20. Family Violence, Child Protection and the
Criminal Law

Contents
Introduction 933
Criminal offences relating to child protection 935
Specific offences 936
The location of offence provisions 938
The form of the offence provisions 941
Penalties for offences under child protection laws 941
Information sharing between child protection agencies and the police 944
Confidentiality of reporters 944
Deciding whether to prosecute 950
Mandatory reporting of children’s exposure to family violence 955
Protection orders and children—the current legal framework 960
Magistrates courts 960
Children’s courts 962
Commissions’ views 968
Child protection and juvenile justice 973
Commissions’ views 978

Introduction

20.1 The interaction of state and territory child protection laws with a range of other
state and territory laws is one of the areas under consideration in this Inquiry. 1 This
chapter focuses on the intersections between child protection law, the criminal law and
the law relating to family violence protection orders, and considers ways to address
gaps between child protection and criminal laws to improve the protections for children
whose safety is threatened in situations involving family violence.

20.2 As noted in Chapter 4, the various laws under consideration reflect different
purposes. Child protection laws operate within a child welfare paradigm, the main
purpose of which is to provide measures to assist and support children and young
people who are in need of care and protection. 2 A consistent theme across all child
protection laws—and one which is shared with the family law jurisdiction, considered
in Chapter 19—is that the welfare and best interests of the child are the paramount

---

1  See Ch 1.
2  See Ch 19.
consideration.\(^3\) In a child welfare context, central to determining the best interests of a child is the importance of preserving the integrity of the family unit and promoting a child’s positive relationships with his or her family by offering support and assistance to the family. Consistent with this philosophy is the obligation on the state to limit its intervention in the relationship between a child and parent to that which is necessary to secure the safety and wellbeing of the child.\(^4\)

20.3 The purposes of family violence legislation in the states and territories are expressed in various ways, a common theme of which is ensuring, facilitating or maximising the safety and protection of persons, including children, who fear or experience family violence or are exposed to it. The protection of children is central to both child protection laws and family violence protection orders.

20.4 Criminal laws, however, have different purposes, focusing upon the maintenance of social order and defining the fundamental requirements for a person’s treatment of others. Central to the concept of criminality are the notion of individual culpability and the criminal intention for one’s actions.\(^5\) Where family law disputes are regarded as ‘private’ disputes, concerning litigation between individual litigants, criminal law is ‘public’ because it is the state which is responsible for the investigation and prosecution of offences. Common to both the criminal law and child protection law is the central role played by the state.

20.5 The recommendations made in this chapter reflect the context of the different purposes that each legislative regime serves. The chapter begins with an examination of specific offences of child abuse and neglect contained in child protection legislation and the criminal law, which in large part reflect the grounds upon which a legislative child protection intervention is triggered. This is followed by a discussion of specific issues relating to information sharing between the two central agencies responsible for executing the state’s child protection and prosecution functions—the child protection agency and the police. The Commissions make recommendations aimed at facilitating greater information sharing and cooperation between these two agencies to ensure a more coordinated and effective response to child abuse and neglect. The specific issues considered include: permitting otherwise confidential information to be shared with law enforcement agencies in limited circumstances; fostering the involvement of the child protection agency in decisions to prosecute; and promoting more constructive and effective reporting practices by police. The chapter also discusses—and makes recommendations in relation to—the powers of children’s courts to make family violence protection orders, and their capacity to refer concerns for the safety of

---

\(^3\) *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 9(a); Children, Youth and Families Act 2005 (Vic) s 10(1); Child Protection Act 1999 (Qld) s 5(1); Children and Community Services Act 2004 (WA) s 7; Children’s Protection Act 1993 (SA) s 4(1); Children, Young Persons and Their Families Act 1997 (Tas) s 8(2)(a); Children and Young People Act 2008 (ACT) s 11; Care and Protection of Children Act 2007 (NT) s 9.*

\(^4\) See, eg, *Children and Young Persons (Care and Protection) Act 1998 (NSW) s 9(2)(c); Children, Youth and Families Act 2005 (Vic) s 10(3)(a).* See also Chs 4, 19.

\(^5\) *Australian Law Reform Commission, *Principled Regulation: Federal Civil and Administrative Penalties in Australia, Report 95 (2002), [2.9]. See also Ch 4.*
children and young people, that arise in the course of proceedings, to child protection agencies for investigation and report.

Criminal offences relating to child protection

20.6 Parents, caregivers and those with parental responsibility have a duty, at law, to provide children in their care with the ‘necessities of life’, which includes providing financial support, food, clothing, accommodation, healthcare and access to education.\(^6\) The duty normally extends to children up to the age of 16 years, but may apply to older children in some circumstances, for example, where the child has a disability. Parents and caregivers also have a duty to protect children in their care from harm, including harm that is caused as a result of abuse or neglect.

20.7 The failure of those with parental responsibility to provide for the basic needs of children in their care, or to protect them from harm as a result of abuse or neglect, may constitute an offence under general criminal law or under child protection laws, thus exposing the parent or caregiver to criminal proceedings and the consequences of a criminal conviction.

20.8 As noted in Chapter 19, child abuse and neglect are often closely linked to family violence. An offender may be abusing both a parent and children; exposure to incidents of family violence between adults may be a risk to the child’s health and safety; or violence may interfere with a person’s capacity to be an effective parent.

20.9 Serious cases of child abuse and neglect, causing permanent or fatal injury to a child, are usually dealt with under the general criminal law as an offence of violence—for example, assault or manslaughter. Sexual abuse is also dealt with under the criminal laws of each state and territory which create a number of sexual offences against children.\(^7\) Sexual offences are dealt with in Part G of this Report, which also considers the difficulties of collecting forensic evidence and the provision of better support to victims in order to reduce rates of attrition. This section will not deal in detail with the application of these general offences.

20.10 The criminal law also creates a number of specific offences relating to child neglect and abuse. The creation of specific offences recognises that the criminal law has an important role to play in child abuse and neglect, on the basis that a function of the criminal justice system is to define acceptable standards of behaviour. Prosecution of an offender when those standards are breached sends a clear message to the community, denounces abusive or neglectful conduct, punishes the offender and acts as both a specific and general deterrent, to prevent the offender and others from committing or recommitting the same offence. The importance of the criminal law in

---

\(^6\) See, eg, Crimes Act 1900 (NSW) s 43A(2); Criminal Code (Qld) s 364; Criminal Law Consolidation Act 1935 (SA) s 30; Criminal Code (Tas) ss 144, 145; Criminal Code (NT) s 183. Parents also have a primary duty to house, educate and provide for their children under the Child Support (Assessment) Act 1989 (Cth) s 3.

\(^7\) See, eg, Crimes Act 1900 (NSW) ss 66A–66D; Crimes Act 1958 (Vic) ss 45–49A; Criminal Code (Qld) ss 210, 215; Criminal Code (WA) s 320–322; Criminal Law Consolidation Act 1935 (SA) ss 49, 58; Criminal Code (Tas) ss 124–125A; Criminal Code (NT) s 127.
labelling child abuse and neglect as unacceptable and a violation of children’s rights was emphasised in a number of submissions to this Inquiry.8

20.11 In the Consultation Paper, the Commissions identified three issues in relation to provisions dealing with offences against children: whether the offence provisions are more appropriately placed in child protection statutes or in the general criminal laws of the states and territories;9 whether the way in which the offence provisions are currently drafted—which varies across all the jurisdictions—creates practical difficulties for law enforcement agencies, such that it affects decisions to bring prosecutions;10 and whether the penalties prescribed for these offences are appropriate.11

20.12 The offences under each set of laws will be considered first, followed by a consideration of submissions and consultations with respect to these three issues.

**Specific offences**

**Offences under child protection legislation**

20.13 In four jurisdictions, there are child abuse and neglect offences in child protection legislation. In Western Australia, a person with the care and control of a child must not do an act, or fail to do an act, knowing (or recklessly disregarding) that the conduct may cause significant harm to a child from abuse (physical, sexual, emotional or psychological) or neglect.12 The relevant legislation defines ‘neglect’ to include the failure by the child’s parents to provide adequate care or effective medical, therapeutic or remedial treatment for the child.13 The penalty is imprisonment for up to 10 years.

