

19. The Intersection of Child Protection and Family Laws

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Introduction

19.1 Cases that involve child protection issues commonly have contact with more than one court. There may be proceedings in criminal courts, children’s courts and family courts. The child and family may also have contact with numerous agencies, such as child protection agencies, police, health workers and others. It is the legal intersections that are the main focus of this chapter, but agencies such as child protection departments play a key role in legal interventions.

19.2 This part of the Report, Part E, focuses on child protection; in particular on issues that arise where child protection law intersects with family law and criminal law. This chapter examines the intersection of child protection and family laws. The following chapter, Chapter 20, examines the intersections of child protection legislation with criminal law.

19.3 The Terms of Reference engage issues of child protection and safety on a number of levels. The first term of reference focuses on the interaction in practice of a range of laws including child protection laws and the *Family Law Act 1975* (Cth), and child protection laws and relevant federal, state and territory criminal laws. The second term of reference focuses on sexual assault in the family violence context and the impact of inconsistent interpretation or application of laws, including rules of evidence, on victims of such violence. As noted in Chapter 1, in the case of children, the issue of sexual assault potentially brings together all the areas of law under consideration in this Inquiry. Sexual assault is considered in Part G of this Report.

19.4 In this chapter the issue of child protection is first defined and the relationship between child abuse and neglect and family violence is explored. The chapter outlines the development of child protection law and sets out the processes that occur when concerns about the safety of a child are raised.

Interconnectedness of family violence and child abuse

What is child abuse and neglect?

19.5 There is no consistent definition of child abuse within Australia that is used in all jurisdictions and by all professions work with children and families. Holzer and Bromfield give a useful definition of the broad concept of child abuse or maltreatment:

Maltreatment refers to non-accidental behaviour towards another person, which is outside the norms of conduct and entails a substantial risk of causing physical or emotional harm. Behaviours may be intentional or unintentional and include acts of omission and commission. Specifically abuse refers to acts of commission and neglect to acts of omission.¹

19.6 These authors note that, in practice, the terms ‘child abuse’ and ‘child neglect’ are used more frequently than the term ‘child maltreatment’.

19.7 A range of behaviours are generally included in child maltreatment. These include physical abuse, sexual abuse, emotional maltreatment (including psychological abuse) and neglect. Exposure of children to family violence is also a form of abuse and is now recognised as such in some legislation. More often, it is included in the category of emotional maltreatment,² but in some jurisdictions, exposure to family violence is a

1 P Holzer and L Bromfield, *National Child Protection Clearinghouse Resource Sheet No 12: Australian Legal Definitions—When is a Child in Need of Protection?* (2010), prepared for the Australian Institute of Family Studies, 1.

2 For example, in NSW, a child or young person is at risk of significant harm if they are living in a household where there have been incidents of domestic violence and, as a consequence, the child or young person is at risk of serious physical or psychological harm: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 23(1)(d). See also *Children and Young People Act 2008* (ACT) s 342. For a discussion of the different definitions in state and territory child protection laws of when a child is considered to be in need of care and protection, see P Holzer and L Bromfield, *National Child Protection Clearinghouse Resource Sheet No 12: Australian Legal Definitions—When is a Child in Need of Protection?* (2010), prepared for the Australian Institute of Family Studies.

category of abuse or harm in its own right.³ Evidence also suggests that children often experience more than one of the subtypes of abuse or maltreatment.⁴

19.8 The legal definition of child abuse, and the threshold that triggers a reporting duty or allows intervention to protect children, is different across jurisdictions. All jurisdictions substantiate situations where children have experienced significant harm from abuse and neglect through the actions of parents. Some jurisdictions also substantiate on the basis of the occurrence of an incident of abuse or neglect, independent of whether the child was harmed, and others substantiate on the basis of the child being at risk of harm occurring.⁵

19.9 As Dr Leah Bromfield and Prue Holzer note, whilst there are some areas of consistency, the thresholds vary depending on the extent of harm, or risk of harm, that is required (such as whether harm must be of a ‘serious’ or ‘significant’ nature) and whether the definition focuses on the *actions* of the abuser, or the *consequences* of the actions.⁶ For example, in South Australia a person should make a report to the relevant child protection authority when they ‘suspect on reasonable grounds that a child has been or is being abused or neglected’, whereas in NSW a person ‘who has reasonable grounds to suspect that a child or young person is ... at risk of significant harm’ may make a report to the child protection agency.⁷

19.10 Each year the Australian Institute of Health and Welfare (AIHW) undertakes a comprehensive review of state and territory child protection and support services.⁸ In the 2008–09 reporting period, the AIHW found that the number of children subject to a notification of child abuse or neglect, the number under care and protection orders and the number in out-of-home care all increased, and that Indigenous children were over-represented in all areas.⁹ In particular, the AIHW reported that there were 339,454 child protection notifications recorded nationally in 2008–09, which was an increase of almost 7% from the number of notifications recorded in 2007–08 (317,526 notifications), and a 34% increase on the number of notifications recorded in 2004–05 (252,831 notifications).¹⁰ The number of children in out-of-home care across Australia has doubled over the last decade—from 15,674 children in 1998–99 to 31,166 children in 2008–09.¹¹

3 *Children, Young Persons and Their Families Act 1997* (Tas) s 4(ba); *Care and Protection of Children Act 2007* (NT) s 15(2).

4 R Price-Robertson and L Bromfield, *National Child Protection Clearinghouse Resource Sheet No 6: What is Child Abuse and Neglect?* (2009), prepared for the Australian Institute of Family Studies, 2.

5 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, 3.

6 P Holzer and L Bromfield, *National Child Protection Clearinghouse Resource Sheet No 12: Australian Legal Definitions—When is a Child in Need of Protection?* (2010), prepared for the Australian Institute of Family Studies, 1.

7 *Children’s Protection Act 1993* (SA) s 11; *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 24.

8 The 2008–09 report is the 13th annual report.

9 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, vii.

10 *Ibid.*, 12–13.

11 *Ibid.*, 16.

19.11 A report published in 2010 by the NSW Department of Human Services, shows that 26.7% of all children in NSW under 18 years were ‘known to DOCS’ in June 2009—an increase of almost 7% since 2005.¹² The most frequently reported group were children aged under 12 months, including unborn children. High rates were also recorded for preschool aged children. The lowest reporting rates were for children aged over 14 years.¹³

19.12 Few reports made to child protection authorities are substantiated following an initial investigation. Of the 339,454 reports made across Australia in 2008–09, the AIHW found that 54,621 reports—or about 16%—were substantiated, which was a small decrease of 1% from the previous year.¹⁴ However, the rates of substantiation vary between the states and territories, and this partly reflects the different policies and approaches of individual jurisdictions to child protection matters.¹⁵

Family violence and child abuse and neglect

19.13 Studies suggest that between 12% and 23% of Australian children are exposed to family violence,¹⁶ but some research suggests the figure may be higher. For example, research conducted by the Victorian Department of Human Services found that over half of all child protection notifications that were investigated and subsequently substantiated in 2001–02 involved family violence.¹⁷ This reflects international research, which has put the figure for co-occurrence at between 30% and 50%.¹⁸

19.14 Children who live in families where there is intimate partner violence experience a number of negative outcomes, including post-traumatic stress disorder, depression, poor school performance, and higher rates of aggressive behaviour.¹⁹ Dr Lesley Laing notes that research is emerging that shows children’s safety is especially compromised in situations where there is both family violence and child abuse.²⁰ Children in such situations are at increased risk of developing health and

12 A Zhou, *Estimate of NSW Children Involved in the Child Welfare System* (2010), prepared for the Department of Community Services (NSW). See also National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), especially 16–21.

13 A Zhou, *Estimate of NSW Children Involved in the Child Welfare System* (2010), prepared for the Department of Community Services (NSW), 3.

14 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, 13.

15 *Ibid.*, 16.

16 R Price-Robertson, L Bromfield and S Vassallo, *The Prevalence of Child Abuse and Neglect* (2010), prepared for the Australian Institute of Family Studies, 4.

17 P Holzer and L Bromfield, *NCPASS Comparability of Child Protection Data: Project Report* (2008), prepared for the National Child Protection Clearinghouse, 19–20.

18 T Brown and R Alexander, *Child Abuse and Family Law: Understanding the Issues Facing Human Service and Legal Professionals* (2007), 101.

19 C Goddard and G Bedi, ‘Intimate Partner Violence and Child Abuse: A Child-Centred Perspective’ (2010) 19 *Child Abuse Review* 6.

20 Australian Domestic & Family Violence Clearinghouse, *Domestic Violence in the Context of Child Abuse and Neglect* (2003), 2. See also National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council’s Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), especially 40–42.

behavioural problems. These effects are likely to be more severe than for those exposed to only one of these forms of abuse, and can be played out in a number of ways:

the same perpetrator may be abusing both mother and children, probably the most common scenario; the children may be injured when ‘caught in the crossfire’ during incidents of adult domestic violence; children may experience neglect because of the impact of the violence, controlling behaviours and abuse on women’s physical and mental health; or children may be abused by a mother who is herself being abused.²¹

19.15 Family violence has also been shown to be a common factor among children who are victims of fatal assaults. The NSW Child Death Review Team notes that for children who died as a result of fatal assault in 2008, domestic violence was among the list of most common factors experienced on an ongoing basis prior to their death.²²

19.16 Child abuse is an element of family violence and family violence may be an important factor in child neglect. For the victims, it is therefore difficult to separate these experiences. In this chapter the term ‘child abuse’ is used to refer to acts of commission. However, the focus of this Inquiry is on family violence. The interlocking nature of family violence, child abuse and child neglect and the emotional harm to children of violence against a person who is caring for them, means that definitional precision in the use of these terms is not always possible.

19.17 Statistics of prevalence are also hard to disentangle because of variances in state and territory practices for recording notifications of child abuse.²³ In particular, some states and territories record exposure to family violence as a separate and distinct form of child abuse, whereas others include these cases within the category of emotional abuse and, consequently, notifications of exposure to family violence are not necessarily separately captured.

19.18 Further, family violence towards a parent may affect the ability of the victim to parent effectively. As a solicitor with the Central Australian Aboriginal Family Legal Unit commented in a submission to this Inquiry:

How can you separate violence towards a spouse from parenting issues without acknowledging the impact of violence on parenting?²⁴

19.19 Children and families are entering the child protection system with increasingly complex family circumstances.²⁵ In its submission to the Inquiry, the Children’s Court of NSW noted that, in its experience, where family violence is evident in care and protection matters that come before it, it is rarely a ‘stand-alone’ issue. In most care

21 Australian Domestic & Family Violence Clearinghouse, *Domestic Violence in the Context of Child Abuse and Neglect* (2003), 1–2.

22 NSW Child Death Review Team, *Annual Report 2008*, 120.

23 P Holzer and L Bromfield, *NCPASS Comparability of Child Protection Data: Project Report* (2008), prepared for the National Child Protection Clearinghouse, ch 11.

24 The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010.

25 P Holzer and L Bromfield, *NCPASS Comparability of Child Protection Data: Project Report* (2008), prepared for the National Child Protection Clearinghouse, 19–20.

and protection cases involving domestic violence, the Court stated, mental health problems and parental substance abuse are frequently related issues.²⁶

Legal intervention in child protection

19.20 This section of the chapter considers the development of state intervention in relation to children in need of care and protection, from the *parens patriae* jurisdiction to legislative schemes involving the establishment of specialist children's courts and, among other things, defining thresholds for state intervention. The chapter also considers the procedure for triggering state intervention, the impact of multiple jurisdictions and services, and factors that can exacerbate the tensions present in the legal system due to the differing objectives and purposes of child protection and family law.

