the agencies and organisations involved.<sup>234</sup>

#### **Submissions and consultations**

30.198 In its submission, the Office of the Privacy Commissioner expressed the view that information sharing protocols and MOUs can assist with communication and coordination between federal, state and territory agencies and with relevant private sector organisations. The Office noted, however, that such arrangements do not stand alone but are tools to support good practice and can help agencies and organisations to understand their legal obligations. The Office suggested that such arrangements might include guidance on good privacy practice and complaint procedures.<sup>235</sup>

30.199 The Chief Justice of the Family Court and the Chief Federal Magistrate noted in their submission that protocols and MOUs are useful but they can be overlooked or misconstrued. If they are to be relied upon, it is important that resources are dedicated to promote their existence and to train staff in their use. They also require regular review.<sup>236</sup> A number of other stakeholders also emphasised the importance of training.<sup>237</sup>

30.200 The Magistrates' Court and Children's Court of Victoria noted that protocols and MOUs relied on relationships and goodwill in order to be effective and suggested that a national register—which included family court orders affecting children as well

229 Family Law Council, *Family Law and Child Protection: Final Report* (2002), [2.20].

230 T Brown, R Sheehan, M Frederico and L Hewitt, *Resolving Family Violence to Children: An Evaluation of Project Magellan* (2001), 49.

231 D Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (2007), prepared for the Family Court of Australia, 137–141.

232 Consultation Paper, Proposal 10–14.

233 Ibid, Proposal 14–3.

234 Ibid, Question 14–14.

235 Office of the Privacy Commissioner, *Submission FV 147*, 24 June 2010.

236 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

237 Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010.

as family violence protection orders—would be a more effective method of sharing information. The submission noted that there is a protocol in place between the Magistrates' Court of Victoria and the federal family courts to have family court orders faxed through upon request, although the protocol is not well established and has encountered difficulties, particularly when personnel change. The submission suggested that one way to improve communication would be to have liaison officers in each court, for example, federal family court officers in the Magistrates' Court and the Children's Court and vice versa.<sup>238</sup> A number of other stakeholders agreed that liaison officers were an important element to support such arrangements.<sup>239</sup>

30.201 The Aboriginal Family Violence Prevention and Legal Service expressed support for information sharing protocols and MOUs, noting that they should be publically available and that ongoing training was important. The submission also noted liaison officers could be responsible for providing training in relation to the information sharing arrangements.<sup>240</sup>

30.202 The Queensland Law Society expressed support for the existing protocol between the federal family courts and the Queensland child protection agency and noted that the arrangements around the protocol included regular meetings between the parties.<sup>241</sup> In a joint submission, Domestic Violence Victoria and others suggested that it was important that such arrangements sit within a broader model of integrated services.<sup>242</sup>

30.203 In its submission, the Tasmanian Department of Premier and Cabinet noted that, anecdotally, the Tasmanian protocol is not often used, suggesting that this was perhaps because family violence matters come before the courts soon after the breakdown of a relationship and before there are federal family court orders in place.<sup>243</sup>

30.204 National Legal Aid stated in relation to the Western Australian MOUs:

These memoranda of understanding are working well, particularly with respect to the Family Court's access to information from [the Department of Child Protection] and the Magistrates Courts database. DCP 86 now has an officer permanently located at the Family Court of WA to facilitate the information sharing process.<sup>244</sup>

#### ***Commissions' views***

30.205 There is some evidence from stakeholders that information-sharing protocols and MOUs between the courts and relevant agencies and organisations do have a valuable role to play in facilitating communication and information exchange between

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238 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

239 Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

240 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010.

241 Queensland Law Society, *Submission FV 178*, 25 June 2010.

242 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

243 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.

244 National Legal Aid, *Submission FV 232*, 15 July 2010.

parties in the family law, family violence and child protection systems. However, there was also recognition that protocols and MOUs cannot stand alone and are dependent on the knowledge and involvement of officers and staff. The Commissions agree that simply putting protocols in place is not sufficient. These arrangements must be given an ongoing profile among court and agency officers; they must form the basis of an ongoing and responsive relationship between the parties and must be supported and implemented in practice. Ongoing training and liaison arrangements are also essential to ensure that the protocols and MOUs are actively and effectively implemented.

30.206 At present, there are few information-sharing protocols in the context of family violence. In the Commissions' view, there would be value in developing formal information sharing arrangements between the state and territory courts, the federal family courts, police and other agencies in relation to family violence matters. It may also be appropriate to include non-government organisations such as family violence support workers in any such arrangements. The development of information-sharing protocols in the context of family violence is consistent with the views expressed in *Time for Action*.

30.207 Above, the Commissions recommend that federal family courts and state and territory child protection agencies develop protocols that include procedures for dealing with requests for documents and information under s 69ZW and for responding to subpoenas issued by federal family courts.<sup>245</sup> The Commissions note that the federal family courts already have formal information sharing arrangements in place with child protection agencies in a number of jurisdictions and that negotiations are under way in several others. Stakeholders expressed a level of support for these arrangements and the Commissions are of the view that it would be of value to put protocols in place in every jurisdiction. The Commissions again emphasise that it will be necessary to ensure that the parties to the information sharing protocols receive ongoing training to ensure that the arrangements are well known and understood and that the protocol arrangements are effectively implemented.

**Recommendation 30–16** Federal family courts, state and territory magistrates courts, police, and relevant government agencies should develop protocols for the exchange of information in relation to family violence matters. Parties to such protocols should receive regular training to ensure that the arrangements are effectively implemented.

**Recommendation 30–17** Federal family courts and state and territory child protection agencies should develop protocols for the exchange of information in those jurisdictions that do not yet have such arrangements in place. Parties to such protocols should receive regular training to ensure that the arrangements are effectively implemented.

### A national register

30.208 The capacity for family violence protection orders to be enforced across jurisdictions is essential to the safety of victims. The Australian Government Solicitor noted, in a background paper to *Time for Action*, that:

This is especially so given that it is not uncommon for victims to move interstate (or to move from New Zealand to Australia or vice versa) in order to escape violent relationships. People who have obtained a protection order may also relocate for other reasons, for example, to be closer to their extended family or to seek employment.<sup>246</sup>

30.209 Currently, a protection order that has been obtained in one state or territory is not automatically enforceable in another state or territory. Rather, the victim of family violence or some other person must register the ‘external protection order’ in the second jurisdiction.<sup>247</sup> Registration is essentially an administrative process; however, there are some differences between jurisdictions with respect to the types of orders that are capable of registration, provisions for notification of the person against whom the order has been made, and duration for which the external protection order is in force. In some jurisdictions—including NSW, Queensland, Tasmania and the Northern Territory—a court may vary an external protection order before registration.

30.210 Family violence legislation in Victoria, Western Australia, the ACT and the Northern Territory provides that if the court registers an external protection order, the court or registrar is to provide notice of the registration to the court that made the order (the original court). In Victoria and the ACT, the court must also provide the original court with notice of any variation to the original order. The ACT is the only jurisdiction that also provides for feedback from the original court to a court which has registered a protection order made in the ACT—if an ACT court has been notified by an external court that it has registered an ACT protection order, the ACT court must notify the external court if it revokes or varies the order.<sup>248</sup>

30.211 Although every state and territory makes provision for the registration of external protection orders, the question of establishing a centralised national scheme has been considered on a number of occasions. In 1999, the Domestic Violence Legislation Working Group expressed the view that a national registration scheme, supported by a single register, would streamline and simplify inter-jurisdictional registration, and would enable protection orders:

[to] attain immediate and true nationwide portability and provide needed protection to the victims of domestic violence, no matter where they live in Australia.<sup>249</sup>

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<sup>246</sup> Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.4.1].

<sup>247</sup> The one exception is the Northern Territory, where a police officer can enforce a protection order if the officer ‘reasonably believes a person in the Territory is a defendant named in an unregistered external order’. The police officer must, as soon as possible, make a declaration to the Commissioner of Police stating the belief and the grounds for belief: *Domestic and Family Violence Act 2007* (NT) pt 3.4.

<sup>248</sup> *Domestic Violence and Protection Orders Act 2008* (ACT) s 109.

<sup>249</sup> Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), 169.

30.212 In 2009, the Australian Government Solicitor (AGS) commented favourably on the proposed scheme, noting that it was unclear why a scheme of this kind had not yet been implemented.<sup>250</sup>

30.213 One of the ‘immediate actions’ to which the Australian Government committed in its response to *Time for Action* was to work with the states and territories, through the Standing Committee of Attorneys-General (SCAG), to establish a national scheme for the registration and recognition of family violence protection orders. While registration involves simply putting information on a register so that it is available to those who access the register, recognition involves allowing another jurisdiction to give effect to and enforce the order that has been registered. The Australian Government noted that the proposed scheme would allow orders to be recognised and enforced across state and territory borders.<sup>251</sup> A SCAG working group has been established to develop options for the national scheme.<sup>252</sup>

30.214 The 1999 Domestic Violence Legislation Working Group proposed a central database as the repository of the relevant information. Information entered on the database would include the names of the parties, the period for which the order had effect and the prohibitions or conditions imposed by the order. Information would also include whether the order had been extended, varied, revoked or set aside on appeal. Upon the entry of an order into the register, the order would be deemed to have been registered and to be enforceable in each state and territory.<sup>253</sup>

30.215 The Working Group noted the potential advantages of using CrimTrac—developed for exchanging national policing information—as the supporting database, commenting that:

CrimTrac appears to offer a vastly improved concept in national registration of orders and overcomes all of the problems associated with manual registration, such as notice to the defendant of registration, mechanical or administrative processes and costs incurred by State and Territory courts, reliability of orders and enforcement of orders.<sup>254</sup>

30.216 It appears that CrimTrac already includes some information about protection orders.<sup>255</sup> The AGS has noted that:

Our understanding is that police in all jurisdictions provide at least some information to CrimTrac about such orders for inclusion in the database, although we understand that the amount of detail provided varies significantly between jurisdictions.<sup>256</sup>

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250 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.4.11].

251 Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009), 5.

252 Ibid, 12.

253 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), pt 3 div 1.

254 Ibid, 169.

255 CrimTrac, *Police Information* <[www.crimtrac.gov.au/police\\_information/index.html](http://www.crimtrac.gov.au/police_information/index.html)> at 12 March 2010.

256 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.4.9].

30.217 CrimTrac includes extensive safeguards to ensure the integrity and security of information held on its systems. Access to operational data is provided on a ‘need to know’ basis and audit logs are maintained of access to, and disclosure of, information.<sup>257</sup>

#### ***Extending the scope of the register***

30.218 The 1999 Working Group recommendations and, from the information presently available, the Australian Government’s commitment to a national registration scheme are both limited to information about protection orders obtained under state and territory family violence legislation. A question that arises in this Inquiry is whether the register should be expanded to include other information, for example, orders and injunctions issued by the family courts and child protection orders.

30.219 In 1998, the Kearney McKenzie Report recommended that consideration should be given to establishing a central register of parenting orders made by the Family Court and protection orders made by state and territory courts. The Report recommended that this information should be accessible to judges and registrars of the Family Court, magistrates and registrars of local courts and to police.<sup>258</sup> A similar option for reform was set out in the Pyke Review, which suggested that a register could:

- provide ready and immediate access to orders made by the Family Court inconsistent with family violence orders; and registered pursuant to s 68P(3) of the *Family Law Act*; and
- ensure that orders made in each of the State Courts, Supreme Court, District Court, Magistrates Court and Youth Court in family violence matters and child protection proceedings are immediately available on the database of each Court and immediately available to the Police.<sup>259</sup>

30.220 There may also be scope for a national register to include other types of information, such as undertakings entered into by a person requesting that a child be returned to Australia under the *Convention on the Civil Aspects of International Child Abduction* (Hague Convention).<sup>260</sup> An overseas court can grant such a request on the condition that the person requesting the child’s return enters into an undertaking of non-molestation. The Full Court of the Family Court has noted that:

If undertakings are to be given, it is important to make sure they can be enforced ... There does not appear to be any existing mechanism by which the Court that extracts the undertaking can ensure that it is complied with. There does not appear to be any legal basis upon which the Court of the State in which the child has been returned, can require compliance with an undertaking given to another court.<sup>261</sup>

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257 CrimTrac, *Police Information* <[www.crimtrac.gov.au/police\\_information/index.html](http://www.crimtrac.gov.au/police_information/index.html)> at 12 March 2010.

258 Kearney McKenzie & Associates, *Review of Division 11* (1998), 29. The Kearney McKenzie Report predates the establishment of the Federal Magistrates Court, so contact orders made by this court are not listed as orders which should be included in the database.

259 M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007), 137.

260 The Hague Convention is discussed in Ch 17.

261 *Police Commissioner of South Australia v Temple [No 2]* (1993) 114 FLR 148, [35].

30.221 In the Consultation Paper, the Commissions proposed that the national register should include protection orders made under state and territory family violence legislation as well as orders and injunctions made under the *Family Law Act*. The Commissions also proposed that the information be available to federal, state and territory police officers, federal family courts, and state and territory courts that hear protection order proceedings.<sup>262</sup> In addition the Commissions asked whether there was any other information that should be included on the register and whether there were any other persons who should have access to the register.<sup>263</sup>

### **Submissions and consultations**

30.222 The proposal for the establishment of a national register received support from a significant number of stakeholders.<sup>264</sup> The Domestic Violence Prevention Council (ACT) noted that the register should include interim, as well as final, orders and that the system should ‘allow for the real time interrogation by courts and law enforcement to assist in decision making and policing responses’. The Council also suggested that the register should contain information on breach of orders.<sup>265</sup> The Magistrates’ and Children’s Court of Victoria also suggested that the register should include information relating to ‘the contravention of intervention orders’.<sup>266</sup>

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262 Consultation Paper, Proposal 10–15.

263 Ibid, Question 10–21.

264 Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Queensland Government, *Submission FV 229*, 14 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Office of the Privacy Commissioner, *Submission FV 147*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; T Searle, *Submission FV 108*, 2 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Confidential, *Submission FV 69*, 2 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 18*, 13 January 2010.

265 Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010.

266 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

30.223 Similarly, the Law Council of Australia submitted:

The database should also include pending charges and criminal convictions with respect to family violence or child abuse if possible or practicable. Otherwise this would require the information being obtained from a number of state-based criminal databases.<sup>267</sup>

30.224 A number of submissions suggested that child protection orders should be included in the national register.<sup>268</sup> The National Abuse Free Contact Campaign, for example, submitted that:

It is our experience that in many instances, information in regard to child protection issues are not shared or made use of in determinations of the family law system. It is our view that child protection agencies and children's courts should not only have access to such a database, but that any orders made by children's court, or matters involved in child protection agencies should also be included on the national database.<sup>269</sup>

30.225 Other submissions argued that it is important for non-government organisations, women and children's legal and non-legal support workers, and—subject to safeguards—Independent children's lawyers who have been appointed under the *Family Law Act* to be included among those parties able to utilise the register.<sup>270</sup> One stakeholder suggested that schools should be able to access the register in order to provide appropriate protection for pupils.<sup>271</sup>

30.226 However, a number of submissions expressed reservations about expanding the register to include *Family Law Act* orders and injunctions. The Victorian Aboriginal Legal Service submitted:

There is also a question around the usefulness of the amalgamation of family violence protection orders and injunction orders made under the *Family Law Act* 1975 (Cth) in Victoria for the simple fact that injunction orders aren't used by VALS (and presumably others) because they aren't enforceable. Victoria Police do not act on Family Law matters. Therefore intervention orders are used instead.<sup>272</sup>

30.227 The Queensland Law Society also expressed concern about including orders made under the *Family Law Act*, noting the wide range of orders that can be made in relation to matters such as property settlement and child support.<sup>273</sup>

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267 Law Council of Australia, *Submission FV 180*, 25 June 2010.

268 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

269 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010.

270 Queensland Law Society, *Submission FV 178*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

271 Confidential, *Submission FV 69*, 2 June 2010.

272 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

273 Queensland Law Society, *Submission FV 178*, 25 June 2010.

30.228 Submissions also highlighted the need for any national register to adequately consider privacy and security concerns.<sup>274</sup> The Office of the Privacy Commissioner argued that any proposal to create a national register needs to be accompanied by a comprehensive privacy framework that includes: designing systems architecture and the parameters governing information collection, flows and consent mechanisms; data security measures; legislative measures in relation to who can access the register and for what purpose; and oversight mechanisms including the provisions for audit and complaint handling. The Office also encouraged the undertaking of a privacy impact assessment (PIA) as part of developing a national register of this kind.<sup>275</sup>

#### **Commissions' views**

30.229 The Australian Government has committed to the development of a national scheme for the registration and recognition of family violence protection orders. The Commissions are of the view that this is an excellent development that should be supported as a constructive step towards improving the protection available for victims of family violence. It will allow victims of family violence to move seamlessly from one jurisdiction to another without the need to take action to register a family violence order in the second jurisdiction. It will also help to ensure that police in the second jurisdiction are aware of the existence of the order.

30.230 The Commissions agree with the Domestic Violence Prevention Council (ACT) that the scheme should include interim, as well as final, orders. The Commissions are also of the view that the scheme should include police-issued orders. Interim and police orders are often issued to address acute family violence situations and it would leave a gap in the system if these critical orders were not included.

30.231 In the Commission's view, a national register of this kind also provides an opportunity for a formalised exchange of information relevant to proceedings involving family violence more broadly. While the initial proposal is to include information about family violence protection orders, in the Commissions' view there is scope to extend the ambit of the register to include, for example, child protection orders made under state and territory child protection legislation, and information about parenting orders and family violence related injunctions made under the *Family Law Act*. The Commissions agree that it will not be necessary to include all federal family court orders on the register, but only those that are relevant to family violence and child protection proceedings in the state and territory courts.

30.232 The Commissions are also of the view that the Australian Government Attorney-General's Department—as the Central Authority for the *Hague Convention*—should give future consideration to including conditions and non-molestation undertakings made in *Hague Convention* cases on the national register. While registration would not affect the enforceability of undertakings and conditions, it would

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274 Queensland Government, *Submission FV 229*, 14 July 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Office of the Privacy Commissioner, *Submission FV 147*, 24 June 2010.

275 Office of the Privacy Commissioner, *Submission FV 147*, 24 June 2010.

ensure that police officers, state and territory courts, and federal family courts are aware that they exist, and may take them into consideration, where appropriate, in protection order or parenting proceedings.

30.233 Throughout the course of this Inquiry, the Commissions have heard about the problems that arise because of the gaps in information flow between the family law system, the family violence system and the child protection system. In this chapter the Commissions have made a number of recommendations to improve information flows including: clarifying initiating application forms,<sup>276</sup> amending legislation that regulates the disclosure of information in relation to parenting orders, family violence orders and child protection orders;<sup>277</sup> providing state and territory courts with access to the Commonwealth Courts Portal<sup>278</sup> and establishing information sharing protocols and MOUs between courts, agencies and organisations working in these areas.<sup>279</sup>

30.234 The Commissions' view is, however, that a central register including information about family violence orders, child protection orders and related federal family court orders would be a more efficient and effective mechanism to ensure that the various systems are aware of orders and proceedings relating to the same family. It would be a significant step towards closing the information gaps between the systems and improving the protection provided for victims of family violence. It will help to ensure that courts and agencies have access to the full range of orders applying in any particular case, and is likely to lead to more consistent decision making across the jurisdictions. In developing the register, further consideration could also be given to including information about criminal convictions for family violence related offences and breach of the relevant orders.

30.235 The Commissions note that the proposed national register is being established, not only to register family violence orders, but also to allow inter-jurisdictional enforcement of the orders. In the Commissions' view, many of the arguments relating to the automatic registration and recognition of family violence orders in other jurisdictions, might also be made in relation to child protection orders and it would be sensible to extend the registration and recognition arrangements to include them.

30.236 A related issue is the persons and entities that may access information on the national register. The Commissions' view is that—at a minimum—access should be available to federal family courts, state and territory courts that hear protection order and child protection order proceedings, child protection agencies and the police. The Commissions do not have sufficient information in relation to allowing private sector individuals and organisations to have access to the register and so do not make a recommendation on this point.

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276 Recs 30–1 and 30–2.

277 Recs 30–3, 30–4, 30–9, 30–10, 30–11, 30–12, 30–13.

278 Rec 30–8.

279 Recs 30–16 and 30–17.

30.237 The Commissions note that privacy and security concerns mean that access to such data should be restricted to a ‘need to know’ basis. Current safeguards in CrimTrac, such as audit logs, should also apply. The Commissions agree with the Office of the Privacy Commissioner that a national register of this kind needs to be accompanied by a comprehensive privacy framework and recommend that a PIA be prepared as part of developing the register.

**Recommendation 30–18** A national register should be established. At a minimum, information on the register should:

- (a) include interim, final and police-issued protection orders made under state and territory family violence legislation; child protection orders made under state and territory child protection legislation; and related orders and injunctions made under the *Family Law Act 1975* (Cth); and
- (b) be available to federal, state and territory police, federal family courts, state and territory courts that hear matters related to family violence and child protection, and child protection agencies.

**Recommendation 30–19** The national register recommended in Rec 30–18 should be underpinned by a comprehensive privacy framework and a privacy impact assessment should be prepared as part of developing the register.



# **31. Education and Data Collection**

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## **Contents**

Introduction	1459
Education and training	1460
The importance of education and training	1460
Providing and maintaining quality education and training	1461
Key focus areas for education and training	1462
Nature and dynamics of family violence	1462
A national bench book for judicial officers	1465
Education of lawyers	1469
Other recommendations	1471
Ensuring quality and best practice	1474
National approach to education and training	1477
National Centre of Excellence	1477
Expert panel and reference group	1477
National Judicial Institute for Family Violence and Sexual Assault	1478
Data collection	1479
Summary of recommendations	1480
Death reviews	1482

## **Introduction**

31.1 A central and critical theme in this Inquiry is the need for effective education and training of individuals—including judicial officers, lawyers, police prosecutors, family dispute resolution practitioners and victim support services—working in the family law, family violence, criminal justice and child protection systems. A proper appreciation and understanding of the nature and dynamics of family violence, and the overlapping legal frameworks is fundamental in practice to ensuring the safety of victims and their families. The Commissions have also identified data collection and evaluation as important means to ensure that systems continually improve through reflection on practice.

31.2 This chapter brings together the key recommendations in these areas to give an overall picture of the policy approach taken by the Commissions. In addition, it considers the possible mechanisms and institutions required to provide and maintain quality education and training in the family violence context at a national level.

## **Education and training**

### **The importance of education and training**

31.3 The importance of education and training in the family violence system has been addressed in two key reports commissioned by the Australian Government: *Time for Action* by the National Council to Reduce Violence against Women and their Children (National Council),<sup>1</sup> and the *Family Violence Courts Review*, by Professor Richard Chisholm (the Chisholm Review).<sup>2</sup>

31.4 A key theme of *Time for Action* was the need for ‘attitudinal change at all levels of government and society’, which involves ‘adequate funding and professional training of the workforce’.<sup>3</sup> The report included a number of strategies relating to education and training in different fields.<sup>4</sup>

31.5 In particular, *Time for Action* recommended that, in achieving the outcome of ensuring just responses, a key strategy was to ‘ensure judicial officers, law enforcement personnel and other professionals within the legal system have appropriate knowledge and expertise’.<sup>5</sup> It recommended that a national education and professional development framework be developed that recognised the specific roles of those involved in the legal system. This framework should

be designed with these specific audiences in mind; be informed by research on the social context within which violence against women and children takes place; emphasise the diversity of experiences and needs of victim/survivors of violence in the community; and enhance understanding of the intent and operation of relevant legislation.<sup>6</sup>

31.6 Similarly, the Chisholm Review recommended that there should be consideration of the ways in which those working in the family law system ‘might be better educated in relation to issues of family violence’.<sup>7</sup> It was further recommended that family law courts review the use of existing best practice principles in relation to family violence,<sup>8</sup> and consider measures to make those principles more influential.<sup>9</sup>

31.7 Judicial education and training were also identified as key issues by the Victorian Law Reform Commission in its reports on family violence and sexual assault laws,<sup>10</sup> and as key areas in strategic frameworks for addressing family violence,

1 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009).