20.14 In Victoria and Tasmania, it is an offence for a person who has a duty of care to a child to take, or fail to take, action that has either resulted in harm to the child, or has the potential to cause harm.14 The maximum penalty ranges, respectively, from 12 months imprisonment to two years.

20.15 NSW child protection law makes it an offence for any person—not just one who has care of a child—to do an act intentionally that causes or appears likely to cause injury or harm to a child or young person.15 It is also an offence for a person who has care of a child or young person to fail to provide the child or young person with

---

8 Queensland Government, Submission FV 229, 14 July 2010; Berry Street Inc, Submission FV 163, 25 June 2010; Confidential, Submission FV 160, 24 June 2010; Confidential, Submission FV 82, 2 June 2010.
10 Ibid, Questions 13–1, 13–3.
11 Ibid, Question 13–4.
12 Children and Community Services Act 2004 (WA) s 101. ‘Harm’ is defined as any detrimental effect of a significant nature on the child’s wellbeing: s 28(1).
13 Ibid s 28(1).
14 Children, Youth and Families Act 2005 (Vic) s 493; Children, Young Persons and Their Families Act 1997 (Tas) s 91(1).
15 Children and Young Persons (Care and Protection) Act 1998 (NSW) s 227.
adequate and proper food, nursing, clothing, medical aid or accommodation.¹⁶ Both these offences attract a maximum monetary penalty of 200 penalty units, the value of which is currently $22,000.¹⁷

20.16 A number of child protection laws also make it an offence for a person who has care and control of a child to leave a child unattended and unsupervised either in a motor vehicle,¹⁸ or more generally.¹⁹ In NSW, the offence is framed more broadly to apply to any person, not only one who has care and control of a child.²⁰ Again, the penalties for these offences vary substantially across the jurisdictions—from a monetary penalty in NSW to a term of up to five years’ imprisonment in Western Australia.²¹

20.17 Other offences contained in child protection legislation include removing a child or young person from the care of a person who has protection and care responsibility under the relevant Act,²² and offences concerning tattooing, branding and body piercing.²³

**Offences under general criminal legislation**

20.18 In four jurisdictions—Queensland, South Australia, the ACT and the Northern Territory—offences relating to child abuse and neglect are contained in general criminal laws. The criminal statutes of NSW and Tasmania also contain more serious offences relating to the abuse and neglect of children.

20.19 Under the criminal legislation of NSW, Queensland, Western Australia, South Australia, Tasmania, the ACT and the Northern Territory, it is an offence for a person with parental responsibility to fail to provide a child—generally defined as a child under the age of 16 years—under his or her care with the ‘necessities of life’—generally defined as the provision of accommodation, food, clothing and access to healthcare, and education.²⁴ In NSW, the maximum penalty is imprisonment for five years; in the ACT, it is two years. In Queensland, South Australia and Tasmania, maximum penalties of three years imprisonment apply where the neglect endangers the child’s health.

---

¹⁶ Ibid s 228.
¹⁷ Crimes (Sentencing Procedure) Act 1999 (NSW) s 17.
¹⁸ Children and Young Persons (Care and Protection) Act 1998 (NSW) s 231; Children and Community Services Act 2004 (WA) s 102.
¹⁹ Children, Youth and Families Act 2005 (Vic) s 494; Children, Young Persons and Their Families Act 1997 (Tas) s 92.
²⁰ Children and Young Persons (Care and Protection) Act 1998 (NSW) s 231.
²¹ Children and Community Services Act 2004 (WA) s 102. The penalty for a summary conviction is three years imprisonment and a fine of $36,000.
²² See, eg, Children and Young Persons (Care and Protection) Act 1998 (NSW) s 229; Children, Youth and Families Act 2005 (Vic) s 496.
²³ See, eg, Children and Young Persons (Care and Protection) Act 1998 (NSW) ss 230–230A; Children and Community Services Act 2004 (WA) s 103.
²⁴ Crimes Act 1900 (NSW) s 43A; Criminal Code Act 1899 (Qld) ss 177, 286; Criminal Law Consolidation Act 1935 (SA) s 39; Criminal Code (WA) s 263; Criminal Code (Tas) ss 144–152; Crimes Act 1900 (ACT) s 39; Criminal Code (NT) ss 149, 183.
20.20 In Queensland, it is an offence for any person who has the care and control of a child to cause harm to a child aged below 16 years by reason of failing to provide for the child, deserting the child or leaving the child without means of support.25 In a number of jurisdictions it is also a crime to abandon or expose a child where that act endangers the life of the child or may cause serious injury, although the provisions vary in terms of the age of the child.26 In the Northern Territory, for instance, the offence relates to a child aged under two years, while in NSW and Queensland, the offence applies to a child aged under seven years. These offences attract maximum penalties ranging from five to seven years imprisonment, some depending on the age of the child.

20.21 There is some variation among the elements of the offence provisions in the criminal laws of the states and territories. Most require the prosecution to prove either an intentional or reckless act or omission and that the child has suffered, or was placed at risk of suffering, a high degree of harm such as serious injury or danger of death. Section 43A of the Crimes Act 1900 (NSW), for instance, provides that a person with parental responsibility for a child who intentionally or recklessly fails to provide the child with the ‘necessities of life’ is guilty of an offence if the failure causes a danger of death or serious injury to the child.27 By contrast, under s 30 of the Criminal Law Consolidation Act 1935 (SA)—which applies not only to children but to vulnerable adults—the prosecution must show failure to provide food, clothing or accommodation, but it does not require the prosecution to prove risk of harm.28

The location of offence provisions

20.22 The question of whether offences against children for abuse and neglect should be contained in child protection legislation or in criminal laws attracted substantial, but quite diverse, comment. A number of stakeholders argued that the offences ought to be located in general criminal laws as this would clearly label the behaviour as a violation of children’s rights and a crime, thus sending a clear message to the community that such behaviour is unacceptable.29 Some submissions expressed the view that violence against any person should be an offence under general criminal law,30 and that the law

25 Criminal Code Act 1899 (Qld) s 364. In Tasmania, it is an offence to ill-treat a child aged below 14 years: Children, Young Persons and Their Families Act 1997 (Tas) s 178.
26 Crimes Act 1900 (NSW) s 43; Criminal Code (Qld) s 326; Criminal Code (NT) s 184. See also, Criminal Code (WA), which makes it an offence for a parent (who is able to maintain a child) to desert a child under the age of 16 years: s 344.
27 See, eg, Crimes Act 1900 (NSW) s 43A inserted by Crimes Amendment (Child Neglect) Act 2004 (NSW). This is distinct from the similar offence in s 228 of the Children and Young Persons (Care and Protection) Act 1998 (NSW) which does not require the prosecution to prove that the failure by a person with parental responsibility to provide adequate care and support to the child has caused harm.
28 Criminal Law Consolidation Act 1935 (SA) s 30.
30 Justice for Children, Submission FV 148, 24 June 2010; Confidential, Submission FV 109, 8 June 2010.
should not treat acts of abuse and neglect against children any less seriously than it treats such acts committed against adults.\textsuperscript{31}

20.23 National Legal Aid and Professor Julie Stubbs supported locating the offence provisions in general criminal laws on the basis that the offences may be more useful there, given that similar offences in child protection legislation were rarely, if ever, prosecuted.\textsuperscript{32} The Queensland Government also took this position, arguing that the primary purpose of child protection legislation is to work with families in order to promote the safety of children in the least intrusive way to meet the child’s needs. It said that, while the two systems work in parallel with each other, a child protection response is not, nor should it be, contingent on securing a conviction. The Queensland Government submission noted that its criminal legislation provides for a wide range of specific and general offences against children.\textsuperscript{33}

20.24 In contrast, a number of other submissions, including the Magistrates’ Court and the Children’s Court of Victoria and the Department of Premier and Cabinet (Tas) submitted that offences against children for abuse and neglect should be retained in child protection legislation because of its child-focused approach.\textsuperscript{34} As one stakeholder commented:

\begin{quote}

We need a dedicated legislation and legal system that focuses on children and young people as the priority, with personnel who are trained and understand the needs of children and young people, and concepts of harm and the detrimental effect this has on children. I would be very concerned if the focus was on criminal laws, as these do not have a particular focus on children, and this is needed, to ensure their rights and needs are prioritised. I believe that moving this to criminal law would be a significant step backwards in achieving children’s rights to safety and protection from harm.\textsuperscript{35}

\end{quote}

20.25 Another group of stakeholders was of the view that offences of abuse and neglect of children should be contained in both criminal laws and in child protection laws, depending on the degree of abuse or neglect.\textsuperscript{36} One stakeholder submitted that offences against children for abuse and neglect have a place in both general criminal legislation and child protection legislation. It suggested that the legislation should draw a clear link between abuse and neglect of children and domestic and family violence. The onus should be on holding the person who commits acts of violence accountable for the abuse and neglect of children in cases where there was evidence of domestic and family violence, rather than blaming the non-abusive parent—usually the mother—

\begin{footnotes}

\textsuperscript{31} Berry Street Inc, Submission \textit{FV} 163, 25 June 2010.