Development of state intervention

19.21 The earliest legal interventions in relation to children in need of care and protection used the *parens patriae* jurisdiction. This jurisdiction to make orders and give directions in relation to the welfare of children was inherited from the Court of Chancery in England by the Supreme Courts of each state and territory.²⁷ However, beginning in the mid-19th century, state and territory governments legislated to secure the welfare of children by defining the circumstances in which children needed to be protected from neglect or abuse, and the ways in which young people might be treated as criminals.²⁸

19.22 Developments in child protection legislation were often motivated by revelations of cases of severe abuse or neglect, which spurred child welfare activists in the late 1800s and early 1900s to form rights and advocacy bodies, including societies for the prevention of cruelty to children.²⁹

19.23 Starting with South Australia in 1890 and including all states by 1918, dedicated children's courts were established throughout Australia.³⁰ Children's courts had two principal functions: child care and protection; and exclusive jurisdiction with respect to child offenders. They were required to sit separately, either in specially designated premises, or by arranging for segregated court time, when other business was not being transacted.³¹ By the 1970s all states and territories had introduced legislation to protect

26 Children's Court of New South Wales, *Submission FV 237*, 22 July 2010. See also the discussion of compounding factors in Ch 1.

27 A Dickey, *Family Law* (5th ed, 2007), 287. For a fuller discussion of the historical background, see A Dickey, *Family Law* (4th ed, 2002), 389.

28 G Monahan and L Young (eds), *Children and the Law in Australia* (2008), at [1.11] trace the ten principal Acts passed in Victoria over 90 years, from 1864 to 1933.

29 B Mathews, 'Protecting Children from Abuse and Neglect' in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 204, [10.5].

30 Seymour details the legislation establishing the first children's courts: J Seymour, *Dealing with Young Offenders* (1988), 76–87.

31 *Ibid.*, 83.

children.³² The evolution of the child protection system has included numerous reviews of child protection services.³³

19.24 A recurring theme concerns when it is appropriate for the state to intervene and the appropriate role of child protection services:

According to a public health model of disease prevention, tertiary services are one platform in a well functioning service system. The public health model is comprised of three service platforms: primary services, secondary services, and tertiary services. This model can also be used in a child protection context. Primary services provide services for all children (eg, education and health). Secondary services are targeted at families at higher risk or in need of additional support. Tertiary child protection services are a last resort, and the least desirable option for families or the state. Families that require a tertiary response to ensure the safety of their children form the ‘tip of the iceberg’. Consequently, the primary and secondary service domains are larger than the tertiary domain representing the need for more services in these areas.³⁴

19.25 The legal system will become involved through child protection legislation and criminal law in relation to the ‘tertiary domain’. However family courts make decisions in relation to children from all domains.

Child protection interventions and procedures

19.26 As noted above, each state and territory has its own system of child protection laws and supporting agencies. These laws are invoked by the state when parents are determined to be insufficiently protective of a child. In each jurisdiction there are thresholds for intervention by child protection authorities to protect children and to assist parents and families.³⁵ The 2008–09 report on child protection in Australia by the AIHW reported that while ‘the processes used to protect children are broadly similar’,³⁶ there are ‘significant differences’ in how jurisdictions deal with and report child protection issues.³⁷ Keeping in mind such differences, a broad description of the way in which child protection agencies engage with families is set out below.

32 The current legislation is: *Children and Young Persons (Care and Protection) Act 1998* (NSW); *Children, Youth and Families Act 2005* (Vic); *Child Protection Act 1999* (Qld); *Children and Community Services Act 2004* (WA); *Children’s Protection Act 1993* (SA); *Children, Young Persons and Their Families Act 1997* (Tas); *Children and Young People Act 2008* (ACT); *Care and Protection of Children Act 2007* (NT).

33 See J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008); Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Little Children are Sacred: Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007); Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009). The Victorian Law Reform Commission has also recently submitted to the Attorney-General a review of Victoria’s child protection legislative arrangements.

34 L Bromfield and P Holzer, *Protecting Australian Children* (2008), 4.

35 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, ch 1. See also B Mathews, ‘Protecting Children from Abuse and Neglect’ in G Monahan and L Young (eds), *Children and the Law in Australia* (2008) 204.

36 Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, 1.

37 *Ibid.*, 1. Appendix 4 of the report provides extracts from the relevant legislation of the ‘in need of care and protection’ threshold.

19.27 Child protection intervention is triggered first by a report of concern to a child protection or support service. Reports could come from community members, professionals, organisations, the child, parents or relatives, and may relate to abuse and neglect or ‘broader family concerns such as economic problems or social isolation’.³⁸ Reports are then assessed against the relevant criteria and classified either as a family support issue or warranting a child protection intervention.

19.28 An investigation involves an assessment of the degree of harm or risk of harm for the child and will either be ‘substantiated’ or ‘not substantiated’ and the assessment questions may differ according to the relevant jurisdiction.

19.29 The relevant child protection agency may apply to the court in each jurisdiction for a care and protection order, but such action is usually taken ‘only as a last resort in situations where the child protection agency believes that continued involvement with the child is warranted’.³⁹ Although the law may affect all of the steps in the process, an application to a children’s court is only contemplated at the end of a series of interventions and decisions and in relation to only a small percentage of cases.

19.30 Some notifications may also give rise to prosecutions, as considered in Chapter 20. The police and director of public prosecutions in the relevant jurisdiction may be involved in making an assessment of whether a matter should proceed further down the criminal justice pathway. If not, the matter falls back within the overall umbrella of child protection concerns.

19.31 At the same time as care proceedings are being contemplated or dealt with in state and territory children’s courts, there may also be applications in federal family courts for parenting orders. Criminal proceedings in relation to the same experiences of violence or abuse may also be pursued in state criminal courts. Related applications for protection orders may also be made, generally in state magistrates’ courts. Child protection cases may therefore potentially present themselves in three different jurisdictions.

The impact of multiple jurisdictions and services

19.32 That families may be involved in proceedings in more than one jurisdiction is a recurring theme of the interactions under review in this Inquiry. The need to go to multiple courts increases the possibility of inconsistent orders, and the possibility that people will drop out of the system without the protections they need, thus putting them at risk of further violence and abuse. It also increases costs and stress on families at a very difficult time. Children in particular may find the uncertainty and delay difficult to handle. One nine year-old child said:

38 Ibid, 2.

39 Ibid.

I felt worried that mum was going to go back and forth and back and forth and it wasn't going to stop ... [I felt] freaked out, I couldn't get to sleep, I had nightmares, I was crying a lot ... [It was just all] horrible and frightening.⁴⁰

19.33 Repeated contact with different parts of the legal and service systems may also require women and children who are the targets of violence to have to tell their story repeatedly. A 13 year-old described this problem as follows:

[The assessment session] was frustrating. Because every time it was banging your head against a brick wall. You always go back to the way it was. Like we were stuck there. Like another person wants to see it again ... we had already done that ... We had to go through it all again, which is crap.⁴¹

19.34 As explained in Chapter 2, there is a division of jurisdiction in Australia between states and territories as administrators of the public domains of criminal and child protection laws, and the federal family courts as adjudicators of private law disputes. Inadequate communication, coordination or information sharing between courts and child protection agencies has been identified as a critical problem.⁴²

19.35 The tensions between different parts of the system have been attributed to the different cultures and histories of the different parts of the system. In the United Kingdom, Professor Marianne Hester refers to the three 'planets' of domestic violence, child protection and parenting orders:

Domestic violence work in the UK (and many other countries) has been influenced by feminist understanding of domestic violence as gender based, and tends to see the problem as (mainly) male perpetrators impacting on (mainly) female victims or survivors. The work of child protection services in the UK has a very different history to that of domestic violence, with the family, and in particular 'dysfunctional' families, as central to the problem. Within this approach the focus is on the child and her or his main carer, usually the mother. These structural factors, with domestic violence and child protection work on different 'planets', have made it especially difficult to integrate practice, and have resulted in child protection work where there is a tendency to see mothers as failing to protect their children rather than as the victims of domestic violence, and where violent male perpetrators are often ignored. These difficulties are made even more complex where both child protection and arrangements for child visitation post separation of the parents intersect. Within the context of divorce proceedings, mothers must be perceived as proactively encouraging child contact and must *not* be attempting to 'aggressively protect' their children from the direct or indirect abuse of a violent father. The child protection and child visitation/contact planets thus create further contradictions for mothers and children: there may be an expectation that mothers should protect their children, but at the same time, formally constituted arrangements for visitation may be implemented that do not

40 A Hay, 'Child Protection and the Family Court of Western Australia: The Experiences of Children and Protective Parents' (Paper presented at Child Sexual Abuse: Justice Response or Alternative Resolution Conference, Adelaide, 1-2 May 2003), 11.

41 *Ibid.*, 10.

42 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 60.

adequately take into account that in some instances mothers and/or children may experience further abuse.⁴³

19.36 An Australian study, conducted by Drs Heather Douglas and Tamara Walsh of the University of Queensland, argues that the competing discourses of child protection and family violence create difficult dilemmas for women.⁴⁴ They argue that there is:

- the ‘interpersonal conflict’ misunderstanding—failing to recognise the particular dynamics associated with family violence, with ‘ramifications for the way in which child protection workers respond to abused mothers and their children’;⁴⁵
- the ‘protective parent’ dilemma—if a mother is not perceived as acting protectively, she may be seen as ‘part of the reason for the dangerous environment’ and the removal of children from her care becomes more likely;⁴⁶
- ‘the mother is to blame’ phenomenon—the focus of child protection authorities is on the woman and her capacity to protect the children, and not on the father’s ‘capacity to cease using violent or abusive behaviour’;⁴⁷ and
- the ‘leave’ ultimatum—move to ‘accommodation away from the domestic violence perpetrator and continue to care for the children, or stay with their abuser and lose the children’.⁴⁸

19.37 It is apparent from the discussion above that the fragmented nature of the system for dealing with child protection and family violence can create difficult problems for the families who must use the system. The system may make sense to those who work within it, but those who use it can find it confusing and intimidating.

Exacerbating factors

19.38 The tensions present in the legal system may be mediated or exacerbated for some women by their identities, histories or experiences. For example, the Commissions have heard of the particular difficulties that arise for women with intellectual disabilities in accessing services and asserting their capacity to parent.⁴⁹

19.39 Indigenous women are likely to approach the legal system with particular concerns arising from the history of the ‘stolen generation’ and the fear of their children being taken from them:

For many Aboriginal people, the intervention of child protection services is a common experience that often goes back several generations. Recently it was reported that

43 M Hester, ‘Commentary on H Douglas and T Walsh, “Mothers, Domestic Violence and Child Protection”’ (2010) 16 *Violence Against Women* 516, 517.

44 H Douglas and T Walsh, ‘Mothers, Domestic Violence and Child Protection’ (2010) 16 *Violence Against Women* 489.

45 *Ibid.*, 492.

46 *Ibid.*, 492–3.

47 *Ibid.*, 493–5.

48 *Ibid.*, 496–7. This is described by the authors as a ‘binary ultimatum to stay or leave’, which, without significant support, ‘misunderstands the complexity of many mothers’ situations’: 499.

