3. Framework for Reform

Contents

Introduction—the reform challenge 139
Principles of reform 140
  Seamlessness 141
  Accessibility 142
  Fairness 142
  Effectiveness 143
Framework of reform recommendations 143
  Background 143
  Reform response 144
  One court to deal with family violence? 144
  Expansion of federal jurisdiction to include child protection 146
  Corresponding jurisdictions 148
Focus of reform 150

Introduction—the reform challenge

3.1 This Inquiry focuses on areas of intersection and interaction between a wide number of laws, operating in different ways and in different spheres. There are federal as well as state and territory laws; criminal as well as civil laws. Some concern private law matters—between individuals; some concern public law matters—between individuals and the state. As noted in Chapter 2, where people who are experiencing family violence encounter the legal systems across the state and federal division of powers—and even within the state and territory systems alone—there are particular challenges.

3.2 For example, one family in which there is serious, ongoing controlling violence may need to go to three different courts in order to deal with that violence. The family is likely to commence proceedings in a magistrates court for a protection order. The conduct that led to the need for protection may constitute a criminal offence; and there may be a prosecution, often also in the magistrates court—but in more serious cases in the District (County) or Supreme Court. The violence may have alerted family, neighbours or the police to notify a child protection agency, which may commence care proceedings in a children’s court. At the same time, one of the parents may wish to see the children and commence proceedings in a family court for parenting orders governing the children’s living arrangements.
3.3 The impact on children may be especially severe, as reflected through the eyes of a nine-year old child speaking of the uncertainty of ongoing Family Court proceedings:

I felt worried that mum was going to go back and forth and back and forth and it wasn’t going to stop ... [I felt] freaked out, I couldn’t get to sleep I had nightmares, I was crying a lot ... [It was just all] horrible and frightening.1

3.4 The sense of being ‘bounced’ between systems was described by one contributor to this Inquiry as feeling ‘like a ball on a pool table’.2 It is further compounded by gaps in law and gaps in practice. The laws often operate in what has been described as ‘silos’, with people potentially being bounced around and falling between the gaps between these various laws.3 One women’s legal centre attributed the dropping away of complaints of family violence to such gaps:

The small numbers of women who do build the courage to report [family violence] then have to battle their way through the legal and court systems. In [our centre’s] experience, these systems have inherent gaps which ultimately fail to protect women. They fall through the cracks and are left feeling vulnerable and re-traumatised; the reason so many women give up.4

3.5 From the perspective of those dealing with family violence, such experiences may have a significant detrimental impact on safety. The object of this Inquiry is, therefore, to determine ‘what, if any, improvements could be made to relevant legal frameworks to protect the safety of women and children’.

3.6 This Report contains 187 recommendations for reform. The recommendations reflect, on the one hand, the Government’s objectives with respect to the reduction of violence, particularly in relation to women and children, and, on the other hand, a framework of key principles for the Inquiry.

3.7 This chapter provides an outline of the key principles embodied in the recommendations for reform, followed by a summary of the overall framework of the recommendations in the light of the problems and challenges of the fragmentation of jurisdiction described in Chapter 2.

**Principles of reform**

3.8 The Australian Government has identified a clear goal ‘to reduce all violence in our communities’, recognising that ‘whatever the form violence takes, it has serious and often devastating consequences for victims, their extended families and the

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2 Confidential, Submission FV 49, 5 May 2010.
3 Or on a ‘roundabout’ as described in the AIFS evaluation: Australian Institute of Family Studies, *Evaluation of the 2006 Family Law Reforms: Summary Report* (2009), [4], 21. This separation of practice or ‘silos’ was reflected, for example, in one submission to this Inquiry, where different committees of the one Law Society came to strongly divergent conclusions with respect to a number of matters raised in the Consultation Paper: Law Society of New South Wales, Submission FV 205, 30 June 2010.
4 Hunter Women’s Centre, Submission FV 79, 1 June 2010.
3. Framework for Reform

A specific concern—and the immediate trigger—for the work of the National Council to Reduce Violence against Women and their Children, was that violence against women 'comes at an enormous economic cost'. The National Plan to Reduce Violence against Women forms part of the Government response, in turn including the referral of the current Inquiry to the Commissions.