\textsuperscript{32} National Legal Aid, Submission \textit{FV} 232, 15 July 2010; J Stubbs, Submission \textit{FV} 186, 25 June 2010.

\textsuperscript{33} Queensland Government, Submission \textit{FV} 229, 14 July 2010.

\textsuperscript{34} Department of Premier and Cabinet (Tas), Submission \textit{FV} 236, 20 July 2010; Magistrates’ Court and the Children’s Court of Victoria, Submission \textit{FV} 220, 1 July 2010; F Hardy, Submission \textit{FV} 126, 16 June 2010; Better Care of Children, Submission \textit{FV} 72, 24 June 2010; M Condon, Submission \textit{FV} 45, 18 May 2010.

\textsuperscript{35} F Hardy, Submission \textit{FV} 126, 16 June 2010.

\textsuperscript{36} Wirringa Baiya Aboriginal Women’s Legal Centre Inc, Submission \textit{FV} 212, 28 June 2010; Women’s Legal Service Queensland, Submission \textit{FV} 185, 25 June 2010; Confidential, Submission \textit{FV} 184, 25 June 2010; Confidential, Submission \textit{FV} 162, 25 June 2010; C Pragnell, Submission \textit{FV} 70, 2 June 2010; Confidential, Submission \textit{FV} 69, 2 June 2010.

\end{footnotes}
for failing to protect the child. This was a persistent criticism of the response of the child protection sector to family violence.

**Commissions’ views**

20.26 The major advantage of locating the offence provisions in child protection legislation, rather than in criminal laws, is that decisions as to whether to bring proceedings are subject to a consideration of the objects and principles of the legislation. These make the best interests of children the paramount consideration. It also facilitates the involvement of child welfare experts in harm assessments, and in decisions to investigate and prosecute alleged offences, therefore ensuring appropriate protective responses. On the other hand, locating offence provisions in a criminal statute clearly marks the behaviour as serious, outside the confines of acceptable behaviour and criminal in nature.

20.27 As discussed previously, there is a fundamental distinction between criminal law, on the one hand, and civil law—child protection and family violence legislation—on the other hand. The former looks to past behaviour, with a focus on punishment of the offender and retribution for the victim, while child protection and family violence legislation are forward-looking. Their common and principal objective is to protect and secure the future welfare of those who are at risk of harm caused by family violence—typically by imposing conditions that regulate the behaviour and movements of those who have committed family violence.

20.28 This complex interrelationship between criminal and care and protection issues lends support to the Commissions’ view that the strongest approach to decisions about how to deal with offences against children involves co-operative relationships between key agencies that bring different interests, skills and responsibilities to the process. For example, in NSW, Joint Investigation Response Teams—made up of community services caseworkers, the police and health professionals—undertake joint investigation of child protection matters. In the Northern Territory, the Child Abuse Taskforce also includes Indigenous representatives and other agencies as required in their joint investigations. These and other inter-agency cooperative arrangements are discussed in more detail in Chapter 29.

20.29 The Commissions note the various approaches taken by different states and territories, and acknowledge the diversity of views and responses on the location of these offence provisions and the force of arguments on both sides. The appropriate response to the fact that there are strong arguments in favour of locating the offence provisions in criminal law and in child protection legislation may be to place them in both, and to make a decision about which legislation to use depending on factors such as the nature and severity of the offence. However, the Commissions conclude, on the basis of the submissions received, that there is not sufficient weight of evidence to justify making a specific recommendation.

---

37 Confidential, Submission FV 184, 25 June 2010.
The form of the offence provisions

20.30 Few submissions addressed the question in the Consultation Paper about the way the offence provisions are currently drafted.38 The Magistrates’ Court and the Children’s Court of Victoria commented that there may be cause for a review of the offence provisions if the requirement to prove intention was deterring prosecutors from bringing prosecutions.39 The Courts submitted that Victorian courts have not dealt with offences of child abuse or neglect under s 493 of the *Children, Youth and Families Act 2005* (Vic), although five people were sentenced for leaving a child without supervision or care in 2007–08. However, it also noted that circumstances giving rise to the charge were more likely to be dealt with by way of referral to the child protection agency where the emphasis is on the need to ensure future safety of the child:

> Usually the best interests of a child will be served by maintaining a relationship with the child’s parent. This suggests a need to prioritise protection over prosecution in all but the most serious cases.40

20.31 The Commissioner for Children (Tas) also noted that prosecutions had rarely, if ever, been brought for child abuse or neglect under s 91 of the Tasmanian child protection legislation, attributing this largely to the difficulty faced by a prosecutor to secure a conviction. The Commissioner noted that the provision ‘may well be there for educational impact rather than as a prosecutorial tool’.41

Commisions’ views

20.32 The low number of submissions raising this as an issue of concern suggests that the way the offence provisions are framed was not a pressing issue for the safety of children. Low levels of prosecution were indicated in two submissions, but may be the result of a number of factors. Any concerns about particular offence provisions may be best dealt with by individual jurisdictions. The Commissions do not, therefore, make any recommendation in relation to the form of the offence provisions.

Penalties for offences under child protection laws

20.33 In the Consultation Paper, the Commissions asked what range of penalties ought to be available for offences under child protection legislation.42 The Commissions considered whether, where a prosecution is brought under child protection legislation, alternative penalties should be available to the court other than imprisonment or a court-imposed fine. Such penalties may include community service orders or conditional bonds that might, for example, impose conditions requiring offenders to participate in offender rehabilitation programs designed to address risk factors

---

38 Consultation Paper, Question 13–2. Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010; Berry Street Inc, Submission FV 163, 25 June 2010; Commissioner for Children (Tas), Submission FV 62, 1 June 2010.
39 Ibid.
40 Ibid.
41 Commissioner for Children (Tas), Submission FV 62, 1 June 2010.
42 Consultation Paper, Question 13–4.
associated with the offender’s conduct, such as alcohol and substance abuse. They may therefore be more likely to produce an effective outcome, in terms of rehabilitation, retribution and deterrence, than the imposition of a court fine.

20.34 A range of community-based, non-custodial sentencing options are widely available in all Australian jurisdictions, generally as an alternative to a sentence of imprisonment, although in some jurisdictions, such as Victoria, they are also available as an alternative to a fine. These include options such as community service orders, and orders that require participation in programs designed to address offending behaviour.

20.35 In all jurisdictions where imprisonment is a possible sanction for child abuse and neglect offences—that is, in all jurisdictions except NSW—the normal sentencing alternatives to prison would be available under the jurisdictions’ sentencing laws.

20.36 A particular issue arises in NSW, where the only sentencing option available to a court for a child abuse or neglect offence under the Children and Young Persons (Care and Protection) Act 1998 (NSW) is to impose a fine or give a bond under s 10 of the Crimes (Sentencing Procedure) Act 1999 (NSW). Such a bond allows the court to discharge an offender without conviction on conditions that may include a requirement that the offender participates in a treatment or rehabilitation program. The Commissions note that imprisonment was a penalty under the previous NSW child welfare legislation, and this would have allowed access to a wider range of community-based sentences. The 2008 Report of the Special Commission of Inquiry into Child Protection Services (Wood Inquiry) declined to reinstate imprisonment as a penalty for abuse and neglect offences in the NSW legislation on the basis that it was not in the best interests of the child, particularly in the case of a parent offender, because to do so would be likely to exacerbate underlying risk factors.