49 S Seymour, *Australian Law Reform Commission Family Violence Inquiry—Case Studies Contribution*, 2 January 2010, 4.

child protection workers in Australia have begun removing the fifth generation of Aboriginal children from their parents, meaning that some Aboriginal families have an eighty year history of child protection intervention. ... Many scholars have observed that as a result of the intersecting factors of poverty, race and gender, Aboriginal women, and women who are recent immigrants, are particularly disadvantaged and discriminated against in their engagements with institutional processes.⁵⁰

19.40 Migrant women report that they find using courts difficult. Their lack of knowledge of the Australian legal and cultural system, in addition to any language barriers, adds to the difficulties:

In my country I was studying. My family are educated ... all of them. But here, I knew nothing ... how to catch a bus, how to pay a bill ... and I knew no-one else. And he used my ignorance as my chains.⁵¹

19.41 They are likely to find going to court an intimidating experience:

[F]inally, with the help of different agencies, I went to the court, and I got a restraining order. It was probably as frightening as it was being in my marriage.⁵²

19.42 They may also find the child protection system in Australia mystifying:

I did not understand why this happened. My husband, he beats me, and now my children are gone. Why did this happen. No one told me.⁵³

19.43 Such experiences were also strongly echoed in submissions made to this Inquiry.⁵⁴

50 H Douglas and T Walsh, 'Mothers, Domestic Violence and Child Protection' (2010) 16 *Violence Against Women* 489, 500 (citations omitted).

51 Women's Council for Domestic and Family Violence Services (WA), *HURT Project: The Shame of Domestic and Family Violence in Australia* <<http://www.hurt.net.au>> at 30 July 2010.

52 Ibid.

53 M Dimopoulos, *Protection Applications in the Children's Court: Report of Consultations with New and Emerging Communities* (2010) prepared by MyriaD Consultants for the Victorian Law Reform Commission, 23. See also National Council to Reduce Violence against Women and their Children, *Background Paper to Time for Action: The National Council's Plan to Reduce Violence against Women and their Children, 2009–2021* (2009), 30–35.

54 For example, in relation to Indigenous women: Women's Legal Service Brisbane, *Submission FV 223*, 2 July 2010; North Australian Aboriginal Justice Agency, *Submission FV 194*, 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179*, 25 June 2010; Women's Legal Centre (ACT & Region) Inc, *Submission FV 175*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149*, 25 June 2010; Shoalcoast Community Legal Centre, *Submission FV 141*, 24 June 2010. In relation to women with disability: Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women With Disabilities Australia, *Submission FV 143*, 24 June 2010; Women Working Alongside Women with Intellectual and Learning Disabilities Sexual Violence Prevention Association, *Submission FV 140*, 24 June 2010; Disability Services Commission (WA), *Submission FV 138*, 23 June 2010; J Fletcher, *Submission FV 01*, 27 July 2009. In relation to immigrant women: Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; Women's Legal Service Brisbane, *Submission FV 223*, 2 July 2010; Women's House Shelta, *Submission FV 139*, 23 June 2010; Migrant Women's Emergency Support Service trading as Immigrant Women's Support Service, *Submission FV 61*, 1 June 2010; Confidential, *Submission FV 48*, 22 May 2010; P Easteal, *Submission FV 39*, 14 May 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 18*, 13 January 2010; Confidential, *Submission FV 15*, 11 November 2009. Similar concerns were raised in relation to lesbian, bisexual, transgender or intersex women: ACON, *Submission FV 119*,

Previous and current reviews

19.44 The need for review of the intersections of child protection laws, family laws and criminal laws is apparent from the discussion above. This Report is by no means the only review of these problems. The interactions between the family law and child protection systems have been addressed by the Family Law Council in 2002⁵⁵ and in 2009;⁵⁶ by the ALRC and the then Human Rights and Equal Opportunity Commission (HREOC) in the report, *Seen and Heard: Priority for Children in the Legal Process* (ALRC Report 84),⁵⁷ and by Professor Richard Chisholm's *Family Courts Violence Review* (Chisholm Review).⁵⁸

19.45 Reviews of specific state and territory child protection systems have also raised practical interaction issues in the context of evaluating the functions of child protection agencies.⁵⁹ The problems have also been identified and discussed by government committees,⁶⁰ in academic articles and studies⁶¹ and in judicial decisions.⁶² Both the Council of Australian Governments and the Standing Committee of Attorneys-General (SCAG) are also considering issues relating to child protection, and improvements that can be made at a national level to the way government agencies and courts deal with these issues.⁶³

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

55 Family Law Council, *Family Law and Child Protection: Final Report* (2002).

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

57 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), ch 15.

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

59 For example, Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009); J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008).

60 Family Law Pathways Advisory Group, *Out of the Maze: Pathways to the Future for Families Experiencing Separation* (2001), 75; House of Representatives Standing Committee on Family and Community Affairs—Parliament of Australia, *Every Picture Tells a Story: Report on the Inquiry into Child Custody Arrangements in the Event of Family Separation* (2003).

61 See, eg, F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38; T Brown, M Frederico, L Hewitt and R Sheehan, *Problems and Solutions in the Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia* (1998); J Seymour, 'The Role of the Family Court of Australia in Child Welfare Matters' (1992) 21 *Federal Law Review* 1.

62 See, eg, *Re Karen* (1995) 19 Fam LR 528.

63 Council of Australian Governments, *Protecting Children is Everyone's Business: A National Framework for Protecting Australia's Children 2009–2020* (2009); R McClelland (Attorney-General), *Family Violence in Focus Conference [Opening Address]*, (2009) <www.attorneygeneral.gov.au> at 31 July 2010. The VLRC is currently reviewing child protection applications in the Family Division of the Children's Court; Victorian Law Reform Commission, *Review of Victoria's Child Protection Legislative Arrangements: Information Paper* (2010).

The relationship between family law and child protection law

19.46 The *Family Law Act* and state and territory child protection legislation both enable courts to make orders regulating and displacing parental responsibility for children. The *Family Law Act* is generally invoked when there is a dispute between parents. However, any person who is concerned with the wellbeing of a child can apply for a parenting order under the *Family Law Act*.⁶⁴ A parenting order made by a court under pt VII of the *Family Law Act* can stipulate the content of the parties' parental responsibilities to a very broad extent,⁶⁵ and typically determines where the child will live and how much time he or she will spend with each parent.

19.47 It is common for child protection concerns to be raised in an application under the *Family Law Act*. In 2007, a study of 300 court files involving parenting disputes from three registries of the Family Court and the Federal Magistrates Court revealed that allegations of child abuse were raised in between 19% to 50% of all cases: and more than half of the cases in the sample involved allegations of family violence, many at the severe end of the spectrum.⁶⁶

19.48 While child protection concerns may arise in parenting matters in federal family courts, child protection proceedings are usually brought under state and territory laws and determine whether a child is in need of care or protection. They are almost always initiated by a child protection agency.⁶⁷ A range of care and protection orders may be made, allocating parental responsibility for a child, including determining where a child will live and who can have contact with that child. Orders that can be made include:

- orders giving parental responsibility and care to the relevant minister or child protection department;
- orders giving parental responsibility and care to relatives or other appropriate people;
- orders giving shared parental responsibility to the parents and the minister or child protection agency;

64 *Family Law Act 1975* (Cth) s 65C. See also *KAM & MJR* [1998] FamCA, in which Justice Burr found that any person may file an application for a parenting order, but to be granted such an order the person must demonstrate a 'concern with' the care, welfare and development of the child. The required degree of that nexus depends on the facts of the case.

65 A Dickey, *Family Law* (5th ed, 2007), 257.

66 L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children's Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies. The variance between the figures for allegations of abuse arises because the study examined two samples, general litigants and judicial determinations in both the Federal Magistrates Court and the Family Court of Australia. The largest figure, 50%, relates to judicially determined matters in the Family Court of Australia.

67 In the ACT, someone other than the chief executive may apply for a protection order with the leave of the Court: *Children and Young People Act 2008* (ACT) s 425. Protection applications in Victoria may be made by the Secretary, or by a member of the police force: *Children, Youth and Families Act 2005* (Vic) ss 181, 240(1), 240(3), 243.

- orders for supervision by the department, with or without undertakings;
- undertakings or recognisances by parents or children, with no further supervision; and
- orders in relation to contact arrangements.⁶⁸

19.49 The same families could be involved in both child protection and family law proceedings and there could be conflicting orders. Section 109 of the *Australian Constitution* provides that when a law of a state is inconsistent with a law of the Commonwealth, the latter shall prevail, and the state law shall, to the extent of the inconsistency, be invalid. However, as noted in Chapter 2, in the case of child protection legislation, the federal *Family Law Act* defers to orders under state legislation because the Commonwealth parliament does not have legislative competence in relation to such matters. Section 69ZK(1) of the *Family Law Act* provides that a court having jurisdiction under the Act must not make any order under the Act (other than a child maintenance order) in relation to a child who is under the care of a person pursuant to a state or territory child welfare law,⁶⁹ unless:

- (a) the order is expressed to come into effect when the child ceases to be under care; or
- (b) the order is made in proceedings relating to the child in respect of whom the written consent of a child welfare officer of the relevant state or territory has been obtained.

19.50 A ‘child welfare law’ is any law of a state or territory that relates to the incarceration of a child for a criminal offence,⁷⁰ as well as any law listed in sch 5 of the *Family Law Regulations 1984* (Cth). Schedule 5 sets out 38 state and territory laws, including those dealing with child protection.⁷¹ Because the circumstances of children and families are highly likely to change over time, the usual course is for the family courts not to make an order of the kind referred to in s 67ZK(1)(a) but to terminate or adjourn any proceedings of federal family courts for the period of the child’s care under child protection laws.⁷² Section 69ZK(2) confirms that state and territory courts may make child protection orders, including where a parenting order is in place under

68 These orders may not be available in all jurisdictions, and some may be differently named: Australian Institute of Health and Welfare, *Child Protection Australia 2008–09*, 88–91.

69 The child must be under care, not simply the subject of ‘concern’ or ‘known’ to the relevant child protection agency: *R v Lambert* (1980) 146 CLR 447.

70 *Family Law Act 1975* (Cth) s 4; *Family Law Regulations 1984* (Cth) reg 12B(1).

71 It appears that some relevant legislation from a number of jurisdictions has not been prescribed as required by *Family Law Act 1975* (Cth) s 4; *Family Law Regulations 1984* (Cth) reg 12B(2), sch 5. See also *Acts Interpretation Act 1901* (Cth) s 10. The Commissions note that as at 30 July 2010, the list of prescribed laws incorrectly prescribes: (item 6) *Children and Young Persons Act 1989* (Vic), rather than the *Children, Youth and Families Act 2005* (Vic); (item 28) *Community Welfare Act 1983* (NT), rather than the *Care and Protection of Children Act 2007* (NT); (item 32) *Children and Young People Act 1999* (ACT), rather than the *Children and Young People Act 2008* (ACT).

72 R Chisholm, *The Child Protection–Family Law Interface* (2009), 25.

the *Family Law Act*, and, in such cases, the child protection order prevails over the *Family Law Act* order so long as it is in force.⁷³

19.51 However these provisions only define the relationship between orders of children's courts and family courts. Other difficulties arise in practice. When proceedings are commenced, it is not always possible for child protection workers, family members or lawyers to predict which is the most appropriate court to make the decision about whom a child should live with and spend time with. Proceedings in children's courts are almost always instigated by child protection agencies, whereas proceedings in family courts are instigated by a parent, or another person concerned with the wellbeing of a child. Some cases involving child abuse may therefore commence in a family court—a court that does not have the capacity to investigate child abuse and may not have the power to make the order that is needed. Some cases may commence in a children's court, but after investigation and intervention by a child protection agency and a decision that the state does not need to intervene, there remains a need to determine which parent a child should live with, and whether he or she should spend time with the other parent. Some children may be the subject of proceedings in both courts.

19.52 There are three main issues that arise from this jurisdictional tangle:

- family courts and their relationship with child protection agencies;
- the power of children's courts to make parenting orders; and
- the problem of duplication of proceedings, with families in both courts.