2 R Chisholm, *Family Courts Violence Review* (2009).

3 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 21.

4 Ibid, Recs 1.3.2, 3.1.1, 3.1.4, 3.1.5, 3.3.8.

5 Ibid, Rec 4.4.

6 Ibid, Rec 4.4.1.

7 Ibid, Rec 4.3.

8 As identified in, Family Court of Australia, *Best Practice Principles for Use in Parenting Disputes When Family Violence or Abuse is Alleged* (2009).

9 R Chisholm, *Family Courts Violence Review* (2009), Recs 4.3, 4.6, 4.8.

10 Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006).

including the *Australasian Policing Strategy for the Prevention and Reduction of Family Violence*.<sup>11</sup>

31.8 Many stakeholders emphasised the importance of education and training as part of an integrated response, and as a necessary strategy for improving the system as whole.<sup>12</sup> For example, the Sydney Women's Domestic Violence Court Advocacy Service submitted that:

An integrated response to domestic and family violence should include education and training programs for all stakeholders, including operational police, prosecutors, lawyers, judicial officers and victim's services.<sup>13</sup>

31.9 Similarly, the Australian Association of Social Workers highlighted that:

One of the essential aspects of successful coordinated responses is the ability to build into systems consistent and appropriate training. As the ALRC has identified, ensuring training is effective, and measuring the effectiveness of training, is a challenge. It is essential to ensure that education and training is sensitive, specific and relevant to the needs of particular stakeholders, and that training programs are designed with the ultimate aim of improving service responses to victims of domestic and family violence.<sup>14</sup>

### Providing and maintaining quality education and training

31.10 While quality education and training are critical, it must be recognised that education and training are subject to limitations—including the receptiveness of the audience and the persistence of social and cultural norms. The Commissions recognise that calls for further education and training are easy to make, but that there are numerous challenges to ensuring that education and training are relevant, useful and have a meaningful impact on behaviour in an ongoing way. In this respect, it is vital to

11 *Australasian Policing Strategy on the Prevention and Reduction of Family Violence* (2008).

12 Confidential, *Submission FV 235*, 16 July 2010; National Legal Aid, *Submission FV 232*, 15 July 2010; Family Relationship Services Australia, *Submission FV 231*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; WESNET—The Women's Services Network, *Submission FV 217*, 30 June 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Women Everywhere Advocating Violence Elimination, *Submission FV 210*, 29 June 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; T McLean, *Submission FV 204*, 28 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010; Women With Disabilities Australia, *Submission FV 143*, 24 June 2010; Women's House Shelta, *Submission FV 139*, 23 June 2010; Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Anglicare Australia, *Submission FV 115*, 10 June 2010.

13 Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010.

14 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010.

have in place mechanisms for review to ensure that quality and best practice are maintained in education and training programs.

31.11 Ideally, effective education and training programs should properly equip those working in the area of family violence with a thorough understanding of the nature and dynamics of family violence, and the ability to navigate the range of overlapping legal frameworks.<sup>15</sup> The Education Centre Against Violence (ECAV) has identified a number of challenges in ensuring the quality of family violence training. These include: the adequacy of the content of training, the adequacy of the length of training, and the number and qualifications of trainers. An issue affecting quality and consistency is that most training in this area is not subject to accreditation and not otherwise assessed for quality or longer term impacts on practice.<sup>16</sup>

31.12 Another key challenge is ensuring that training is delivered in an appropriate way. Education and training may be provided by way of formal training programs conducted face to face; online programs; or educational resources, such as bench books or DVDs. The mode of delivery must be appropriate, especially for those working in regional and remote communities, and those from cultural and linguistically diverse (CALD) backgrounds. Research suggests that adults learn best by applying skills in practice and engaging in critical reflection on their own practice. However, it appears that less appropriate classroom-based learning continues to be prevalent in family violence training.

31.13 Another significant challenge is that of adequate resourcing. Training needs to be resourced adequately and less visible costs of training need to be considered in funding.

31.14 Lastly, adequate access to training is also important, including for those working in remote or regional areas. Access can also be affected by organisational cultures and practices, such as attitudes to releasing staff for training.<sup>17</sup>

## **Key focus areas for education and training**

31.15 The Commissions have, throughout this Report, made recommendations in specific areas where the interaction in practice of legal frameworks may be improved through education and training. This section brings together some of those recommendations, and also considers a number of issues in relation to education and training at a national level.

### **Nature and dynamics of family violence**

31.16 One important aspect of education and training is in relation to the nature, dynamics and effects of family violence, including sexual assault in the family violence

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15 The need for education and training in relation to the nature and dynamics of family violence—considered below—forms a key part of the Commissions' policy approach.

16 S Stewart (Education Centre Against Violence), *Consultation*, By telephone, 18 February 2010.

17 Ibid.

context. In Part B, the Commissions recommend a common interpretative framework comprising:

- consistent core definitions of family violence across the relevant legislative schemes—namely, state and territory family violence and criminal legislation, and the *Family Law Act 1975* (Cth)—underpinned by a common understanding of the types of conduct that constitutes family violence;<sup>18</sup> and
- provisions complementing consistent definitions of family violence, including those which address: guiding principles based on a human rights framework; features and dynamics of family violence; purposes of family violence legislation; and grounds for obtaining a protection order.<sup>19</sup>

31.17 The Commissions consider, however, that this framework should be part of a package of recommendations to facilitate a common understanding of family violence across the legal sector and the community more broadly. In particular, it must be accompanied by ongoing education and training of all professionals in the family violence system—including judicial officers, legal practitioners, police prosecutors and other professionals—about the nature and dynamics of family violence, as recognised in the framework.

31.18 Judicial officers, legal practitioners, police prosecutors and other professionals in the family violence system should receive education and training on a regular basis in conjunction with the recommended legislative changes.

31.19 In addressing interactions between family violence and the criminal law in Part C, the Commissions emphasise the critical importance of, and make recommendations for, relevant education and training for professionals in the criminal justice system about recognising and responding to the nature and dynamics of family violence.<sup>20</sup> These measures include:

- recognising the pattern-based nature of family violence within the predominately incident-based framework of the criminal law, namely by developing and using appropriate prosecutorial guidelines and education and training programs about the use of representative charges, charge negotiations, and negotiations as to agreed statements of facts,<sup>21</sup> and
- increasing recognition and understanding of the potential relevance of federal offences committed in a family violence context, including when such offences should be prosecuted or used as a basis for obtaining a family violence protection order.<sup>22</sup>

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18 Recs 5–1 to 5–5, 6–1 to 6–4.

19 Recs 7–1 to 7–7.

20 Key recommendations concerning police and prosecutors are outlined below.

21 Rec 13–2.

22 Rec 8–2.

31.20 In Part E, in relation to child protection, the Commissions recommend that state and territory child protection authorities and alternative dispute resolution providers should ensure that staff and alternative dispute resolution service practitioners participating in alternative dispute resolution in child protection matters undertake training on: family violence dynamics; and the need for parents, as well as children, who are victims of family violence to have access to appropriate support.<sup>23</sup>

31.21 In Part G, in relation to sexual assault in the family violence context, the Commissions note that there is often an ‘implementation gap’ between the written law and practice. This is caused in part by some individuals continuing to subscribe to myths and misconceptions surrounding the nature and dynamics of sexual assault. In Chapter 26, the Commissions suggest that training for police, legal practitioners, judicial officers and victim referral and support services should encompass areas such as: the myths and stereotypes surrounding sexual assault; the emotional, psychological and social impact of sexual assault on victims; and the different experiences and needs of particular marginalised victims, such as those with a cognitive impairment, Indigenous people and those from CALD and gay, lesbian, bisexual, transgender and intersex communities.<sup>24</sup> The Commissions also emphasise the need for prosecution of sexual assault to occur in the context of a legal system which is alive to cultural and linguistic diversity, and the vital importance of culturally appropriate service provision.<sup>25</sup>

31.22 The Commissions recommend that state and territory governments and relevant educational, professional and service delivery bodies should ensure ongoing and consistent education and training in relation to the substantive law, as well as the nature and dynamics of sexual assault as a form of family violence, including its social and cultural contexts.<sup>26</sup>

#### ***Submissions and consultations***

31.23 A number of submissions emphasised the need for greater education in relation to the nature and dynamics of family violence, and its effect on victims and their families, for *all* those involved in the system. For example, Legal Aid NSW submitted that:

Judicial officers need to undertake significant domestic violence training to ensure that they understand the complexity and the nature of this violence ... To enable judicial officers to make educated and informed decisions, they need to understand the dynamics of family violence and the impact of this violence on victims and their children.<sup>27</sup>

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23 Rec 23–10.

24 See Chs 24, 31–32, and Chs 26, 30–32 for a discussion of these issues.

25 See Chs 26, 32.

26 Rec 26–3.

27 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

31.24 Similarly, National Legal Aid submitted that:

There is a need for courts and service providers to commit to ensuring that education and training are provided to judicial officers and service providers to facilitate the development of a common language for communication in relation to family violence issues. This will help to ensure the workability of the arrangements. NLA suggests that the nature, features and dynamics of family violence are matters to be addressed in providing comprehensive education, rather than for inclusion in legislation.<sup>28</sup>

31.25 The Canberra Rape Crisis Centre submitted that:

In developing responses to the various proposals and questions posed in the Consultation Paper, it is clear to us that members of the judiciary need to be included in education initiatives concerning the complexities of family violence and sexual assault and the resulting harm that arises for victims of these crimes ... [W]e believe this is essential.<sup>29</sup>

31.26 Other submissions highlighted the need for education and training on the nature and dynamics of family violence as it relates to children,<sup>30</sup> women and girls with a disability,<sup>31</sup> and Aboriginal and Torres Strait Islander peoples.<sup>32</sup>

#### ***Commissions' views***

31.27 As noted above, the Commissions consider that a proper understanding of the nature and dynamics of family violence and its impact on victims better enables those in the system—including judicial officers, legal practitioners, police prosecutors, and other professionals—to support and assist victims. The Commissions note that family violence has a disparate impact on vulnerable groups in the community, such as children, women with a disability, and Indigenous women specifically, and that it is important to ensure that education and training addresses these impacts.

**Recommendation 31–1** The Australian, state and territory governments and educational, professional and service delivery bodies should ensure regular and consistent education and training for participants in the family law, family violence and child protection systems, in relation to the nature and dynamics of family violence, including its impact on victims, in particular those from high risk and vulnerable groups.

#### **A national bench book for judicial officers**

31.28 Family violence may engage a range of overlapping frameworks. Familiarity with, and competence in, these frameworks by legal professionals and judicial officers is therefore vital to ensuring fair and just outcomes for victims. However, there appears

28 National Legal Aid, *Submission FV 232*, 15 July 2010.

29 Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

30 National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; H McGlade, *Submission FV 84*, 2 June 2010.

31 Women With Disabilities Australia, *Submission FV 143*, 24 June 2010.

32 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010.

to be limited training of judicial officers in Australia—even those in specialised courts—in the area of family violence.<sup>33</sup> This has been identified as a key concern of those involved in the family law system, and by stakeholders in this Inquiry.

31.29 The Commissions make a number of recommendations in relation to judicial education. In Chapter 16, the Commissions recommend that those involved in protection order proceedings under state and territory family violence legislation be provided training on the courts' jurisdiction under the *Family Law Act*.<sup>34</sup> In Chapter 32, the Commissions make recommendations for regular training on family violence issues for judicial officers in specialised family violence courts.<sup>35</sup>

31.30 In addition, the issue of a national bench book to assist judges in family-violence related matters in any court or jurisdiction featured prominently in this Inquiry. In the Consultation Paper, the Commissions endorsed the recommendation in *Time for Action* for the development of a model bench book on family violence and sexual assault issues. The Commissions noted that an excellent comparative example of a bench book dealing with family violence issues had been published in Canada by the National Judicial Institute, titled *Domestic Violence and Family Law in Canada: A Handbook for Judges* (Canadian bench book). This covers, among other things, the use and misuse of social context information; understanding and assessing family violence; and interpreting victim and offender behaviour.<sup>36</sup>

31.31 The Commissions also noted various developments in Australia. For example, the Australasian Institute of Judicial Administration has published useful bench books and other resources including, relevantly, the *Solution-Focused Judging Bench Book*—including an excellent chapter on the nature of family violence—and the *Bench Book for Children Giving Evidence in Australian Courts*.<sup>37</sup> The Judicial Commission of NSW and the Judicial College of Victoria have also published other bench books on sexual assault and sentencing issues (including family violence).<sup>38</sup> The Judicial College of Victoria has made available online its bench books on family violence, sexual assault, and criminal charges.<sup>39</sup>

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33 The Commissions discuss specialised family violence courts in Ch 32.

34 Rec 16–9.

35 Rec 32–3.

36 L Neilson, *Domestic Violence and Family Law in Canada: A Handbook for Judges* (2009).

37 M King, *Solution-Focused Judging Bench Book* (2009); Australasian Institute of Judicial Administration, *Bench Book for Children Giving Evidence in Australian Courts* (2009).

38 See Judicial Commission of New South Wales, *Sexual Assault Handbook* (2009) <[www.judcom.nsw.gov.au/publications/benchbks/sexual\\_assault/index.html](http://www.judcom.nsw.gov.au/publications/benchbks/sexual_assault/index.html)> at 14 April 2010; Judicial Commission of New South Wales, *Sentencing Bench Book* (2009) <[www.judcom.nsw.gov.au/publications/benchbks/sentencing/index.html](http://www.judcom.nsw.gov.au/publications/benchbks/sentencing/index.html)> at 21 February 2010; Judicial College of Victoria, *Victorian Sentencing Manual* (2009), Judicial College of Victoria, *Sexual Assault Manual* (2008) <[www.judicialcollege.vic.edu.au/publications/sexual-assault-manual](http://www.judicialcollege.vic.edu.au/publications/sexual-assault-manual)> at 21 February 2010.

39 Judicial College of Victoria, *Sexual Assault Manual* (2008) <[www.judicialcollege.vic.edu.au/publications/sexual-assault-manual](http://www.judicialcollege.vic.edu.au/publications/sexual-assault-manual)> at 21 February 2010.

31.32 The Commissions make recommendations for the development of a national bench book on family violence, including sexual assault, for judicial officers, as part of a national family violence education and training strategy. These recommendations envisage that the model bench book should be:

- comprehensive, in that it would cover all relevant civil and criminal laws in state, territory and federal jurisdictions;
- additional and complementary to existing bench books in state, territory and federal jurisdictions, in that the development of a national resource should not preclude the ongoing development and use of jurisdiction-specific resources;
- integrated with existing resources in state, territory and federal jurisdictions, in that jurisdiction-specific bench books should cross-refer to provisions in the national bench book; and
- developed by federal, state and territory governments, in consultation with relevant stakeholders to ensure the appropriate identification of, and responses, to the particular impacts of family violence upon persons from specific cultural, linguistic and social groups.

31.33 The Commissions consider that the content of such a national bench book should include the following.

#### ***Criminal law***

- guidance about the potential relevance of family violence-related evidence to criminal offences and defences—for example, evidence of the pre-existing relationship between parties, including evidence of previous violence;<sup>40</sup>
- guidance about sentencing in family violence-related matters—including sentencing offenders for breach of protection orders;<sup>41</sup> and, in particular, how to treat, in sentencing, the consent of a victim to contact with a respondent that is prohibited by a protection order;<sup>42</sup>
- guidance about the operation of defences to homicide where a victim of family violence kills the person who was violent towards him or her;<sup>43</sup> and
- identifying the circumstances in which a warning about the danger of convicting on the uncorroborated evidence of a particular complainant or child witness in a sexual assault case is in the interests of justice.<sup>44</sup>

#### ***Family violence legislation and the Family Law Act***

- material to assist judicial officers in state and territory courts to understand and exercise their jurisdiction under the *Family Law Act*. This material should

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40 Rec 13–1(a).

41 Recs 13–1(b), 12–8.

42 Rec 12–5.

43 Rec 14–3.

44 Rec 28–2.

include guidance on the considerations relevant to making protection orders that are inconsistent with current family law orders and options available for resolving such inconsistencies to ensure the safety of victims of family violence.<sup>45</sup>

### ***Submissions and consultations***

31.34 A number of submissions strongly supported the development of a national bench book, noting in particular the Canadian bench book.<sup>46</sup> The Magistrates' Court and Children's Court of Victoria submitted that

this bench book provides a model for a national bench book to assist Australian judicial officers in developing their understanding of the social context of family violence, the complexities of legislation across jurisdictions and identifying and applying those principles to judicial decision-making. While there is ample research in these areas, contribution of a bench book would allow judicial officers access to reliable information and assist them in translating that information into legal practice.<sup>47</sup>

31.35 Similarly, the Government of Victoria noted that the Canadian bench book is

an example of best practice research undertaken to provide contextual material for judicial officers regarding family violence, and will be invaluable as a model for development of similar specialist tools in an Australian context. It is understood that such a tool has application to family law, family violence, state/territory and Commonwealth jurisdictions.<sup>48</sup>

31.36 Domestic Violence Victoria and others, in a joint submission, urged the Australian government to find a way to make the resource available to Australian courts for adoption locally, and to the wider family violence sector.<sup>49</sup>

### ***Commissions' views***

31.37 In the Commissions' view, the development of a national bench book would be a useful resource for judicial officers in Australia, and should be pursued. In particular, such a book would promote consistency in the interpretation and application of laws across jurisdictions, offer guidance and promote best practice among judicial officers. As noted above, relevant bench books have been published by judicial institutes and bodies in Australia. The Commissions consider that these works could be built upon and, with adequate resourcing, that such bodies could contribute towards the development of a national bench book.

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45 Rec 16–8.

46 National Legal Aid, *Submission FV 232*, 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

47 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

48 Victorian Government, *Submission FV 120*, 15 June 2010.

49 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

31.38 The Commissions are aware that the Victorian Department of Justice is currently in the process of securing access to the Canadian bench book, and that Victoria and South Australia are exploring a partnership agreement to progress work at a state level in relation to a bench book.<sup>50</sup> The Commissions consider that there is potential for collaboration between the Australian, state and territory governments to develop a similar bench book in Australia, using the Canadian bench book as a model.

31.39 Lastly, the Commissions note that a national bench book should act as a complement to, rather than a substitute for, quality education and training.

**Recommendation 31–2** The Australian, state and territory governments should collaborate with relevant stakeholders to develop and maintain a national bench book on family violence, including sexual assault, having regard to the Commissions' recommendations in this Report in relation to the content that should be included in such a book.

### **Education of lawyers**

31.40 Lawyers represent another key target area for education and training. As noted above, lawyers engaging with issues of family violence need to be more aware of family violence issues, and be equipped to navigate through the different legal frameworks that apply.

31.41 In the Consultation Paper, the Commissions expressed the view that family violence should be addressed in university law courses and in continuing professional development requirements. The Commissions proposed that:

- Australian universities offering law degrees should review their curriculums to ensure that family violence is appropriately addressed; and
- Australian law societies and institutes should review continuing professional development requirements to ensure that legal issues concerning family violence are appropriately addressed.<sup>51</sup>

### **Submissions and consultations**

31.42 These proposals received broad support.<sup>52</sup> A number of submissions suggested that family violence should be included in university curricula as a compulsory

50 Victorian Government, *Submission FV 120*, 15 June 2010.

51 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Proposal 19–14 and 19–15.

52 National Legal Aid, *Submission FV 232*, 15 July 2010; Government of South Australia, *Submission FV 227*, 9 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society,

subject.<sup>53</sup> Others suggested that curriculums should also cover victim impact.<sup>54</sup> A number of submissions also suggested that education needs to be linked with practical experience training.<sup>55</sup> One stakeholder suggested that universities should be encouraged to invite practitioners from the field as guest lecturers.<sup>56</sup>

31.43 The Magistrates' Court and Children's Court of Victoria asked the Commissions to consider a program of national accreditation for legal practitioners in family violence and sexual assault

as a means of promoting interest in these areas of practice and complementing existing specialisation in family law and criminal law. It would be helpful for agencies working with victims and offenders and the parties themselves to be able to identify practitioners who understand the relationship between these areas of practice and can assist their clients to navigate complex judicial processes from start to finish. Such accreditation could promote higher levels of understanding and education in research relating to family violence and its application to legal practice.<sup>57</sup>

#### ***Commissions' views***

31.44 The Commissions' view is that lawyers engaging with issues of family violence should be provided with targeted education and training to help them to better assist victims and to navigate through the different legal frameworks that apply. The Commissions are of the view that family violence should be addressed in university law courses and in continuing professional development requirements. To ensure that all students are introduced to the nature and dynamics of family violence, these issues should be covered in relevant elective and compulsory subjects, including family law and criminal law.

31.45 The Commissions note the views of the Magistrates' Court and Children's Court of Victoria on the merits of a national program of accreditation for legal practitioners in family violence and sexual assault. Accreditation is available for family dispute resolution practitioners under the National Mediation Accreditation System, which

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*Submission FV 178*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

53 Legal Aid NSW, *Submission FV 219*, 1 July 2010; Confidential, *Submission FV 96*, 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

54 National Legal Aid, *Submission FV 232*, 15 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

55 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

56 Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

57 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

'relies on voluntary compliance by mediator organisations that agree to accredit mediators in accordance with the requisite standards'.<sup>58</sup> A number of stakeholders emphasised the need for more rigorous accreditation in the family dispute resolution context.<sup>59</sup> The Commissions consider that the desirability of accreditation for legal practitioners in family violence and sexual assault should be explored as one element of the national audit of education and training in family violence, discussed below.

**Recommendation 31–3** Australian tertiary institutions offering legal qualifications should review their curriculums to ensure that legal issues concerning family violence are appropriately addressed.

**Recommendation 31–4** Australian legal professional bodies should review continuing professional development requirements to ensure that legal issues concerning family violence are appropriately addressed.

## Other recommendations

31.46 The need for specific education and training for those working in the family violence, family law, criminal law, and child protection systems is discussed throughout this Report. As noted at the outset of this chapter, a central theme in ensuring that the recommendations for reform of legal frameworks in this Report are effective in improving the safety of victims and their families is through sustained education and training of all individuals working in the area and responding to family violence allegations or incidents.

### *Sexual assault*

31.47 The Commissions identified the issue of responding to sexual assault, including in a family violence context, as an area where legal practitioners might particularly benefit from more education and training. In Chapters 27 and 28, the Commissions make a number of recommendations in relation to government and non-government bodies providing education to practitioners around issues relating to evidence in sexual assault matters, to complement other reforms. These include that practitioners receive:

- education and training about the sexual assault communications privilege and how to respond to a subpoena for confidential counselling communications;<sup>60</sup>
- education and training about procedural requirements for admitting and adducing evidence of sexual activity;<sup>61</sup> and

<sup>58</sup> See National Alternative Dispute Resolution Council, *National Mediator Accreditation System* Department of Justice <<http://www.nadrc.gov.au/>> at 27 September 2010.

<sup>59</sup> National Legal Aid, *Submission FV 232*, 15 July 2010; Family Relationship Services Australia, *Submission FV 231*, 15 July 2010; Office of the Child Safety Commissioner, *Submission FV 215*, 30 June 2010.

<sup>60</sup> Rec 27–9.

<sup>61</sup> Rec 27–7.