The objective of this Inquiry reflects the Government’s objective—through recommendations for reform of legal frameworks—to improve safety for women and children in the context of family violence. In this context, the idea of ‘frameworks’ extends beyond law in the form of legislative instruments and includes education, information sharing and other matters. The overall touchstone throughout the chapters and recommendations, however, is one of improving safety.

The recommendations in this Report are underpinned by four specific principles or policy aims that relevant legal frameworks in this Inquiry should express: seamlessness, accessibility, fairness and effectiveness, as summarised below.

1. **Seamlessness**—to ensure that the legal framework is as seamless as possible from the point of view of those who engage with it.

2. **Accessibility**—to facilitate access to legal and other responses to family violence.

3. **Fairness**—to ensure that legal responses to family violence are fair and just, holding those who use family violence accountable for their actions and providing protection to victims.

4. **Effectiveness**—to facilitate effective interventions and support in circumstances of family violence.

**Seamlessness**

The idea of ‘seamlessness’ is expressed in a number of ways in various reviews and discussions about responding to family violence. Time for Action identified, as one key ‘outcome’ area, that ‘systems work together effectively’, which combines ‘seamlessness’ as an interaction of systems as well as ‘effectiveness’.

At times, ‘seamlessness’ is expressed as an aspiration of having one court deal with the wide range of matters that can arise in relation to a family, where women and children are affected by family violence and child abuse. The approach to the idea expressed as ‘one court’ is considered further below in the framework for reform.

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6 Ibid.
3.13 At other times the idea of seamlessness may be seen, for example, in terms of:

- recommendations for consistency of definitions;\(^8\)
- recommendations for greater sharing of information and facilitation of pathways between the various services, agencies and courts that are involved in family violence matters;\(^9\)
- training programs, knowledge bases and professional development for all those in the various systems that deal with issues of family violence and child abuse;\(^10\)
- coordination or integration of responses to family violence matters.\(^11\)

3.14 From the point of view of those engaging with the legal frameworks in which issues of family violence and child abuse arise, the Commissions consider that the key focus for this Inquiry must be upon the experience of those participants—to see the system through their eyes. ‘Seamlessness’ in practice may involve a combination of each and every one of the elements identified so far, and to be considered throughout this Inquiry. It is a foundational policy principle driving the recommendations for reform contained in this Report.

**Accessibility**

3.15 In the report, *A Strategic Framework for Access to Justice in the Federal Civil Justice System* (the Access to Justice Framework), the Access to Justice Taskforce of the Australian Government Attorney-General’s Department identifies ‘accessibility’ as a key principle: ‘Justice initiatives should reduce the net complexity of the justice system’.\(^12\) It also includes the principle of ‘efficiency’, that ‘the justice system should deliver outcomes in the most efficient way possible, noting that the greatest efficiency can often be achieved without resorting to a formal dispute resolution process, including through preventing disputes’.\(^13\)

**Fairness**

3.16 *Time for Action* identified as one key ‘outcome’ area, that ‘responses are just’.\(^14\) The Access to Justice Framework identifies two ‘access to justice principles’: ‘appropriateness’ and ‘equity’.\(^15\) These are similar to the idea of ‘fairness’ and

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\(^8\) For example, Family Law Council, *An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Recs 1, 5. See also Chs 5–7.
\(^9\) For example, Ibid, Recs 4, 12. See also Ch 30.
\(^10\) For example, Ibid, Recs 2, 3. See also Ch 31.
\(^11\) See Ch 29 for a discussion of integrated responses generally.
\(^13\) Ibid, 63.
‘accessibility’. The ideas of being ‘fair and just’ and ‘providing protection’ should also include the idea of ‘respect’, which is also a key outcome in *Time for Action*.16

3.17 Fairness also reflects human rights principles—in particular, Australia’s obligations under international conventions, considered in Chapter 2. A key obligation concerns the right to minimum procedural guarantees in the case of criminal charges, especially relevant in the context of Part G of this Report, concerning sexual assault.