Family courts and their relationship with child protection agencies

19.53 Proceedings may commence in the family courts, and allegations of family violence, including abuse of a child, or neglect of a child, may be made in those proceedings. While most family law disputes are resolved by negotiation or family dispute resolution (FDR), a significant number of those cases that go on to be tried in the family courts raise child protection concerns.⁷⁴ However, whilst children's courts rely on state child protection agencies to investigate allegations of child abuse and neglect, family courts do not have a mechanism to investigate allegations of child abuse. They rely upon the parties, independent children's lawyers, family consultants and state child protection agencies to provide them with information to make a decision about children who are at risk. The relationship between family courts and state agencies in this regard has not always been mutually satisfying. Further, it has sometimes appeared to a judicial officer in a family court that the only available option

73 In Western Australia and South Australia, the provision in s 69ZK(1) enabling a child welfare officer to give consent to proceedings is inoperative until a relevant proclamation is made under s 69ZF: see A Dickey, *Family Law* (5th ed, 2007), 276.

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

for a child is to give parental rights to a state child protection agency, although there is no clear statutory power to do so.⁷⁵

19.54 In this section, the legal relationship between family courts and child protection agencies will be considered, followed by a summary of the challenges of working together and an identification of some of the gaps in the system and proposals for closing them.

The legal relationship

19.55 Family courts have obligations—discussed below—to inform child protection agencies about allegations of child abuse made in the context of family law proceedings. For evidence about that abuse and its impact on the children, they rely on a number of sources. One source is obviously the parties, but they are often engaged in allegations and counter-allegations or denials about violence. Information from independent sources, such as child protection agencies, independent children’s lawyers, and family consultants is of particular importance.

19.56 A child protection agency may already have relevant information on its own file, such as reports, risk assessments or expert reports. In other cases the agency may only have a record of notification of suspected abuse, but no other information. For example, it may have taken no action in relation to that notification because the notification does not reveal abuse at a level to justify the allocation of resources for a response. In other cases the issue of abuse may be raised for the first time in a family court so that the child protection agency has no record of the child.

19.57 The legal relationship between child protection agencies and family courts is provided for in the *Family Law Act*, which contains two provisions obliging family courts to notify child protection agencies of child abuse in certain circumstances. First, s 67Z provides that if a ‘Notice of Child Abuse or Family Violence’ (Form 4) is filed, the Registry Manager of the court must ‘as soon as practicable, notify a prescribed child welfare authority’.⁷⁶ Secondly, under s 67ZA(2) where an officer or professional in a family court has reasonable grounds for suspecting that a child has been abused, or is at risk of being abused, the person must, as soon as practicable, notify a prescribed child welfare authority of his or her suspicion and the basis for the suspicion.⁷⁷ Section 67ZA(3) provides that a person may—rather than must—notify the relevant child protection agency where the person has reasonable grounds for suspecting that a child has been ill treated, or is at risk of being ill treated; or has been exposed, or subjected, or is at risk of being exposed or subjected, to behaviour which

75 The case of *Ray v Males* [2009] FamCA holds that the court does have such a power. That case has been appealed and the judgment is reserved at the time of writing. The case is discussed further below.

76 *Family Law Act 1975* (Cth) s 67Z(3). ‘Registry Manager’ is defined in s 67Z(4) to mean: (a) in relation to the Family Court—the Registry Manager of the Registry of the Court; and (b) in relation to the Family Court of Western Australia—the Principal Registrar, a Registrar or a Deputy Registrar, of the court; and (c) in relation to any other court—the principal officer of that court’. Chisholm notes that this requires notification ‘whether or not there is plausible supporting evidence’: R Chisholm, *The Child Protection–Family Law Interface* (2009), 23.

77 *Family Law Act 1975* (Cth) s 67ZA(2). Section 67ZA(1) sets out the list of relevant court staff and professionals affected by the obligation.

psychologically harms the child.⁷⁸ The Chisholm Review suggested that, while notifications by the court are mandatory under s 67Z, the effect of a notice under that section appears to have less weight than notifications by professionals under s 67ZA of the *Family Law Act* when it comes to a child protection agency deciding whether to investigate an allegation.⁷⁹

19.58 There are provisions in the *Family Law Act* that allow family courts to obtain information from child protection agencies. A family court can make an order under s 69ZW in child-related proceedings requiring a prescribed state or territory agency to provide the court with documents or information, including notifications of suspected abuse, assessments and reports. Family courts can also acquire documents by issuing subpoenas under pt 15.3 of the *Family Law Rules*. For further discussion about these information-sharing provisions, see Chapter 30.

19.59 The *Family Law Act* also contains provisions concerning parties who intervene in proceedings. Section 92 sets out the general rule that, apart from proceedings for divorce or validity of marriage, ‘any person may apply for leave to intervene’.⁸⁰ Sections 91B and 92A specifically address intervention where child maltreatment concerns arise. By virtue of s 92A, a prescribed welfare authority is entitled to intervene in proceedings where it is alleged that a child has been abused or is at risk of being abused. Section 91B enables a family court to request intervention by a child protection officer in a matter involving a child’s welfare. An officer who agrees to intervene is deemed to be a party to the proceedings. An officer may also decline to intervene.⁸¹ The combined effect of these provisions is that a child protection agency is entitled to intervene where child abuse, or a risk of it, is alleged; may request to intervene; or be requested to intervene. In all cases, once a child protection agency intervenes, it is, ‘unless the court otherwise orders, to be taken to be a party to the proceedings with all the rights, duties and liabilities of a party’.⁸² This includes potential liability for costs orders.

19.60 There is no express power in the *Family Law Act* for the courts to compel a child protection agency to intervene. However, in *Ray v Males*,⁸³ Benjamin J concluded that the court can allocate parental responsibility to a child protection agency even if that agency does not consent, and where it proposes to do so, it has the power to join the agency as a party to the proceedings.

19.61 In that case allegations of abuse were made in relation to two children. Benjamin J was concerned that no parent or other person would be found to be a viable parent for one or both of the children. The Secretary of the Department of Health and Human Services, Tasmania, had been invited—under s 91B—to join the proceedings, but had declined to intervene. Further, the Department did not consent to accept

78 Ibid s 67ZA(3). If the relevant person is aware that the authority has previously been notified about the abuse or risk in either case, the person need not notify, but may still do so: s 67ZA(4).

79 R Chisholm, *The Child Protection–Family Law Interface* (2009), 23.

80 *Family Law Act 1975* (Cth) s 92(1).

81 Ibid s 91B(2).

82 Ibid s 92A(3).

83 *Ray v Males* [2009] FamCA.

parental responsibility in relation to the children. Benjamin J considered whether or not he had the power to join the Secretary and whether or not he had the power to make parenting or other orders that would bind the Secretary. He found that it was within the scope of his powers to join a party and that he had the power to make an order imposing parental responsibility on the Secretary when, in his view, there were no other alternatives.

19.62 This decision has been appealed to the Full Court of the Family Court and, at the time of writing, judgment is reserved. If the first instance decision in this case is upheld on appeal, it may be that family courts will, in future, join child protection agencies in cases where they are concerned that there will be no viable parent and they wish to allocate parental rights to the child protection agency.

The challenges of working together

19.63 There are a number of concerns about the operation in practice of the provisions outlined above. Family courts may not be satisfied with the response of child protection agencies to notifications of child abuse by the courts or invitations to participate as witnesses or parties in family law proceedings. For example, in 2009 in *Denny & Purdy*, Burr J commented that requests for information or for the relevant department to intervene were frequently met with refusal.⁸⁴ In *Ray v Males*,⁸⁵ noted above, a request was made by a family court under s 91B for the child protection agency to intervene, but the agency decided that it did not wish to do so, despite the concern of the judge that there may be no viable parent.

19.64 To ameliorate these problems, family courts, child protection agencies and other agencies have developed agreed, coordinated responses to child protection cases that seek to ensure the court has the evidence it needs to make decisions. For example, the ‘Magellan’ case management program applies to serious cases of child abuse in the Family Court of Australia. It relies on non-statutory regulation, such as case management rules and memorandums of understanding (MOU), which create agreed ways of collaborating in serious child abuse cases. Formal and informal agreements about information sharing may also result in arrangements between courts and child protection agencies, designed to ensure that courts have evidence they need from child protection agencies. These information sharing issues are discussed further in Chapter 30.

19.65 Despite such initiatives, it appears that some problems remain. Important to an understanding of these problems are the different cultural and legislative frameworks within which family courts and child protection agencies work, and which drive different responses to child abuse.

19.66 These differences were the subject of comment in the Wood Inquiry into child protection services in NSW.⁸⁶ Whilst a family court might notify the relevant child

84 *Denny & Purdy* [2009] FamCA, [34].

85 *Ray v Males* [2009] FamCA (discussed further below).

86 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), 548–549.

protection agency of allegations of child abuse and anticipate that the agency will investigate and be prepared to provide information and evidence for the court, there are a number of valid reasons why that agency may not take the steps the court desires.

19.67 First, the report may not be judged sufficiently serious to justify intervention. Under the *Family Law Act*, the threshold for making a notification is a suspicion, based on reasonable grounds, that the child to whom the proceedings relate has been abused or is at risk of being abused.⁸⁷ Under child protection legislation, the standard is generally higher—for example, in NSW it is risk of significant harm.⁸⁸ There may therefore be different legal and cultural practices and understandings about the appropriate threshold for intervention between family courts and child protection agencies.

19.68 In consultations during this Inquiry, judicial officers and staff in family courts demonstrated a very strong commitment to protecting children in child abuse cases—cases they described as the worst and most difficult cases they deal with. Consultations with child protection agencies, children’s courts and practitioners experienced in both jurisdictions provided a different perspective in which family court cases are not the most difficult cases. There is often some capacity to protect the child if appropriate orders are made: there may be a viable carer and/or some resources of money, stability or emotional capacity to parent. The most difficult and most deserving of cases are those in the children’s courts which are brought because the child protection agency believes that the capacity to keep the child safe is not present in the family.

19.69 Cases such as *Ray v Males*, where there is a concern that there is no viable or protective parent, would appear to be better dealt with, from start to finish, in a children’s court, because it is that court which has the power to allocate parental responsibility to a child protection agency. The responsibility for taking action in a children’s court lies with a child protection agency. The first possible reason why the agency does not intervene and apply to the children’s court is likely to be that there is a difference of perspective between the family court and the child protection agency about the risk to the child and the viability and safety of other options for the child’s care.

87 *Family Law Act 1975* (Cth) s 67ZA(2). Section 67ZA(3) permits (but does not mandate) notification where a person suspects, on reasonable grounds, ill treatment or exposure to behaviour which would cause psychological harm. Section 67Z requires notification where a party raises an allegation of abuse.

88 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 30(b): a child will only be at risk of significant harm if current concerns exist for the safety, welfare or wellbeing of the child (s 23). In the ACT, emotional abuse will only constitute ‘abuse’ under the Act if it has caused or will cause significant harm to a child’s wellbeing or development: *Children and Young People Act 2008* (ACT) s 342. In Victoria, a child is in need of protection if the child has suffered or is likely to suffer significant harm from physical or sexual abuse, or suffer significant damage to their emotional or intellectual development as a result of emotional or psychological harm: *Children, Youth and Families Act 2005* (Vic) s 162. In the Northern Territory, a child is in need of care and protection if the child has suffered or is likely to suffer harm. Harm is an act, omission or circumstance causing a significant detrimental effect on a child’s wellbeing: *Care and Protection of Children Act 2007* (NT) ss 15, 20. In Western Australia, a child is in need of protection if the child has suffered or is likely to suffer harm as a result of abuse. Harm means a detrimental effect of a significant nature on a child’s wellbeing: *Children and Community Services Act 2004* (WA) s 28.

19.70 Secondly, a child protection agency may choose not to act because the information provided by the person who notifies the abuse may not disclose sufficient reason to believe the child is at risk of the alleged abuse. For example, while the notifier (often the other parent) may have a belief to that effect, the evidence to support that belief may be insufficient, or a notification may be made without foundation for vexatious purposes.