- education about legislation authorising the use of pre-recorded evidence in sexual assault proceedings, and training in relation to interviewing victims of sexual assault and taking pre-recorded evidence.<sup>62</sup>

31.48 The Commissions also suggest that there may be a need for education concerning: the scope of evidence of sexual reputation;<sup>63</sup> the nature of sexual assault, including the context in which sexual offences typically occur; the emotional, psychological and social impact of sexual assault in relation to decisions about jury warnings on the effect of delay on the credibility of complainants;<sup>64</sup> and expert evidence about children's responses to sexual abuse and their reliability as witnesses.<sup>65</sup>

#### ***Police and prosecutors***

31.49 In Chapter 32, the Commissions recommend that state and territory police should ensure that all police—including specialised police units—receive regular education and training consistent with the *Australasian Policing Strategy for the Prevention and Reduction of Family Violence*. This includes training in communication skills, including cross-cultural communication, to address the different needs and contexts of family violence in the case of marginalised groups.<sup>66</sup>

31.50 Further, the Commissions make a number of recommendations with respect to education and training of police and prosecutors in relation to nature and dynamics of family violence, and in dealing with family-violence related incidents. These include:

- as part of their training on the dynamics of family violence, police should be trained to clearly identify persons who have used family violence and persons who need to be protected from family violence, and to distinguish one from the other. Guidance should also be given in police codes of practice and guidelines;<sup>67</sup>
- training police and prosecutors on how the dynamics of family violence might affect the decisions of victims of such violence to negate the existence of family violence or to withdraw previous allegations of violence;<sup>68</sup>
- training police about the matters which they seek victims of family violence to address in sworn or affirmed ‘statements of no complaint’—in which victims attest to the fact that they do not wish to pursue criminal action;<sup>69</sup>
- providing guidance to police about charging an offender with breach of a protection order and any underlying criminal offence constituting the breach;<sup>70</sup>

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62 Rec 26–8.

63 Chs 27, 8.

64 Chs 24, 31.

65 Ibid.

66 Rec 32–5.

67 Rec 9–5.

68 Rec 12–2.

69 Rec 12–4.

70 Rec 12–6.

- reinforcing, through training, police obligations when preparing witness statements in relation to breach of protection order proceedings, including asking victims about the impact on them of breach, and/or advising them that they may wish to make a victim impact statement and about the use that can be made of such a statement;<sup>71</sup>
- training police and prosecutors about potential federal offences committed in a family violence context, including when such offences should be prosecuted or used as a basis for obtaining a family violence protection order;<sup>72</sup>
- supporting the execution of police duties to inform victims of bail decisions;<sup>73</sup> and
- ensuring that police and prosecutors are encouraged by appropriate prosecutorial guidelines and education and training programs, to use representative charges wherever appropriate in family-violence related criminal matters where the charged conduct forms part of a course of conduct.<sup>74</sup>

#### ***Family dispute resolution practitioners***

31.51 In Chapter 21, the Commissions recommend that the Australian Government Attorney-General's Department, family dispute resolution service providers, and bodies responsible for legal education should develop ways to ensure that lawyers who practice family law are given adequate training and support in screening and assessing risks in relation to family violence and making appropriate referrals to other services.<sup>75</sup>

31.52 In Chapter 22, the Commissions recommend that the Australian Government should co-ordinate the development of education and training (including cross-disciplinary training), for family courts' registry staff, family consultants, judicial officers and lawyers who practise family law, about the need for screening and risk assessment where a s 60I certificate has been issued indicating a matter is inappropriate for family dispute resolution.<sup>76</sup> Such training should be developed collaboratively with family courts, lawyers' organisations and other bodies responsible for the education and training of family courts' registry staff, family consultants, judicial officers, and legal practitioners.

31.53 The Commissions also recommend that bodies responsible for the education and training of family dispute resolution practitioners and family counsellors should develop education and training to ensure that provisions in the *Family Law Act* and in state and territory child protection legislation for disclosure of information relating to

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71 Rec 12–9.

72 Rec 8–2.

73 Rec 10–3.

74 Rec 13–2.

75 Rec 21–3.

76 Rec 22–3.

actual or potential abuse, harm or ill-treatment of children are understood and appropriately acted upon.<sup>77</sup>

### ***Integrated responses***

31.54 In Chapter 29 the Commissions examine the range of responses to family violence across Australia where an attempt has been made to integrate services from different agencies and sectors. Where integration is occurring, there is a need for education about the roles of different players within the system itself. For example, government staff and community workers benefit from understanding the legislation and how the court system works, just as the court system benefits from understanding the social and financial consequences of their decisions.<sup>78</sup>

31.55 In Chapter 30, the Commissions make recommendations that parties involved in integrated responses including courts, judicial officers, lawyers and practitioners, police and relevant agencies receive ongoing training to ensure that arrangements are effectively implemented.<sup>79</sup>

### **Ensuring quality and best practice**

31.56 As noted above, the Commissions recognise a number of challenges to the provision of quality education and training. The quality and effectiveness of training need to be regularly monitored and evaluated to ensure that resources are effectively utilised, and that best practice is maintained.

31.57 In 2009, ECAV conducted an audit of domestic and family violence training provided by government and non-governmental organisations in NSW, as part of the Intersectoral Domestic and Family Violence Education and Training project, established under the NSW Government's whole of government approach to domestic and family violence. This audit involved a survey of training conducted in key agencies in 2008. The survey was followed by a number of regional cross-sector focus groups on training needs. This audit has not yet been published.<sup>80</sup>

31.58 In the Consultation Paper, the Commissions proposed that the Australian and state and territory governments should ensure the quality of family violence training by:

- developing minimum standards for assessing the quality of family violence training, and regularly evaluating the quality of such training in relevant government agencies using those standards;
- developing best practice guidelines in relation to family violence training, including the content, length, and format of such training;

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77 Rec 22–5.

78 S Stewart (Education Centre Against Violence), *Consultation*, By telephone, 18 February 2010: The legislative framework appears to be commonly used as a basis for training, at least in NSW.

79 See Recs 30–16, 30–17.

80 S Stewart (Education Centre Against Violence), *Consultation*, By telephone, 18 February 2010.

- developing training based on evidence of the needs of those being trained, with the ultimate aim of improving outcomes for victims; and
- fostering cross-agency and collaborative training, including cross-agency placements.<sup>81</sup>

31.59 Further, the Commissions suggested that it would be desirable, before implementing any recommendations on training, that the Australian Government and state and territory governments collaborate in conducting a national audit of family violence training conducted by government and non-government agencies in order to:

- ensure that existing resources are best used;
- evaluate whether training meets best practice principles; and
- promote the development of best practice in training.<sup>82</sup>

#### ***Submissions and consultations***

31.60 A significant number of submissions supported the proposal for a national audit.<sup>83</sup> National Legal Aid submitted that:

Such an audit would be of benefit in consultation with the sector only to the extent necessary to identify the minimum standards for assessing the quality of family violence training and to identify gaps or areas of duplication which should be addressed to make use of available resources.<sup>84</sup>

31.61 The Australian Domestic and Family Violence Clearinghouse agreed. However, it noted that ‘it is not only a question of making use of the resources—in some cases there are no resources and this needs to be remedied’.<sup>85</sup>

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81 Consultation Paper, Proposal 19–7.

82 Ibid, Proposal 19–16.

83 National Legal Aid, *Submission FV 232*, 15 July 2010; Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

84 National Legal Aid, *Submission FV 232*, 15 July 2010.

85 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

31.62 Similarly, there was broad support for the development of minimum standards for assessing the quality of education and training, and for fostering cross-agency and collaborative training. ECAV submitted that:

We would suggest that consideration be given to the development of ‘minimum standards’ for domestic and family violence training at the national level, perhaps in conjunction with the proposed national development framework ... We note that ECAV’s recent audit of Domestic and Family Violence (DFV) training in NSW indicates that currently most training in NSW is occurring in single agency settings. However, the findings of a series of statewide cross-sector focus groups about DFV training needs indicate that service providers would welcome the opportunity to participate in more cross-agency professional development. Despite the challenges involved in implementing this type of training, its potential benefit in terms of supporting best practice integrated responses needs highlighting. Consideration ought also to be given to factoring intersectoral training into the development of a comprehensive professional development framework for DFV practitioners.<sup>86</sup>

31.63 A number of submissions also noted that the Australian Government has stated that it would ‘develop a multi disciplinary training package for lawyers, judicial officers and other professionals working within the family law system, to improve the consistency and handling of cases’.<sup>87</sup>

#### *Commissions’ views*

31.64 The Commissions agree that the Australian Government and state and territory governments should collaborate in conducting a national audit of training by government and non-government agencies. Such an audit—conducted in consultation with the sector—would be useful in identifying gaps and areas of duplication of existing resources. The Commissions consider that this is a desirable first step before implementing any recommendations on education and training. The Commissions note that the experience of the ECAV can be drawn upon in designing any audit.

31.65 The Commissions believe that developing minimum standards for assessing the quality of education and developing best practice guidelines are important tools to help improve the system. Below the Commissions consider the role of a national body that could develop minimum standards and promote best practice in family violence responses.

31.66 The Commissions also endorse the Australian Government’s response to *Time for Action*, in developing a multi-disciplinary training package for those working in the family law system. The problem of ‘silos’ separating the different areas of the legal framework dealing with family violence was a recurring theme in this Inquiry. The Commissions are of the view that cross-agency and collaborative training is important to ensure that those working in the system are adequately equipped to deal with all aspects of family violence. Cross-agency training is part of a suite of recommendations aimed at generating a more seamless and effective response to family violence.

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86 Education Centre Against Violence, *Submission FV 90*, 3 June 2010.

87 National Legal Aid, *Submission FV 232*, 15 July 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010.

31.67 Finally, the Commissions note that such an audit may also provide the opportunity to consider the merits and practicability of a system of accreditation for legal professionals working in the areas of family violence and sexual assault.

**Recommendation 31–5** The Australian, state and territory governments should collaborate in conducting a national audit of family violence training conducted by government and non-government agencies in order to:

- (a) ensure that existing resources are best used;
- (b) evaluate whether training meets best practice principles; and
- (c) promote the development of best practice in training.

## National approach to education and training

31.68 One issue that emerged during the course of the Inquiry was whether there was a role for a national body charged with developing policy, promoting best practice and providing education and support to those working in the family violence area. The Commissions note a number of different options have been raised in previous reports, and in submissions to this Inquiry.

### National Centre of Excellence

31.69 The National Council advocated the establishment of a National Centre of Excellence for the Prevention of Violence against Women.<sup>88</sup> This would, among other things, provide a national resource for the development of policy and benchmarks, and develop and promote ‘gold-standard’ practice to reduce violence against women and their children across Australia.<sup>89</sup> Further, there should be a specific funding stream to address prevention education policy, including training and accreditation of staff and programs.<sup>90</sup>

### Expert panel and reference group

31.70 A key recommendation by the Family Law Council in its 2009 advice to the Commonwealth Attorney-General concerned the development of a ‘common knowledge base’ by an expert panel and reference group for those working in the family law system.<sup>91</sup> The reference group would include representatives of a diverse range of organisations and be involved in reviewing Australian and international research findings—to ensure that the common knowledge base is evidence based and current—and advising the Government on its research agenda in the area of family

<sup>88</sup> National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 41.

<sup>89</sup> Ibid.

<sup>90</sup> Ibid, 68.

<sup>91</sup> Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Recs 6.1–6.7.

violence.<sup>92</sup> It recommended that professional and peak bodies should use the common knowledge base to guide good practice and underpin training programs and professional development,<sup>93</sup> and that family pathways networks are aware of and disseminate information from the family violence common knowledge base.<sup>94</sup>

31.71 The Family Law Council also recommended that the expert panel and reference group ‘endorse the content of education and training on family violence for those involved in the system’, including family dispute resolution practitioners, lawyers, independent children’s lawyers, family consultants, and experts who provide evidence to courts.<sup>95</sup> It recommended that all key players should undertake relevant ongoing training at least annually.<sup>96</sup> The education and training would be conducted by, or performed under the auspices of, bodies including the Family Law Section of the Law Council of Australia, state law societies and foundations, the Australasian Institute of Judicial Administration, National Legal Aid and the federal family courts.<sup>97</sup> The Family Law Council also recommended the revision and periodic updating of the *Best Practice Guidelines for Lawyers Doing Family Law Work*.<sup>98</sup>

### **National Judicial Institute for Family Violence and Sexual Assault**

31.72 A number of submissions to the Inquiry asked the Commissions to consider the merits of establishing a National Judicial Institute for Family Violence and Sexual Assault.<sup>99</sup> The Magistrates’ Court and the Children’s Court of Victoria, for example, envisaged that

such a body would be a central repository of best practice, current research and information to support judicial officers, across jurisdictions, to undertake their work in family violence family law and sexual assault. It could develop professional development programs for judicial officers to ensure more consistent application of research findings.<sup>100</sup>

31.73 Further, the Courts supported the Institute playing a role in transferring specialised knowledge and expertise in dealing with family violence and sexual assault across federal, state and territory jurisdictions, and establishing and maintaining national networks of judicial officers and staff specialising in family violence or family law.<sup>101</sup>

31.74 Similarly, the Victorian government submitted that

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92 Ibid, Recs 6.3–6.4.

93 Ibid, Rec 6.7.

94 Ibid, Rec 6.9.

95 Ibid, 40.

96 Ibid.

97 Ibid.

98 Ibid, [6.8].

99 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

100 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

101 Ibid.

support for such a body was one of the key recommendations from the National Family Violence conference hosted by the Australasian Institute of Judicial Administration in October 2009 ... such an Institute could support best practice across federal and state jurisdictions. It could also ensure a coordinated approach to best practice tools that would have application across jurisdictions (eg model benchbook).<sup>102</sup>

31.75 The Victorian government also noted that the Institute could ‘promote judicial excellence through procedural reform, and highlight the critical role that judicial officers play in the overall justice response to family violence and sexual assault’.<sup>103</sup>

#### ***Commissions’ views***

31.76 The Commissions support the strategy of developing a comprehensive professional development framework for those working in family violence, as recommended in the *Time for Action* report. The Commissions also support the principle of a national body charged with developing policy, promoting best practice and providing education and support to those working the family violence area.

31.77 The Commissions make no specific recommendations as to whether a new body should be established in the form of a National Centre of Excellence (as proposed in the *Time for Action* report), or an expert panel and reference group (as recommended by the Family Law Council), or a National Judicial Institute for Family Violence and Sexual Assault (as suggested by the Victorian Government and the Magistrates’ and Children’s Court of Victoria). The Commissions note that while there is substantial merit in each of these proposed bodies, further work and consultation may be required to establish the most effective and efficient approach to national family violence policy development and education.

### **Data collection**

31.78 Another important issue identified by the Commissions is the need for ongoing data collection and evaluation. In *Time for Action*, the National Council highlighted that ‘data relating to violence against women and their children in Australia is poor’,<sup>104</sup> and proposed that one of the tasks of its proposed National Centre of Excellence for the Prevention of Violence against Women would be to ‘coordinate a national research agenda and data collection effort’.<sup>105</sup> The Council noted that:

Data on services sought by, and provided to, victims is not readily available, and the way in which information is reported is generally inconsistent and does not allow for a comprehensive understanding of family violence against women.<sup>106</sup>

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102 Victorian Government, *Submission FV 120*, 15 June 2010.

103 Ibid.

104 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 49.

105 Ibid.

106 Ibid, 47.

31.79 Similarly, the Family Law Council's proposal for an expert panel and reference group, discussed above, would also provide a focus for coordinating bodies for improving data collection and analysis.<sup>107</sup>

31.80 The importance of accurate and comprehensive data in informing policy initiatives has been recognised in Victoria through the Victorian Family Violence Database.<sup>108</sup> The database—the only project of its kind in Australia—was developed because ‘access to reliable and meaningful statistics on family violence is essential for the development of appropriate policy response in Victoria’.<sup>109</sup> The Victorian Department of Justice stated in its report, *Victorian Family Violence Database: Volume 4, Nine Year Trend Analysis 1999-2008*, that:

A lack of meaningful data collection and analysis has long been identified as a pressing issue by government and non-government agencies ... The reduction of family violence requires a whole-of-government—and inter-government—evidence-based approach. Accurate and reliable data analysis is central to pursuing such an approach and achieving effective response to family violence.<sup>110</sup>

31.81 In this Report, the Commissions have noted the inadequacy of current data, including: data on federal prosecutions relevant to family violence;<sup>111</sup> court statistics in relation to family violence-related criminal matters;<sup>112</sup> data on the extent of sexual violence against children, women from culturally and linguistically diverse backgrounds, Indigenous women and children;<sup>113</sup> and data on the reporting and prosecution of sexual offences.<sup>114</sup> The Commissions also note that adopting a common shared understanding of family violence will help to facilitate the capture of statistics about family violence, thereby providing more useful and comparable data upon which policies to address family violence can be based.<sup>115</sup>

### **Summary of recommendations**

31.82 In Chapter 8, the Commissions recommend that the Australian Institute of Criminology (AIC), or another suitable agency, should gather and report data about federal offences committed in the family violence context. This should include:

- which federal offences are prosecuted and the result;
- who conducts the prosecution;

<sup>107</sup> Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 38.

<sup>108</sup> The Database holds data about family violence incidents reported by Victoria Police, intervention order applications finalised in the Magistrates' Court and Children's Court of Victoria, family violence services provided by specific agencies funded through the Department of Human Services, family violence-related presentations to Victorian public hospital emergency departments and calls to the Victims Support Agency's Victims of Crime Helpline and Victims Assistance and Counselling Programs.

<sup>109</sup> Department of Justice (Vic), *Victorian Family Violence Database: Volume 4, Nine Year Trend Analysis* (2009), 18.

<sup>110</sup> Ibid, 19.

<sup>111</sup> See Chs 8, 3–7.

<sup>112</sup> See Chs 12, 22–23.

<sup>113</sup> See Chs 24, 7–9.

<sup>114</sup> See Chs 26, 8–1.

<sup>115</sup> Ch 8, 34.

- whether the offences are prosecuted jointly with state and territory crimes committed in the family violence context; and
- when the offences form the basis of a protection order.<sup>116</sup>

31.83 Similarly, in Chapter 26, the Commissions recommend that the Australian Centre for the Study of Sexual Assault, the AIC and similar state and territory agencies should prioritise the collection of comprehensive data in relation to sexual assault perpetrated in a family violence context. In particular on:

- attrition rates (including reasons for attrition and the attrition point);
- case outcomes; and
- trends in relation to particular groups including Aboriginal and Torres Strait Islander peoples.<sup>117</sup>

31.84 In Chapter 12, the Commissions recommend that to the extent that state and territory courts record and maintain statistics about criminal matters lodged or criminal offences proven in their jurisdiction, they should ensure that such statistics capture separately criminal matters or offences that occur in a family-violence related context. In every other case, state and territory governments should ensure the separate capture of statistics of criminal matters or offences in their jurisdictions that occur in a family-violence related context.<sup>118</sup>

31.85 Another major gap in the system identified by the Commissions is the absence of a national protection order database.<sup>119</sup> In Chapter 30, the Commissions endorse the Australian Government's commitment to the development of a national scheme for the registration and recognition of family violence orders. The Commissions recommend that such a register should, at a minimum:

- include interim, final and police-issued protection orders made under state and territory family violence legislation; child protection orders made under state and territory child protection legislation; and related orders and injunctions made under the *Family Law Act*; and
- be available to federal, state and territory police officers, federal family courts, state and territory courts that hear family violence and child protection related matters, and child protection agencies.<sup>120</sup>

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116 Rec 8–1.

117 Rec 26–1.

118 Rec 12–7.

119 See Ch 30. The Australian Government has committed to working with the states and territories to establish a national scheme for the registration of protection orders. Details have not yet been released about how such a national scheme would operate.

120 Rec 30–18.

### **Death reviews**

31.86 Another area identified by stakeholders related to data collection aimed at reviewing and analysing deaths resulting from domestic violence. Women's Legal Services Australia has previously supported such a review, stating that:

WLSA supports any mechanism aimed at monitoring and analysing deaths resulting from domestic violence ... The role of the review is to identify risk factors, barriers to effective intervention and gaps in service delivery or the integration of responses. These review processes are not aimed at attributing blame, but rather at making improvements to systems responses and preventing future deaths.<sup>121</sup>

31.87 Domestic Violence Victoria and others, in a joint submission, noted that its members are represented in the Systemic Review of Family Violence Deaths led by the Victorian Coroners Court:

It is crucial that other states and territories establish their own appropriately resourced family violence death review, in consultation with family violence victim support services and peak bodies. We believe that national leadership is also important in ensuring that data and research from the various reviews are centrally coordinated so that jurisdictions are able to learn from one another about effective family violence death prevention.<sup>122</sup>

31.88 The Magistrates' Court and Children's Court of Victoria noted similarly in relation to the Systemic Review of Family Violence Deaths that:

The courts believe this process has the potential to provide valuable information about the way the justice system (including its courts) interacts both with its agencies and external agencies in responding to family violence cases. A comprehensive and systematic review of family violence deaths provides a significant opportunity to examine the success or otherwise of integrated responses to family violence.<sup>123</sup>

### **Commissions' views**

31.89 In the Commissions' view, a commitment to quality data collection and evaluation is crucial to ensuring systemic change and improvement—and is an important element in an effective and ongoing national response to family violence. Comprehensive, up to date and accurate data help to underpin evidence-based policy and legal responses to family violence, and inform quality education and training programs. Further, the collection and sharing of data are crucial elements of an integrated response.

31.90 In particular, the Commissions are of the view that states and territories should undertake systemic reviews into deaths resulting from family violence. The Commissions agree with the submissions that such data would aid the system in identifying risk factors, gaps in responses and other deficiencies that, if addressed, may help to prevent deaths resulting from family violence.

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121 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010, Attachment 4.

122 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

123 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

31.91 Elsewhere in this Report, the Commissions have highlighted many existing examples of good practice in relation to data collection and analysis that have helped the system reflect upon its own practices and inform policy directions. For example, a number of integrated responses have been evaluated, including the ACT's Family Violence Intervention Program,<sup>124</sup> the Tasmanian Safe at Home program;<sup>125</sup> the NSW Domestic Violence Integrated Court Model,<sup>126</sup> the Joondalup specialised court in Western Australia; and the ECAV evaluation of cross-sectoral training in NSW.<sup>127</sup>

31.92 The Commissions also commend government initiatives such as the Victorian Family Violence Database, which is the most comprehensive database of its kind in Australia. As noted above, the database appears to have played an important role in the formulation of family-violence related policy in Victoria since its inception.

31.93 Finally, the Commissions consider there is role for bodies such as the AIC, or a national body as discussed above—if appropriately funded and resourced—to play a major role in fostering the collection of data and its dissemination to those working in the family system.

**Recommendation 31–6** State and territory governments should undertake systemic and ongoing reviews into deaths resulting from family violence.

124 Urbis Keys Young, *Evaluation of the ACT Family Violence Intervention Program Phase II* (2001).

125 Successworks, *Review of the Integrated Response to Family Violence: Final Report* (2009).

126 L Rodwell and N Smith, *An Evaluation of the NSW Domestic Violence Intervention Court Model* (2008), prepared for the NSW Bureau of Crime Statistics and Research.

127 This report was not publicly available at the time of writing.



## **32. Specialisation**

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### **Contents**

Introduction	1485
Advantages and challenges of specialisation	1486
Advantages of specialisation	1486
Challenges of specialisation	1487
Specialised family violence courts	1488
Elements of specialised family violence courts	1489
The value of specialised family violence courts	1490
International models	1491
Existing specialised family violence courts in Australia	1494
Jurisdiction and elements	1494
Expanding specialised family violence courts in Australia	1501
Jurisdiction of specialised family violence courts	1501
Elements of specialised family violence courts	1506
Mainstreaming specialised practices	1512
Commissions' views	1513
Specialised police	1514
The roles and advantages of specialised police	1514
Specialised police in Australia	1515

### **Introduction**

32.1 In the course of this Inquiry, the Commissions have formed the view that the specialisation of key individuals and institutions is crucial to improving the interaction in practice of legal frameworks governing family violence, including sexual assault in a family violence context. This chapter considers ways to foster and improve the effectiveness of specialised family violence courts and specialised police units with the aim of producing safe, fair and just outcomes for victims and their families.

32.2 This chapter focuses in particular on specialised family violence courts. The term ‘specialised court’ can be used to refer to a number of things. For example, the term can be used to refer to separate stand alone courts that deal only with a particular subject matter—such as the Family Court of Australia—which ‘specialises’ in matters under the *Family Law Act 1975* (Cth). Children’s courts, similarly, may be considered as specialised courts dealing with child related matters. There are, however, no stand alone specialised family violence courts in Australia.