**Effectiveness**

3.18 The Access to Justice Framework includes ‘effectiveness’ as one of its key principles:

> The interaction of the various elements of the justice system should be designed to deliver the best outcomes for users. Justice initiatives should be considered from a system-wide perspective rather than on an institutional basis. All elements of the justice system should be directed towards the prevention and resolution of disputes, delivering fair and appropriate outcomes, and maintaining and supporting the rule of law.17

3.19 *Time for Action* included as a specific outcome that ‘systems work together effectively’.18

**Framework of reform recommendations**

**Background**

3.20 The consequence of the division of powers discussed in Chapter 2 means that ‘neither the Commonwealth nor the States’ jurisdiction provides a family unit with the complete suite of judicial solutions to address all of the legal issues that may impact on a family in respect of their children’.19

3.21 This fragmentation of jurisdiction sits clearly within the Terms of Reference for this Inquiry. Put at its simplest:

> more than one court may be involved in a particular family breakdown. Disputes cannot be neatly divided into private and public areas of law and parties will often have to institute or be engaged in proceedings in various legal forums to have all of their issues determined. ... The overlapping jurisdictions cause significant angst for the parties involved and considerable difficulties for the courts.20

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3.22 Throughout this Inquiry the Commissions have continued to hear about the fact of, and problems arising from, the fragmentation of jurisdiction—not only from those who work within the current system but also those who seek its protection. As a result, the effective protection of those who experience family violence is compromised by gaps arising as a result of the interaction between the jurisdictions. In consultations and submissions the Commissions have also heard that the problems involve not only a fragmentation of laws, but also a fragmentation of practice.

Reform response

3.23 The challenge in this Inquiry is to suggest a practical way of achieving all of the goals articulated in the policy framework outlined above. That is, within the overall primary concern with safety, relevant legal frameworks should express seamlessness, accessibility, fairness and effectiveness. In this section the Commissions consider the options for reform and the proposition of ‘one court’, concluding that ‘one court’—as a concept rather than as a new or separate institution—embodies all of the policy goals identified for improving the interaction between the systems in practice in the interests of protecting the safety of those who experience family violence. In the section that follows, the concept of one court that informs the recommendations in this Report is explained.

One court to deal with family violence?

3.24 Would it be feasible to establish one court with a full range of jurisdiction to deal with the wide range matters arising in situations of family violence—a fully integrated court with the ability to deal with protection orders, child protection, family law, perhaps even criminal issues? Some jurisdictions have chosen this route.

3.25 An international example is the Specialist Domestic Violence Unit in the District of Columbia that includes:

a fully integrated court that handles civil, criminal, and family law matters in relation to disputes ‘where the parties are related by blood, legal custody, marriage, cohabitation, a child in common, or a romantic relationship’. The court hears protection order hearings and all misdemeanour criminal charges and, once a case has been brought to it, any family law matters involving the same parties.21

3.26 It might be argued that such a model would potentially have distinct benefits, including, for example:

• parties would not be shuttled from court to court;
• fewer court appearances;
• less cost;
• less repetition of evidence;

3. Framework for Reform

- quicker resolution of issues—if properly resourced;
- those experiencing family violence would be less likely to drop out of the system without the remedies they need for achieving safety;
- confidence in the ability of the legal system to respond to family violence would build;
- specialised judges, as well as specialised court staff, lawyers, prosecutors and specialised practice;
- premises with safety protection; and
- co-location of services—including legal and family violence support services.

3.27 In summary, it might be argued that this would, overall, satisfy clearly all of the guiding principles identified by the Commissions as the framework for reform in this Inquiry.

3.28 However, there are a number of very significant challenges to be met in practice with creating one court of the model suggested above:

- in the Australian context there is the constitutional division of power between the Commonwealth and the states described in Chapter 2; and
- the cost and practical challenges of establishing a completely new specialist family violence court would be very significant.

3.29 If these difficulties were overcome and the Australian Government created one federal family violence court, the states and territories would still provide many of the services relevant to safety—especially police and child protection services—and there would be questions as to how the new court would work with the existing specialist jurisdiction of the federal family courts.