19.71 Thirdly, the reported concern may relate to events some time in the past, or the child may currently be in a situation where he or she is no longer exposed to the risk disclosed in the report. Child protection legislation generally focuses on current concerns that might justify the involvement of child protection agencies. Thus historic matters, which might be relevant to family law proceedings, may not be sufficient to attract the intervention of the child protection system.

19.72 Fourthly, the child protection agency may decide that the family court is the most appropriate venue. If there is a viable carer and the child is in his or her care, the child is safe from the perspective of the child protection agency. In these circumstances it may be that a child protection agency will prioritise deployment of resources to children who are not safe.

19.73 In consultations the Commissions were also told that child protection authorities may sometimes resist involvement in family courts because, if they were to respond to all requests from the court for information, investigations and participation in family court cases, they would have a flow of work over which they have no control and for which they are not funded. This could divert them from priorities and undermine other work.

19.74 The Commissions were also told that child protection agencies may decline to provide information or to intervene because their involvement with the family has been limited and they have nothing of use on file. Given that NSW Community Services has recently reported that 27% of all children under 18 years were known to the agency,⁸⁹ it is hardly surprising that all cases are not exhaustively investigated and that the file in some cases contains very little.

19.75 However, the net effect of these dynamics is that, in some locations at least, family courts expect a response that they do not get from child protection agencies. Family courts need information to assist them in making decisions about children's safety in cases where there have been allegations of child abuse. They have no investigatory arm through which they can acquire independent evidence. They want the information from child protection agencies, but the agency does not always respond in the way that the court wishes.

19.76 In consultations during this Inquiry it became apparent that the investigatory gap was worse in some locations than in others. Some courts and child protection agencies reported that they had negotiated a relationship that worked well, and meant that family

⁸⁹ A Zhou, *Estimate of NSW Children Involved in the Child Welfare System* (2010), prepared for the Department of Community Services (NSW).

courts had access to child protection information in the possession of state agencies. In other places continuing difficulties were reported. Regional differences were also reported in research by Fiona Kelly and Dr Belinda Fehlberg which showed that difficulties in communication between courts and the child protection agency apparent in Victoria were not present in the ACT.⁹⁰ In the ACT, the level of communication between child protection authorities and the court was relatively high, with the child protection agency volunteering information to the court; responding to requests from the court for information; monitoring and supervising cases in response to orders of the Family Court.⁹¹

Gaps in the system and proposals for closing them

19.77 The first gap between the family courts and the child protection system is what might be called the ‘investigatory gap’—caused by the fact that the family courts have no investigatory arm to provide them with independent investigations in cases where child abuse is raised as an issue. The children who are vulnerable in this gap are those who:

- are the subject of family law proceedings involving allegations of child abuse;
- state child protection authorities decide not to assist; or
- are not included in a program such as the Magellan case management program for cases involving serious child abuse.

19.78 For these children, there are allegations of abuse but there may be no agency to conduct an independent investigation of the allegations and to present evidence to the family courts.

19.79 The second gap in the system, which might be called the ‘jurisdictional gap’, arises where a case involving allegations of child abuse is in the family courts and the court wishes to make an order giving parental responsibility to the child protection agency because the judge considers that there is no other viable option for that child.

19.80 One method of dealing with the investigatory gap has been to use agreements, MOUs and other regulatory practices that regulate how cases involving child protection issues in the family court will be managed. In 1997 the ALRC and HREOC approached concerns about the intersection of child protection and family law in the context of optimism that the problem could largely be solved by a cross-vesting scheme.⁹² As noted in Chapter 2, the cross-vesting of state jurisdiction in federal courts failed.⁹³ However the Commissions also recommended that protocols for inter-agency cooperation between the family courts, child protection agencies and children’s courts

90 F Kelly and B Fehlberg, ‘Australia’s Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection’ (2002) 16 *International Journal of Law, Policy and the Family* 38, 60.

91 *Ibid.*, 61–62.

92 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997).

93 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511.

should be developed and that referrals to state child protection agencies from the courts should be recorded and tracked.⁹⁴

19.81 The most prominent case management system that relies on agreed methods of working is the Magellan program, concerning serious cases of child abuse in the Family Court of Australia.⁹⁵ Magellan has narrowed the gap by providing for agreed ways in which child protection agencies will work with the family courts in child abuse cases. But it has not closed the gap: it does not operate in all regions of Australia or in the Federal Magistrates Court. The expansion of Magellan and other options for collaborative practice are discussed further in Chapter 29.

19.82 A different approach to the investigatory gap was taken in 2002 by the Family Law Council, which recommended that the federal government should establish a federal ‘Child Protection Service’ that would, amongst other things, investigate child protection concerns and provide information arising from such investigations to courts exercising jurisdiction under the *Family Law Act*.⁹⁶ The recommendation would have provided a dedicated risk assessment and investigatory resource for federal family courts, as an alternative to, and in the absence of, information from state and territory child protection agencies. However, this recommendation has not been adopted.

19.83 The jurisdictional gap—that the federal family courts cannot make orders under child protection legislation—has also attracted attention. It has been proposed that the states refer their powers in relation to child protection, so that federal family courts may be given the power to make child protection orders. In 2009 the Family Law Council recommended that:

The Attorney General as a member of SCAG address the referral of powers to federal family courts so that in determining a parenting application federal family courts have concurrent jurisdiction with that of State Courts to deal with all matters in relation to children including where relevant family violence, child protection and parenting orders.⁹⁷

19.84 In Chapter 17 the Commissions discuss the limits on the ‘concurrent jurisdiction’ that can be achieved, within the constraints of the *Australian Constitution*, namely, that the result of any such referral is to confer on the Australian Parliament power to make federal laws in the areas covered by the referral. It cannot give federal family courts direct jurisdiction *under* state child protection, or other, legislation—this was the flaw in the cross-vesting scheme, as discussed in Chapter 2.

19.85 A referral of power could cover all child protection matters, enabling the Australian Government to expand the power of federal family courts in respect of child welfare matters so that it mirrors the jurisdiction of children’s court. It could be of a

94 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), Rec 124.

95 T Brown, R Sheehan, M Frederico and L Hewitt, *Resolving Family Violence to Children: An Evaluation of Project Magellan* (2001).

96 Family Law Council, *Family Law and Child Protection: Final Report* (2002), Recs 2, 3.

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

more limited nature, dealing specifically with the problem arising in *Ray v Males* and referring only the power to make an order in relation to child protection in situations where there is no viable and protective parent or other carer and the judicial officer wishes to make an order in favour of the child protection agency.

19.86 In discussing the jurisdictional gap, the Consultation Paper canvassed the Family Law Council proposal, asking if there is any role for a referral of legislative power to the Commonwealth in relation to child protection matters. If that question was answered in the affirmative, the Commissions asked what should such a referral cover.⁹⁸

Submissions and consultations

Investigatory gap

19.87 Stakeholders expressed strong concern in relation to the first gap, that is, the absence of investigatory resources in family court cases involving allegations of child abuse. Stakeholders argued for the need for an investigatory capacity to be provided to family courts, by greater involvement of child protection agencies in family courts or by other means.

19.88 There was also support for family courts having the power to compel the involvement of child protection agencies in cases where there are child protection concerns, and for family courts having the power to join the child protection agency as a party. The two submissions that referred to the forthcoming decision in the appeal in *Ray v Males*, supported change to the provisions of the *Family Law Act* for the family courts to be able to compel the involvement of child protection agencies.⁹⁹

19.89 There was also strong support for child protection agencies to play a much greater role in family court proceedings. This support came from many different perspectives—from individuals, from non-government organisations working with victims of violence, from lawyers and from other professional groups and agencies.¹⁰⁰ The submission of the Australian Association of Social Workers provides an example of a typical response:

The AASW recommends that child protection agencies have a greater role within family law proceedings. The existing provisions of s 91B and s 92A of the *Family*

98 Consultation Paper, Question 14–5.

99 National Legal Aid, *Submission FV 232*, 15 July 2010; Queensland Government, *Submission FV 229*, 14 July 2010.

100 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Office of the Child Safety Commissioner, *Submission FV 215*, 30 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Women's Legal Service Victoria, *Submission FV 189*, 25 June 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Justice for Children, *Submission FV 148*, 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; N Ross, *Submission FV 129*, 21 June 2010; Confidential, *Submission FV 96*, 2 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63*, 1 June 2010.

Law Act need to be re-examined to ensure that they provide the appropriate mechanisms for the involvement of child protection agencies. Reports from child protection agencies where there have been reports of abuse or neglect need to inform decisions made within the family law proceedings to provide the best possible outcome for children.¹⁰¹

19.90 A number of submissions drew attention to the resource difficulties faced by child protection agencies. The Department of Human Services (NSW), for example, suggested that it could provide investigatory services to the family courts, but this would need to be on a fee for service basis.¹⁰² The National Abuse Free Contact Campaign and the National Council of Single Mothers and their Children submitted that a specialist section within child protection agencies should be developed to do family court based work and that these sections could be funded federally.¹⁰³

19.91 Stakeholders reported that in locations with a smaller population, informal working relationships develop and communication, collaboration and sharing of resources are more likely. In regions where liaison between the court and the child protection agency was reportedly good, court staff and others in the system attributed this to the existence or building of good relationships between agencies, facilitated by structures and individuals who knew both cultures and systems, could translate between them, and who were trusted by people in both. Having good people in key positions was seen as crucial to making cooperative relationships work well.¹⁰⁴

Jurisdictional gap

19.92 In relation to the jurisdictional gap, two submissions supported the idea of giving family courts the full range of state and territory child welfare powers.¹⁰⁵ Two other submissions thought that this issue was complex and would need further careful consideration.¹⁰⁶ There was, however, some support for a partial reference of powers to give family courts the ability to exercise child welfare in those limited number of cases, such as *Ray and Males*, where there is no viable and protective carer available.¹⁰⁷

Commissions' views

19.93 The Commissions are disinclined to repeat the recommendation of the Family Law Council that a federal child protection service be established. It received very limited support in consultations and submissions.¹⁰⁸ Moreover, state child protection

101 The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010.

102 Department of Human Services (NSW), *Submission FV 181*, 25 June 2010.

103 National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

104 For example, Family Court Brisbane, *Consultation FVC 97*, Brisbane, 20 April 2010.

105 Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010.

106 Queensland Government, *Submission FV 229*, 14 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010.

107 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220*, 1 July 2010; Department of Human Services (NSW), *Submission FV 181*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

108 Department of Human Services (NSW), *Submission FV 181*, 25 June 2010.

agencies have existing expertise and infrastructure in child protection matters. They are also the agencies likely to be working with the child and the family if there are continuing concerns about the safety of children after any hearing in a family court. Establishing a federal agency could create another gap in the system, between a federal agency that provides child protection investigatory services for family courts, and the state agency responsible for working with the family in the longer term.

19.94 The Commissions also note that in some locations there does not appear to be an ongoing problem of collaboration between courts and child protection agencies and the relationship appears to be working to the satisfaction of both. Further, the Magellan program was negotiated between the Court and relevant agencies and appears to have worked very successfully and to have saved resources.¹⁰⁹ In the view of the Commissions, it is highly desirable that the provision of child protection investigatory services in matters before the family courts is dealt with by negotiation, collaboration and agreement (see Chapter 29).

19.95 However, the Commissions are also concerned that the problems outlined above have been identified for many years, that recommendations to deal with them have been made in numerous ways and that, in some locations at least, no solution has been found. The Commissions note the strength of support from stakeholders that this issue be dealt with effectively. In the interests of the children concerned, these problems should not be allowed to persist.