32.3 In courts that deal with a range of subject matters, there can be a division or special program embedded within existing court structures that deals with a particular

subject matter. For example, in Victoria, there is the Family Violence Division of the Magistrates' Court of Victoria. In other instances, a court may operate a 'specialised list', in which certain categories of cases are heard on certain days of the week, often by dedicated judges. Both these types of 'specialised courts' are common in the Australian legal system.

32.4 Many specialised courts simply operate as a matter of practice, and their structures are established through administrative mechanisms. However, some specialised courts may be expressly established by legislation.<sup>1</sup>

32.5 In this chapter, the Commissions use the term specialised family violence courts as a general description to refer to a division, program, specialised list or a specialist family violence court room within existing state or territory magistrates or local courts set up to deal with family violence.

32.6 The Commissions make no recommendations in this chapter for establishment of specialised sexual assault courts or specialised child sexual assault courts. The Terms of Reference direct the Commissions to consider sexual assault in the family violence context. In Chapter 26, the Commissions express the view that where sexual assault occurs in the family violence context, it should be considered and dealt with as family violence.

## **Advantages and challenges of specialisation**

### **Advantages of specialisation**

32.7 Specialisation has been promoted by many working in family violence as a strategy for achieving best practice. However, there is a real debate about whether resources—such as funding, staffing, training and education—are better concentrated in specialised units and courts, or dispersed more generally throughout the system. It is also arguable that—given the cost of family violence to the Australian community—both specialisation and greater resourcing of the system generally represent achievable best practice benchmarks.<sup>2</sup>

32.8 Specialisation can help to ensure that victims have contact with those in the system—including judicial officers, lawyers, prosecutors, police and family dispute practitioners—with a better understanding of the nature, features and dynamics of family violence.<sup>3</sup> This knowledge and understanding allows these individuals to better assist victims in navigating the legal, social and health systems by connecting together legal frameworks and social services.<sup>4</sup>

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1 The Family Violence Court Division of the Magistrates' Court of Victoria has its own legislative basis, and is discussed below.

2 The Commissions discuss the cost of family violence to the Australian community in Ch 1.

3 The Commissions consider the nature, features and dynamics of family violence in Ch 7.

4 For example, magistrates in the specialised family violence courts in Victoria, discussed below, routinely ask questions in applications for protection orders about pending prosecutions or past convictions, pending or past family law proceedings, the use of counselling and drug programs, and applications for victims' compensation: *Court Observation: Sunshine Magistrates' Court of Victoria: Family Violence List*, 25 January 2010.

32.9 Specialisation can also operate to improve the system as a whole. As many stakeholders have emphasised, attitudinal and behavioural change—although highly desirable—can be slow to achieve. Specialisation acts both as a way of attracting those with an interest and aptitude for family violence work, and allows education, training and other resources to be focused upon a smaller group for more immediate results and improved outcomes. Specialists can help to promote attitudinal change if they are given opportunities to share information with, and to contribute to, the education and training of those in the general system.<sup>5</sup>

32.10 Specialisation can improve consistency and efficiency in the interpretation and application of laws as a result of shared understandings and the awareness and experience of a smaller number of decision makers. Specialists can identify and solve problems more quickly and effectively and can develop and promote best practice that can then be mainstreamed to drive change in the system more generally.

32.11 In the long run, the efficiency gains through specialisation may produce better outcomes that result in substantial savings elsewhere in the system—for example, earlier and more effective legal intervention may result in fewer cases requiring child protection agencies to intervene, and fewer demands on medical and psychological services.

32.12 For these reasons, specialists are more likely to be effective in addressing family violence, and in their ability to make the system more efficient as a whole.

### Challenges of specialisation

32.13 Stakeholders have identified a number of operational challenges associated with specialisation. These include: the accessibility of specialised services; the appropriate selection and retention of specialists; and the ongoing need to ensure and maintain adequate resourcing and support.<sup>6</sup>

32.14 One commonly expressed concern is that specialised services, because of the resources they require, may only reach a certain segment of the population, leaving some victims of family violence—especially those in regional and remote communities—no better off. This can lead to a degree of arbitrariness in which some victims receive better treatment than others.

32.15 Another concern relates to how specialists are selected. The attitudes and aptitudes of specialists are vital to ensuring consistent and quality outcomes for victims. Many models of specialisation, however, lack clarity about the selection criteria for specialised roles.<sup>7</sup> For example, most specialised courts in Australia do not

<sup>5</sup> The Commissions emphasise below the importance of mainstreaming specialised practices. Further, in Ch 31, the Commissions note the importance of education and training (including cross-agency and intersectoral training) in promoting cultural and behavioural change in the system.

<sup>6</sup> North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

<sup>7</sup> See, eg, NSW Ombudsman, *Policing Domestic Violence in NSW* (1999), 47–48.

require judicial officers working in the courts to receive particular training as a prerequisite for appointment.<sup>8</sup>

32.16 The recruitment and retention of staff is a common challenge for many specialised units working in the area of family violence. Due to the traumatising nature of the work, specialists can suffer ‘burnout’, unless adequate support and recognition is provided.

32.17 A related issue is the need to ensure appropriate incentives—including career progression opportunities—for specialists. For example, in 2006, the New South Wales (NSW) Ombudsman commented in relation to specialised police known as Domestic Violence Liaison Officers (DVLOs):

Unfortunately, there are still few, if any, incentives for police officers to act in the role, apart from the availability of regular daytime shifts. Conversely, the inability of DVLOs to work 12-hour shifts and have up to six consecutive rest days is one of the less appealing aspects of the role for many officers. There is no special allowance payable to DVLOs, and no recognised career path associated with the position. Partly for these reasons, there is little status attached to being a DVLO.<sup>9</sup>

32.18 There is a need to ensure that adequate human and financial resources are available for specialists, and that there is a commitment to long-term resourcing. For example, the NSW Ombudsman noted that the effectiveness of DVLOs was being hampered by inadequate access to vehicles, computers and mobile phones.<sup>10</sup>

32.19 The Commissions also recognise the particular challenge of ensuring that specialisation does not simply lead to parts of the system becoming so specialised as to operate in ‘silos’. As considered below, specialisation needs to be continually mainstreamed and promoted in the general system as best practice. This highlights the importance of inter-agency collaboration, information sharing, and consistent training and education for specialists and non-specialists alike.<sup>11</sup>

32.20 In the following sections, the Commissions consider ways to maximise the benefits of specialised family violence courts and specialised police units, while addressing, as far as possible, the operational challenges.

## **Specialised family violence courts**

32.21 Of particular interest to this Inquiry is the use of specialised courts. Since the 1990s, specialised courts have flourished in the form of drug courts, mental health courts, community courts and—most importantly, for the purposes of this Inquiry—family violence courts. In Australia, family violence courts now operate in NSW,

8 By way of contrast, under s 4H of the *Magistrates’ Court Act 1989* (Vic), the Family Violence Court Division (FVCD) is constituted only by magistrates gazetted by the Chief Magistrate. The Chief Magistrate is required to ‘have regard to the magistrate’s relevant knowledge and experience in dealing with matters relating to family violence’. Consultations reveal, however, that there has been some ‘dilution’ of the specialist training selection process over the life of the FVCD.

9 NSW Ombudsman, *Domestic Violence: Improving Police Practice* (2006), 27.

10 *Ibid*, 29.

11 See also Chs 29, 30, 31, in relation to inter-agency collaboration, information sharing, and education and training respectively.

Victoria, Queensland, South Australia, Western Australia and the Australian Capital Territory (ACT).<sup>12</sup> Such a court has also been recommended recently for Tasmania.<sup>13</sup> In the US, where they originated, over 200 family violence courts now exist,<sup>14</sup> and since 1999, the UK has rolled out over 120 Specialised Domestic Violence Courts (SDVCs).<sup>15</sup> Canada has several well-established specialised family violence courts.<sup>16</sup> Some have also been established in New Zealand.<sup>17</sup>

### Elements of specialised family violence courts

32.22 Specialised family violence courts differ significantly in their features and degree of specialisation. However, such courts will typically exhibit some, or all, of the following:

- *Specialised personnel*: These will include specialised judicial officers, but may also involve specialised prosecutors, lawyers, victim support workers, and community corrections officers. In some cases, these personnel may be chosen because of their specialised skills, or be given specialised training in family violence.
- *Specialised procedures*: These will include special days in court dedicated to family violence matters ('dedicated lists'). They may also include 'case coordination mechanisms' to 'identify, link, and track cases related to family violence', such as integrated case information systems, or the use of 'specialised intake procedures' (specialised procedures that apply when the victim first enters the court system).<sup>18</sup>
- *Emphasis on specialised support services*: There will be someone, employed by the court or another organisation available to support family violence victims in managing the court process, and often these workers are responsible for referring victims to other services, such as counselling. There may also be specialised legal advice or representation available for both the victim and defendant.

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12 An overview of these courts is set out below.

13 Successworks, *Review of the Integrated Response to Family Violence: Final Report* (2009), 64–65.

14 A national project on such courts in the US identified 208 courts with specialised dockets or dedicated judges at the end of 2009, although this was restricted to courts dealing with criminal cases: M Labriola and others, *A National Portrait of Domestic Violence Courts* (2009), Center for Court Innovation, ix. See D Shelton and E Donald, *The Current State of Domestic Violence Courts in the United States, 2007* (2007); J Helling, *Specialized Criminal Domestic Violence Courts* (2005); S Kelitz, R Guerrero, AM Jones and DM Rubio, *Specialization of Domestic Violence Case Management in the Courts: A National Survey* (2001), prepared for the National Center for State Courts.

15 See Crime Reduction Centre Information Team, *Safety and Justice: The Government's Proposals on Domestic Violence* (2003).

16 See L Tutty, J Ursel and F Douglas, 'Specialized Domestic Violence Courts: A Comparison of Models' *What's Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (2008) 69.

17 See New Zealand Family Violence Clearinghouse, *Evaluating the Waitakere Family Violence Court* (2007).

18 S Kelitz, R Guerrero, AM Jones and DM Rubio, *Specialization of Domestic Violence Case Management in the Courts: A National Survey* (2001), prepared for the National Center for State Courts, 5–6, describes case management in the US courts.

- *Special arrangements for victim safety:* Some courts will also include specially designed rooms and separate entrances to ensure the safety of victims, and may offer facilities which enable vulnerable witnesses to give evidence remotely.
- *Offender Programs:* Some courts have the capacity to order or refer an offender to a program which aims to educate the offender and address personal issues to prevent re-offending, usually through counselling.<sup>19</sup> Some courts have offender support workers to engage and refer offenders to behavioural change programs.
- *Problem solving or therapeutic approaches:* Some courts adopt broader approaches aiming to ‘solve problems’ and achieve therapeutic outcomes.<sup>20</sup>

#### **The value of specialised family violence courts**

32.23 The experiences of Australian and overseas jurisdictions provide some evidence of the value of specialised family violence courts in terms of improving the interaction in practice of legal frameworks relevant to this Inquiry. These benefits include:

- greater sensitivity to the context of family violence and the needs of victims through the specialised training and skills of staff;
- greater integration, coordination and efficiency in the management of cases through identification and clustering of cases into a dedicated list, case tracking, inter-agency collaboration, and the referral of victims and offenders to services;
- greater consistency in the handling of family violence cases both within and across legal jurisdictions;
- greater efficiency in court processes;
- development of best practice, through the improvement of procedural measures in response to regular feedback from court users and other agencies; and
- better outcomes in terms of victim satisfaction, improvement in the response of the legal system (for example, better rates of reporting, prosecution, convictions and sentencing in the criminal context), better victim safety, and—potentially—changes in offender behaviour.<sup>21</sup>

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19 For discussion of offender programs, see Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), [20.129]–[20.134].

20 See *Ibid*, [20.140]–[20.160] for discussion of problem-solving and therapeutic courts. National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009); Law Reform Commission of Western Australia, *Court Intervention Programs: Final Report Project No 96* (2009), 92; S Eley, ‘Changing Practices: The Specialised Domestic Violence Court Process’ (2005) 44 *The Howard Journal of Criminal Justice* 113, 114–115; S Kelitz, R Guerrero, AM Jones and DM Rubio, *Specialization of Domestic Violence Case Management in the Courts: A National Survey* (2001), prepared for the National Center for State Courts, 5.

### International models

32.24 Overseas jurisdictions have adopted various models of specialised family violence courts. In the US, there are over 200 such courts in operation, more than half of which are in New York, Washington, Florida, California, and Alabama.<sup>22</sup> Many of these, however, simply operate dedicated lists for matters relating to protection orders. Many others adopt the ‘criminal model’ of streaming all criminal matters related to family violence.<sup>23</sup>

32.25 Perhaps the most notable example is the New York model, which includes both Domestic Violence Courts and Integrated Domestic Violence Courts (IDVCs). There are now 44 IDVCs in operation, servicing approximately 90% of the population of New York.<sup>24</sup> While the Domestic Violence Courts deal with criminal matters relating to intimate partners, cases are transferred to the IDVCs where there are overlapping civil, criminal, or family law claims arising out of a family violence incident between intimate partners.<sup>25</sup> In IDVCs, a single judge conducts all related criminal, civil and family law matters from beginning to end.<sup>26</sup> As in other specialised courts, the cases are not consolidated, but rather remain separate civil, criminal, and family law matters. As a result, each case has its own burden of proof and is conducted as any other like case would be. A resource coordinator keeps judges informed of offender compliance and refers the defendant to appropriate services.

32.26 Another notable model is the Domestic Violence Unit in the District of Columbia, which includes a fully integrated court that handles civil, criminal, and family law matters in relation to disputes ‘where the parties are related by blood, legal custody, marriage, cohabitation, a child in common, or a romantic relationship’.<sup>27</sup> The court hears protection order proceedings and all misdemeanour criminal charges and, once a case has been brought to it, any family law matters involving the same parties. These are consolidated and heard in the Domestic Violence Court.<sup>28</sup> The court is serviced by two intake centres that serve as a ‘one stop shop’ for victim support, and a Domestic Violence Coordination Unit—a specialised section of the court registry.

22 S Moore, *Two Decades of Specialized Domestic Violence Courts: A Review of the Literature* (2009), Crime Prevention Branch, Attorney-General’s Department Center for Court Innovation, 2.

23 See D Shelton and E Donald, *The Current State of Domestic Violence Courts in the United States*, 2007 (2007); see also M Labriola and others, *A National Portrait of Domestic Violence Courts* (2009), Center for Court Innovation.

24 New York State Unified Court System, *Integrated Domestic Violence Courts* <[www.nycourts.gov/courts/problem\\_solving/idv/home.shtml](http://www.nycourts.gov/courts/problem_solving/idv/home.shtml)> at 16 February 2010.

25 IDVCs have authority to hear a whole range of matters, including criminal domestic violence cases, protection order hearings, and all related family issues, including custody, visitation, and divorce: New York State Division of Criminal Justice Services, *New York State Domestic Violence Courts Program Fact Sheet*.

26 Center for Court Innovation, *Integrated Domestic Violence Courts* <[www.courtinnovation.org/](http://www.courtinnovation.org/)> at 16 February 2010.

27 D Epstein, ‘Effective Intervention in Domestic Violence Cases: Rethinking the Roles of Prosecutors, Judges, and the Court System’ (1999) 11 *Yale Journal of Law and Feminism* 3, 29.

28 Superior Court of District of Columbia, *Domestic Violence Unit Rules* <[www.dccourts.gov/dccourts/docs/Rules-DV.pdf](http://www.dccourts.gov/dccourts/docs/Rules-DV.pdf)> at 16 February 2010.

32.27 This court operates under federal legislation which requires related cases to be assigned for the duration of those proceedings to the same judge or magistrate, '[t]o the greatest extent practicable, feasible, and lawful'.<sup>29</sup> The legislation also requires the provision of accessible materials, and an integrated computerised case management system.<sup>30</sup> In addition, judges must certify to the chief judge that they will participate in the ongoing training programs.<sup>31</sup>

32.28 Considerable research into the effectiveness of specialised family violence courts in the US has been conducted. The implications from this research have been stated as follows. Some, but not all, family violence courts are associated with reduced levels of reoffending. Family violence courts are associated with increased rates of conviction and decreased dismissal rates. Victims of family violence rate their satisfaction in specialised courts more highly. Victims of family violence who were aware that there was a family violence court, reported greater willingness to report repeat offending. Family violence courts are associated with more efficient case processing. Finally, family violence courts report higher levels of offender compliance.<sup>32</sup>

32.29 In Canada, over 50 family violence courts are in operation.<sup>33</sup> The first, and most studied, court was established in 1990 in Manitoba. The Manitoba court has specialised staff, special rooms and victim support services dealing with spousal abuse, child abuse and elder abuse.<sup>34</sup> An evaluation of that court found a significant reduction in domestic homicide and recidivism, and earlier and more frequent reporting of violent offenders.<sup>35</sup> The broadest program operates in Ontario, where there is a specialised family violence court in every jurisdiction.<sup>36</sup> In Calgary, the specialised team includes probation officers, police, and court caseworkers. Caseworkers contact the victims shortly after the police lay charges and review each case, checking whether the victims' wishes have changed, ensuring that victims are aware of the status of the case,

29      *District Court of Columbia Family Court Act of 2001* 11 DC CODE ANN §11–1104 (US).

30      Ibid.

31      Ibid.

32      A Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (2009), National Institute of Justice. See also M Labriola and others, *A National Portrait of Domestic Violence Courts* (2009), Center for Court Innovation, 9.

33      S Moore, *Two Decades of Specialized Domestic Violence Courts: A Review of the Literature* (2009), Crime Prevention Branch, Attorney-General's Department Center for Court Innovation.

34      See J Ursel and C Hagyard, 'The Winnipeg Family Violence Court' *What's Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (2008) 95.

35      A Hennessy, *Specialist Domestic and Family Violence Courts: The Rockhampton Experiment* (2008) <[www.archive.sclqlld.org.au/judgepub/2008/Hennessy160608.pdf](http://www.archive.sclqlld.org.au/judgepub/2008/Hennessy160608.pdf)> at 2 October 2009, 3.

36      Ministry of the Attorney General (Ontario), *Programs and Services for Victims of Crime* <[www.attorneygeneral.jus.gov.on.ca/english/ovss/programs.asp#domestic](http://www.attorneygeneral.jus.gov.on.ca/english/ovss/programs.asp#domestic)> at 16 February 2010. See M Dawson and R Dinovitzer, 'Specialized Justice: From Prosecution to Sentencing in a Toronto Domestic Violence Court' *What's Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (2008) 120.

as well as conducting risk assessments.<sup>37</sup> As in the US, the exact models vary greatly between jurisdictions.<sup>38</sup>

32.30 The UK has 141 family violence courts in operation.<sup>39</sup> These deal only with criminal matters. While models vary, the UK has a National Resource Manual that lists 12 key components for successful SDVCs, including: a steering group; multi-agency risk assessment conferences; trained and specialised staff; court listing considerations; identification of family violence and data collection; victim and children support services; and a focus on equality and diversity.<sup>40</sup>

32.31 The first 25 SDVCs were evaluated in 2007–08.<sup>41</sup> The performance of individual SDVCs varied significantly, which obscured the success of some individual SDVCs.<sup>42</sup> In more successful SDVCs, there was evidence of high arrests and more successful prosecutions; higher rates of victim support in court; and improved confidence in the criminal justice system by both victims and the community. The review concluded that

omission of any of the core components led to less successful outcomes in one or more of the measures. The combination of the overall components was pivotal in delivering success.<sup>43</sup>

32.32 In New Zealand, two specialised family violence courts have been established in Waitakere and Manukau. The features of these courts include: stakeholder meetings; dedicated lists; specialised staff; duty solicitors; victim advisors; and links with community services. While these courts deal primarily with criminal matters related to family violence, applications for protection orders (which, in the New Zealand legal system, are dealt with by the Family Court of New Zealand) can be made before the specialised criminal court. If those orders are consented to, the family violence court arranges for the application to be processed in the Family Court. If the order is not consented to, the application is referred to the Family Court. The process is facilitated by a ‘Family Court Coordinator’, who is jointly responsible with Victim Advisors for information sharing between the Family Court and the Family Violence Court.<sup>44</sup> A

37 See L Tutty, K McNichol and J Christensen, ‘Calgary’s HomeFront Specialized Domestic Violence Court’ *What’s Law Got to Do With It? The Law, Specialized Courts and Domestic Violence in Canada* (2008) 152.

38 See L Tutty, J Ursel and F Douglas, ‘Specialized Domestic Violence Courts: A Comparison of Models’, 69.

39 See Department of Justice (UK), ‘More Specialist Domestic Violence Courts Offer Tailored Support to Victims’ (Press Release), 19 March 2010. This exceeds the 128 planned to roll out by 2011: Her Majesty’s Government (UK), *National Domestic Violence Delivery Plan—Annual Progress Report 2008–2009*.

40 Crime Reduction Centre Information Services Team, *Specialist Domestic Violence Court Programme Resource Manual* (revised ed, 2008).

41 Her Majesty’s Courts Services (UK), Home Office (UK) and Crown Prosecution Service (UK), *Justice with Safety: Specialist Domestic Violence Courts Review 2007–08* (2008).

42 Ibid, 5.

43 Ibid, 6.

44 Ministry of Justice (NZ), *Family Violence Courts National Operating Guidelines* (2008).

2008 evaluation indicated that the courts have had some success, ‘in spite of considerable difficulties’, including lack of resources and training.<sup>45</sup>

### **Existing specialised family violence courts in Australia**

32.33 As noted above, in Australia there are family violence courts in NSW, Victoria, Queensland, Western Australia, South Australia, and the ACT. All these are part of the local or magistrates court in the relevant jurisdiction. Such a court has recently been recommended for Tasmania.<sup>46</sup> In most of these jurisdictions, the family violence court operates in only one or a couple of locations. In Western Australia, however, specialised family violence courts operate in six locations.<sup>47</sup>

#### **Jurisdiction and elements**

32.34 One particularly important way in which specialised family violence courts in Australia differ is in the extent to which they exercise jurisdiction. As noted in Chapter 16, although all state and territory local or magistrates courts have broad jurisdiction over a range of matters—including criminal matters, family violence protection orders, and family law (to the extent that this is conferred)—the full extent of this jurisdiction is not necessarily exercised in specialised family violence courts.<sup>48</sup>

32.35 The extent to which jurisdiction is exercised depends largely on the practical and administrative arrangements of the court. For example, many local and magistrates courts in Australia operate a specialised list for protection orders, where matters are listed and heard on a particular day.<sup>49</sup> Family violence courts in NSW, Western Australia and the ACT follow the ‘criminal model’, in that these lists deal exclusively with criminal matters related to family violence. The South Australian specialised family violence court deals with both criminal matters and applications for protection orders.

32.36 In Australia, only the Family Violence Court Division (FVCD) of the Magistrates’ Court of Victoria exercises jurisdiction over protection orders; summary criminal proceedings; committals for indictable offences; civil personal injury claims; compensation and restitution; and (to the extent conferred upon the Magistrates’ Court) jurisdiction over family law and child support.<sup>50</sup> It can also sit as the Victims of Crime

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45 T Knaggs, *The Waitakere and Manukau Family Violence Courts: An Evaluation Summary* (2008), prepared for the Ministry of Justice (NZ).

46 Successworks, *Review of the Integrated Response to Family Violence: Final Report* (2009), 64–65.

47 These are courts in Jundalup, Fremantle, Rockingham, Midland, Armadale, and Perth.

48 Local and magistrates courts generally have their own legislation, eg, *Local Courts Act 2007* (NSW); *Magistrates’ Court Act 1989* (Vic); *Magistrates Courts Act 1921* (Qld); *Magistrates Court Act 2004* (WA); *Magistrates Court Act 1991* (SA); *Magistrates Court Act 1987* (Tas); *Magistrates Court Act 1930* (ACT); *Magistrates Act 2009* (NT).

49 For example, in Victoria, each Magistrates’ Court runs a family violence list on one or more days of the week and internal protocols require the listings to be separate from criminal or other lists.

50 *Magistrates’ Court Act 1989* (Vic) s 41.

