



Australian Government

Australian Law Reform Commission



NSW
Law Reform
Commission
Justice & Attorney General

Family Violence —A National Legal Response

SUMMARY REPORT

ALRC Final Report Summary 114

NSWLRC Final Report Summary 128

October 2010

This Report reflects the law as at 1 September 2010.

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All ALRC publications can be made available in a range of accessible formats for people with disabilities. If you require assistance, please contact the ALRC.

Telephone: within Australia (02) 8238 6333

International +61 2 8238 6333

TTY: (02) 8238 6379

Facsimile: within Australia (02) 8238 6363

International +61 2 8238 6363

E-mail: info@alrc.gov.au

Homepage: www.alrc.gov.au

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Terms of Reference

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

Australian Law Reform Commission

Commissioners

Professor Rosalind Croucher, President

Magistrate Anne Goldsbrough, Part-time Commissioner

Special Adviser

George Zdenkowski

Executive Director

Sabina Wynn

Family Violence Team

Isabella Cosenza, Senior Legal Officer, Team Leader

Jared Boorer, Legal Officer (from 6 April 2010)

Dr Joyce Chia, Legal Officer (1 November 2009–15 April 2010)

Anna Dziedzic, Legal Officer (1 March–20 August 2010)

Lisa Eckstein, Legal Officer (1 January–19 March 2010)

Erin Mackay, Legal Officer (1 November 2009–6 January 2010)

Sara Peel, Legal Officer (from 6 April 2010)

Christina Raymond, Legal Officer (from 6 April 2010)

Child Protection Team

Chris Paul, Senior Legal Officer (11 January–24 March 2010)

Althea Gibson, Legal Officer (31 August–1 November 2009)

Sexual Assault Team

Bruce Alston, Senior Legal Officer, Team Leader (from 27 January 2010)

Dr Jane Wangmann, Senior Legal Officer, Team Leader (2 November 2009–29 January 2010)

Amanda Alford, Legal Officer (from 6 April 2010)

Dr Anne Cossins (Consultant from 22 January 2010)

Katy McGree, Legal Officer (from 11 January 2010–30 July 2010)

Overarching Issues Team

Carolyn Adams, Senior Legal Officer, Team Leader (from 1 May 2010)

Isabella Cosenza, Senior Legal Officer, Team Leader (until 30 April 2010)

Maha Melhem, Senior Legal Officer (from 6 April 2010)

Khanh Hoang, Legal Officer (from 6 April 2010)

Research Manager

Jonathan Dobinson (until 14 May 2010)

Librarian

Carolyn Kearney

Project Assistant

Tina O'Brien

Legal Interns

Dorothea Anthony

Aaron Besser

Philip Boncardo

Zhiyan Cao

Mia Hollick

Mariam Jacob

Tracey Kingsbury

Tamara Phillips

Calvin Shaw

James Small

Anna Spies

New South Wales Law Reform Commission

Commissioners

Emeritus Professor Hilary Astor (from 15 March 2010)

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

Professor Michael Tilbury (until February 2010)

The Hon James Wood AO QC, Chairman

Executive Director

Paul McKnight

Legal Officers

Nicole Abadee (October–December 2009)

Lisa Alonso Love (March–August 2010)

Francesca Di Benedetto (from February–October 2010)

Fiona Lam, Intern (January–February 2010)

Bridget O'Keefe (May–October 2010)

Robyn Young (January–February 2010)

Report Summary

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Introduction

This Summary Report provides an accessible overview of the policy framework and recommendations in the two-volume Final Report in the Inquiry into family violence by the Australian Law Reform Commission (ALRC) and the New South Wales Law Reform Commission (the Commissions). The full Report sets out in detail the issues raised by the Terms of Reference, and the research and evidence base upon which the Commissions' recommendations were formulated, including a thorough discussion of stakeholder views and the Commissions' conclusions.

This Summary Report begins with a snapshot of the context for the Inquiry, including the background to the Terms of Reference. This is followed by a consideration of the

framework for the reform, including a description of the development of the key principles underpinning the 187 final recommendations put forward by the Commissions. The recommendations are then considered as an expression of two principal themes—improving legal frameworks and improving practice, concluding with a summary of the net effect of the recommendations.

Context

The recommendations in the Report 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’.¹ 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 2010.² 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.³ 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).⁴ 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

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

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

3 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 Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms* (2009).

Summary 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 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 of the Report. 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 challenge for the Commissions 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. 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.⁵

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), 7.

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’.⁶ 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’.⁷

However, as noted in Chapter 1, the suite of recommendations presented in the Report 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.

Fragmentation of laws and practice

As noted in Chapter 2 of the Report, 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’.⁸

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.⁹

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

6 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.

7 Ibid, 26.

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

9 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].

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 touchstone throughout the chapters and recommendations, however, is one of improving safety and that where laws are in place, they need to be effective.

Development of the reform response

Commitment to widespread consultation is a hallmark of best practice law reform. In undertaking this 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 of the Report. 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 means of 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.

The Commissions received 240 submissions 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.

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

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

Principles for reform

The framework for reform in this Inquiry is set out in Chapter 3 of the Report. In summary, the recommendations in the 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.

Presentation of report

The Report is divided into eight parts—as the lens through which the interaction issues were considered. The arrangement of material in this way was a pragmatic one to make the consideration of the wide-ranging area of the Inquiry more manageable through the dissection of issues.

Part A, Introduction, comprises three chapters: Chapter 1, an 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.

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.

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.

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.

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.

Part F, Alternative Dispute Resolution (ADR), comprises three chapters. Chapter 21 considers the regulation of family dispute resolution (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 FDR 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.

Part G, Sexual Assault, comprises five chapters focusing on the second Term of Reference. This Term of Reference required 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.

Part H, Overarching Issues, the final part of the Report, comprises four chapters and 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 the Report.

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 the Report, the Commissions make many 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 the 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 the 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 Commissions conclude that 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 the 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.¹⁰

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.

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

¹⁰ 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.

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 local court magistrates. 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 the 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 obtained better 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 the 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 the 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 the 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 judges. 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 the 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 the 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 the 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 the 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 the 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 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 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.

List of Recommendations

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.

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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.