19.96 The Commissions are of the view that investigatory services in family court cases should be provided by state child protection agencies. Further, there is strength in the proposal of the National Abuse Free Contact Campaign and the National Council of Single Mothers and their Children that there should be a specialist section in state child protection agencies to undertake this work. This arrangement would have several advantages including:

- drawing on existing child protection expertise;
- providing a dedicated service responsive to the particular needs of family courts;
- developing expertise within child protection agencies in the needs of family courts;
- providing a resource of people familiar with both systems who can ‘translate’ between the systems and educate participants in both systems; and
- providing a service that is not in competition with resources that need to be devoted to state child protection matters.

19.97 The funding of this service should be negotiated by federal, state and territory governments. Its scope and costs will doubtless vary according to local conditions and existing agreements and practices in relation to these cases. It will be difficult to

109 T Brown, R Sheehan, M Frederico and L Hewitt, *Resolving Family Violence to Children: An Evaluation of Project Magellan* (2001).

determine how funding should be divided between state and federal work, but the difficulty of the task does not remove the pressing need to do it. This Inquiry has provided further evidence, if it were needed, of the persistent problems and confirms the need for action to be taken to rectify the situation.

19.98 In relation to the jurisdictional gap, given the responses from stakeholders, the Commissions are disinclined to recommend a general reference of child welfare powers to family courts. However, a limited reference of powers to enable the courts to make orders giving parental rights and duties to a child protection agency where there is no other viable and protective carer for a child is supported. A power to join a state child protection agency in this very limited class of cases is also recommended.

19.99 Despite support from submissions, the Commissions are presently disinclined to recommend that federal family courts should have a general power to join a state child protection agency as a party. Many of the supportive submissions responded to the general question of whether federal family courts should have additional powers to ensure that intervention by the child protection system occurs when necessary in the interest of the safety of children. Thus the responses to this question seemed to reflect a more general concern that child protection agencies should play a greater role in family court cases, without necessarily exploring the consequences of compelling state agencies to be a party in family court cases.

19.100 It would be an exceptional step for a court to join an agency as a party against its will. There would be significant cost implications for child protection agencies, in staff time, representation in hearings and possible adverse costs orders. It is also arguable that joining the agency as a party would not achieve a great deal in many cases. Any documents in the possession of the agency can already be accessed through subpoena. The reason for joining the agency as a party in *Ray v Males* was because the court contemplated making an order that the agency have parental rights and duties. In most cases it would appear that what family courts need from child protection agencies is not that they be a party in the case, but information and investigation of child abuse allegations. The more important question is how that information and those investigations are to be provided.

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

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

The power of children's courts to make parenting orders

19.101 Some cases start in the child protection context, but are later referred to family courts. A child protection agency may investigate reported abuse or neglect and, during the course of that investigation, identify a viable and protective carer for the child. This may happen before or after proceedings are commenced in a children's court. If proceedings in the children's court have commenced, in some jurisdictions they will be withdrawn and the carer will be advised to go to a family court for a parenting order. In some cases, orders will be made in the children's court that do not include the continued involvement of the child protection agency in the life of the child. In these cases, children's court orders may be registered in the family courts.

19.102 This section of the chapter begins by identifying the overlapping concerns of the courts in relation to parenting issues and then considers the expansion of the power of the children's court, in limited cases, to make parenting orders.

Overlapping concerns

19.103 The fact that there is federal family law jurisdiction and state child protection legislation and that both deal with issues of who a child shall live with, who the child shall spend time with, and protection of that child, also creates difficulties where the issue of child abuse is raised first in the state context. For example, rather than raising an allegation of child abuse in family court proceedings, a parent or another person may first notify a child protection agency that they have concerns about the child's safety. That agency will investigate, and if it concludes that the child is in need of care and protection, it will commence proceedings in a children's court. Although there are some exceptions, generally it is a child protection agency that must commence such proceedings.¹¹⁰

19.104 The question of whether the case should be in the children's court or a family court may arise at three different stages. First, during the agency's investigation, but before it has commenced proceedings in a children's court, the agency may identify a viable and protective carer for the child and refer the carer to a family court. Secondly, the child protection agency may already have commenced proceedings in a children's court and it may identify a viable and protective carer. It may then withdraw its application in the children's court and advise that carer to make an application for a parenting order in a family court.

19.105 Thirdly, after a hearing in a children's court, it may become apparent that, although the child protection matters are resolved, there is still a dispute, for example between parents who cannot agree who the child shall live with and who it shall spend time with. Orders of a children's court may not include the continued involvement of a child protection agency, but may instead regulate the parents' involvement with a

110 In the ACT, someone other than the chief executive may apply for a protection order with the leave of the Court: *Children and Young People Act 2008* (ACT) s 425. Protection applications in Victoria may be made by the Secretary, or by a member of the police force: *Children, Youth and Families Act 2005* (Vic) ss 181, 240(1), 240(3), 243.

child. For example, courts in some states can make orders under the child protection legislation in relation to who may have contact with a child, and the conditions of that contact. In other states, courts are only able to make orders prohibiting contact by certain parties—they are unable to establish a contact regime.¹¹¹ When the children's court makes orders regulating parental contact these orders can be registered in the family courts.¹¹²

Children's court or family court?

19.106 In a family violence context, an illustration of the issues is provided by the example of children regarded as being at serious risk from family violence. A report is made to a child protection agency and that agency concludes that the mother may be a viable carer if the violent father is excluded from the home and from contact with the mother and children. The mother may be advised by the child protection agency to go to a family court for a parenting order. A parenting order in a family court may be desirable for the agency because, if the children are with a viable and protective carer, the conditions for a care order (that the child is in need of care and protection) no longer apply. Further, if these children are now considered safe, the agency's resources need to be used to protect other children who are at risk.

19.107 The mother may also prefer an order from the family court rather than the continuing involvement of the child protection agency in her life and that of her children. However, there may be problems involved in referring these cases to the family courts, especially if the applicant does not receive support from the child protection agency in making the application.

19.108 First, the viable carer may not take action in the family courts, so that there may be no enforceable order securing the safety of the children, either under the *Family Law Act* or under state and territory family violence legislation. In the example above, if the mother does not secure the arrangements in relation to the children with an order and the father takes them or fails to return them after spending time with them, she will have no order on which to rely and the children may be at risk.

19.109 Secondly, in the family court, the applicant may have difficulty in securing the order that was envisaged by the agency as being safe and protective for the children. The applicant may have difficulty marshalling evidence of violence and abuse. Providing evidence of violence to a standard sufficient to satisfy family courts

111 In NSW, Victoria, Western Australia, South Australia, Tasmania and the ACT, the court can make orders in relation to contact when it makes other orders relating to the care of the child: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s79(2)(b); *Children, Youth and Families Act 2005* (Vic) s 283(1)(e); *Children and Community Services Act 2004* (WA) s 63(1); *Children's Protection Act 1993* (SA) s 38(1)(f); *Children, Young Persons and Their Families Act 1997* (Tas) s 42(4)(e); *Children and Young People Act 2008* (ACT) s 464(2)(a). In Queensland and the Northern Territory, the court may only prohibit contact: *Child Protection Act 1999* (Qld) s 61(b); *Care and Protection of Children Act 2007* (NT) s 123(2).

112 *Family Law Act 1975* (Cth) ss 70C, 70D and 70E provide for this registration. The effect of registering an order is that it has the same force and effect as a family court order under pt VII of the Act.

may be difficult and is rarely attempted, except in the most severe of cases.¹¹³ Further, where cases involving child protection concerns are transferred to the family courts, it may be that the applicant wishes to, or has been advised to, seek an order excluding or strictly limiting contact with a violent parent. As noted in the Chisholm Review, certain provisions of the *Family Law Act* may impede the extent to which the court is informed about any history or risk of family violence. In particular, concerns have been raised about s 60CC(3)(c)—the ‘friendly parent’ provision—and s 117AB, that provides for costs orders if the court is satisfied that a party to proceedings knowingly made a false allegation or statement in the proceedings.¹¹⁴ Thus the outcome may not be the one envisaged by the child protection agency that sent the applicant to the family courts and it may be one that puts the children at risk.

19.110 Evidence of these problems is provided from several sources. In 2002, the Family Law Council argued that there will be some cases where it is appropriate to leave it to a viable carer to seek orders in a family court, for example where all that is needed is to formalise an agreed arrangement. However, in other cases it will be ‘an abrogation of the public responsibility to ensure that children are protected’, because

a parent may find it very difficult to take responsibility for presenting a case to court. There may be language problems, problems understanding the legal system, or problems receiving or maintaining legal aid. Victims of domestic violence or other abuse may find it very difficult to take responsibility for a legal battle with the perpetrator when they remain fearful of the former partner’s propensity for violence. For these reasons, if the child can be adequately protected through orders made under the Family Law Act, then in some cases it may be very important for child protection authorities to take the lead in presenting the case for orders which will protect a child.¹¹⁵

19.111 Empirical research and scholarly commentary also provides evidence of the problem. An evaluation of the Magellan program in 2001 noted that cases were being shifted from children’s courts to family courts at the instigation of child protection agencies.¹¹⁶ It was noted there that cases that had been in the children’s court were disproportionately represented in the cases that went the full length of proceedings in the Family Court in the Magellan program and were the most expensive in terms of the costs of representation of the children.¹¹⁷

19.112 In Kelly and Fehlberg’s 2002 study of child protection cases in the Victorian Children’s Court, it was revealed that the Department of Human Services sought to withdraw its Children’s Court application in 80 out of 113 cases because a viable carer had been identified and that carer had obtained, applied for, or was willing to apply for

113 See, eg, A Rees, *Consultation FVC NSWLRC 7*, Melbourne, 16 June 2010. See also L Moloney and others, *Allegations of Family Violence and Child Abuse in Family Law Children’s Proceedings: A Pre-reform Exploratory Study* (2007), prepared for the Australian Institute of Family Studies.

114 R Chisholm, *Family Courts Violence Review* (2009), [3.2], Rec 3.5. See also Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Rec 13.

115 Family Law Council, *Family Law and Child Protection: Final Report* (2002), 77.

116 T Brown, R Sheehan, M Frederico and L Hewitt, *Resolving Family Violence to Children: An Evaluation of Project Magellan* (2001).

117 *Ibid.*, 38.

family court orders.¹¹⁸ In some cases, family court orders were not obtained. However, 62 of these cases were tracked in the family court. Family court orders in favour of the identified viable carer were obtained in 56 of the tracked cases but, in 6 cases, the orders were not in favour of the identified viable carer. In one case, the agency identified the father as the viable carer and referred the family to the family court, but had no further involvement. The children were placed in the care of their mother, from whom the child protection agency had twice removed them and whose situation had not changed significantly.¹¹⁹

19.113 In this study, the Department of Human Services very rarely played any role in the family court proceedings to which they referred carers, appearing in only six of the 62 tracked cases. The researchers identified some cases involving serious violence and high levels of concern about children's safety where children were left without orders.

19.114 In Kelly and Fehlberg's study, the Victorian Department of Human Services recommended that carers apply for family court orders because such orders would provide stability for the children. While orders of children's courts, including orders about whom a child is to live with, may be of limited duration, parenting orders under the *Family Law Act* may remain in force until the child is 18.¹²⁰ Unfortunately, stability was not necessarily an outcome for the children in the family courts. Kelly and Fehlberg identified a number of cases where there were repeated applications and orders.¹²¹ In their sample, the actions of child protection agencies in referring viable carers to the family courts did not always achieve the aims of an enforceable order, an order in favour of a parent identified by the agency as a viable parent and a stable situation for the child.