Assistance Tribunal to hear applications for statutory victims' compensation in family violence cases.<sup>51</sup>

32.37 The following table sets out the elements of each specialised family violence court in Australia.<sup>52</sup> A brief description of the courts in each jurisdiction follows, including any independent evaluations of such courts.

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51 Department of Justice (Vic), *Family Violence Court Division—Overview* <[www.justice.vic.gov.au](http://www.justice.vic.gov.au)> at 10 December 2009.

52 This is based on published information about the courts available as at January 2010, and in some cases there is insufficient information to establish whether the court includes a particular element.

**Table A: Specialised family violence courts in Australia**

Features	ACT	NSW	Qld	SA	VIC	WA
<b>Locations</b>	Canberra	Campbelltown; Wagga Wagga	Rockhampton	Elizabeth; Port Adelaide; Adelaide	Ballarat; Heidelberg	Joondalup; Fremantle; Rockingham; Midland; Armadale; Perth
<b>Jurisdiction</b>	Criminal matters pre-trial	Criminal matters pre-trial	Criminal matters	Criminal matters; protection orders	Criminal matters; protection orders; civil and statutory compensation; family law	Criminal matters (with some trials) and protection orders
<b>Specialised personnel</b>	Judicial officers; prosecutors; police	None specified	Prosecutors	Judicial officers	Judicial officers; prosecutors; registrars; legal aid lawyers for victims and defendants	Judicial officers; police prosecutors; defendant lawyers
<b>Specialised training</b>	Prosecutors and police	None specified	None specified	None specified	All	None specified
<b>Special procedures</b>	Dedicated list; case tracking; practice direction	Case tracking; practice direction	Dedicated list	Dedicated list	Dedicated list	Dedicated list; case management
<b>Victim support services</b>	Witness assistant; Domestic Violence Crisis Service	Victim advocate; referrals to services	Victim support workers; referrals to services	Support workers for victim, defendant and children; counselling for children and victims <sup>1</sup>	Victim and defendant support workers; family violence outreach workers; referrals to services	Victim support worker; referrals services
<b>Victim safety arrangements</b>	None specified	‘Safe’ waiting rooms	Remodelling of facilities	None specified	Extra security officers; remote witness rooms	None specified
<b>Offender programs</b>	Yes	Yes	Yes	Yes	Yes	Yes

### Australian Capital Territory

32.38 The specialised family violence list in the ACT Magistrates Court is one component of the ACT's integrated response, the Family Violence Intervention Program (FVIP).<sup>53</sup> This deals with criminal charges related to family violence, which are managed pre-trial by a coordinating magistrate. The family violence list does not deal with protection orders.<sup>54</sup> Matters tagged as family violence-related are heard weekly. A practice direction imposes tight time limits and requirements for earlier disclosure of evidence.<sup>55</sup> The court has the benefit of specialised police officers and specialised family violence prosecutors.<sup>56</sup> Victim support services include Police Victim Liaison Officers, a Witness Assistant, and the Domestic Violence Crisis Service, a victim support organisation.<sup>57</sup> The court may refer those convicted of a family violence offence to a family violence offender intervention program run by ACT Corrective Services.

32.39 Independent evaluations of the FVIP indicate that the specialised court has led to earlier finalisation of cases through guilty pleas, with the majority of cases being finalised within 13 weeks.<sup>58</sup> Earlier evaluations also recorded positive responses by the majority of victims to the court process.<sup>59</sup>

### New South Wales

32.40 In 2005, two family violence courts were piloted in Wagga Wagga and Campbelltown as part of the Domestic Violence Intervention Court Model (DVICM). These pilots were established by a Memorandum of Understanding between the NSW Attorney General's Department, NSW Police, the Department of Community Services,<sup>60</sup> the Department of Corrective Services, the Legal Aid Commission of NSW and the Department of Housing.

32.41 The DVICM program focused on improved evidence collection by the police, automated referrals to victim services, and increased information sharing and co-ordination from key agencies through Regional Reference Groups and Senior Officers Groups. The Local Courts implemented a Practice Note requiring early disclosure of evidence.<sup>61</sup> Stakeholder agencies met weekly to update matters before the court. Magistrates could, if deemed appropriate as part of the sentence, place an offender on a perpetrator program run by the Probation and Parole Service in Wagga Wagga and Campbelltown.

53 The FVIP is also discussed in Ch 29.

54 Protection orders are dealt with by the Protection Unit of the Magistrates Court.

55 Magistrates Court of the Australian Capital Territory, *Practice Direction No 2 of 2009*.

56 The ACT ODDP has the longest established family violence prosecution team in the country.

57 The Domestic Violence Crisis Service offers court support, but it notes that it has been forced to reduce the availability of this service significantly, because of inadequate resources: Domestic Violence Crisis Service (ACT), *Annual Report 2008* (2008), 45.

58 Urbis Keys Young, *Evaluation of the ACT Family Violence Intervention Program Phase II* (2001). Another evaluation was conducted in 2009 but has not yet been published.

59 Ibid.

60 Now known as Community Services.

61 Local Courts (NSW), *Local Court Practice Note No. 1 of 2006*.

32.42 An independent evaluation in 2008 indicated that the pilots did not have any significant impact on the finalisation of cases by early pleas, the withdrawal of prosecutions, the time for finalisation, or penalties.<sup>62</sup> The most successful aspect of the pilot was increased access to victim support.<sup>63</sup> While the DVICM has been made permanent in those locations, there are no plans to roll it out elsewhere in NSW. However, practice directions mandating strict time limits have been issued in other local courts.<sup>64</sup>

32.43 The Commissions heard in consultation with the DVICM in Wagga that the pilots were achieving continued success in terms of improved victim safety and access to victim support services. It was noted that the structures and links of the DVICM had helped to foster relationships, understanding and confidence between individuals and organisations to the benefit of victims. A number of challenges were highlighted including: the need for more resources, training, high level co-ordination and information sharing.<sup>65</sup>

### ***Queensland***

32.44 A pilot was developed from 2006 in Rockhampton Magistrates Court, under the leadership of the Chief Magistrate. The pilot included: a specialised police prosecutions team; a dedicated list; domestic violence support officers in court; improved information and referrals to service providers; changes to police procedure; greater communication and liaison through regular stakeholder meetings and co-ordination; and offender programs. While the pilot began without funding,<sup>66</sup> the 2009–10 Queensland family violence strategy indicates that the specialised court program will form part of an integrated response being tested in Rockhampton.<sup>67</sup>

### ***South Australia***

32.45 South Australia pioneered the first specialised family violence court in Australia at Elizabeth in 1999. Since then, specialised family violence courts have been added to the Adelaide and Port Adelaide Magistrates Court. Unlike the model used in NSW, Queensland and the ACT, these hear both criminal matters and protection order matters. Where both criminal and civil matters arise in a case, these are heard together. While the courts have specially assigned magistrates, there is no specialised training for judicial officers.<sup>68</sup> The specialised family violence courts are monitored by a

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62 L Rodwell and N Smith, *An Evaluation of the NSW Domestic Violence Intervention Court Model* (2008), prepared for the NSW Bureau of Crime Statistics and Research.

63 Ibid, 55.

64 Office For Women's Policy (NSW), *Discussion Paper on NSW Domestic and Family Violence Strategic Framework* (2008).

65 Domestic Violence Intervention Court Model Wagga Wagga, *Consultation*, Wagga Wagga, 13 May 2010.

66 A Hennessy, *Specialist Domestic and Family Violence Courts: The Rockhampton Experiment* (2008) <[www.archive.sclqld.org.au/judgepub/2008/Hennessy160608.pdf](http://www.archive.sclqld.org.au/judgepub/2008/Hennessy160608.pdf)> at 2 October 2009.

67 Queensland Government, *For Our Sons and Daughters: A Queensland Government Strategy to Reduce Domestic and Family Violence Program of Action 2009–2010* (2009), 5.

68 Deputy Chief Magistrate Andrew Cannon and R McInnes, *Consultation*, By telephone, 25 September 2009.

steering committee comprised of court staff, magistrates, prosecutors, policy officers, offender-treatment workers, and the Commissioner for Victims' Rights (South Australia).<sup>69</sup>

32.46 The South Australian model also provides support workers for victims, offenders and children; and can refer offenders to offender programs (known as Violence Intervention Programs).<sup>70</sup>

### *Victoria*

32.47 In the period leading up to 2002, the Magistrates' Court of Victoria established internal specialist family violence listing protocols, led by a supervising magistrate appointed by the Chief Magistrate.<sup>71</sup> These protocols, along with a family law and family violence steering committee of magistrates and registrars, helped establish better, more consistent family violence listing practices. The Children's Court of Victoria was also represented on this Committee. All major magistrates' courts in Victoria run a dedicated family violence list.

32.48 In 2005, the FVCD of the Magistrates' Court of Victoria commenced sitting at Ballarat and Heidelberg. The Victorian Government committed \$5.2 million over four years to the resourcing of the FVCD, with a separate allocation for the associated offender programs.<sup>72</sup> Funding has been continued for those two sites.

32.49 The FVCD differs from other Australian family violence courts in a number of ways. It is the only court that is expressly established by legislation.<sup>73</sup> It is also the only court that exercises jurisdiction over civil compensation claims, statutory compensation claims, and family law and child support matters as well as criminal matters and protection orders.<sup>74</sup> All judicial officers must be formally appointed to the court.<sup>75</sup> The same judicial officer hears related cases, but each case is heard using the applicable standard of proof and procedure. Judicial officers report satisfaction with managing these processes.<sup>76</sup>

32.50 All selected judicial officers and staff received specialised and ongoing training. In addition to specialised magistrates and police prosecutors, the court also has support workers for victims and offenders, family violence outreach support workers, legal aid and community lawyers for victims and defendants, and a specialised registrar. The FVCD is therefore the closest example of a 'one stop shop' model for victims of family violence in Australia. As it is a pilot, however, access to the court is available only

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69 Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

70 Courts Administration Authority South Australia, *Magistrates Court Violence Intervention Program* <[www.courts.sa.gov.au/courts/magistrates/index.html](http://www.courts.sa.gov.au/courts/magistrates/index.html)> at 16 February 2010.

71 Anne Goldsbrough was the first supervising magistrate from 2002–2007.

72 Department of Justice (Vic), *Family Violence Court Division—Overview* <[www.justice.vic.gov.au/](http://www.justice.vic.gov.au/)> at 16 February 2010.

73 *Magistrates' Court Act 1989* (Vic) s 4H.

74 Ibid s 4I.

75 Ibid s 7(1) provides that the 'Governor in Council may appoint as many magistrates as are necessary for transacting the business of the Court.'

76 Magistrate N Toohey, *Consultation*, Melbourne, 25 January 2010.

where victims or offenders are residing in, or the family violence was committed in, postcodes specified by a gazetted notice.<sup>77</sup>

32.51 In addition, there are Specialist Family Violence Service courts operating in Melbourne, Frankston, Sunshine and Werribee. These courts exhibit similar features to the FVCD, with three exceptions: they do not exercise the same combined jurisdiction of the FVCD, specialising instead in hearing family violence protection orders;<sup>78</sup> they do not have power to require a respondent to attend counselling; and they do not have support workers for respondents.<sup>79</sup>

32.52 Victoria also established a Neighbourhood Justice Centre in 2007 as a pilot program. This is a multi-jurisdictional court focused on the neighbourhood of the City of Yarra, which sits as a Magistrates' Court and Children's Court, Victorian Civil and Administrative Tribunal (VCAT) and Victims of Crime Assistance Tribunal (VOCAT). Its jurisdiction in relation to family violence is the same as that of the FVCD.<sup>80</sup> In addition, it has jurisdiction over guardianship and administration,<sup>81</sup> residential tenancies (sitting as VCAT) and victims' compensation claims (sitting as VOCAT). It is a 'one stop shop' for a range of services, including counselling, legal advice and representation, mediation, housing support, personal and material aid, and employment and training support. It also includes restorative justice processes.<sup>82</sup>

32.53 The Neighbourhood Justice Centre has an on-site officer from the family law courts on some mornings. The officer can provide forms, contact details for referral agencies, advice on Family Court and Federal Magistrates Court processes, advice on what clients can expect in a court room, and confirms listing dates for matters already before the federal family courts.<sup>83</sup>

### ***Western Australia***

32.54 Western Australia has developed the most geographically extensive program of specialised family violence courts in Australia, with courts in Joondalup, Fremantle, Rockingham, Midland, Armadale, and Perth. The plan is to roll out similar courts in all metropolitan areas of Western Australia.<sup>84</sup>

32.55 After Victoria, the Western Australian model has the most features of a family violence court in Australia. While there are variations between the individual courts, in

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77 *Magistrates' Court Act 1989* (Vic) s 4I(4).

78 While there is no legislative support for co-listing of cases in the Specialist Family Violence Service courts, this occurs in practice at the direction of judicial officers.

79 However, the Magistrates' Court of Melbourne provides Family Violence Applicant Workers who are tasked with providing information, support and referrals to external service providers and community agencies to aggrieved family members and affected children at the court premises.

80 Department of Justice (Vic), *Family Violence Court Division—Overview* <[www.justice.vic.gov.au](http://www.justice.vic.gov.au)> at 10 December 2009.

81 The Tribunal has original jurisdiction under Part 6 of the *Guardianship and Administration Act 1986* (Vic).

82 Restorative justice processes are discussed in Ch 21.

83 Department of Justice (Vic), *Family Violence Court Division—Overview* <[www.justice.vic.gov.au](http://www.justice.vic.gov.au)> at 10 December 2009.

84 Law Reform Commission of Western Australia, *Court Intervention Programs*, Consultation Paper (2008), 132–133.

general the courts can deal with criminal matters pre-trial, and have some capacity to deal with trials as well as protection orders. There are specialised magistrates and police prosecutors, support workers, a coordinating committee for strategy and policy, and inter-agency case management for operational matters. Offender programs are available and there is some monitoring of progress by judicial officers halfway through the program. There are customised programs for Indigenous persons and members of other cultural groups.

32.56 The Joondalup court was evaluated in 2000–01. The evaluation found that far more charges were laid as a result of a specialised police family violence investigation unit.<sup>85</sup> Only slightly more offenders were referred to offender programs in the pilot court. More breaches of the requirements of the program were detected and recorded in the pilot court, which may have been the result of case management processes. Case management was seen to be beneficial, and overall the court was described as a ‘qualified success’.<sup>86</sup>

## Expanding specialised family violence courts in Australia

32.57 In the Consultation Paper, the Commissions expressed the preliminary view that specialised family violence courts should be more widely established in Australia.<sup>87</sup> There was significant support for this proposal in submissions and consultations, and the Commissions remain of the view that such courts are of value and should be more widely established in Australia.<sup>88</sup> However, a variety of views was expressed on the minimum, desirable features of such courts and the range of matters they should consider.

### Jurisdiction of specialised family violence courts

32.58 A preliminary question for the establishment of specialised family violence courts concerns the range of matters that such courts should consider. In the Consultation Paper, the Commissions proposed that state and territory governments should ensure that specialised family violence courts determine matters relating to

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85 In 39% of cases as compared to 7.1% in non-specialised districts: *Ibid*, 131.

86 *Ibid*.

87 Consultation Paper, [20.102].

88 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; WESNET—The Women’s Services Network, *Submission FV 217*, 30 June 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Confidential, *Submission FV 171*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Sydney Women’s Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124*, 18 June 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; M Condon, *Submission FV 45*, 18 May 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

protection orders and criminal proceedings related to family violence.<sup>89</sup> It was further proposed that state and territory governments should review whether specialised family violence courts should also be responsible for handling related claims for civil and statutory compensation, child support and family law matters, to the extent such jurisdiction is conferred in the state and territory.<sup>90</sup> This position closely mirrors the model in the Victorian FVCD.

32.59 In the Consultation Paper, the Commissions did not propose that specialised family violence courts should be asked to exercise jurisdiction in relation to child protection matters. The Commissions noted that in all states and territories there are specialised children's courts that have jurisdiction related to the care and protection of children and young people, and also criminal cases involving young people. In the Tasmania, the ACT and the Northern Territory, the Children's Court is presided over by a magistrate. In NSW, Victoria, Queensland, Western Australia and South Australia, the head of the court is a specialist judge of the District Court.<sup>91</sup> Most states have specialist children's courts operating in capital cities. Outside these areas, the local magistrate can convene a children's court when necessary.<sup>92</sup>

#### ***Submissions and consultations***

32.60 There was strong support for the proposal that specialised courts should determine matters relating to family violence protection orders and criminal proceedings related to family violence.<sup>93</sup> For example, the Australian Domestic and Family Violence Clearinghouse submitted that:

Where they do not embrace a multi-jurisdictional capacity, specialist courts do not address the secondary victimisation which victims experience when required to present evidence in multiple court proceedings. The value of specialised courts is predicated on the extent to which they address victim needs and enhance safety of victims, so where they do not address this, they are less effective ... It is the 'one court, one family' capacity of the Victorian model that ensures it is exemplary in the Australian context. The value of state and territory courts using their 68R Family Law Act power is also noted as facilitative of jurisdictional capacity in this regard.<sup>94</sup>

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89 Consultation Paper, Proposal 20-2.

90 Ibid, Proposal 20-5.

91 C Cunneen, 'Young People and Juvenile Justice' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 187, [9.11]. The Chief Children's Court Magistrate in NSW is now a District Court judge, as reflected in the text above.

92 Ibid, [9.11].

93 WESNET—The Women's Services Network, *Submission FV 217*, 30 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 82*, 2 June 2010; Confidential, *Submission FV 81*, 2 June 2010; M Condon, *Submission FV 45*, 18 May 2010.

94 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010;

32.61 Consultations with one of the magistrates at the Ballarat FVCD in Victoria also indicated that the ‘one stop shop’ model was beneficial for victims, who had the advantage of familiarity with the court throughout related proceedings.<sup>95</sup> Other submissions highlighted that specialisation would diminish inconsistencies in the interpretation and implementation of legislation between different magistrates.<sup>96</sup>

32.62 However, a number of submissions raised concerns about the challenges and practicability of allowing specialised family violence courts to exercise jurisdiction in relation to a wide range of matters.<sup>97</sup> The Victorian Aboriginal Legal Service queried whether

the FVCD is appropriately situated to attend to other matters such as compensation ... This may decrease the effectiveness of the specialist court such as the Division by: diminishing the acute specialisation in family violence expertise; clouding family violence issues in consideration of other complex matters simultaneously; and diluting the identity and purpose of the Division when changing hats between concerns oriented towards the victim, the perpetrator and the best interest of the child.<sup>98</sup>

32.63 Similarly, the Women’s Legal Service NSW submitted that such a proposal ‘would need careful consideration, as different functions are being carried out, for example, criminal jurisdiction, civil jurisdiction for compensation and federal family law jurisdiction’.<sup>99</sup>

32.64 The Children’s Court of NSW did not support sharing its specialist jurisdiction with a specialised family violence court:

To direct criminal cases involving juveniles and the care and protection cases away from specialist Children’s courts on the basis that a particular case involves issues of domestic violence, would clearly not be the optimum use of the accumulated knowledge and expertise of a specialist Children’s Court ... The Children’s Court is of the view that instead of conferring part of the court’s criminal and care and protection jurisdictions on a specialist domestic violence court, the jurisdiction of the Children’s Court should in certain areas be expanded.<sup>100</sup>

32.65 The Court noted that this may require parties to attend both the Children’s Court and the proposed specialised family violence court. However, this could be managed by:

the provision of community-based support persons to accompany a party to the separate courts and to offer them assistance and support along the whole legal journey. Alternatively, a centralised support service could be established to which referrals could be made by all courts dealing with family violence issues, and the role of which would be to provide assistance, information and support to all the parties.<sup>101</sup>

95 Magistrate N Toohey, *Consultation*, Melbourne, 25 January 2010.

96 Confidential, *Submission FV 164*, 25 June 2010; Sydney Women’s Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010.

97 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Confidential, *Submission FV 81*, 2 June 2010.

98 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010, 49.

99 Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010, 76.

100 Children’s Court of New South Wales, *Submission FV 237*, 22 July 2010.

101 Ibid.

### ***Commissions' views***

32.66 As noted above, all state and territory local or magistrates courts have broad jurisdiction over a range of matters—including criminal matters, protection orders, and family law (to the extent that this is conferred)—although the full extent of this jurisdiction is not necessarily exercised.<sup>102</sup>

32.67 In Chapter 16, the Commissions set out a framework for reform of the jurisdictions of courts that deal with issues of family violence to address the gaps arising as a result of the interaction between different legal systems. The local or magistrates court is the first port of call for many victims of family violence and their families. The Commissions consider that state and territory magistrates courts should be in a position to address, at least on an interim basis, the range of issues that commonly arise in family violence matters. A system in which one court is able to deal with most legal issues—and where it cannot, is able to facilitate the transfer of the matter to another court—will go some way towards reducing the impact of inconsistencies between the legal systems, and better ensure the protection and safety of victims of family violence. The Commissions consider that these benefits are best leveraged in a specialised family violence court.

32.68 In relation to the exercise of family law jurisdiction, state and territory magistrates courts have no power when making or varying a protection order, to make a parenting order.<sup>103</sup> The Commissions recommend that, when making or varying a protection order, state and territory courts should also be able to make parenting orders ‘until further order’.<sup>104</sup> The exercise of this power would mean that magistrates can deal proactively with family law issues, such as when a parent can spend time with a child, which may otherwise exacerbate a situation involving family violence.

32.69 The Commissions also recommend that state and territory magistrates courts should be required to consider using s 68R of the *Family Law Act* to amend inconsistent parenting orders to protect victims of family violence. This alleviates the need for a victim of violence to go to a federal family court to seek an amendment to the parenting order as well as a state or territory magistrates court to seek a protection order, and ensures that the issue is considered by judicial officers.<sup>105</sup>

32.70 The Commissions received little by way of substantive submissions on whether specialised family violence courts should also consider related claims for civil and statutory compensation, and child support matters, but note the concerns expressed by some stakeholders in relation to asking specialist courts to exercise a wide range of divergent jurisdictions. The Commissions make no recommendations in relation to this

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102 The reasons why the full extent of jurisdiction is not always exercised—for example, the culture in state and territory magistrates courts of deferring to federal family courts rather than exercising jurisdiction under the *Family Law Act 1975* (Cth)—is discussed in Ch 16.

103 As noted in Ch 16, before 2006, s 68R of the *Family Law Act* permitted state and territory courts, when making or varying a protection order, to make a parenting order, in addition to their ability to revive, vary, suspend or discharge a parenting order. This aspect of s 68R was repealed by the *Family Law Amendment (Shared Parenting) Act 2006* (Cth).

104 Rec 16–3.

105 Rec 16–1.

issue, but note the current review of the FVCD of the Magistrates' Court of Victoria may provide further feedback.<sup>106</sup> State and territory governments may wish to review this matter in establishing or expanding specialised family violence courts, in light of the results of the Victorian review.

32.71 In relation to child protection matters, the Commissions are mindful that such issues are already dealt with in specialised children's courts in all states and territories. In Chapter 20 the Commissions make recommendations for the expansion of the jurisdiction of state and territory children's courts to be able to make protection orders.<sup>107</sup> In the Commissions' views, this will help to reduce the gaps in protection and enable families to have a number of issues promptly resolved.

32.72 A further option would be to expand the jurisdiction of specialised family violence courts to enable them to consider child protection matters. The Commissions do not have sufficient information or feedback to make a recommendation on this issue. As noted above, in Chapter 16 the Commissions recommend that state and territory courts making family violence protection orders should be able to make parenting orders 'until further order'.<sup>108</sup> The Commissions note that allowing specialised family violence courts to make interim child protection orders, until the matter can be considered by a children's court, may yield similar benefits for victims and their families.