3.30 Conversely, if the ‘one court’ were to be a state court, the consequences would also be significant. Even though the states have jurisdiction in relation to family violence protection orders, crime and child protection, if all family violence matters were to go to state courts, would the Australian Government then vacate the field of family law, leaving it to the states? It would hardly be sensible for family violence cases to be dealt with in a state court and family disputes not involving violence to be dealt with in a federal court. Such a move would create another gap in the system. Further, the expense of such a move for the states would be considerable and the specialist expertise in federal family courts in relation to violence could be lost.

3.31 The following section considers how to implement a ‘one court’ concept within the context of such limitations, reviewing two main options—the expansion of federal jurisdiction to include child protection; and the development of corresponding jurisdictions.
Expansion of federal jurisdiction to include child protection

3.32 The option of expanding the jurisdiction of family courts to include certain child protection responsibilities reflects the fact that both systems share a primary focus on the best interests of the child. As noted by the Family Law Council in 2002, the ‘duplication of effort between state and federal systems’ is a matter of continuing concern. At that time the Council recommended that, to avoid such duplication,

a decision should be taken as early as possible whether a matter should proceed under the Family Law Act or under child welfare law with the consequence that there should be only one court dealing with the matter.22

3.33 The Family Law Council described this approach as the ‘One Court principle’,23 although this idea of one court is more limited than that discussed above, involving a choice of jurisdiction rather than an amalgamation or expansion of jurisdiction. In 2009 the Council went further, recommending that:

The Attorney-General as a member of SCAG address the referral of powers to federal family courts so that in determining a parenting application federal family courts have concurrent jurisdiction with that of State Courts to deal with all matters in relation to children including where relevant family violence, child protection and parenting orders.24

3.34 The essence of this proposal is to expand the ability of federal family courts, allowing them to make child protection decisions. Due to the constitutional constraints discussed in Chapter 2, any expansion of federal jurisdiction would require: first, the referral of power to the Commonwealth; and secondly, the enactment of federal legislation pursuant to such referral. Child protection matters were not included in the referral of power that led to the introduction in 1995 of provisions in the Family Law Act applicable to ex-nuptial children as well as to children of marriages.25 To be given jurisdiction in relation to child protection decisions would require a further referral, followed by the amendment of the Family Law Act.

3.35 Such a proposal also raises issues of the extent of the powers that should be given to family courts under such federal legislation. Would they replace state children’s courts and deal with all child protection matters, or would there be only a limited reference of powers allowing a family court to give parental rights to a child protection agency in cases where there was no other suitable carer? The Family Law Council suggested ‘concurrent jurisdiction’, but the matter is a complicated one. What cannot be achieved is the specific goal of the flawed cross-vesting scheme—namely to give federal courts jurisdiction under state laws.

23 Ibid.
3.36 The benefits of a consolidation of jurisdiction, depending on the extent of any referral of powers, may be that:

- cases that involve both child protection issues and parenting issues could be dealt with in one court, perhaps accompanied by protection orders under federal law;
- for those families presenting in family courts, there would be greater seamlessness and accessibility—and safety.

3.37 Such a consolidation of jurisdiction would, however, have to meet a number of challenges, including that:

- family courts are federal and most services—including child protection and police—are at state level, with existing intersecting legislation and established processes between state law and state agencies;
- family courts would be making orders that affect the workload of state agencies—such as child protection agencies and the police;
- family courts and child protection agencies have different objectives and different focuses, and there may be a lack of trust as a consequence: the Commissions were told in consultations that child protection agencies, and other services providers, may not have full confidence in family courts to make decisions that they consider safe for children;
- there would still be a gap in the system, requiring some families to go to a family court for child protection and parenting issues and to magistrates courts for family violence protection orders and criminal prosecutions.

3.38 During this Inquiry the Commissions have heard of the difficulties that any referral of power would involve. As remarked by one Family Court judge during a cross-jurisdictional roundtable of judicial officers:

In an ideal world, the whole child protect ion and family violen ce jurisdiction should be national, under national legislation. Fe deral family courts would be the obvious courts to do this. However, this will not happen— it needs major constitutional change, a Commonwealth takeover of services and more resources.