19.115 Professor Thea Brown and Dr Renata Alexander have also commented that referring viable carers in child protection cases to a family court is not always effective and that there are conflicts and gaps in the systems.¹²²

19.116 Evidence of this problem also came from consultations and submissions. One participant in the ALRC's Family Violence Online Forum provided an illustration of this dilemma:

118 F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38, 47. The same tendencies were also found by Brown et al in another study: T Brown, M Frederico, L Hewitt and R Sheehan, *Problems and Solutions in the Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia* (1998).

119 F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38, 49.

120 *Family Law Act 1975* (Cth) s 65H. The Children's Court of Victoria, when making a protection order, may only grant custody to a third party for a period of less than 12 months: *Children, Youth and Families Act 2005* (Vic) s 283(1)(d).

121 F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38, 50.

122 T Brown and R Alexander, *Child Abuse and Family Law: Understanding the Issues Facing Human Service and Legal Professionals* (2007).

For instance, the [child protection department] get contacted in relation to the safety of a child due to family violence allegations etc. They advise the mother to take out an intervention order excluding the father from the home or they will have no choice but to remove the child from her care. The mother then takes out an intervention order excluding the father. The department then make an assessment that their involvement is not warranted in the case as they deem the mother to be acting protectively.

The problem ... arises when an application is made in the family court jurisdiction by the father to spend time with the children.

At the Family or Federal Magistrates Court, the mother explains why she is seeking that the father have no contact or supervised contact with the children. She says she was advised by [the child protection department] to restrict contact. [The child protection department] however have not provided any written evidence of this advice, except to advise the court that they have no reason to be involved where the mother is acting protectively.

The mother is then left in court by herself, without [the child protection department] providing support to the mother's position. The mother then has to explain why she is acting as an 'unfriendly parent' (as per the *Family Law Act*) by not facilitating contact.¹²³

Proposals for closing the gap

19.117 A number of proposals have already been made in relation to the problems identified above. These proposals are reviewed before the responses from stakeholders are considered. The first proposal is for child protection agencies to stay engaged with more parents when they advise them to apply to the family court. The second is that the jurisdiction of the children's courts be extended to allow them to make orders under the *Family Law Act*, so that where cases are commenced in the children's courts and it becomes evident that a parenting order under the *Family Law Act* is more appropriate, that court can make such an order.

Change of practice of child protection agencies

19.118 Greater support for parents with family violence and child protection concerns who litigate in family courts may be achieved by a change of practice by child protection agencies, in favour of staying engaged with more families at an appropriate level. In some cases, no further intervention will be required because the desired orders are achieved by consent. In other cases the intervention required will be limited to providing a letter detailing the nature of the advice given to the applicant by the child protection department. In others it may involve voluntary provision of documentation (rather than reliance on subpoena or s 69ZW of the *Family Law Act*), the provision of practical support during FDR and/or litigation, or involvement in the case through intervention under s 92A of the *Family Law Act*. Kelly and Fehlberg describe this type of intervention in their study of cases in the ACT—albeit in relation to a small sample.¹²⁴

123 *Comment on ALRC Family Violence Online Forum: Women's Legal Service Providers.*

124 F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38.

19.119 The consequences of providing this support would place a greater responsibility on child protection agencies. However the consequences of not providing it would appear to be that some children are placed at risk. If the recommendation above, of specialist units within child protection services dealing with family law work, is accepted, these units could be a resource for litigants referred to the family courts by the agency, as well as for the court in requesting investigation of child abuse. This may ameliorate the burden on state child protection departments.

19.120 Further, it may be that the required support for some clients does not need to be provided by a child protection agency, but could be provided, for example, by a domestic violence court support worker, parenting support, counselling support or other services.

Expanding jurisdiction of children's courts

19.121 The second proposal to close this gap in the system involves giving children's courts powers to make orders under the *Family Law Act* so that those courts could make a parenting order in an appropriate case rather than referring the parent to a family court. In ALRC Report 84, the ALRC and HREOC considered that, in principle, there is no procedural reason for this limitation on the jurisdiction of state and territory children's courts and recommended the vesting of federal jurisdiction under s 69J of the *Family Law Act* in children's courts.¹²⁵ In its report on *Family Law and Child Protection*, the Family Law Council recommended that 'the Family Law Act should be amended to allow Children's and Youth Courts to make consent orders regarding residence and contact in certain circumstances'.¹²⁶

19.122 While children's courts in some states can make orders under the relevant child protection legislation in relation to who may have contact with a child, and the conditions of that contact, in other states, courts are only able to make orders prohibiting contact by certain parties—they are unable to establish a contact regime.¹²⁷

125 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), Rec 122. This proposal was repeated by the VLRC—Victorian Law Reform Commission, *Review of Family Violence Laws: Report* (2006), Rec 77 stated that the *Child, Youth and Families Bill 2005* should be amended to declare the Children's Court a court of summary jurisdiction, so the court can exercise powers under the *Family Law Act* to make, vary, discharge or alter a family law child contact order. See also *Children, Young Persons and Their Families Act 1997* (Tas) s 48(2); *Children and Young People Act 2008* (ACT) ss 17(1)(f), 456(4)(c).

126 Family Law Council, *Family Law and Child Protection: Final Report* (2002), 82, Rec 10.

127 In NSW, Victoria, Western Australia, South Australia, Tasmania and the ACT, the court can make orders in relation to contact when it makes other orders relating to the care of the child: *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 79(2)(b); *Children, Youth and Families Act 2005* (Vic) s 283(1)(e); *Children and Community Services Act 2004* (WA) s 63(1); *Children's Protection Act 1993* (SA) s 38(1)(f); *Children, Young Persons and Their Families Act 1997* (Tas) s 42(4)(e); *Children and Young People Act 2008* (ACT) s 464(2)(a). In Queensland and the Northern Territory, the court may only prohibit contact: *Child Protection Act 1999* (Qld) s 61(b); *Care and Protection of Children Act 2007* (NT) s 123(2).

19.123 Each state and territory court of summary jurisdiction is vested with jurisdiction under pt VII of the *Family Law Act*.¹²⁸ Magistrates are able to exercise federal family law jurisdiction under s 69J of the *Family Law Act*, but children's court magistrates are not able to do so—because s 69J confers powers on 'each court of summary jurisdiction', and it appears to be generally accepted that children's courts are not courts of summary jurisdiction.¹²⁹ However, where magistrates sit in both children's courts and the general jurisdiction of the magistrates court, it would appear that while the judicial officer has no jurisdiction to make orders under the *Family Law Act* when sitting in the children's court, the same judicial officer does have the power to do so when sitting in the magistrates court.

19.124 In the Consultation Paper, the Commissions asked whether children's courts should be given more powers to ensure orders are made in the best interests of children that deal with parental contact issues and, if so, what those powers should be.¹³⁰ The Commissions also asked whether the *Family Law Act* should be amended to extend the jurisdiction that state and territory courts already have under pt VII to make orders for a parent to spend time with a child.¹³¹

Submissions and consultations

Involvement of child protection agencies

19.125 There was overwhelming support from stakeholders for child protection agencies to be more involved in family court proceedings.¹³² For example, the Law Society of NSW stated that 'child protection agencies should intervene in Family Courts more often as they have a useful and relevant role to play'.¹³³ The Office of the

128 Other than proceedings for granting leave for adoption proceedings: *Family Law Act 1975* (Cth) s 69J(1). But note that much of what is given under s 69J is taken away by s 69N which requires the transfer to family courts of contested proceedings, except with the consent of the parties.

129 Family Law Council, *Family Law and Child Protection: Final Report* (2002), 82; Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), [15.50]. There may be room for debate about this issue, which will depend on interpretation of particular state legislation. However, leaving such issues aside, it appears to be the accepted practice that children's courts refer cases to a family court rather than exercising jurisdiction under the *Family Law Act*.

130 Consultation Paper, Question 14–1.

131 Consultation Paper, Question 14–2.

132 National Legal Aid, *Submission FV 232*, 15 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Legal Aid NSW, *Submission FV 219*, 1 July 2010; Office of the Child Safety Commissioner, *Submission FV 215*, 30 June 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212*, 28 June 2010; Law Society of New South Wales, *Submission FV 205*, 30 June 2010; Solomums Australia for Family Equity, *Submission FV 200*, 28 June 2010; National Abuse Free Contact Campaign, *Submission FV 196*, 26 June 2010; Confidential, *Submission FV 184*, 25 June 2010; Women's Legal Services NSW, *Submission FV 182*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010; C Humphreys, *Submission FV 131*, 21 June 2010; Confidential, *Submission FV 109*, 8 June 2010; Education Centre Against Violence, *Submission FV 90*, 3 June 2010; C Pragnell, *Submission FV 70*, 2 June 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010.

133 Law Society of New South Wales, *Submission FV 205*, 30 June 2010.

Child Safety Commissioner in Victoria also submitted that child protection agencies should be required to play a much more active role in family law proceedings and ‘it is critical that kinship carers are not abandoned by child protection when cases go across the state or territory and federal systems’.¹³⁴

19.126 Stakeholders also raised concerns that child protection agencies were passing on matters to family courts, sometimes with adverse consequences. For example, the National Peak Body for Safety and Protection of Parents and Children argued that child protection agencies avoided involvement in family court cases ‘handballing this to family courts ... so the children and vulnerable mums are falling through the cracks in the system’.¹³⁵

Expanding power of children’s courts

19.127 With respect to the question whether children’s courts should be given power to make parenting decisions under the *Family Law Act*, many submissions responding to this question did so in a general way by supporting the idea that one court should deal with all child protection cases. For example, the Aboriginal Family Violence Prevention and Legal Service submitted that:

the current two court system for dealing with children’s matters is clumsy, confusing for families and can lead to inconsistent outcomes when two jurisdictions take different approaches.¹³⁶

19.128 The Magistrates’ Court and Children’s Court of Victoria observed that:

When dealing with a family and determining issues affecting that family, the capacity to exercise all jurisdictions is sensible and avoids inconsistent responses from different courts on the same facts. The child’s best interests should be the focus not the appropriateness of a particular jurisdiction.¹³⁷

19.129 Submissions also mentioned the problems of the lack of coordination between the two systems and the need for improved integration to provide a holistic approach, consistent with the ‘one court’ principle. One submission also argued specifically for ‘a more seamless approach’.¹³⁸

19.130 However, a number of concerns were raised in relation to increasing the jurisdiction of children’s courts to deal with *Family Law Act* matters. The first was the complexity of the task that would be faced by magistrates called upon to make orders under both child protection and family law. Cases involving child protection issues, including family violence, are complex cases. The Chief Justice of the Family Court and the Chief Federal Magistrate submitted that courts exercising jurisdiction under both state or territory child protection legislation and under the *Family Law Act* would

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

135 National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47*, 24 May 2010.

136 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010. See also The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Women’s Legal Service Queensland, *Submission FV 185*, 25 June 2010; Confidential, *Submission FV 184*, 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144*, 24 June 2010.

137 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

138 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010.

be dealing with legislation which contains ‘many significant and fundamental differences’.¹³⁹ Children’s court judicial officers may be full time specialists but, more frequently, they also sit in the very broad general jurisdiction of magistrates courts. Adding *Family Law Act* proceedings to the list of matters to which they must attend would add significantly to their tasks.¹⁴⁰

19.131 The concern noted above, that magistrates courts presently have jurisdiction under the *Family Law Act* but rarely exercise it, was also mentioned in submissions, although specialist family violence courts were named as an exception.¹⁴¹ It was suggested that the reluctance of magistrates to use their powers may be based on a feeling that they do not have the requisite expertise.¹⁴² Concerns of this nature led the Chief Justice of the Family Court and the Chief Federal Magistrate to suggest that:

In child protection proceedings where contact between parents arises as an incidental matter it is difficult to see an objection in principle to this being determined in a state child protection court. Once a child protection issue has been determined however, the state court’s jurisdiction in what is otherwise a federal family law issue should cease.¹⁴³

19.132 The importance of specialised courts, both for children’s cases¹⁴⁴ and for family law matters,¹⁴⁵ and the need for training for judicial officers who do this work was argued by a number of submissions.¹⁴⁶ The Magistrates’ Court and the Children’s Court of Victoria agreed that there will be a need for training, but emphasised that Victoria has learned from the benefits of specialised courts dealing with family violence cases.¹⁴⁷

19.133 A further concern was that children’s courts are presently operating over capacity. Adding another jurisdiction to their workload would require additional resources.¹⁴⁸

139 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

140 Ibid; Berry Street Inc, *Submission FV 163*, 25 June 2010; N Ross, *Submission FV 129*, 21 June 2010.

141 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

142 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Local Court of NSW, *Submission FV 101*, 4 June 2010.