32.73 The Commissions agree with the NSW Children's Court that specialised family violence courts and children's courts should establish appropriate referral arrangements and support mechanisms to help victims navigate between the two courts. The role of a dedicated liaison officer appears to be desirable in this regard. The Commissions also emphasise the importance of information sharing arrangements between the courts. For example, the Commissions recommend in Chapter 30 that both family violence protection orders and child protection orders are included in the national database, to ensure that all courts are aware of existing orders made in relation to a particular family.<sup>109</sup>

**Recommendation 32–1** State and territory governments, in consultation with relevant stakeholders, should establish or further develop specialised family violence courts within existing courts in their jurisdictions.

**Recommendation 32–2** State and territory governments should ensure that specialised family violence courts are able to exercise powers to determine: family violence protection matters; criminal matters related to family violence; and family law matters to the extent that family law jurisdiction is conferred on state and territory courts.

<sup>106</sup> This review was not publicly available at the time of writing.

<sup>107</sup> Rec 19–4.

<sup>108</sup> Rec 16–3.

<sup>109</sup> Rec 30–18.

### **Elements of specialised family violence courts**

32.74 In the Consultation Paper, the Commissions proposed that family violence courts should include a minimum set of features.<sup>110</sup> The Commissions did not include specialised prosecutors in the proposed list, as it did not have sufficient information upon which to base a proposal.<sup>111</sup> The Commissions noted, however, that there may be significant value in specialised prosecutors dealing with family violence issues, including cases of sexual assault.

32.75 For example, the ACT Office of the Director of Public Prosecutions (ODPP) has for several years had specialised family violence prosecutors assisted by three witness assistants as part of the FVIP.<sup>112</sup> The ODPP states that:

Having specialist prosecutors allows for a consistency of approach and for continuity for victims. Specialisation also enhances the relationships with other essential agencies—the police, the Office of Children and Youth and Family Support, the Domestic Violence Crisis Service and Victims Support ACT.<sup>113</sup>

32.76 Victoria has established a Specialist Sexual Offence Unit in the Office of Public Prosecutions (OPP), including a regional office in Geelong. The OPP reports that:

The work of the OPP’s Specialist Sexual Offences Unit ... has proven that the co-location of specialist prosecutors and solicitors under the leadership of an experienced Crown Prosecutor can produce significant improvements in the handling of such sensitive and traumatic prosecutions.<sup>114</sup>

32.77 In the US, specialised family violence prosecutors are more common. The National Institute of Justice has helpfully summarised the research available in the US on the effectiveness of specialised prosecutors. It notes that the research is limited and because of the variation of programs and their co-existence with specialised courts in many cases, it is ‘difficult to pinpoint what works and what does not’.<sup>115</sup> However, ‘in general, the research suggests that these programs work well on a number of levels’.<sup>116</sup> There is evidence of increased victim satisfaction; significant increases in prosecution and conviction rates; and more robust outcomes that are better monitored and enforced.<sup>117</sup>

32.78 In the Consultation Paper, the Commissions proposed that specialised family violence courts should, as a minimum, include the following features:

- especially selected judicial officers;

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110 Consultation Paper, Proposal 20–4.

111 Ibid, [20.38].

112 The FVIP is discussed in Ch 31. In 2009–2010, the ODPP intend to establish a specialist unit for sexual offences as well: Office of the Director of Public Prosecutions (ACT), *Annual Report 2008–09*, 16.

113 Ibid, 15.

114 Office of Public Prosecutions and Director of Public Prosecutions (Vic), *Annual Report 2008–2009*, 7. The Victorian OPP also has legal prosecution specialists in other areas, such as organised crime: 17.

115 A Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (2009), National Institute of Justice, Ch 6.

116 Ibid.

117 Ibid.

- specialised and ongoing training on family violence issues for judicial officers, prosecutors, registrars and police;<sup>118</sup>
- victim support workers;
- arrangements for victim safety; and
- mechanisms for collaboration with other court agencies and non-government organisations.<sup>119</sup>

32.79 The Commissions also proposed that state and territory governments should, to the extent feasible, make victim support workers and lawyers available at family violence related court proceedings.<sup>120</sup>

#### ***Submissions and consultations***

32.80 The Magistrates' Court and the Children's Court of Victoria noted in relation to the proposed list of minimum features that:

the experience of the court ... in relation to the Family Violence Court Division and Family Violence Specialists Services is that the features identified in this proposal, to the extent that they exist, have worked very effectively in improving all aspects of the courts' processes.<sup>121</sup>

32.81 The Australian Domestic and Family Violence Clearinghouse supported the proposal on the proviso that such courts

have a range of response strategies and support strategies available to them ... These supports would include free legal representation as well as victim support services, including access to family law advice and representation in relation to parenting matters ...

They need to have support and oversight of a leading judicial officer to ensure consistency between courts and provide advice and support to judicial officers. In addition, judicial officers need to be trained and gazetted.<sup>122</sup>

32.82 The Magistrates' Court and the Children's Court of Victoria also submitted that 'an essential part of the model is legal representation for victims and offenders and a support worker for offenders'.<sup>123</sup> Deputy Chief Magistrate Cannon of the South Australian Magistrates Court, submitted that in his view, 'providing victim support is the single most useful thing that can empower victims, followed by a special list that ensures that they are dealt with respectfully and consistently'.<sup>124</sup>

32.83 A number of submissions expressed support for the proposal that state and territory governments should, to the extent feasible, make available lawyers at family

118 Specialised police are discussed separately, below.

119 Consultation Paper, Proposal 20-4. Collaboration between courts, non-government organisations and other agencies is discussed in Ch 29.

120 Consultation Paper, Proposal 19-2. These issues are dealt with in Ch 29.

121 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

122 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

123 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010.

124 A Cannon, *Submission FV 137*, 23 June 2010.

violence related court proceedings.<sup>125</sup> Domestic Violence Victoria and others, in a joint submission noted:

Given the often complex family law issues that can arise out of protection order proceedings, it is essential for victims to have access to legal advice and representation at their first mention date through duty lawyer services. These services not only provide legal advice and assistance around the protection order proceedings, but also connect the client to legal assistance for family law matters.<sup>126</sup>

32.84 A number of submissions expressed the view that it was also important to ensure adequate legal advice and representation for defendants.<sup>127</sup> Other submissions stressed the importance of adequate funding for duty lawyers, through Legal Aid or Community Legal Centres.<sup>128</sup>

32.85 A number of submissions pointed to the value of specialised prosecutors as a minimum and desirable feature of specialised courts.<sup>129</sup> The Office of the Director of Public Prosecutions NSW submitted that:

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- 125 National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; WESNET—The Women's Services Network, *Submission FV 217*, 30 June 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; NSW Women's Refuge Movement Working Party Inc, *Submission FV 188*, 25 June 2010; J Stubbs, *Submission FV 186*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Confidential, *Submission FV 162*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010; Confidential, *Submission FV 130*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; Confidential, *Submission FV 71*, 1 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.
- 126 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.
- 127 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010.
- 128 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010.
- 129 Queensland Law Society, *Submission FV 178*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with

Specialised family violence courts which include specially selected judges and specialised prosecutors and other agencies represent best practice and must be considered desirable if these matters are to be dealt with expeditiously, sensitively and professionally.<sup>130</sup>

32.86 Similarly, the Queensland Commission for Children and Young People and Child Guardian submitted that specialised prosecutors share a common understanding with specialist magistrates, police and victim support workers.<sup>131</sup> They play a specific role in—among other things—prosecuting offences at a high level, preparing briefs of evidence, ensuring appropriate charges have been laid, and encourage victim participation and attendance at court.<sup>132</sup>

32.87 Submissions also highlighted a number of challenges facing specialised courts, including the need for adequate resourcing, and accessibility for those in regional and remote communities.<sup>133</sup> The Sydney Women's Domestic Violence and Advocacy Service submitted that:

considering the resources required—the establishment of nation-wide specialised domestic and family violence courts is not currently an immediate or feasible option and that—at far less cost—existing courts could be immediately developed to deal with domestic violence related protection orders, associated criminal charges, family law matters and child protection matters.<sup>134</sup>

### ***Commissions' views***

32.88 In the Commissions' view, specialised family violence courts with certain minimum core features, including specialised prosecutors, would enhance the efficacy and effectiveness of the courts in dealing with family violence. The Commissions' recommendations envisage, where possible, the creation of specialised family violence courts—being divisions, programs, lists or a specialised court room—within existing state and territory local and magistrates courts with a number of essential support features. The Commissions are not recommending the establishment of a separate stand alone court.

32.89 First, all judicial officers in a family violence court should be especially selected for their roles. The attitude, knowledge and skills of judicial officers are critical to the

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Disabilities Network, *Submission FV 146*, 24 June 2010; Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010; Ngaanyatjarru Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service, *Submission FV 117*, 15 June 2010; Confidential, *Submission FV 81*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

130 Office of the Director of Public Prosecutions NSW, *Submission FV 158*, 25 June 2010.

131 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

132 This was also highlighted in Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010.

133 Children's Court of NSW, *Submission FV 237*, 22 July 2010, North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010; Confidential, *Submission FV 81*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

134 Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010.

success of such a court, and it is important that selection be based on such criteria.<sup>135</sup> As noted above, the adoption of specialised lists and specialised practices may attract judicial officers who have experience, and are interested in working in family violence. This is an important step in building a leadership cohort, who can drive reform and promote attitudinal change within the system.

32.90 Secondly, there was strong support for the role of specialised prosecutors as an essential feature of specialised family violence courts. The Commissions agree with the majority of submissions that specialised prosecutors—working in cooperation with magistrates, police and victim support workers—can play an important role in achieving consistent and quality outcomes for victims of family violence.

32.91 Thirdly, the Commissions are of the view that the provision of specialised, free and timely legal advice and representation would enhance the effectiveness of specialised family violence courts. In Chapter 29, the Commissions recommend that federal, state and territory governments should prioritise the provision of and access to legal services, for victims of family violence, including enhanced support for victims in high risk and vulnerable groups.<sup>136</sup>

32.92 Fourthly, specialised and ongoing training on family violence issues is critical to ensuring a shared understanding of family violence within the court. Ideally, this training should be provided to all staff, as was done with the Victorian FVCD. At a minimum, training should be provided to the following key participants: judicial officers, prosecutors, lawyers and registrars.

32.93 Fifthly, victim support workers play a key role in ensuring the success of such courts. Such workers may be employed directly by the court or a community organisation may be funded to provide the service. In Chapter 29, the Commissions recommend that federal, state and territory governments should prioritise the provision of, and access to, culturally appropriate victim support services for victims of family violence, including enhanced support for victims in high risk and vulnerable groups.<sup>137</sup>

32.94 Finally, family violence courts should also have special arrangements for victim safety at court, such as separate waiting rooms for victims, separate entrances and exits, remote witness facilities and appropriately trained security staff. The provision of interpreters is also essential.

32.95 The Commissions are also of the view that specialised family violence courts should have arrangements in place to liaise with, and cooperate with, other relevant agencies. Integrated responses to family violence are discussed in Chapter 29.

32.96 The Commissions acknowledge the establishment or further development of specialised family violence courts will be dependent on mechanisms such as funding,

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<sup>135</sup> Magistrate N Toohey, *Consultation*, Melbourne, 25 January 2010. Under s 4H of the *Magistrates' Court Act 1989* (Vic), the FVCD is constituted only by magistrates gazetted by the Chief Magistrate. While specialist training and support for gazettal started strongly, this has been diluted in a push to have as many magistrates as possible ‘available’ to sit in the FVCD to the detriment of specialisation.

<sup>136</sup> Rec 29–4.

<sup>137</sup> Rec 29–3.

programs of action, policy and operational support from inter-agency committees, and political support across those departments affected. The Commissions refer to the relative success achieved by the cross-government approach in Victoria as an illustrative model. The cost of establishing or further developing specialised family violence courts needs to be considered in light of the cost of family violence to the Australian community.<sup>138</sup>

### **Offender programs**

32.97 In the Consultation Paper, the Commissions expressed the view that offender programs are resource-intensive and, to date, the evidence of their effectiveness is equivocal.<sup>139</sup> A number of submissions suggested that offender programs are largely ineffective in reducing violence, especially when the offender does not attend voluntarily.<sup>140</sup> The Commissions also received a number of submissions in favour of offender programs where such programs are specifically designed to address family violence.<sup>141</sup>

32.98 The Commissions are aware that offender programs currently exist in all Australian jurisdictions. The Commissions note, and endorse, the Australian Government's response to *Time for Action*, which proposes to invest \$3 million in research on offender treatment programs in consultation with the states and territories and experts in the treatment field.<sup>142</sup> The Commissions are of the view that the place of offender programs as an essential feature of specialised family violence courts should be reconsidered in light of the proposed research.

**Recommendation 32–3** State and territory governments should ensure that specialised family violence courts have, as a minimum:

- (a) specialised judicial officers and prosecutors;
- (b) regular training on family violence issues for judicial officers, prosecutors, lawyers and registrars;
- (c) victim support, including legal and non-legal services; and
- (d) arrangements for victim safety.

138 See Ch 1.

139 Consultation Paper, [20.129]–[20.139].

140 No To Violence Male Family Violence Prevention Association Inc, *Submission FV 136*, 22 June 2010; Hunter Women's Centre, *Submission FV 79*, 1 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

141 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Northern Territory Legal Aid Commission, *Submission FV 122*, 16 June 2010; A Cossins, *Submission FV 112*, 9 June 2010.

142 Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009), 13.

## Mainstreaming specialised practices

32.99 As noted above, many stakeholders expressed the view that the establishment of specialised family violence courts in regional and remote communities is not feasible or practical. While the Commissions agree that this is the case, the issue is whether the benefits of specialisation can be mainstreamed into other courts. For example, the Commissions note that many of the specialised practices in the FVCD have been applied to the Specialised Family Violence Services courts. In the Consultation Paper, the Commissions proposed that state and territory governments should review whether, and to what extent, the following features have been adopted in the courts in their jurisdiction dealing with family violence, with a view to adopting them:

- identifying, and listing on the same day, protection order matters and criminal proceedings related to family violence, as well as related family law and child protection matters;
- providing victim and defendant support, including legal advice, on family violence list days;
- assigning selected and trained judicial officers to work on cases related to family violence;
- adopting practice directions for family violence cases;
- ensuring that facilities and practices secure victim safety at court; and
- establishing a forum for and feedback from, and discussion with, other agencies and non-government organisations.<sup>143</sup>

32.100 A large number of submissions supported this proposal.<sup>144</sup> For example, the Australian Domestic and Family Violence Clearinghouse stated that ‘in the absence of a specialist court these would be beneficial measures’.<sup>145</sup> The Women’s Domestic Violence Court Advocacy Service Network submitted that:

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<sup>143</sup> Consultation Paper, Proposal 20–5.

<sup>144</sup> WESNET—The Women’s Services Network, *Submission FV 217*, 30 June 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women’s Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Women’s Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; Sydney Women’s Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Commissioner for Victims’ Rights (South Australia), *Submission FV 111*, 9 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Confidential, *Submission FV 81*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; Women’s Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; M Condon, *Submission FV 45*, 18 May 2010.

<sup>145</sup> Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010.

We believe that listing related matters on the same day will lead to effectiveness and efficiency in outcomes for victims, limit conflicts occurring between protection orders and family violence or family court proceedings, be cost effective and ensure that all parties aren't required to attend court on numerous occasions for separate matters.

We also believe there needs to be some system for ensuring that in rural and remote regional areas, victims are not unnecessarily disadvantaged by family law court proceedings in terms of access to support services.<sup>146</sup>

### Commissions' views

32.101 Given the broad support for this proposal, the Commissions are of the view that, where possible, the measures proposed should be adopted in other courts dealing with family violence as best practice, especially in regional and remote communities.

32.102 It would appear efficient for proceedings relating to family violence protection orders, criminal proceedings related to family violence, and child protection to be listed on the same day, or a part of a day, as the caseload permits. Child protection issues can be included because, as noted above, in many rural and remote communities, the local magistrate can convene a children's court when necessary. This capacity may be more restricted in metropolitan courts where matters are considered by separately constituted children's courts. If such listing practices are adopted, this will help to facilitate the presence of support workers and legal services for victims and defendants.

32.103 The Commissions recognise the practical difficulties in assigning selected and trained judicial officers to work on cases related to family violence, given the wide range of matters considered by magistrates in regional and remote communities. As such, the Commissions consider that, where possible, judicial officers should receive ongoing training in relation to family violence. In Chapter 31, the Commissions note the importance of judicial officers understanding the nature and dynamics of family violence. The Commissions recommended Australian, state and territory governments and educational, professional and service delivery bodies should ensure regular and consistent education and training for participants in the family law, family violence and child protection systems, in relation to the nature and dynamics of family violence, including its impact on victims, in particular those from high risk and vulnerable groups.<sup>147</sup> As a complement to education and training, the Commissions also recommend the development of a national bench book in relation to family violence, including sexual assault.<sup>148</sup> This is likely to improve consistency in decision making and improve the court experience for victims. The Commissions consider that where the caseload and available resources justify it, specialised police and prosecutors could also be assigned.

32.104 Finally, the Commissions consider that courts generally should review existing court practices with a view to improving victim safety at court. For example, the use of separate exits and entrances, separate waiting rooms for victims, and escorts

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146 Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010.

147 Rec 31-1.

148 Rec 31-2.

to and from the courtroom may be ways of improving safety. While modification of facilities may require resources, a review of existing facilities may well identify simple and cost-efficient strategies to achieve these results, including reduced security staff costs and reduced incidents.

**Recommendation 32–4** State and territory governments should, where possible, promote the following measures in all courts dealing with family violence matters, including courts in regional and remote communities:

- (a) identifying and listing on the same day, protection order matters and criminal proceedings related to family violence, as well as related family law and child protection matters;
- (b) training judicial officers in relation to family violence;
- (c) providing legal services for victims and defendants;
- (d) providing victim support on family violence list days; and
- (e) ensuring that facilities and practices secure victim safety at court.

## Specialised police

32.105 Police play an important role in responding to, intervening in, and preventing family violence, and are the first point of contact for many victims. Police are responsible for recording incidents, interviewing victims and collecting evidence to support charges and—as discussed in Chapter 9—applying for protection orders in the civil system. It is well recognised that initial positive police response is vital not only to victim safety, but also to whether victims report any further victimisation, or seek engagement with the legal system more generally.<sup>149</sup>

### The roles and advantages of specialised police

32.106 While there are wide variations in the roles and functions of specialised police units, these typically include:

- conducting investigations and collecting evidence;
- developing police strategies and policies concerning family violence;
- developing and participating on inter-agency networks, and coordination and liaison with relevant government and non-government agencies;
- training, education and research on family violence issues;
- providing advice and guidance to other police officers on family violence issues;

149 Queensland Crime and Misconduct Commission, *Policing Domestic Violence in Queensland* (2005), xii.

- supervising, monitoring or providing quality assurance in relation to police responses to family violence incidents;
- liaising with courts and prosecutors; and
- providing information and support to victims.

32.107 There is little empirical research available on the effectiveness of specialised police in the family violence context in Australia. In the US, 11% of police departments have specialised family violence units. Research there indicates that specialised units which emphasise repeated victim contact and evidence gathering

have been shown to significantly increase the likelihood of prosecution, conviction and sentencing. Specialised domestic violence units are generally associated with more extensive inquiries by police department call takers ... Domestic violence units are also more likely to amass evidence to turn over to prosecutors.<sup>150</sup>

32.108 Further, the research indicated that specialised responses are associated with victims leaving abusive relationships earlier; reporting repeated incidents more frequently; and being more likely to secure protection orders.<sup>151</sup> There is some evidence that they also reduce violence.<sup>152</sup>

### Specialised police in Australia

32.109 In most jurisdictions in Australia, there are specialised police units in the areas of family violence, sexual assault and child protection. The following table sets out the nature of the specialised police roles in each jurisdiction.<sup>153</sup>

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150 A Klein, *Practical Implications of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges* (2009), National Institute of Justice, Ch 5, section 2.

151 Ibid, Ch 5, section 3.

152 Ibid, Ch 5, section 4.

153 This information is based on the descriptions of roles given in published information, generally from police websites, and may not capture all the activities and functions undertaken by specialised police. Certain functions, such as victim support and liaison with the legal system, may be carried out by different actors in the jurisdictions.

***Table: Specialised police in Australia***

Function	ACT	NT	NSW	Qld
Statewide Unit	Family Violence Program Manager; Family Violence Project Officer; Victim Liaison Officers	Not specified	The Domestic and Family Violence Team – Policy and Programs, Field Operations	State Domestic Violence Coordinator
Regional Units	Specialist Sexual Assault and Child Abuse Team	Domestic and Personal Violence Protection Units; Child Abuse Teams	Regional Domestic Violence Sponsors and Coordinators	Regional Domestic Violence Coordinators; District DVLOs
Local Units	Not specified	DVLOs	DVLOs	Station DVLOs
Strategy and Policy	Not specified	Not specified	Not specified	Yes (District DVLOs); Yes (Station DVLOs)
Coordination and Liaison with agencies	Yes	Not specified	Yes	Yes (District DVLOs)
Training	Yes (for all police)	Not specified	Yes	Yes (District DVLOs)

Function	SA	Tas	Vic	WA
Statewide Unit	Not specified	Not specified	Family Violence Unit	Family Violence State Coordination Unit
Regional Units	Sexual Crimes Investigations Branch	Victim Safety Response Teams	Family Violence Advisers	Family Protection Coordinator; Child Abuse Squads
Local Units	Family Violence Investigation Sections; Child and Family Intervention Officers	Not specified	Family Violence Liaison Officers; Child Abuse Investigations Teams	Not specified
Strategy and Policy	Not specified	Yes	Yes	Yes
Coordination and Liaison with agencies	Not specified	Yes	Yes (Family Violence Advisers)	Yes
Training	Not specified	Not specified	Yes	Not specified

32.110 There are wide variations in the structure and functions of specialised police units in Australia. In jurisdictions such as South Australia and the Northern Territory, the role of DVLOs appears primarily to be as a point of contact for victims. In Tasmania, the Victim Safety Response Teams (VSRTs) also have other

responsibilities, including providing case coordination, attending integrated case coordination meetings, assessing applications to vary police family violence orders, and conducting safety audits and preparing safety plans.<sup>154</sup> The VSRTs form part of the integrated response to family violence in Tasmania under the ‘Safe at Home’ program.<sup>155</sup>

32.111 There also appears to be an impetus in other jurisdictions towards models integrating specialised police units—especially in sexual assault and child protection—with other government agencies and victim support organisations.<sup>156</sup> Particular focus is given in these units to more effective investigations and comprehensive victim support in collaboration with other agencies.

32.112 In Victoria, two Sexual Offences and Child Abuse Investigative Teams (SOCITs) have been established within two pilot Multidisciplinary Centres located in Frankston and Mildura.<sup>157</sup> The SOCITs are co-located with sexual assault units, child protection and victim support organisations. SOCIT members are specially trained detectives who are able to investigate matters, take victim statements and collect and prepare briefs of evidence. There are currently five SOCIT units in Victoria, with more units in transition as part of an expansion by Victorian police.<sup>158</sup>

32.113 SOCIT members are required to take a four week course covering video and audio recorded evidence, sexual assault investigation and victim management.<sup>159</sup> Members also have access to specialist training in interviewing suspects and victims, in particular in the context in which sexual assault occurs.<sup>160</sup>

32.114 NSW Police have established the Child Wellbeing Unit (CWU), which commenced operation in January 2010.<sup>161</sup> The role of the CWU is to help police officers identify whether or not a child is at risk of harm and needs to be referred to Community Services (NSW). If not, the CWU advises police on how to help children and their families gain access to the services that they need.<sup>162</sup>

32.115 In the Northern Territory, the Child Abuse Taskforce, established in 2005-06, is made up of Northern Territory Police, Family and Community Services, and Australian Federal Police officers. The Northern Territory Police handle serious and complex cases of maltreatment, and AFP handles incidents in Indigenous and remote communities.

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154 Successworks, *Review of the Integrated Response to Family Violence: Final Report* (2009), 11–12.

155 The Safe at Home program is discussed in Ch 29.

156 For a discussion of integrated responses, see Ch 29.

157 The MDCs were established in April 2007, as part of joint initiatives between Victoria Police and the relevant Centres Against Sexual Assault.