---

43 See, eg, Crimes (Sentencing Procedure) Act 1999 (NSW) s 8.
44 Sentencing Act 1991 (Vic) s 36. See also Judicial College of Victoria, Victorian Sentencing Manual (2009), [14.2].
45 The maximum penalty under the Children and Young Persons (Care and Protection) Act 1998 (NSW) is 200 penalty units.
46 Crimes (Sentencing Procedure) Act 1999 (NSW) s 10(1) provides that, where a court finds a person guilty of an offence, the court may make an order: dismissing the charge, discharging the offender on condition that the person enter into a good behavior bond for up to 2 years, or discharging the offender on condition that the offender agrees to participate in an ‘intervention program’, where the court is satisfied under s 10(2A) that such an order would reduce the likelihood of the person committing further offences by promoting the treatment or rehabilitation of the person.
47 Child Protection Act 1987 (NSW), repealed.
Submissions and consultations

20.37 A number of stakeholders submitted that a full range of penalties should be available for offences against children contained in child protection laws, up to, and including, imprisonment.49

20.38 The Magistrates’ Court and the Children’s Court of Victoria submitted that the focus should be on ensuring that the sentencing court has the flexibility to craft orders that reflect the circumstances of each particular case.50 It noted that, in Victoria, the court is able to apply a full range of penalties—including penalties to advance rehabilitation such as community-based orders—and can take into account the wide range of scenarios that might fall within the legislation, the ongoing role of an offender as a parent and the best interests of the child affected by the abuse or neglect.

20.39 The availability of community-based orders to divert offenders to relevant programs aimed at addressing associated issues, such as family violence or drug and alcohol abuse, was widely supported.51 However, a concern was expressed that these need to be linguistically and culturally appropriate and offenders need to be supported so that they understand clearly what the orders require; how to comply with them; and the consequences of breaching them.52 The Victorian Aboriginal Legal Service Co-operative Ltd cited the Wulgunggo Ngalu Learning Place as an example of a culturally-appropriate place for Aboriginal and Torres Strait Islander men who are undertaking community-based orders. The program aims to help these men successfully complete their orders while teaching life skills to reduce the likelihood of return to offending behaviour.53

20.40 Another significant concern was that community-based orders are not widely available outside metropolitan areas. The unavailability of programs in rural and remote areas hampers judicial officers in sentencing. It results in some people being sentenced to imprisonment, and fails to offer rehabilitation or other therapeutic interventions that might address underlying problems.54

Commissions’ views

20.41 It would appear that the only state in which there are limited sentencing options available in relation to abuse and neglect offences under child protection legislation is NSW, where imprisonment was removed as a sentencing option in 1998, when the new

49 Department of Premier and Cabinet (Tas), Submission FV 236, 20 July 2010; National Legal Aid, Submission FV 232, 15 July 2010; Berry Street Inc, Submission FV 163, 25 June 2010; Confidential, Submission FV 160, 24 June 2010; M Condon, Submission FV 45, 18 May 2010.
50 Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010.
53 Ibid.
child protection legislation was introduced. However, as discussed above, NSW courts do have some capacity under the Crimes (Sentencing Procedure) Act 1999 to impose a bond on an offender, where it considers a bond appropriate. Furthermore, where there is enough evidence, the police also have the option to bring proceedings under the criminal law, where a wider range of sentencing options are available to the court. For these reasons, and in view of the conclusions reached by the Wood Inquiry, as noted above, the Commissions make no recommendation.

**Information sharing between child protection agencies and the police**

20.42 The investigation, and prosecution, by law enforcement agencies of serious offences alleged to have been committed against a child or young person may be hampered by laws that do not clearly permit relevant information to be shared with the police. Consequently, the ability of the criminal justice system to protect the safety not only of the alleged victim but also of other children and young people may be compromised.

**Confidentiality of reporters**

20.43 Child protection laws across Australia make it an offence for a person to disclose the identity of a person who makes a report to a child protection agency, or to disclose information contained in a report from which the reporter’s identity could be revealed, except to the extent that disclosure is made in the course of performing official duties under the legislation, or where the reporter has consented. In some jurisdictions, the circumstances in which relevant information that is otherwise confidential may be shared has been broadened. These provisions are examined below.

20.44 Child protection legislation also generally precludes information which would reveal the identity of the reporter from being admissible in court proceedings, unless the court is satisfied that the information is of critical importance to the proceedings, and that failure to allow it to be tendered as evidence would prejudice the proper administration of justice.

20.45 In the context of a possible criminal prosecution, the concern is that these provisions may prevent the disclosure to police of information that might assist in a prosecution.

---

56 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(1); *Children, Youth and Families Act 2005* (Vic) ss 41, 129–130, 190; *Child Protection Act 1999* (Qld) ss 186–188; *Children and Community Services Act 2004* (WA) ss 23, 124F, 141, 240–1; *Children’s Protection Act 1993* (SA) ss 13, 52L; *Children, Young Persons and Their Families Act 1997* (Tas) ss 16, 103; *Children and Young People Act 2008* (ACT) ss 846, 868-871; *Care and Protection of Children Act 2007* (NT) s 27(2) 150, 195, 221.
57 See, eg, *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29(2); *Children and Community Services Act 2004* (WA) s 240(4); *Care and Protection of Children Act 2007* (NT) s 27(2). See also Ch 30.
Where child protection workers and police officers are working together as part of an integrated joint response team, such as Queensland’s Suspected Child Abuse and Neglect Team (SCAN) or Western Australia’s ChildFirst Assessment and Interview Team, collaborative arrangements between police and child protection agencies are generally governed by agreement.\(^{58}\)

However, it seems that there may be some confusion in practice when the matter falls outside the brief of a joint inter-agency team. In a recent inquiry into child protection services in Victoria, the Victorian Ombudsman found that child protection workers were confused about what information they could, and could not, share. One misapprehension was that child protection workers could not disclose the identity of reporters to Victoria Police when investigating allegations of physical or sexual abuse against children.\(^{59}\) This is despite an express provision in the Victorian legislation that allows a protective intervener—defined as the Secretary of the child protection agency or a member of the police force—to share information, including the identity of a reporter, with another protective intervener or to a person in connection with a court proceeding, including proceedings in the Family Court.\(^{60}\)

Recent amendments to the Children and Young People (Care and Protection) Act 1998 (NSW), implementing recommendations made by the Wood Inquiry,\(^{61}\) were designed to avoid this uncertainty. The NSW legislation now provides that information from which a reporter’s identity may be revealed can be shared with a law enforcement agency in clearly defined circumstances. Those circumstances are:

- where the information is disclosed in connection with the investigation of a serious offence alleged to have been committed against a child or young person; and
- where the disclosure is necessary to safeguard or promote the safety, welfare and wellbeing of any child or young person;\(^{62}\) and, as an added safeguard,
- where a senior law enforcement officer certifies that obtaining the reporter’s consent may prejudice the investigation, or where the person or body making the disclosure certifies in writing that it is impractical to obtain the consent of the reporter.\(^{63}\)

\(^{58}\) But note, the Queensland SCAN unit is established and governed under the Child Protection Act 1999 (Qld) to investigate serious allegations of child abuse and neglect. The role and responsibilities of SCAN members and the relevant information sharing protocols are outlined in sections 159I–159L of the Child Protection Act 1999 (Qld). For information on inter-agency teams in other jurisdictions, see Ch 29.

\(^{59}\) Ombudsman Victoria, Own Motion Investigation into the Department of Human Services Child Protection Program (2009), [78]–[79].

\(^{60}\) Children, Youth and Families Act 2005 (Vic) s 209.


\(^{62}\) Children and Young Persons (Care and Protection) Act 1998 (NSW) s 29(4A).

\(^{63}\) Ibid s 29(4B). The Act also requires the reporter to be advised of the fact that his or her identity has been disclosed, or that the contents of their report have been disclosed, except in certain circumstances: s 29(4C).
Child protection legislation in Western Australia was also amended in 2008 to broaden the circumstances in which identifying information about a reporter can be disclosed. Among the circumstances listed, the *Children and Community Services Act 2004* (WA) provides that identifying information can be disclosed to, or by, a police officer for the purpose of, or in connection with, an investigation of a suspected offence, or for the conduct of a prosecution of an offence, relating to the child. The provision is narrower than the NSW provision as it is confined to the investigation and prosecution of an offence alleged to have been committed against the child who is the subject of the report.