143 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

144 Ibid; N Ross, *Submission FV 129*, 21 June 2010.

145 Wirringa Baiya Aboriginal Women’s Legal Centre Inc, *Submission FV 212*, 28 June 2010; Department of Human Services (NSW), *Submission FV 181*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010.

146 Women’s Legal Services Australia, *Submission FV 225*, 6 July 2010; Office of the Child Safety Commissioner, *Submission FV 215*, 30 June 2010.

147 Magistrates’ Court and the Children’s Court of Victoria, *Submission FV 220*, 1 July 2010.

148 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; Berry Street Inc, *Submission FV 163*, 25 June 2010; N Ross, *Submission FV 129*, 21 June 2010.

19.134 Along with strong support for one court to deal with children's matters and the need for a more seamless system, there was also much support for further consideration and investigation of this proposal before action is taken.¹⁴⁹ The Queensland Government, for example, argued that this option would require some fundamental changes to accommodate significant differences between the two systems.¹⁵⁰ One example of a practical issue is that children's courts are closed courts, whereas family courts are not.¹⁵¹ 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.¹⁵²

Commissions' views

Involvement of child protection agencies

19.135 The Commissions acknowledge the powerful case for child protection services having more involvement in family court proceedings where they investigate allegations of child abuse and refer carers to family courts for orders. There will be cases where a simple referral is all that is required and the applicant has the capacity to secure the orders needed. However, this is clearly not sufficient to provide effective protection for all families and some children appear to be endangered by this gap in the system. Therefore, where a child protection agency investigates child abuse, locates a viable and protective carer, and refers that carer to a family court for parenting orders, the agency should, in appropriate cases, provide written information to a family court about its advice and the reasons for it, provide reports and other evidence as appropriate and/or intervene in the proceedings.

19.136 If the recommendation of the Commissions for a specialist service within child protection agencies for family court cases is accepted, it may be appropriate that this service could also provide support for such litigants. Alternatively it may be that what is required in some cases is not support from a child protection agency but from a court support service that would facilitate the referral and access to other supports.

Expanding power of children's courts

19.137 ALRC Report 84 criticised legal processes which required a child's persistent and multiple engagement with the legal system as being contrary to the

149 National Legal Aid, *Submission FV 232*, 15 July 2010; Queensland Government, *Submission FV 229*, 14 July 2010; Women's Legal Services Australia, *Submission FV 225*, 6 July 2010; The Australian Association of Social Workers, *Submission FV 224*, 2 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173*, 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168*, 25 June 2010; Victorian Government, *Submission FV 120*, 15 June 2010.

150 Queensland Government, *Submission FV 229*, 14 July 2010; Women's Legal Service Queensland, *Submission FV 185*, 25 June 2010.

151 N Ross, *Submission FV 129*, 21 June 2010.

152 National Legal Aid, *Submission FV 232*, 15 July 2010.

child's best interests.¹⁵³ It is also at odds with the goal of seamlessness that the Commissions have identified as a principal aim of this Inquiry.¹⁵⁴ The Commissions' view is that, wherever possible, matters involving children should be dealt with in one court—or as seamlessly as the legal and support frameworks can achieve in any given case.

19.138 This was also the outcome recommended by the Family Law Council in 2002 as part of its 'one court principle'—that is, that state and territory courts should have a broad power to make residence and contact orders under the *Family Law Act* in child protection proceedings so that one court can deal with all substantive matters and ensure the child's best interests and welfare are addressed.¹⁵⁵

19.139 The best interests of children and those who care for them is clearly served by being able to have all issues dealt with by one court. It is those children and their families who pay the price for the failure to imagine a better and undivided system, and to implement it. The Commissions therefore recommend that, when a matter is before a children's court, such court should have the same powers to make decisions under the *Family Law Act* as do magistrates courts. This should include the expanded powers recommended in Chapter 16.

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

19.141 The Commissions acknowledge, however, that there are arguments against giving children's courts powers under the *Family Law Act*. For example, while magistrates courts presently have the power to make orders under pt VII of the *Family Law Act*, they appear to be disinclined to use those powers. As noted in Chapter 16, this may be because:

- magistrates may not be familiar with their powers under the *Family Law Act*;
- legal representatives may also not be familiar with those powers and may not request that they be used or argue effectively for their use;
- decisions under pt VII of the *Family Law Act* are complex decisions and there may be concerns about falling into appealable error; and
- magistrates courts have limited time available in busy court lists—making these decisions would be an added burden.

153 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), ch 15.

154 See Ch 3.

155 Family Law Council, *Family Law and Child Protection: Final Report* (2002), 85–86, Rec 12.

19.142 Similar considerations may well be relevant to children's courts making decisions under the *Family Law Act* and it is therefore important that, accompanying any expansion of jurisdiction, the necessary resources are committed for children's courts to be confident in exercising these powers.

19.143 Further, FDR is often used to resolve family disputes and its availability may be limited in children's courts. However, there is a developing use of FDR in child protection cases (see Chapter 23). Further, FDR services are community based, rather than court based, and can be accessed by litigants with parenting issues who commence in children's courts. Hence the Commissions consider that this is not a powerful argument against expanding children's court jurisdiction.

19.144 However, the Commissions are also cognisant of the complexity of making the proposed changes, involving, as they do, a shift in decision making about parenting in some cases of child abuse to children's courts. Issues of resources, training and concerning the fundamental differences in the perspectives of children's and family courts and in the legislation under which they act, were some of the reservations expressed by stakeholders.

19.145 The Commissions therefore suggest that the work proposed in Western Australia, involving integration of family law and child protection issues, be used as an instructive pilot, to identify the benefits and challenges of this change in more detail and to inform future developments in other states and territories.

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

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

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

Families in both courts—duplication of proceedings

19.146 The possibility that proceedings will be duplicated also arises in child protection cases. For example, proceedings may be commenced in a children's court by a child protection agency but, whilst those proceedings are in train, a parent who wishes to spend time with her or his children, will make an application to a family court for an order. While orders of family courts defer to those of children's courts, both the parties and the court may nevertheless expend considerable time and effort dealing with the same family and the same facts. Children who are mired in these parallel proceedings may be subjected to stress, uncertainty and perhaps repeated contact with courts and other agencies in two jurisdictions.

19.147 In most states and territories, the relevant child protection authorities and family courts have entered into protocols that assist in coordinating cases that may be in family courts or children's courts.¹⁵⁶

19.148 This problem has received repeated judicial and academic attention and criticism.¹⁵⁷ In 1995, the Hon Alistair Nicholson CJ (as he then was) said in *Re Karen*:

It is all too common for departments in the states and territories and this court to be proceeding along parallel, but divergent tracks in relation to issues of children's welfare.¹⁵⁸

19.149 The ALRC and HREOC noted the same problem in their joint report in 1997.¹⁵⁹

19.150 The Family Law Council observed in 2002 that there is a 'need for state and territory government to reach agreement with the Commonwealth at the highest levels to ... avoid unnecessary duplication of effort and confusion of orders'.¹⁶⁰ Again, in 2009, the Council noted that many families are involved in proceedings in more than one jurisdiction, with increased likelihood that inconsistent orders may be made, people will be put at risk, and will suffer added strain.¹⁶¹

19.151 The research by Kelly and Fehlberg in 2002, noted above, provides empirical evidence of cases where proceedings were on foot in both courts at the same time with very little communication between the two courts.¹⁶² In one case, despite the provisions of s 69ZK(1) discussed above, conflicting orders were made in the children's court and the family court on the same day.¹⁶³ Communication did take place in some cases, but Kelly and Fehlberg concluded that whether or not this happened seemed to be a function of which social worker was allocated to the case.¹⁶⁴ They also noted in their sample some very complex cases involving long term litigation in both courts, where the availability of two jurisdictions to the parties appeared to have offered them two opportunities to argue their cases to the full, 'accentuating the emotional harm to the children'.¹⁶⁵

156 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), 38. Most of these protocols are not publicly available.

157 See, eg, *Re Karen* (1995) 19 Fam LR 528; F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38; T Brown, M Frederico, L Hewitt and R Sheehan, *Problems and Solutions in the Management of Child Abuse Allegations in Custody and Access Disputes Before the Family Court of Australia* (1998); J Seymour, 'The Role of the Family Court of Australia in Child Welfare Matters' (1992) 21 *Federal Law Review* 1.

158 *Re Karen* (1995) 19 Fam LR 528, 556.

159 Australian Law Reform Commission and Human Rights and Equal Opportunity Commission, *Seen and Heard: Priority for Children in the Legal Process*, Report 84 (1997), [15.11]–[15.13].

160 Family Law Council, *Family Law and Child Protection: Final Report* (2002), 91.

161 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), 60.

162 F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38.

163 *Ibid.*, 55.

164 *Ibid.*, 56.

165 *Ibid.*, 56.

19.152 Professor Thea Brown and her co-researchers evaluating the Magellan program also found cases involving duplication of proceedings in both courts.¹⁶⁶ She asked why there were cases that involved a final hearing in two different courts, why there was duplication of time, effort and funding, and what impact the duplication has on the children involved.¹⁶⁷ In half of the cases reviewed, families were involved in other legal proceedings. Although some of this duplication may be unavoidable, it caused delays and stress to the children who were involved in multiple legal proceedings.¹⁶⁸ It is likely that some duplication of proceedings relates to cases that are particularly complex and difficult to manage. Nevertheless, one of the lessons of the Magellan program appears to be that if multiple and complex problems are dealt with in one court, there will be discernible benefits to the parties, the children and in reducing costs.¹⁶⁹

Submissions and consultations

19.153 Although few stakeholders referred specifically to duplication of proceedings as an issue, the focus of many submissions was the more general point that there should be only one court dealing with these issues. For example, the Victorian Office of the Child Safety Commissioner referred to the importance of reducing duplication, and removing the need for attendance at multiple courts and repeated court appearances.¹⁷⁰ UnitingCare Children, Young People and Families submitted that there should be consistency in the MOUs and protocols between family courts and child protection agencies, with cross-jurisdictional training in interpretation of these protocols.¹⁷¹

Commissions' views

19.154 The Commissions have a continuing concern that the existing protocols and MOUs that govern the relationship between family courts, children's courts and child protection agencies may not be operating effectively and that the impact on children will be detrimental. The recommendations made above for increased involvement of child protection agencies in family courts and for children's courts to exercise jurisdiction under the *Family Law Act* may resolve some of the problems of duplication. In addition to these measures, family courts and children's courts should review their protocols and practices for communicating about cases in both courts and improve that communication so that duplication does not occur.

166 T Brown, R Sheehan, M Frederico and L Hewitt, *Resolving Family Violence to Children: An Evaluation of Project Magellan* (2001).

167 *Ibid.*, 38.

168 *Ibid.*, 47.

169 *Ibid.*

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

171 UnitingCare Children Young People and Families, *Submission FV 151*, 24 June 2010.

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