158 Victorian Government, *Submission FV 120*, 15 June 2010.

159 This training is provided at the Centre for Investigative Training, through the Detective Training Course.

160 Victorian Government, *Submission FV 120*, 15 June 2010.

161 NSW Police Force, *Children: Sex Crimes Squad* <[www.police.nsw.gov.au/community\\_issues/children](http://www.police.nsw.gov.au/community_issues/children)> at 14 March 2010.

162 Ibid.

32.116 In the ACT, the Sexual Assault and Child Abuse Team (SACAT) is responsible for the criminal investigation of serious offences including allegations of sexual or physical assault of children. The team plays a major role in collecting evidence of suspected criminal activity, and placing matters before the courts where sufficient evidence exists.<sup>163</sup> SACAT provides ‘a fully integrated environment for victims of sexual offences’, facilitating interviews, forensic examinations and the provision of support for victims.<sup>164</sup>

32.117 SACAT also retains a Sexual Assault Victim Liaison Officer, whose role is intended to improve the experience of victims in the criminal justice system. This role includes keeping victims informed of the progress of the investigation and any criminal proceedings and responding to their concerns about interactions with police and the criminal justice system.<sup>165</sup>

32.118 The push for a more coordinated, national police response to family violence is recognised in the *Australasian Policing Strategy on the Prevention and Reduction of Family Violence*, released in November 2008. This strategy includes principles and objectives, as well as a program for action. Relevantly, measures in this program include an audit of training and a review of workforce development; audits of research and the development of an Australasian knowledge base of best practice across jurisdictions; and audits of current legal and policy responses, including confirming the role of specialised responses.<sup>166</sup>

#### ***Submissions and consultations***

32.119 The Consultation Paper proposed that each state and territory police force should ensure that:

- victims have access to a primary contact person within the police who specialises, and is trained, in family violence issues;
- a police officer is designated as a primary point of contact for government and non-government agencies involved in responding to family violence;
- specially trained police have responsibility for supervising, monitoring, or assuring the quality of police responses and providing training and advice to operational police; and
- there is a central forum or unit responsible for policy and strategy concerning family violence within the police.<sup>167</sup>

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<sup>163</sup> See Memorandum of Understanding between ACT Policing (Adult Sexual Assault Team and Child Abuse Team), ACT Department of Disability, Housing and Community Services, the Office for Children, Youth and Family Support and Care and Protection Services and Aboriginal and Torres Strait Islander Services.

<sup>164</sup> Office of the Director of Public Prosecutions (ACT) and Australian Federal Police, *Responding to Sexual Assault: The Challenge of Change* (2005), 14.

<sup>165</sup> Ibid, 17.

<sup>166</sup> *Australasian Policing Strategy on the Prevention and Reduction of Family Violence* (2008).

<sup>167</sup> Consultation Paper, Proposal 20–1.

32.120 This proposal received broad support.<sup>168</sup> The Commissioner for Victim's Rights (South Australia) submitted that 'having dedicated victim liaison officers has proven integral to the police assisting victims to exercise their rights and to access victim assistance'.<sup>169</sup> The Canberra Rape Crisis Centre submitted that the 'ACT experience of the SACAT is exemplary', with victims reporting they are supported and believed regardless of whether charges are laid or the prosecution proceeds.<sup>170</sup> Other submissions noted that specialised police were often empathetic, committed and took a personal interest in matters,<sup>171</sup> helping to engender confidence in victims and the public alike.<sup>172</sup> The Commissions heard similar views expressed in consultations.<sup>173</sup>

32.121 In response to the question in the Consultation Paper<sup>174</sup> on the challenges facing police specialising in family violence and sexual assault matters, two key themes emerged.

32.122 First, the majority of submissions emphasised the importance of comprehensive education and training for specialised police, covering the nature and dynamics of family violence.<sup>175</sup> In relation to sexual assault units, submissions argued for development of skills and systems to attend sexual assault incidents, providing information to victims and gathering forensic evidence.<sup>176</sup> Education and training were viewed as particularly important in regional and remote communities, where police are required to be multi-skilled and equipped with a broad knowledge base.<sup>177</sup> A number of submissions expressed the view that there was a need for similar levels of training for

168 Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; WESNET—The Women's Services Network, *Submission FV 217*, 30 June 2010; Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; Law Council of Australia, *Submission FV 180*, 25 June 2010; Queensland Law Society, *Submission FV 178*, 25 June 2010; Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010; Confidential, *Submission FV 164*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132*, 22 June 2010; N Ross, *Submission FV 129*, 21 June 2010; F Hardy, *Submission FV 126*, 16 June 2010; Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010; K Johnstone, *Submission FV 107*, 7 June 2010; Confidential, *Submission FV 105*, 6 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46*, 24 May 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

169 Commissioner for Victims' Rights (South Australia), *Submission FV 111*, 9 June 2010.

170 Canberra Rape Crisis Centre, *Submission FV 172*, 25 June 2010.

171 Confidential, *Submission FV 164*, 25 June 2010; Confidential, *Submission FV 105*, 6 June 2010.

172 Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010.

173 Central Australian Legal Aid Service and Northern Territory Legal Aid Commission, *Consultation*, Alice Springs, 28 May 2010; Central Australian Aboriginal Family Legal Unit and Central Australian Women's Legal Service, *Consultation*, Alice Springs, 28 May 2010; Northern Territory Police, *Consultation*, Darwin, 26 May 2010; Magistrate N Toohey, *Consultation*, Melbourne, 25 January 2010.

174 Consultation Paper, Question 20–1.

175 Education Centre Against Violence, *Submission FV 90*, 3 June 2010; M Condon, *Submission FV 45*, 18 May 2010; One in Three Campaign, *Submission FV 35*, 12 May 2010.

176 National Association of Services Against Sexual Violence, *Submission FV 195*, 25 June 2010.

177 M Condon, *Submission FV 45*, 18 May 2010.

general duties police dealing with family violence to ensure consistency of response in the absence of specialised police.<sup>178</sup>

32.123 Secondly, many submissions argued that the sustainability—in particular reducing high staff turnover—and success of specialised police units required ongoing resourcing, support and high level leadership within the police organisations.<sup>179</sup> In a joint submission, Domestic Violence Victoria and others highlighted that in relation to Family Violence Liaison Officers there was ‘a high turnover through normal rotation of portfolios’, exacerbated by ‘insufficient opportunity for training and professional development in these roles’.<sup>180</sup> Similar views were expressed that DVLOs in NSW ‘have not been well supported by their own colleagues and the role of the DVLO is not considered prestigious within the NSW Police Force’.<sup>181</sup> The Commissions heard similar views expressed in consultations with the Tasmanian Victim Safety Response Teams, including that the training provided was insufficient and work schedules differed in the unit.<sup>182</sup>

#### *Commissions’ views*

32.124 Although there is little information or research available on the role and value of specialised police units in Australia, a significant number of stakeholders reported positive experiences with such units. The Commissions have formed the view that there is substantial merit in the use of specialised police in family violence, sexual assault and child protection matters. Liaison officers provide an important early point of contact for victims and assist them in navigating the legal system. Specialised police at all levels provide contact points for inter-agency collaboration, and may form a key element of integrated responses. Further, monitoring and supervision by specialised police is likely to improve consistency in the application of laws in the context of family violence.

32.125 The Commissions are of the view that the effectiveness and consistency of police responses—including from specialised police units—would benefit from regular education and training. The Commissions, therefore, endorse the actions outlined in the *Australasian Policing Strategy on the Prevention and Reduction of Family Violence* in relation to training and education, aimed at improving knowledge and understanding of all police dealing with family violence. Relevantly, these actions include:

- auditing training to ensure that education and training provided incorporates technical, conceptual and interpersonal skills including appropriate behaviours, cultural awareness and attitudes;

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178 Australian Domestic and Family Violence Clearinghouse, *Submission FV 216*, 30 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Family Voice Australia, *Submission FV 75*, 2 June 2010.

179 Confidential, *Submission FV 184*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

180 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146*, 24 June 2010.

181 Women’s Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010.

182 Sergeant Chris Hey (Victim Safety Response Team), *Consultation*, Hobart, 12 May 2010.

- including victim case studies in training programs where appropriate; and
- engaging in joint training between police and other organisations where appropriate to facilitate a shared understanding of roles and responsibilities.<sup>183</sup>

32.126 Education and training appear especially important in regional and remote communities where the establishment of specialist units may not be so readily feasible. In those circumstances, access to a primary contact person and a number of operational police officers who have some training in dealing with family violence, and are able to liaise with other agencies, would ensure a measure of accessibility for victims and improve practice amongst all police officers.

32.127 The Commissions recognise that specialised police units operate under different organisational structures, and in different policy and operational contexts. Despite this, the Commissions are of the view that, in the development of policing strategies and policy, specialised police units should be fostered. In particular, the comprehensive integrated model in Victoria, in which specialised police units are co-located with other services, appears promising as a model.

32.128 The Commissions are of the view that an important element of fostering specialised units lies in providing career progression opportunities for specialised officers. The effectiveness of specialised police is enhanced where ongoing relationships with victims and networking with other agencies are maintained. The retention of quality staff is vital to ensuring sustainability of specialised police units.

**Recommendation 32–5** State and territory police should ensure, at a minimum, that:

- (a) specialised family violence and sexual assault police units are fostered and structured to ensure appropriate career progression for officers and the retention of experienced personnel;
- (b) all police—including specialised police units—receive regular education and training consistent with the *Australasian Policing Strategy on the Prevention and Reduction of Family Violence*;
- (c) specially trained police have responsibility for supervising, monitoring or assuring the quality of police responses to family violence incidents, and providing advice and guidance in this regard; and
- (d) victims have access to a primary contact person within the police, who specialises, and is trained, in family violence, including sexual assault issues.

183 *Australasian Policing Strategy on the Prevention and Reduction of Family Violence* (2008).



## **Appendix 1. List of Submissions**

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<b>Name</b>	<b>Submission Number</b>	<b>Date</b>
Aboriginal Family Violence Prevention and Legal Service Victoria	FV 173	25 June 2010
ACON	FV 119	15 June 2010
Anglicare Australia	FV 115	10 June 2010
Anonymous	FV 28	25 April 2010
Anonymous	FV 42	22 May 2010
Anonymous	FV 74	2 June 2010
Apprehended Violence Legal Issues Coordinating Committee	FV 228	12 July 2010
Association for Better Care of Children	FV 03	3 August 2009
	FV 20	9 February 2010
Australian Domestic and Family Violence Clearinghouse	FV 216	30 June 2010
Australian Government Attorney-General's Department	FV 166	25 June 2010
Australian Institute of Family Studies	FV 222	2 July 2010
Benevolent Society	FV 203	28 June 2010
P Bennekom	FV 238	22 July 2010
Berry Street Inc	FV 163	25 June 2010
Better Care of Children	FV 72	24 June 2010
M Bourne	FV 159	25 June 2010
A Brunacci	FV 97	4 June 2010

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D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia	FV 168	25 June 2010
Canberra Rape Crisis Centre	FV 172	25 June 2010
A Cannon	FV 137	23 June 2010
A Carvalho	FV 30	4 May 2010
Centacare Safer Families Support Service	FV 118	15 June 2010
G Charlton	FV 240	9 August 2010
Children's Court of New South Wales	FV 237	22 July 2010
Commissioner for Children (Tasmania)	FV 62	1 June 2010
Commissioner for Victims' Rights (South Australia)	FV 111	9 June 2010
Commonwealth Director of Public Prosecutions	FV 76	2 June 2010
Community Legal Centres NSW	FV 98	4 June 2010
M Condon	FV 45	18 May 2010
Confidential A	FV Confidential	1 June 2010
Confidential B	FV Confidential	4 June 2010
Confidential C	FV Confidential	5 June 2010
Confidential D	FV Confidential	25 June 2010
Confidential E	FV Confidential	25 June 2010
Confidential F	FV Confidential	6 July 2010
Confidential	FV 05	31 August 2009
Confidential	FV 13	23 October 2009

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Confidential	FV 14	5 November 2009
Confidential	FV 15	11 November 2009
Confidential	FV 19	27 January 2010
Confidential	FV 31	4 May 2010
Confidential	FV 32	4 May 2010
Confidential	FV 34	6 May 2010
Confidential	FV 43	16 May 2010
Confidential	FV 48	22 May 2010
Confidential	FV 49	5 May 2010
Confidential	FV 52	28 May 2010
Confidential	FV 58	31 May 2010
Confidential	FV 59	31 May 2010
Confidential	FV 65	1 June 2010
Confidential	FV 68	1 June 2010
Confidential	FV 69	2 June 2010
Confidential	FV 71	1 June 2010
Confidential	FV 77	2 June 2010
Confidential	FV 78	2 June 2010
Confidential	FV 81	2 June 2010
Confidential	FV 82	2 June 2010
Confidential	FV 83	2 June 2010
Confidential	FV 85	2 June 2010
Confidential	FV 86	2 June 2010
Confidential	FV 87	3 June 2010
Confidential	FV 88	2 June 2010
Confidential	FV 89	3 June 2010
Confidential	FV 91	3 June 2010

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Confidential	FV 92	3 June 2010
Confidential	FV 94	3 June 2010
Confidential	FV 96	2 June 2010
Confidential	FV 105	6 June 2010
Confidential	FV 106	6 June 2010
Confidential	FV 109	8 June 2010
Confidential	FV 125	20 June 2010
Confidential	FV 128	22 June 2010
Confidential	FV 130	21 June 2010
Confidential	FV 152	24 June 2010
Confidential	FV 156	24 June 2010
Confidential	FV 160	24 June 2010
Confidential	FV 162	25 June 2010
Confidential	FV 164	25 June 2010
Confidential	FV 169	25 June 2010
Cofidential	FV 171	25 June 2010
Confidential	FV 183	25 June 2010
Confidential	FV 184	25 June 2010
Confidential	FV 187	25 June 2010
Confidential	FV 190	25 June 2010
Confidential	FV 191	27 June 2010
Confidential	FV 198	25 June 2010
Confidential	FV 201	25 June 2010
Confidential	FV 213	28 June 2010
Confidential	FV 235	16 July 2010
Confidential	FV 239	23 July 2010
R Copeland	FV 114	8 June 2010

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A Cossins	FV 112	9 June 2010
Crossroads Community Care Centre Inc	FV 211	25 June 2010
Department of Premier and Cabinet (Tasmania)	FV 236	20 July 2010
Disability Services Commission	FV 138	23 June 2010
Domestic Violence Legal Workers Network	FV 154	28 June 2010
Domestic Violence Prevention Council (ACT)	FV 124	18 June 2010
Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network	FV 146	24 June 2010
T Dougall	FV 25	26 February 2010
J Drake	FV 66	1 June 2010
P Easteal	FV 37	12 May 2010
	FV 38	13 May 2010
	FV 39	14 May 2010
	FV 40	14 May 2010
P Easteal and D Emerson-Elliott	FV 41	14 May 2010
P Easteal and A Hopkins	FV 36	12 May 2010
Education Centre Against Violence	FV 90	3 June 2010
J Evans	FV 60	31 May 2010
Fairness In Child Support	FV 100	4 June 2010
Family Law Reform Association NSW Inc	FV 142	24 June 2010
Family Relationship Services Australia	FV 231	15 July 2010
Family Voice Australia	FV 75	2 June 2010
B Fehlberg	FV 11	14 October 2009

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A Fleisher	FV 102	3 June 2010
J Fletcher	FV 01	27 July 2009
Frid & Associates Lawyers	FV 157	24 June 2010
Confidential	FV 14	9 August 2010
L Gomez	FV 10	13 October 2009
Gosnells Community Legal Centre Inc	FV 56	31 May 2010
Government of South Australia	FV 227	9 July 2010
A Greenaway	FV 234	15 July 2010
K Greenland	FV 161	25 June 2010
K Hall	FV 113	8 June 2010
F Hardy	FV 126	16 June 2010
A Harland	FV 80	2 June 2010
B Healey	FV 06	14 September 2009
L Healey	FV 64	1 June 2010
G Hilton-Smith	FV 95	3 June 2010
C Humphreys	FV 04	23 August 2009
	FV 131	21 June 2010
Hunter Women's Centre	FV 79	1 June 2010
Inner City Legal Centre—Safe Relationships Project	FV 17	13 January 2010
	FV 192	25 June 2010
Jenny's Place Women and Children Refuge	FV 54	28 May 2010
K Johnstone	FV 107	7 June 2010
Julia Farr Association	FV 103	4 June 2010
Juries Against Illegal Laws	FV 44	17 May 2010
Justice for Children	FV 148	24 June 2010
	FV 177	25 June 2010
L Laing	FV 199	24 June 2010

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A Lamb	FV 121	16 June 2010
Law Council of Australia	FV 180	25 June 2010
Law Society of New South Wales	FV 205	30 June 2010
Legal Aid NSW	FV 219	1 July 2010
M Litt	FV 209	27 June 2010
Local Court of NSW	FV 101	4 June 2010
H McGlade	FV 84	2 June 2010
E McGuire	FV 53	28 May 2010
T McLean	FV 204	28 June 2010
Magistrates' Court and the Children's Court of Victoria	FV 220	1 July 2010
P Maloney	FV 230	31 May 2010
H Martin	FV 73	2 June 2010
I Matic	FV 93	3 June 2010
D Matthews	FV 67	1 June 2010
J Matysek	FV 27	29 March 2010
Men's Rights Agency	FV 214	29 June 2010
Michelle O	FV 153	24 June 2010
Migrant Women's Emergency Support Service trading as Immigrant Women's Support Service	FV 61	1 June 2010
R Mitchell	FV 208	25 June 2010
G Molineux	FV 33	5 May 2010
Murray Mallee Community Legal Service	FV 167	25 June 2010
National Abuse Free Contact Campaign	FV 196	26 June 2010
National Association of Services Against Sexual Violence	FV 195	25 June 2010

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National Council of Single Mothers and their Children Inc	FV 144	24 June 2010
National Legal Aid	FV 232	15 July 2010
National Peak Body for Safety and Protection of Parents and Children	FV 18	13 January 2010
	FV 21	29 January 2010
	FV 22	17 February 2010
	FV 47	24 May 2010
	FV 155	23 June 2010
Ngaanyatjarra Pitjantjatjara Yankunytjatjara Women's Council Domestic and Family Violence Service	FV 117	15 June 2010
C Nichols	FV 02	31 July 2009
K Nievins	FV 110	8 June 2010
No To Violence Male Family Violence Prevention Association Inc	FV 136	22 June 2010
Non-Custodial Parents Party (Equal Parenting)	FV 12	21 October 2009
	FV 55	1 June 2010
N Norris	FV 176	25 June 2010
North Australian Aboriginal Justice Agency	FV 194	25 June 2010
Northern Territory Legal Aid Commission	FV 122	16 June 2010
NSW Department of Human Services	FV 181	25 June 2010
NSW Women's Refuge Movement Working Party Inc	FV 188	25 June 2010
NT Office Status of Family	FV 123	18 June 2010
Office of the Child Safety Commissioner	FV 215	30 June 2010
Office of the Director of Public Prosecutions NSW	FV 158	25 June 2010
Office of the Privacy Commissioner	FV 147	24 June 2010

One in Three Campaign	FV 35	12 May 2010
P Parkinson	FV 104	5 June 2010
M Payne	FV 193	28 June 2010
Peninsula Community Legal Centre	FV 174	25 June 2010
Perinatal Mental Health Service at St George Hospital	FV 165	25 June 2010
Police Association of New South Wales	FV 145	24 June 2010
C Pragnell	FV 70	2 June 2010
Primary Health Care	FV 57	28 May 2010
Public Defenders Office NSW	FV 221	2 July 2010
Queensland Commission for Children and Young People and Child Guardian	FV 63	1 June 2010
Queensland Government	FV 229	14 July 2010
Queensland Law Society	FV 178	25 June 2010
E Richards	FV 29	3 May 2010
N Ross	FV 129	21 June 2010
O Rundle	FV 50	27 May 2010
Same Sex Domestic Violence Interagency	FV 116	10 June 2010
J Schramm	FV 218	1 July 2010
T Searle	FV 108	2 June 2010
Shared Parenting Council of Australia	FV 206	28 June 2010
Shoalcoast Community Legal Centre	FV 141	24 June 2010
R Smith	FV 135	22 June 2010
B Smyth and R Kaspiew	FV 08	13 October 2009
Solomums Australia for Family Equity	FV 200	28 June 2010

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South Eastern Sydney and Illawarra Area Health Service	FV 197	25 June 2010
St Kilda Legal Service	FV 202	28 June 2010
C Stoney	FV 134	22 June 2010
J Stubbs	FV 186	25 June 2010
Sydney Women's Domestic Violence Court Advocacy Service	FV 132	22 June 2010
The Australian Association of Social Workers	FV 224	2 July 2010
The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation	FV 149	25 June 2010
UnitingCare Children Young People and Families	FV 151	24 June 2010
Victims of Crime Assistance League Inc NSW	FV 23	23 February 2010
	FV 24	23 February 2010
	FV 51	27 May 2010
	FV 99	4 June 2010
	FV 133	21 June 2010
Victorian Aboriginal Legal Service Co-operative Ltd	FV 179	25 June 2010
Victorian Government	FV 120	15 June 2010
S Waddell	FV 127	21 June 2010
R Wallace	FV 07	18 September 2009
	FV 09	13 October 2009
	FV 16	9 November 2009
J Wangmann	FV 170	25 June 2010

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B Wechner	FV 26	13 March 2010
M Wenzel	FV 226	7 July 2010
WESNET—The Women's Services Network	FV 217	30 June 2010
Wirringa Baiya Aboriginal Women's Legal Centre Inc	FV 212	28 June 2010
Women Everywhere Advocating Violence Elimination	FV 210	29 June 2010
Women With Disabilities Australia	FV 143	24 June 2010
Women's Domestic Violence Court Advocacy Service Network	FV 46	24 May 2010
Women's House Shelta	FV 139	23 June 2010
Women's Legal Centre (ACT & Region) Inc	FV 175	25 June 2010
Women's Legal Services Australia	FV 225	6 July 2010
Women's Legal Service Brisbane*	FV 223	2 July 2010
Women's Legal Services NSW	FV 182	25 June 2010
Women's Legal Service Victoria	FV 189	25 June 2010
Women's Legal Service Queensland	FV 185	25 June 2010
Women Working Alongside Women with Intellectual and Learning Disabilities Sexual Violence Prevention Association	FV 140	24 June 2010

\*The endorsements include Women's Legal Service (WLS) and Queensland Domestic Violence Services Network which includes the following Regional Domestic Violence Services as well as the State-wide Domestic Violence Services in Queensland:

- Domestic and Family Violence Prevention Service (South West);
- Cairns Regional Domestic Violence Service Inc.;
- Working Against Violence Support Service Inc. (Logan);
- Brisbane Domestic Violence Advocacy Service;
- Domestic Violence Resource Service (Mackay & Region) Inc;
- Safer Families Support Service (Roma);
- Domestic Violence Prevention Centre Gold Coast;
- Domestic Violence Service of Central Queensland (Emerald);

- North Queensland Domestic Violence Resource Service (Townsville);
- Caboolture Regional Domestic Violence Service Inc;
- Ipswich Women's Centre Against Domestic Violence;
- Centacare Domestic and Family Violence Services, (Sunshine Coast/Cooloola);
- dvconnect: Domestic and Family Violence Telephone Service; and
- Queensland Centre for Domestic and Family Violence Research.