**Consultation Paper**

In the Consultation Paper the Commissions proposed that state and territory child welfare laws be amended to permit the disclosure of the identity of the reporter, and of information contained in the report from which the reporter’s identity could be revealed, to a law enforcement agency of any Australian jurisdiction in particular circumstances. Using the NSW legislation as a model, the Commissions suggested that a person be permitted to disclose the identity of a reporter, or the contents of a report from which the identity of the reporter may be revealed where:

- the information is disclosed in connection with an investigation of a serious offence alleged to have been committed against a child or young person; and
- the disclosure is necessary to protect a child or young person.

Wherever possible or practical, the Commissions proposed three safeguards:

- that the reporter’s consent always be sought first as a matter of best practice;
- the legislation should require a senior law enforcement officer to certify in writing beforehand that obtaining consent would prejudice the investigation of the offence, or that obtaining consent is impractical; and
- the person who disclosed the identity of the reporter should notify the reporter of that fact unless to do so would prejudice the investigation concerned.

The purpose of the proposal was to remove any uncertainty that exists about what information may be provided to a law enforcement agency, and thus remove any impediment to an effective criminal justice response.

---

64 *Children and Community Services Act 2004* (WA) ss 124F (2)(c), 240(2)(iii).
65 Consultation Paper, Proposals 13–1 to 13–4.
Submissions and consultations

20.53 The Commissions received numerous submissions on these proposals, the majority of which supported the proposals to the extent that individual jurisdictions did not already allow protected information to be shared with a law enforcement agency.67

20.54 The governments of Tasmania and Queensland both submitted that the current exceptions in their legislation adequately permit disclosure to the police of otherwise confidential information because disclosure is made in the performance of official functions under the legislation, and is therefore ‘authorised by law’.68 If there is any doubt that this is the case, the Queensland Government noted that the confidentiality of information relating to the reporter may be overridden by a court order where a court considers it appropriate. It argued, therefore, that the current provisions adequately enable information sharing between the police and relevant agencies in the child protection sector. The Queensland Government also submitted that disclosing the reporter’s details to police for situations not connected with the investigation of an offence had the potential to compromise the effectiveness of the legislation by deterring people from reporting their suspicions.69

20.55 The principal concern of those stakeholders that were opposed to the proposals was that paring back the protections given to reporters would deter people from reporting suspected cases of child neglect and abuse.70 While many acknowledged—and agreed with—the purpose of the proposal, there was a concern that the measure would discourage people from making reports to child protection agencies because of fear of repercussions or retribution from their family or their community if it became known that they had made the report. This may be of particular concern in small or regional communities.

20.56 A number of stakeholders also highlighted the need for child protection agencies to take into account the safety of the reporter before disclosing confidential information to a law enforcement agency, particularly where issues of family violence were evident or suspected.71

67 Department of Premier and Cabinet (Tas), Submission FV 236, 20 July 2010; National Legal Aid, Submission FV 232, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, Submission FV 212, 28 June 2010; J Stubbbs, Submission FV 186, 25 June 2010; Women’s Legal Service Queensland, Submission FV 185, 25 June 2010; Confidential, Submission FV 184, 25 June 2010; Confidential, Submission FV 162, 25 June 2010; UnitingCare Children Young People and Families, Submission FV 151, 24 June 2010; C Humphreys, Submission FV 131, 21 June 2010; Confidential, Submission FV 130, 21 June 2010; Better Care of Children, Submission FV 72, 24 June 2010; C Pragnell, Submission FV 70, 2 June 2010; M Condon, Submission FV 45, 18 May 2010.

68 Department of Premier and Cabinet (Tas), Submission FV 236, 20 July 2010; Queensland Government, Submission FV 229, 14 July 2010. See also Child Protection Act 1999 (Qld) s 186(2).


20.57 The Victorian Aboriginal Legal Service Co-operative Ltd submitted that, in the majority of cases, information that would be most relevant in a criminal investigation rests in the content of the report, and not necessarily its source, although there may be instances when the credibility of the source may also need to be tested. It advocated for some protections for reporters to be maintained.\textsuperscript{72}

**Commission’s views**

20.58 As abuse and neglect of children often occurs in the privacy of the home, it is essential that people in our communities—particularly professionals who see children in the course of their everyday work—report their concerns to child protection agencies. To encourage people to make reports, child protection laws contain a suite of protections for reporters. These include provisions that protect reporters’ identities and that protect them from civil actions in defamation or breaches of professional standards when reports are made in good faith. Mandatory reporting provisions in state and territory laws also impose a duty on certain people to report safety concerns about children to relevant agencies.\textsuperscript{73}

20.59 For this reason, the Commissions consider that the confidentiality provisions applying to reporters should only be overridden in exceptional circumstances. Even when these exceptional circumstances exist, the reporter’s consent should always be sought first, wherever possible and practical.

20.60 In the Commissions’ view, those exceptional circumstances must include where the information is sought by a law enforcement agency in connection with the investigation of a serious offence alleged to have been committed against a child. This is to ensure that an effective criminal justice response is activated to protect not only the child who is the victim of the alleged offence, but of other children whose safety may also be at risk.

20.61 A number of child welfare laws contain limited provisions that allow information to be shared between people in the course of performing official functions under the legislation. However, the Commissions are not persuaded that these provisions are always sufficiently clear to permit disclosure of otherwise confidential information about a reporter to a law enforcement agency for the purpose of investigating an alleged criminal offence against a child. Uncertainty about the law causes people working in the sector to adopt a risk-averse approach,\textsuperscript{74} refusing to disclose potentially crucial information because of fear of breaching privacy or secrecy laws. This may, in turn, hinder a proper and timely investigation by the police of serious offences alleged to have been committed against a child, and may subsequently

\textsuperscript{72} Victorian Aboriginal Legal Service Co-operative Ltd, Submission FV 179, 25 June 2010.

\textsuperscript{73} See Children and Young Persons (Care and Protection) Act 1998 (NSW) ss 23, 27; Children, Youth and Families Act 2005 (Vic) ss 162, 184; Education (General Provisions) Act 2006 (Qld) ss 365–366; Public Health Act 2005 (Qld) ss 158, 191; Children and Community Services Act 2004 (WA) ss 3, 124B; Children’s Protection Act 1993 (SA) ss 6, 10–11; Children, Young Persons and Their Families Act 1997 (Tas) ss 3, 4, 14; Children and Young People Act 2008 (ACT) ss 342, 356; Care and Protection of Children Act 2007 (NT) ss 13–16, 26.

\textsuperscript{74} Ombudsman Victoria, Own Motion Investigation into the Department of Human Services Child Protection Program (2009), [78]–[79].
affect the ability to prosecute the offences. In this regard, the Commissions note that some jurisdictions—including NSW and Western Australia—have amended their laws to make it clear that information about a reporter may be disclosed to the police for the purpose of an investigation of a serious offence in relation to a child.

20.62 To the extent that it is not already clearly provided for in individual jurisdictions, the Commissions recommend that state and territory child protection legislation be amended, based on the NSW legislation, to authorise a person to disclose the identity of a reporter, or information contained in a report from which the reporter’s identity may be revealed, to a law enforcement agency where:

- the information is disclosed in connection with the investigation of a serious offence alleged to have been committed against a child or young person; and

- the disclosure is necessary for the purpose of safeguarding or promoting the safety, welfare and wellbeing of any child or young person, whether or not the victim of the alleged offence.

20.63 The Commissions also recommend that disclosure only be authorised where the person or body that discloses to a law enforcement agency the identity of the reporter certifies beforehand that seeking the reporter’s consent is impractical, or a senior police officer certifies that this would prejudice the investigation. If such information is disclosed, the reporter should be advised of that fact as soon as practicable, unless to do so would prejudice the investigation.

20.64 The legislation should also define a law enforcement agency broadly to include federal, state and territory police in order to allow information to be shared across state and territory borders.