3.39 However, the theoretical attractiveness of a ‘one court’ approach, at least with respect to family law and child protection, was endorsed by the Chief Justice of the Family Court, Diana Bryant, and the Chief Federal Magistrate, John Pascoe in their submission to this Inquiry:

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26 Described in Ch 19 as ‘different planets’ and by one stakeholder as ‘parallel universes’: Legal Aid NSW, Submission FV 219, 1 July 2010.

27 At present, family courts can make protective orders—injunctions—although there are difficulties in practice of state police enforcing these orders. To meet such concerns, the Commissions include recommendations for improving the effectiveness of injunctions for personal protection: see Ch 17.

One matter that requires detailed consideration is the feasibility of a unified family law and child protection system, whereby responsibility for private and public family law disputes lies with the federal government. It is appreciated that there are fundamental questions (including constitutional issues) associated with the adoption of such a system and a specific inquiry into unification would be warranted.  

3.40 Western Australia took a different approach from the other states by availing itself of the opportunity provided in the Family Law Act for the creation of a state family court exercising both federal and state jurisdiction. In a submission to this Inquiry, National Legal Aid suggested that the pilot scheme proposed in Western Australia to integrate family law and child protection cases in the state family court could be used as a pilot for the extension of the jurisdiction of the children’s courts in other states.

**Corresponding jurisdictions**

3.41 A further option, and the approach adopted in this Report, is to enable each existing court to provide as many solutions as possible, within the limits of practical reality and the constitutional division of powers. The underlying premise of this option is to work with the jurisdictions that presently exist and to make them more effective mirrors of the other. From the perspective of those who use the legal system, this approach maximises the likelihood that they can get all—or most—of the legal protections and services they need from the court they first approach, at least on an interim basis. The Commissions consider that this option is the most practical, and achievable, option for reforming legal frameworks to improve safety for those experiencing family violence, and is most likely to comply with the guiding principles identified above—provided that it is supported by the range of strategies included in the recommendations for reform throughout this Report.

**State and territory courts**

3.42 State and territory magistrates courts already deal with family violence orders, criminal matters and, in children’s courts, with child protection. They also have limited jurisdiction under the Family Law Act, including to revive, vary, discharge or suspend an existing parenting order or injunction, where it affects the time spent with a child. As noted in Chapter 2, such jurisdiction is conferred under s 77(iii) of the Australian Constitution and is a valid exercise of cross-vesting of jurisdiction from the Commonwealth. There is considerable experience and expertise, therefore, in dealing with a range of issues concerning family violence within the jurisdictional competence of state and territory magistrates courts.

3.43 It may therefore be that magistrates courts hold the best promise of providing ‘one court’ in practice, being able to deal with many legal issues raised for those

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30 Family Court Act 1975 (WA), replaced by Family Court Act 1997 (WA).
31 National Legal Aid, Submission FV 232, 15 July 2010.
33 Ibid s 68R.
experiencing family violence. Indeed, key recommendations in this Report suggest that specialist family violence divisions or lists should be established or developed in magistrates courts with the aim of providing as close to a ‘one stop shop’ as possible. Magistrates courts in some states already have such specialist lists or divisions and thus the recommendations of the Commission build on established practice. These issues are considered in detail in Chapter 32.

3.44 There are, however, many practical and legal problems that arise in making magistrates courts a ‘one stop shop’. For example, while magistrates courts presently have the ability to vary a parenting order, they do not have jurisdiction to make an order, unless by consent. The width of matters that magistrates must deal with already is very extensive, and adding family law to their workload adds to an already considerable burden. These issues are canvassed further in Chapter 17. The workload of magistrates courts is such that expanding the federal matters considered will not be manageable without increased resources and access to services. Increasing education, training and specialisation within magistrates courts, such as family violence lists and specialist magistrates, may address some concerns. Magistrates courts have the strongest geographical coverage of any court, but providing specialised services in rural and remote areas is a challenge. These issues are considered in detail in Chapter 32.