## **Appendix 2. List of Agencies, Organisations and Individuals Consulted**

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<i>Name</i>	<i>Location</i>
ACT Policing	Canberra
Dr S Armstrong	Sydney
Professor H Astor	Sydney
Australian Centre for the Study of Sexual Assault	Melbourne
Australian Domestic and Family Violence Clearinghouse	Sydney
Australian Institute of Criminology	Sydney
Board of Inquiry, Child Protection, NT	Alice Springs
Professor T Brown	Sydney
G Calvert	Sydney
Central Australian Aboriginal Family Legal Unit	Alice Springs
Central Australian Aboriginal Legal Aid Service	Alice Springs
Central Australian Women's Legal Service	Alice Springs
Children's Court, NSW	Sydney
Children's Court, Victoria	Melbourne
Child Victim and Child Witness Service, Department of the Attorney General, WA	Perth
Professor R Chisholm	Sydney
Community Services NSW	Sydney

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Dr A Cossins	Sydney
Dr K Cripps	Sydney
M Davis	Sydney
Department of Health and Families, NT	Darwin
Department of Justice and Attorney-General, NSW	Sydney
Department of Justice, NT	Darwin
Department of Justice, Tasmania	Hobart
Justice L Dessau, Family Court of Australia	Melbourne
Domestic Violence Intervention Court Model	Wagga Wagga
Domestic Violence Law Clearinghouse	Sydney
Domestic Violence Legal Service	Darwin
Education Centre Against Violence	Sydney
Judge R Ellis, District Court, NSW	Parramatta
Expert Roundtable	Sydney
Family Court, Brisbane	Brisbane
Family Court of WA, Information Sharing Protocols Working Group	Perth
Family Law Council	Sydney
Family Law Practitioners Association of Queensland	Brisbane
Family Law Practitioners Association of WA	Perth
Family Relationships Services Australia	Canberra
Family Violence Magistrates, South Australia	Adelaide
Family Violence Response Team	Hobart

Federal Magistrates	Sydney
Federal Magistrates Court, NT	Darwin
Judge P Fulton Hora and S King	Adelaide
GLBTI Community Roundtable	Sydney
Magistrate A Goldsbrough	Melbourne
Professor A Hayes, Australian Institute of Family Studies	Sydney and Melbourne
Dr M Heenan	Melbourne
Chief Magistrate M Hill	Tasmania
Magistrate Hogan	Perth
R Holder, Victims of Crime Coordinator, ACT	Canberra
V Hovane	Perth
Hume/Riverina Community Legal Centre	Albury/Wodonga
Professor C Humphreys	Melbourne
Joondalup Family Violence Court	Joondalup
Judicial Officers Roundtable	Melbourne
Dr G Krayem	Sydney
L Laing	Sydney
Law Reform Commission of WA	Perth
Legal Assistance Forum	Sydney
Legal Aid NSW	Sydney
Legal Aid Roundtable	Sydney
Legal Aid WA	Perth

Legal and Support Services Roundtable	Brisbane
Magistrates Court of Tasmania	Hobart
Magistrates, NT	Darwin
Magistrates, NSW	Sydney
Magistrates, Victoria	Melbourne
Acting Chief Justice P Martino, District Court, WA	Perth
H McGlade	Perth
Dr E McInnes	Adelaide
Men's Advisory Network	Perth
Men's Groups Roundtable	Sydney
Assistant Commissioner M Murdoch, NSW Police	Sydney
National Alternative Dispute Resolution Advisory Council (NADRAC) Roundtable	Canberra
National Indigenous Family Violence Prevention Forum 2010	Mackay
Ngaanyatjarra Pitjantjatjara Yankuytjatjara Women's Council	Alice Springs
North Australian Aboriginal Family Violence Legal Service	Darwin
North Australian Aboriginal Justice Agency	Darwin
Northern Territory Family Pathways Network	Darwin
Northern Territory Legal Aid Commission	Alice Springs and Darwin
Northern Territory Police	Darwin
NSW Commission for Children and Young People	Sydney
NSW Human Services Community Services	Sydney

NSW Legal Assistance Forum	Sydney
NSW Police, Joint Investigation Response Teams	Sydney
NSW Rape Crisis Centre	Sydney
S Odgers SC	Sydney
Office of the Director of Public Prosecutions (ACT)	Canberra
Office of the Director of Public Prosecutions (NSW)	Sydney
Office of the Director of Public Prosecutions (NT)	Darwin
Office of the Director of Public Prosecutions (Qld)	Brisbane
Office of the Director of Public Prosecutions (WA) Roundtable	Perth
Office of Public Prosecutions (Vic)	Melbourne
One in Three Campaign	Sydney
S Page	Sydney
Professor P Parkinson	Sydney
Premier's Council on Preventing Violence Against Women, NSW	Sydney
Public Forum	Hobart
Queensland Domestic and Family Violence Review Team	Sydney
A Rees SC	Sydney
Relationships Australia	Canberra and Hobart
Department of Justice and Community Safety (ACT), Restorative Justice Unit	Canberra
Roundtable	Hobart
Sexual Assault Laws Roundtable	Sydney

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Sexual Assault Resource Centre	Subiaco
Sexual Assault Support Service Centre	Hobart
S Seymour	Sydney
R Smith, NSW Police	Wagga Wagga
Professor J Stubbs	Sydney
C Thompson, Department of Justice and Attorney General, NSW	Sydney
Magistrate N Toohey, Sunshine and Ballarat Magistrates Court	Victoria
Top End Women's Legal Service	Darwin
University of Tasmania, Academics, Faculty of Law	Hobart
P Urquhart, Barrister	Perth
Victoria Legal Aid	Melbourne
Victorian Law Reform Commission	Sydney
Violence Against Women Advisory Group	Sydney
WA Family Pathways Network	Perth
J Wells, Senior Prosecutor	Adelaide
Women's Legal Services NSW	Sydney

## Appendix 3. List of Abbreviations

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2004 Family Law Council advice	Family Law Council, <i>Review of Division 11—Family Violence</i> (2004)
2009 Family Law Council advice	Family Law Council, <i>Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues</i> (2009)
Abduction Convention	<i>Convention on Civil Aspects of International Child Abduction</i>
ABS	Australian Bureau of Statistics
ACSSA	Australian Centre for the Study of Sexual Assault
ACT	Australian Capital Territory
ADR	Alternative dispute resolution
ADVIP	Armadale Domestic Violence Intervention Project (WA)
ADVOs	Apprehended Domestic Violence Orders (NSW)
AFP	Australian Federal Police
AFVPLS	Aboriginal Family Violence Prevention Legal Service Victoria
AGD	Attorney-General's Department
AGS	Australian Government Solicitor
AIC	Australian Institute of Criminology
AIFS	Australian Institute of Family Studies
AIHW	Australian Institute of Health and Welfare
ALRC	Australian Law Reform Commission

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ALRC Report 30	Australian Law Reform Commission, <i>Domestic Violence</i> (1986)
ALRC Report 69	Australian Law Reform Commission, <i>Equality Before the Law: Justice for Women (Part 1)</i> (1994)
ALRC Report 84	Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, <i>Seen and Heard: Priority for Children in the Legal Process</i> (1997)
ALRC Report 102	Australian Law Reform Commission, New South Wales Law Reform Commission and Victorian Law Reform Commission, <i>Uniform Evidence Law</i> (2005)
ALRC Report 103	Australian Law Reform Commission, <i>Same Crime, Same Time: Sentencing of Federal Offenders</i> (2006)
ALRC Report 108	Australian Law Reform Commission, <i>For Your Information: Australian Privacy Law and Practice</i> (2008)
APVOs	Apprehended Personal Violence Orders (NSW)
Best Practice Principles	Family Court of Australia, <i>Best Practice Principles for use in Parenting Disputes when Family Violence or Abuse is Alleged</i>
CAIT	ChildFirst Assessment and Interview Team (WA)
CALD	Culturally and linguistically diverse
CARS	Crisis Advocacy Response Services (Vic)
CASA	Centres Against Sexual Assault
CAT	Child Abuse Taskforce (NT)
CCTV	Closed circuit television
CDPP	Commonwealth Director of Public Prosecutions
CEDAW	<i>Convention on the Elimination of All Forms of Discrimination Against Women</i>
Child FIRST	Child and Family Information Referral Support Teams (Vic)
Chisholm Review	R Chisholm, <i>Family Courts Violence Review</i> (2009)

CLC	Community Legal Centre
Commissions	ALRC and NSWLRC
CRIS	Client Relationship Information System (Vic)
CROC	<i>Convention on the Rights of the Child</i>
CWU	Child Wellbeing Unit (NSW)
DART	Domestic Assault Response Team (NSW)
DCP	Department of Child Protection (WA)
DoCS	Department of Community Services
DPP	Director of Public Prosecutions
Duluth Model	Domestic Abuse Intervention Programs, <i>Duluth Model on Public Intervention</i>
DVCS	Domestic Violence Crisis Service (ACT)
DVICM	Domestic Violence Intervention Court Model (NSW)
DVLO	Domestic Violence Liaison Officer
DVO	Domestic violence order
DVPC	Domestic Violence Prevention Centre Gold Coast (Qld)
DVSS	Domestic Violence Solicitor Scheme (NSW)
ECAV	Education Centre Against Violence (NSW)
FaHCSIA	Department of Families, Housing, Community Services and Indigenous Affairs
Family Court	Family Court of Australia
<i>Family Law Act</i>	<i>Family Law Act 1975</i> (Cth)
FDR	Family dispute resolution

<i>FDR Regulations</i>	<i>Family Law (Family Dispute Resolution Practitioners) Regulations (2008)</i>
FMC	Federal Magistrates Court
Form 4	Family Court of Australia, Form 4—Notice of Child Abuse or Family Violence
FRCs	Family Relationship Centres (Cth)
FRSA	Family Relationship Services Australia
FSF	Family Safety Framework (SA)
FVCD	Family Violence Court Division (Vic)
FVIP	Family Violence Intervention Program (ACT)
FVSC	Family Violence Self Change Program (ACT)
GCDVIR	Gold Coast Domestic Violence Integrated Response (Qld)
GLBTI	Gay, lesbian, bisexual, transgender and intersex
Hague Convention	<i>Convention on the Civil Aspects of International Child Abduction</i>
HREOC	Human Rights and Equal Opportunity Commission
ICC	Integrated Case Coordination (Tas)
ICCPR	<i>International Covenant on Civil and Political Rights</i>
IDVAs	Independent Domestic Violence Advisors (UK)
IDVCs	Integrated Domestic Violence Courts (New York, USA)
IPPs	Information Privacy Principles
IVAWS	International Violence Against Women Survey
JIRT	Joint Investigative Response Team, NSW Police

Kearney McKenzie Report	Kearney McKenzie & Associates, <i>Review of Division 11</i> (1998)
Law Council	Law Council of Australia
Magistrates Court of Western Australia	Magistrates Court of Western Australia constituted by a Family Law Magistrate of Western Australia
MARACs	Multi-Agency Risk Assessment Conferences (UK)
MCCOC	Model Criminal Code Officers Committee
MCLOC	Model Criminal Law Officers Committee
MDCs	Multidisciplinary Centres (Vic)
Moloney study	L Moloney and others, <i>Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study</i> , (2007) Australian Institute of Family Studies.
MOUs	Memorandums of understanding
MRG	Mandatory Reporters Guidance
NAAJA	North Australian Aboriginal Justice Agency
NASASV	National Association of Services Against Sexual Violence
National Council	National Council to Reduce Violence against Women and their Children
NESB	Non-English speaking backgrounds
NPPs	National Privacy Principles
NSW	New South Wales
NSWLRC	New South Wales Law Reform Commission
NT	Northern Territory
NTER	Northern Territory Emergency Response

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NTLAC	Northern Territory Legal Aid Commission
NZLC	New Zealand Law Commission
OCSC	Office of the Child Safety Commissioner (Vic)
ODPP	Office of the Director of Public Prosecutions
OPP	Office of Public Prosecutions (Vic)
Pyke Review	M Pyke, <i>South Australian Domestic Violence Laws: Discussion and Options for Reform</i> (2007)
QC	Queen's Counsel
QLRC	Queensland Law Reform Commission
RLREP	Rape Law Reform Evaluation Project
SA	South Australia
SACAT	Sexual Assault and Child Abuse Team (ACT)
SACP Pilot	Sexual Assault Communications Pro Bono Referral Pilot Project
SCAG	Standing Committee of Attorneys-General
SCAN	Suspected Child Abuse and Neglect (Qld)
<i>Screening and Assessment Framework</i>	Australian Catholic University and Australian Government Attorney-General's Department, <i>Framework for Screening, Assessment and Referrals in Family Relationship Centres and the Family Relationship Advice Line</i> (2008)
SDVCs	Specialist Domestic Violence Courts (UK)
SOCA	Sexual Offences and Child Abuse units (Vic)
SOCIT	Sexual Offences and Child Abuse Investigation Team (Vic)
SOCs	Sexual Offences Courts (South Africa)
SOL	Sexual Offence List (Vic)

<i>Time for Action</i>	National Council to Reduce Violence against Women and their Children, <i>Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021</i> (2009).
TLRI	Tasmania Law Reform Institute
UDHR	<i>Universal Declaration of Human Rights</i>
Uniform Evidence Acts	Legislation based on the Model Uniform Evidence Bill, <i>Evidence Act 1995</i> (Cth) and <i>Evidence Act 1995</i> (NSW)
US	United States
VALS	Victorian Aboriginal Legal Service Co-operative Ltd
VATE	video or audio taping of evidence
VCAT	Victorian Civil and Administrative Tribunal
VLRC	Victorian Law Reform Commission
VOCAT	Victims of Crime Assistance Tribunal (Vic)
VPCU	Violence Prevention Coordination Unit (NSW)
VSRT	Victim Safety Response Team (Tas)
WA	Western Australia
WDVCAS	Women's Domestic Violence Court Advocacy Service (NSW)
WLS NSW	Women's Legal Services NSW
Wood Inquiry	J Wood, <i>Report of the Special Commission of Inquiry into Child Protection Services in NSW</i> (2008)



## **Table of Legislation**

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### AUSTRALIA

#### **Commonwealth**

- Acts Interpretation Act 1901*  
*Aged Care Act 1997*  
*Australian Constitution*  
*Australian Crime Commission Act 2002*  
*Australian Law Reform Commission Act 1996*  
*Child Support (Assessment) Act 1989*  
*Crimes Act 1914*  
*Crimes Legislation Amendment (Sexual Offences Against Children) Act 2010*  
*Criminal Code*  
*Criminal Code Act 1995*  
*Customs Administration Act 1985*  
*Evidence Act 1995*  
*Evidence Amendment Act 2008*  
*Family Law (Child Abduction Convention) Regulations 1987*  
*Family Law (Family Dispute Resolution Practitioners) Regulations 2008*  
*Family Law Act 1975*  
*Family Law Amendment (De Facto Financial Matters and Other Measures) Act 2008*  
*Family Law Amendment (Shared Parental Responsibility) Act 2006*  
*Family Law Amendment Rules 2010 (No 1)*  
*Family Law Reform Act 1995*  
*Family Law Regulations 1984*  
*Family Law Rules 2004*  
*Federal Magistrates Act 1999*  
*Federal Magistrates Court Rules 2001*  
*Judiciary Act 1903*

*Jurisdiction of Courts (Cross-vesting) Act 1987*

*Jurisdiction of Courts of Summary Jurisdiction (Children) Proclamation 2006*

*Marriage Act 1961*

*Matrimonial Causes Act 1959*

*Migration Act 1958*

*Migration Regulations 1994*

*Privacy Act 1988*

*Social Security Act 1991*

*Social Security (Administration) Act 1999*

*Social Security (Public Interest Certificate Guidelines) (DEEWR) Determination 2008*

### **New South Wales**

*Bail Act 1978*

*Child Protection Act 1987*

*Child Protection (Offenders Prohibition Orders) Act 2004*

*Child Protection (Offenders Registration) Act 2000*

*Children (Criminal Proceedings) Act 1987*

*Children and Young Persons (Care and Protection) Act 1998*

*Children and Young Persons (Care and Protection) Regulation 2000*

*Children's Legislation (Wood Inquiry Recommendations) Act 2009*

*Commonwealth Powers (Family Law—Children) Act 1986*

*Community Justice Centres Act 1983*

*Community Justice Centres Amendment Act 2007*

*Contracts Review Act 1980*

*Crimes Act 1900*

*Crimes (Domestic and Personal Violence) Act 2007*

*Crimes (Homicide) Amendment Act 1982*

*Crimes (Sentencing Procedure) Act 1999*

*Crimes Amendment (Child Neglect) Act 2004*

*Crimes Amendment (Consent—Sexual Assault Offences) Act 2007*

*Crimes Amendment (Self-Defence) Act 2001*

*Criminal Procedure Act 1986*  
*Criminal Procedure Amendment (Evidence) Act 2005*  
*Criminal Procedure Regulation 2005*  
*Director of Public Prosecutions Act 1986*  
*Evidence Act 1995*  
*Fines Act 1996*  
*Firearms Act 1996*  
*Health Records and Information Privacy Code of Practice Amendment (Domestic Violence Intervention) 2010*  
*Jurisdiction of Courts (Cross-vesting) Act 1987*  
*Law Enforcement (Powers and Responsibilities) Act 2002*  
*Local Court Act 2007*  
*New South Wales Law Reform Commission Act 1966*  
*Privacy Code of Practice (General) Amendment (Domestic Violence Intervention) 2010*  
*Summary Offences Act 1988*  
*Vexatious Proceedings Act 2008*  
*Victims Support and Rehabilitation Act 1996*  
*Victims Rights Act 1996*  
*Young Offenders Act 1997*

**Queensland**

*Bail Act 1980*  
*Child Protection Act 1999*  
*Commonwealth Powers (Family Law—Children) Act 1990*  
*Criminal Code*  
*Criminal Code (Abusive Domestic Relationship Defence and Another Matter) Amendment Act 2010*  
*Criminal Code Act 1899*  
*Criminal Law (Sexual Offences) Act 1978*  
*Criminal Offence Victims Act 1995*  
*Criminal Offence Victims Regulation 1995*  
*Domestic and Family Violence Protection Act 1989*

*Education (General Provisions) Act 2006*  
*Evidence Act 1977*  
*Evidence (Protection of Children) Amendment Act 2003*  
*Firearms Act 1990*  
*Jurisdiction of Courts (Cross-vesting) Act 1987*  
*Justices Act 1886*  
*Juvenile Justice Act 1992*  
*Magistrates Courts Act 1921*  
*Peace and Good Behaviour Act 1982*  
*Penalties and Sentences Act 1992*  
*Police Powers and Responsibilities Act 2000*  
*Public Health Act 2005*  
*Uniform Civil Procedure Rules 2005*  
*Victims of Crime Assistance Act 2009*

**South Australia**

*Bail Act 1985*  
*Children's Protection Act 1993*  
*Commonwealth Powers (Family Law) Act 1986*  
*Criminal Law Consolidation Act 1935*  
*Criminal Law Consolidation (Rape and Sexual Offences) Amendment Act 2008*  
*Criminal Law (Sentencing) Act 1988*  
*Domestic Violence Act 1994*  
*Evidence Act 1929*  
*Family Relationships Act 1975*  
*Intervention Orders (Prevention of Abuse) Act 2009*  
*Jurisdiction of Courts (Cross-vesting) Act 1987*  
*Magistrates Court Act 1991*  
*Magistrates Court (Civil) Rules 1992*  
*Problem Gambling Family Protection Orders Act 2004*  
*Statutes Amendment (Victims of Crime) Act 2009*

*Summary Offences Act 1953*

*Summary Procedure Act 1921*

*Victims of Crime Act 2001*

*Young Offenders Act 1993*

*Youth Court Act 1993*

### **Tasmania**

*Alternative Dispute Resolution Act 2001*

*Bail Act 1994*

*Children, Young Persons and Their Families Act 1997*

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*Commonwealth Powers (Family Law) Act 1987*

*Criminal Code*

*Criminal Code Act 1924*

*Criminal Code Amendment (Abolition of Defence of Provocation) Act 2003*

*Criminal Procedure (Attendance of Witnesses) Act 1996*

*Evidence Act 2001*

*Evidence (Children and Special Witnesses) Act 2001*

*Family Violence Act 2004*

*Firearms Act 1996*

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*Justices Rules 2003*

*Magistrates Court Act 1987*

*Sentencing Act 1997*

*Supreme Court Civil Procedure Act 1932*

*Victims of Crime Assistance Act 1976*

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**Victoria**

*Bail Act 1977*

*Children, Youth and Families Act 2005*

*Commonwealth Powers (Family Law—Children) Act 1986*

*County Court Act 1958*

*Courts Legislation (Neighbourhood Justice Centre) Act 2006*

*Crimes Act 1958*

*Crimes (Homicide) Act 2005*

*Criminal Procedure Act 2009*

*Criminal Procedure Regulations 2009*

*Evidence Act 2008*

*Evidence (Miscellaneous Provisions) Act 1958*

*Family Violence Protection Act 2008*

*Firearms Act 1996*

*Guardianship and Administration Act 1986*

*Jurisdiction of Courts (Cross-vesting) Act 1987*

*Magistrates' Court Act 1989*

*Magistrates' Court Civil Procedure Rules 2009*

*Public Prosecutions Act 1994*

*Sentencing Act 1991*

*Stalking Intervention Orders Act 2008*

*Supreme Court Act 1991*

*Victims' Charter Act 2006*

*Victims of Crime Assistance Act 1996*

*Victims of Crime Assistance (Amendment) Act 2000*

**Western Australia**

*Bail Act 1982*

*Children and Community Services Act 2004*

*Children's Court of Western Australia Act 1988*

*Criminal Code*

*Criminal Code Act Compilation 1913*

*Criminal Injuries Compensation Act 1985*

*Criminal Law Amendment (Homicide) Act 2008*

*Criminal Procedure Act 2004*

*Evidence Act 1906*

*Family Court Act 1975*

*Family Court Act 1997*

*Firearms Act 1973*

*Jurisdiction of Courts (Cross-vesting) Act 1987*

*Magistrates Court Act 2004*

*Restraining Orders Act 1997*

*Restraining Orders Regulations 1997*

*Sentencing Act 1995*

*Vexatious Proceedings Restriction Act 2002*

*Victims of Crime Act 1994*

*Young Offenders Act 1994*

### **Australian Capital Territory**

*Bail Act 1982*

*Crimes Act 1900*

*Children and Young People Act 2008*

*Crimes (Restorative Justice) Act 2004*

*Crimes (Sentencing) Act 2005*

*Criminal Code*

*Domestic Violence Agencies Act 1986*

*Domestic Violence and Protection Orders Act 2001 (Repealed)*

*Domestic Violence and Protection Orders Act 2008*

*Domestic Violence and Protection Orders Amendment Act 2005*

*Domestic Violence and Protection Orders Regulation 2009*

*Evidence (Miscellaneous Provisions) Act 1991*  
*Evidence Act 1971*  
*Jurisdiction of Courts (Cross-vesting) Act 1993*  
*Magistrates Court Act 1930*  
*Public Advocate Act 2005*  
*Supreme Court Act 1933*  
*Victims of Crime Act 1994*  
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### **Northern Territory**

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*Care and Protection of Children Act 2007*  
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*Criminal Code*  
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*Criminal Reform Amendment Act (No 2) 2006*  
*Domestic and Family Violence Act 2007*  
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*Evidence Act 1939*  
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*Police Administration Act*  
*Sentencing Act 1995*  
*Sexual Offences (Evidence and Procedure) Act 1983*  
*Vexatious Proceedings Act 2006*  
*Victims of Crime Assistance Act 2006*  
*Victims of Crime Assistance Regulations*  
*Victims of Crime Rights and Services Act 2006*

**OVERSEAS**

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*Criminal Code 1985 RS c C-46*

**India**

*Criminal Law (Second Amendment) Act 1983*

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**New Zealand**

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*Domestic Violence Act 1995*

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*Sentencing Act 2002*

**United Kingdom**

*Children Act 2004*

*Children Act 2004 Information Database (England) Regulations 2007*

*Homicide Act 1957*

**United States**

*Alabama Code*

*District Court of Columbia Family Court Act of 2001*

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*Missouri Annotated Statutes*

*Montana Code*

*Nevada Revised Statutes*

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*Violence Against Women Act of 1994 18 USC*

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*Convention on the Rights of the Child (CROC)*

*Declaration on the Elimination of Violence against Women*

*Hague Convention on Civil Aspects of International Child Abduction (Hague Convention)*

*International Covenant on Civil and Political Rights (ICCPR)*

*Universal Declaration of Human Rights (UDHR)*