20.65 The Commissions’ recommendations are limited to the purpose of investigating the commission of an alleged serious offence against a child or young person, and where there is a concern for the safety of a child or young person. They are intended to ensure that legislative provisions do not prevent the sharing of information in circumstances where there is a risk to the safety of a child or young person. The recommendations are consistent with the broad recommendations, in Chapter 30, that family violence and child protection legislation should clearly set out which agencies and organisations may use and disclose information and in what circumstances. This will provide clarity for those being asked to disclose the information, and ensure that any disclosure is consistent with child protection legislation, and with relevant privacy and secrecy legislation, as the disclosure is ‘authorised by law’.

20.66 As with a number of recommendations made in this Report, these recommended legislative amendments must be supported by providing appropriate training to people working in the child protection sector, in both government and non-government agencies, to enhance their understanding of the amendments and implement them in practice.

Privacy legislation and the exception for disclosure that is ‘required or authorised by law’ is discussed in Ch 30.
appropriate arrangements to ensure the laws operate as intended. Chapter 31 acknowledges the importance of ongoing education and training programs.

20.67 The Commissions’ recommendations accord with the overarching objective of this Inquiry—to address gaps in service provision that have arisen in practice where governing legislative frameworks intersect—in order to improve safety outcomes for women and children who are victims of family violence and abuse.

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

(a) the disclosure is in connection with the investigation of a serious offence alleged to have been committed against a child or young person; and

(b) the disclosure is necessary to safeguard or promote the safety, welfare and wellbeing of any child or young person, whether or not the child or young person is the victim of the alleged offence.

The information should only be disclosed where:

(a) the information is requested by a senior law enforcement officer, who has certified in writing beforehand that obtaining the reporter’s consent would prejudice the investigation of the serious offence concerned; or

(b) the agency that discloses the identity of the reporter has certified in writing that it is impractical to obtain the consent.

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

**Deciding whether to prosecute**

20.68 The decision whether to commence a prosecution of offences committed against children is a significant aspect of the criminal justice process. In the majority of cases, the decision whether to prosecute rests with the police. However in the case of serious indictable offences, where a child has suffered significant physical or sexual assault, or has been killed, it is a matter for the state or territory director of public prosecutions.

20.69 Although prosecutorial policy varies across the jurisdictions, prosecutorial discretion is guided by two principal criteria: first, whether there is sufficient reliable

---

76 Supported by the National Legal Aid, Submission FV 232, 15 July 2010.
77 The police are generally responsible for prosecuting all summary matters in a local or magistrates court, except where the charge relates to child sexual assault or a matter involving a police officer.
evidence to support a conviction (the ‘prima facie test’); and secondly, whether it is in the public interest to bring a prosecution.78

20.70 In relation to the first criterion, a number of factors are relevant in assessing whether there is enough evidence to support a conviction, including the availability, competence and reliability of witnesses, and the availability of any lines of defence to the defendant.

20.71 Once the prosecutor is satisfied that there is sufficient evidence to justify making a decision to prosecute, or to continue a prosecution, the second key consideration is whether or not it is in the public interest to pursue the prosecution.79 There is a long list of non-exhaustive factors that may be taken into account when determining this issue, including:

- the seriousness of the offence;
- any aggravating or mitigating factors;
- the age, intelligence and mental health of the offender, the victim and any witnesses;
- the degree of culpability of the alleged offender;
- whether or not the proceedings or the consequences of any resulting conviction would be unduly harsh or oppressive; and
- the prevalence of the offence and the need for general deterrence.80

---


79 Office of the Director of Public Prosecutions (Cth), *Prosecution Policy for the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, cl 2.8; Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 4(3); Office of the Director of Public Prosecutions (Vic), *Prosecution Policies and Guidelines*, cl 2.1.6; Office of the Director of Public Prosecutions (Qld), *Director’s Guidelines*, cl 4(ii); Office of the Director of Public Prosecutions (WA), *Statement of Prosecution Policy and Guidelines* (2005), cl 23; Office of the Director of Public Prosecutions (SA), *Prosecution Policy*, 4; Office of the Director of Public Prosecutions (Tas), *Prosecution Guidelines*; Office of the Director of Public Prosecutions (ACT), *Prosecution Policy*, cl 2.5; Office of the Director of Public Prosecutions (NT), *Guidelines*, cl 2.1. Note that the guidelines for Queensland, Western Australia and the Northern Territory somewhat conflate the two tests, in that the question of whether a prosecution is in the public interest is informed by inquiring into whether there is a reasonable prospect of conviction. Nevertheless, notwithstanding the order of the inquiry, the considerations which inform the exercise of the prosecutor’s discretion are substantially similar across the jurisdictions.

80 See, eg, Office of the Director of Public Prosecutions (NSW), *Prosecution Guidelines*, cl 4(3). See also Ch 26.
20.72 In matters concerning the abuse or neglect of children, a decision to bring a prosecution against a parent can have a devastating impact on the family. This issue was considered by the ALRC in its 1981 report, *Child Welfare*, where the ALRC recommended that:

Prosecutions should therefore be initiated only after careful deliberation. The police should be encouraged to consult representatives of welfare agencies before a decision to prosecute is taken. Further, when a prosecution has been initiated, procedures should be introduced which will facilitate the withdrawal of the proceedings when this is desirable.81

20.73 When matters are referred to a joint or inter-agency team, the decision as to whether to initiate proceedings against a person may be made by the police in consultation with the child protection agency, or at least communicated to the child protection caseworker involved, as directed under policy and procedure manuals.

20.74 In Queensland, unless a matter is urgent, the police are statutorily required to consult with the child protection agency before investigating an offence against a child whom a police officer knows or suspects is a child in need of care and protection, or before initiating proceedings.82 The intention of the provision is to ensure that police and the child protection agency agree on the best strategy to proceed with an investigation and to determine whether initiating proceedings would be in the child’s best interests. In Victoria and Tasmania, a requirement exists for police to consult the child protection agency before bringing a prosecution but only in relation to offences contained in the child protection legislation.83 These provisions recognise that the child protection agency has an interest in decisions to initiate proceedings against a parent, where such action may conflict with the agency’s work with the family to address the underlying risk factors that have given rise to the abuse or neglect.

20.75 In the Consultation Paper, the Commissions sought feedback about the need for, or appropriateness of, statutorily requiring the police to consult with the relevant child protection agency before commencing an investigation or bringing proceedings in respect of an alleged offence against a child whom the police considered to be in need of care and protection.84

**Submissions and consultations**

20.76 All stakeholders who addressed this issue all agreed that cooperation between the police and the child protection agency was critical in responding appropriately and effectively to allegations that a child had been abused or neglected, and for improving outcomes for children and their families.85 The relationship between the police and the

---

82 *Child Protection Act 1999* (Qld) s 248B.
83 *Children, Youth and Families Act 2005* (Vic) ss 493(2), 494(2); *Children, Young Persons and Their Families Act 1997* (Tas) ss 91(2), 92(2)(b).
84 Consultation Paper, Question 13–9.
child protection agency was considered to be central to more consistent and better coordinated responses to child abuse and neglect. As one organisation, Berry Street Inc, commented:

Whilst legislative reform is part of the way forward any legislative reform is only as good as the practice reform that follows. The key here is not legal changes. The main issue is the culture of the relationship between child protection, the police and non-government services which are often the third ‘player’ with the most direct relationship with a family and insight into the circumstances confronting children.