3.45 During the course of this Inquiry, the Commissions have heard that many magistrates are reluctant to use the family law powers they presently have, unless they have a practice background in family law. The width of matters that magistrates must deal with already is very extensive, and adding family law to their workload adds to an already considerable burden. These issues are canvassed further in Chapter 17. The workload of magistrates courts is such that expanding the federal matters considered will not be manageable without increased resources and access to services. Increasing education, training and specialisation within magistrates courts, such as family violence lists and specialist magistrates, may address some concerns. Magistrates courts have the strongest geographical coverage of any court, but providing specialised services in rural and remote areas is a challenge. These issues are considered in detail in Chapter 32.

3.46 If the practical issues are overcome—and these are considerable—the Commissions consider that expanding the jurisdiction of state and territory magistrates by permitting them to make parenting orders on an interim basis may go a long way to defusing one of the key issues in dispute—namely parenting—at the same time as responding to immediate concerns, as well as easing the way to the family court to deal with more long term issues. However the Commissions acknowledge that the case for making such a recommendation needs to be carefully put, given the work in this area by the Family Law Council in 2004, which led to the removal of the power to make ‘contact’ orders as they were then known in the context of family violence proceedings. This is considered in Chapter 17.

3.47 An associated issue is whether the jurisdiction of state and territory children’s courts should also be expanded. Unless children’s courts are courts of summary jurisdiction, they are not currently within the reach of the conferred Family Law Act jurisdiction. Would giving them such jurisdiction facilitate the idea of ‘one court’

34 Ibid s 69N.
35 For example: Family Court Brisbane, Consultation FVC 97, Brisbane, 20 April 2010.
38 Family Law Act 1975 (Cth) s 69J(1)
proposed in this Report? In Chapter 19 the Commissions consider that giving children’s courts power to hear parenting disputes may divert the courts’ resources away from their core business in the care side of their jurisdiction—determining the protection needs of children—to the detriment of their work. From this practical perspective it follows that the conferral of family law jurisdiction on children’s courts ought to be limited to situations where the jurisdiction of the children’s courts is otherwise invoked. Even in such cases it might be argued that the specialisation of children’s courts would be diluted by such additional jurisdiction. A further issue is how such expanded jurisdiction would articulate with the recommended specialist family violence lists or divisions in magistrates courts.

3.48 A further question concerns the exercise of criminal jurisdiction. This is not so much a matter of corresponding jurisdiction but one of improving interactions within existing state and territory frameworks and also supporting the use of specialised family violence lists in magistrates courts.

**Family courts**

3.49 What needs to be done in relation to family courts to improve the mirroring of jurisdiction anticipated in this option for reform? Given screening for family violence is ‘core business’ for federal family courts, an obvious area for reform is in relation to the ability of family courts to provide protection in response to safety concerns through appropriate family violence protection mechanisms in the *Family Law Act*.

3.50 State and territory courts would still consider most of the urgent protection order matters, as they are more accessible and cheaper than family courts and have established experience and expertise in relation to protection orders. However the Commissions consider that, where family court proceedings are on foot and family violence is disclosed or becomes an issue, the family courts ought to have the ability to provide protection as close as possible to that available in state and territory courts. To this end the Commissions recommend that the existing framework for protection orders in the *Family Law Act* be amended so that breach of such orders is a criminal offence—parallel to a breach of a state and territory family violence protection order. While the Commissions have heard that these are underutilised provisions, the mirror principle embodied in this option for reform requires that they operate as closely as possible to the protection provisions available under state and territory legislation.

**Focus of reform**

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

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3.52 The improvement of legal frameworks will be achieved through:

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

3.53 The improvement of practice will be achieved through:

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

3.54 The Commissions reiterate that the range of recommendations in this Report are presented as a whole and that—given they are limited to recommendations about improving legal frameworks—they can only go a small part of the way to responding to family violence. The recommendations are of application across the state, territory and federal spheres and implementation will depend not only on the willingness and support of all relevant governments, but also on the development of integrated, supportive and specialist law and practice.