It is important to understand how the professionals, service and agencies view each other. An example of this may be that if the police have an assumption that [the] child protection [agency] is not assisting them with their work but rather making their work more difficult they will be less [likely] to investigate an alleged offence against a child where the child is suspected of being in need of care and protection. Thus children at risk can receive a different level of intervention not based on the level of risk but the working relationship between police and child protection.86

20.77 In particular, it was considered appropriate and desirable for police to consult with child protection experts when assessing harm or risk of harm to children and young people.87 One stakeholder said that consultation between the police and child protection agencies concerning the investigation of alleged offences against children should be encouraged within child protection laws as a means of assisting police when exercising their prosecutorial discretion.88 Similarly, National Legal Aid submitted that child protection authorities should have collaborative working arrangements with the police to ensure that offenders are prosecuted in appropriate cases.89

20.78 A number of submissions noted that, in many states and territories, the relationship between the police and the child protection agency was governed by inter-agency protocols or guidelines, which emphasised consultation and cooperation between the agencies. The general consensus was that these non-legislative cooperative arrangements were working well in practice, and that legislative change was only desirable if administrative arrangements were not operating effectively.90

20.79 The Queensland Government submitted that the statutory requirement in s 248B of the Child Protection Act 1999 (Qld) applies only where the child is not already known to the child protection agency. Where the child is known to the Department of Child Safety, the Queensland Government stated that there are processes already in place—namely, the inter-agency SCAN teams—to ensure that the Department is aware of any police involvement with the child, and to facilitate cooperation between the two agencies.91

---

87 F Hardy, Submission FV 126, 16 June 2010.  
88 Confidential, Submission FV 184, 25 June 2010.  
89 National Legal Aid, Submission FV 232, 15 July 2010.  
90 Ibid; Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010; Women’s Legal Service Queensland, Submission FV 185, 25 June 2010; Justice for Children, Submission FV 148, 24 June 2010.  
20.80 There was a concern expressed in some submissions that imposing a legislative requirement on the police to consult with the child protection agency may interfere with the duty of the police to investigate all suspicions of criminal activity, or may delay appropriate action being taken to protect the child who was the subject of the allegations.

20.81 The Department of Premier and Cabinet (Tas) advocated against statutorily requiring the police to consult with the child protection agency on the grounds that, as mandatory reporters, the police were nevertheless required to report a child in respect of whom it had care concerns to the child protection agency. It stated that existing protocols between the child protection agency and the police provide mechanisms for determining what action should be taken which both protects the child and ensures police are able to investigate and prosecute alleged crimes effectively and efficiently.

**Commissions’ views**

20.82 A key recommendation of this Inquiry is the promotion and fostering of integrated responses in order to improve outcomes for children and their families, and to make the legal response as seamless as possible in the relevant circumstances. Inter-agency collaboration is an essential feature of integrated responses.

20.83 Collaboration between the police and the child protection agency—together with other relevant agencies—is central to ensuring an appropriate and effective criminal justice and child protection response to allegations of child abuse and neglect, particularly where they arise in the context of family violence. This inter-agency collaboration depends on a shared understanding of the nature and dynamics of family violence both within and across each jurisdiction, which must be reflected in the protocols and guidelines that govern the cooperative arrangements.

20.84 The benefits of closer collaboration are many: police can draw on the expertise of child protection caseworkers to make harm, or risk of harm, assessments; and can acquire a better understanding of the impact on the child and the child’s family of a likely prosecution, and a likely sentence on conviction. This will ensure that all relevant factors are properly considered by the police when exercising their discretion to prosecute, so that prosecutions are initiated only in appropriate cases.

20.85 Where a matter is the subject of a joint inter-agency response, the Commissions note that consultation between the police and the child protection agency is generally covered by the terms of the inter-agency agreement that governs those arrangements. The two agencies are jointly involved in the investigation of child abuse or neglect allegations, therefore reducing trauma on the victim by having to repeat their story, and

---

92 Confidential, Submission FV 162, 25 June 2010. See also Confidential, Submission FV 109, 8 June 2010; Confidential, Submission FV 82, 2 June 2010; C Pragnell, Submission FV 70, 2 June 2010.
93 Confidential, Submission FV 109, 8 June 2010.
94 Department of Premier and Cabinet (Tas), Submission FV 236, 20 July 2010.
95 Recommendation 29–2.
96 See Ch 29.
97 See Part B.
98 Recommendation 29–1.
are required to coordinate the services they provide to the child and non-offending family members. Responses received in submissions and consultations indicated that, where joint inter-agency response teams are involved, these administrative arrangements appear to be working effectively in practice to ensure consultation between the police and the child protection agency.

20.86 There may be a gap in service integration and cooperation if a matter being investigated by the police is not referred to joint investigation—for example, if it does not meet the relevant criteria for referral to the joint investigation unit. However, the Commissions note that where the police are investigating alleged offences of abuse or neglect of a child, as mandatory reporters they must make a report about the child to the relevant child protection authority. Even if a matter is not allocated to a joint inter-agency team, it is probable that the police will consult with the child protection agency in reporting their concerns for the child.

20.87 The issue is whether consultation should be statutorily required, or whether it should be facilitated through the use of administrative mechanisms. The Commissions consider that the key to fostering good working relationships between the police and the child protection agency is more likely to be achieved by building trust and by promoting cultural change both within and across the agencies, rather than by legislative compulsion. As the Commissions conclude in Chapter 29, the success of integrated responses relies to a large extent on strong and visionary leadership, shared principles and objectives, clear inter-agency arrangements, and an ongoing and responsive relationship between the parties. All of these elements can be put in place without a legislative basis. Accordingly, the Commissions recommend that state and territory law enforcement, child protection—and other relevant agencies—should develop a framework for consultation about law enforcement responses when allegations of abuse or neglect of a child, for whom there are care and protection concerns, are being investigated by the police.

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

**Mandatory reporting of children’s exposure to family violence**

20.88 As discussed in Chapter 19, there is a substantial body of research that demonstrates the co-occurrence of child abuse and family violence, and the impact that exposure to family violence has on the long-term health and welfare of children. Consequently, children’s exposure to family violence is now acknowledged in all state and territory child welfare legislation as either a distinct category of child abuse or as a ground in itself triggering a child protection intervention.

20.89 Together with the introduction and expansion of mandatory reporting laws, the recognition of harm caused to children by their exposure to family violence is believed
Family Violence — A National Legal Response

to have contributed to the substantial increase in the number of reports received by child protection agencies over the last five years, from 137,938 in 2001–2002 to 339,454 in 2008–2009. Family violence is one of the most common reasons given for reports to child protection agencies, and a large number of reports—in which family violence was a primary concern—are made by police.

A number of researchers and commentators have questioned whether the formal recognition of the impact of family violence on children in the child protection context has improved services for women and children living with violence. This is said to be due, in part, to the flood of reports that have overloaded a sector that is already strained due to the constant pressure of inadequate resourcing. As Dr Dorothy Scott has argued, this combination of factors has resulted in resources being spent unproductively, reports being investigated too superficially and closed prematurely, caseworkers not being assigned, and critically, children and families missing out on support and education services that they require.

These problems appear to be magnified by laws and policies in some states and territories that require police officers to notify the child protection agency every time they respond to an incident of family violence where children are present or ordinarily resident in the home but not there at the time.

In the Wood Inquiry, for example, it was found that a similar NSW Police policy was inconsistent with the legislative reporting provisions which, at the time, required reports to be made where, as a result of being exposed to incidents of domestic violence, the child or young person was at risk of ‘serious physical or psychological harm’.

Although unintentional, the evidence suggests that legislative reporting requirements or policy directives that require police officers to make a report following every incident of family violence where a child is present or ordinarily resident in the home is counter-productive.

Two consequences may flow from mandatory notifications: the first is that it may discourage women from reporting family violence or breaches of family violence protection orders because of the fear that their children will be removed from them.

101 Ibid.
104 The Commissions understand that this is the current practice in Tasmania and Queensland, but note that it is presently under review in Queensland: Queensland Government, Submission FV 229, 14 July 2010.
This fear is particularly acute for Indigenous women, as a recent study of Indigenous communities in Queensland by Professor Chris Cunneen illustrated:

The reason I haven’t reported is my kids, my babies. I’m worried about them being taken. I had four children. Because police are brought to a house where there is violence, the kids get taken straight away. The Stolen Generation I reckon is coming back. ...

I think the extra dimension for Indigenous women which is onerous is Child Safety. All of these veiled threats that if you do this you will lose the kids … That sort of dynamic was driving people underground and they weren’t reporting because they knew Child Safety would get involved.  

20.95 Cunneen found that many people, including police officers themselves, questioned the usefulness of mandatory reporting by police where a child is present (or usually resident) at the scene of a domestic violence incident. The report concluded that ‘a more sensible policy would provide for better use of police discretion on this issue’. The Queensland Government is presently undertaking a review of its child protection law and practice, and this is one of the primary issues under examination.

20.96 The second consequence that may flow from mandatory notifications is that, because most reports of family violence from police incidents do not reach the threshold for an investigation by the child protection agency, the matter is closed and no support services are provided to the families and children.

Submissions and consultations

20.97 In the Consultation Paper the Commissions asked about the circumstances in which it would be appropriate for police to make child protection notifications when responding to incidents of family violence.

20.98 A number of submissions, particularly from child protection advocates, argued that it was appropriate for police to make a report to the child protection agency in every case where children were exposed to family violence, or its aftermath. They noted that children are not mere witnesses to family violence, but can be seriously affected by it. Failure to report children who are exposed to family violence runs the risk that they will be exposed to greater harm if the conflict escalates, both in terms of


C Cunneen, Alternative and Improved Responses to Domestic and Family Violence in Queensland Indigenous Communities (2009), [6.2.4]. See also Wirringa Baiya Aboriginal Women’s Legal Centre Inc, Submission FV 212, 28 June 2010.

C Humphreys, Submission FV 131, 21 June 2010.

Consultation Paper, Question 13–6.

Department of Premier and Cabinet (Tas), Submission FV 236, 20 July 2010; National Legal Aid, Submission FV 232, 15 July 2010; Berry Street Inc, Submission FV 163, 25 June 2010; Justice for Children, Submission FV 148, 24 June 2010; Confidential, Submission FV 109, 8 June 2010; Education Centre Against Violence, Submission FV 90, 3 June 2010; Confidential, Submission FV 88, 2 June 2010; Confidential, Submission FV 82, 2 June 2010; Confidential, Submission FV 69, 2 June 2010.
potentially being ‘caught in the crossfire’ or in terms of their long term health and wellbeing.

20.99 However, one person observed that, despite the requirement to make a report in all family violence matters in Queensland, the policy was not always consistently applied:

… some police will refer all cases, no matter where the child was, others will make a decision that a baby in the house was not affected by the violence and so not make a decision. And importantly, the referrals are overwhelming the system and often what happens is that a number of ‘occurrence reports’ [are] completed by Police, these can be up to two weeks old, are faxed to Child Safety, and these can often sit there for some time before Child Safety has the opportunity to read through them. My understanding is that any urgent case is called through, nevertheless, there have been situations where a case that Child Safety identified as being concerning, and had they known at the time, would have taken direct action, however, no action was taken because the report was not read for some time.114

20.100 While not disputing the importance of reporting concerns for the safety of children exposed to family violence, many other submissions felt that better results could be achieved in terms of improving the safety outcomes for children and their non-offending families by allowing police more discretion in their reporting practices, and providing alternative pathways for referral.115 As one submission commented:

… there needs to be a rethinking of how we respond to these cases. Police need a few referral pathways, one is to child protection authorities, the second, which could occur in tandem, is to a domestic and family violence service/family support service to work with the family to help address the issues. The difficulty is that currently, if Child Safety in Queensland decides not to investigate because the case does not meet the threshold for intervention, nothing is actually done to support this family.

Key to this is having a well developed risk assessment framework and training and education for police to enable them to more accurately assess harm to children as a result of domestic violence. Ideally, a specialist child protection worker role attached to Police could be involved in undertaking such assessments.116

20.101 Professor Cathy Humphreys submitted that a policy of reporting every single incident of family violence where a child is present is an ‘ineffective, and potentially unethical and damaging route which closes down help-seeking rather than protecting children’.117 She suggested that the statutory route should be reserved for children where there is ‘evidence of physical and sexual abuse or where there is evidence of cumulative harm through repeated incidents’ and children are at risk of significant harm, noting that:

114 F Hardy, Submission FV 126, 16 June 2010.
115 Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010; Women’s Legal Service Queensland, Submission FV 185, 25 June 2010; C Humphreys, Submission FV 131, 21 June 2010; Queensland Commission for Children and Young People and Child Guardian, Submission FV 63, 1 June 2010.
116 F Hardy, Submission FV 126, 16 June 2010.
117 C Humphreys, Submission FV 131, 21 June 2010.
This is not to suggest that children do not need protection and support, but rather that the statutory route has proven to be ineffective in ensuring the protection of large numbers of children notified from police domestic violence incidents. A community services route is needed for children living with domestic violence.\textsuperscript{118}

20.102 The Magistrates’ Court and the Children’s Court of Victoria observed that, under the Code of Practice for the Investigation of Family Violence, Victoria Police are advised that the threshold for child protection intervention is higher than the standard required to apply for a family violence protection order. Accordingly, the Code directs the police to consider whether to apply for a family violence intervention order on behalf of a child in order to secure their protection in cases where the child protection agency has deemed that its threshold for action is not met. The Courts further submitted that it is likely that work has and could be done to allow police to make a relatively sophisticated risk assessment of a child exposed to family violence and that the risk assessment could guide decision making about notification to the child protection agency and applications for family violence protection orders.\textsuperscript{119} In Victoria, the police, courts and family violence service providers now use a Common Risk Assessment Framework, which is reported to be improving consistency in risk assessment.\textsuperscript{120}

\textit{Commissions’ views}

20.103 The Commissions note that a number of Australian jurisdictions have responded to the large increase in numbers of notifications to child protection agencies by refining their assessment and decision-making tools to better identify those cases that require a statutory child protection response. A key feature of these new systems is the introduction of a dual track system whereby reports to the child protection agency are only made where a reporter believes on reasonable grounds that a child is at risk of ‘significant harm’. Concerns for children that fall below this threshold may be made to regional or community intake centres for assessment and referral to appropriate family support and therapeutic services. Child protection agencies are then able to focus on cases where the concerns warrant a full risk of harm assessment and are likely to lead to some form of intervention to protect the child from harm.

20.104 Where the risk is less severe, and statutory intervention is not justified, a range of new approaches have been created that allow more flexible responses to address concerns about a child’s welfare. These new approaches address the needs of those families who find themselves in what Dr Leah Bromfield and Prue Holzer describe as the ‘nexus between risk and need’,\textsuperscript{121}—that is, those families who could benefit from some form of intervention, but who fall below the threshold for statutory child protection involvement. These new approaches have been augmented by improvements to risk assessment processes to ensure consistency in decision-making and better integration of child protection services and family support agencies. The

\textsuperscript{118} Ibid.
\textsuperscript{119} Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010.
\textsuperscript{120} See Ch 18.
Commissions note, however, that the dual track system will only operate effectively if adequate resources are deployed in this ‘less urgent’ stream.

20.105 The Commissions note that the practice of requiring police to make automatic reports to the child protection agency in every case where children are exposed to family violence has been discontinued in most states and territories and is presently under review in Queensland, where the policy is still in place. In the Commissions’ view, when responding to incidents of family violence, it is vital that police use a common risk assessment framework, and retain their discretion to refer appropriate matters to the relevant child protection authority.122

Protection orders and children—the current legal framework

20.106 In practice, family violence protection orders for the protection of children are usually obtained in a magistrates court. Most commonly, children are named as protected persons on applications for family violence orders made to protect a parent, although they may also be sought directly in the child’s own right. In some jurisdictions, family violence protection orders may also be obtained in children’s courts in particular circumstances. These powers are considered below.

Magistrates courts

20.107 Under state and territory family violence legislation, family violence protection orders made in favour of an adult can, and often do, name children or young people as a protected person where they are affected by the same or similar circumstances.123 In Victoria, for example, a court may, on application or on its own initiative, include the child as a protected person in a family violence intervention order —where the child’s need for protection is substantially the same as that of the affected family member—or make a separate final family violence intervention order for the child as a protected person.124 In NSW, the court must also name the protected person’s children where they are living with the person and exposed to the family violence.125

20.108 In most states and territories, applications for a family violence protection order can also be brought by, or on behalf of, a child or young person in their own right.126 An application may be brought by a police officer,127 a parent or any other

---

122 See Ch 18.
123 See, eg, Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 38(2); Family Violence Protection Act 2008 (Vic) s 47; Restraining Orders Act 1997 (WA) s 11B; Domestic Violence and Protection Orders Act 2008 (ACT) s 19. See Ch 5 on definitions of family violence.
124 Family Violence Protection Act 2008 (Vic) s 77(2).
125 Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 38(2).
126 See, eg, Family Violence Protection Act 2008 (Vic) s 45(d); Restraining Orders Act 1997 (WA) s 25; Family Violence Act 2004 (Tas) s 15(2)(c); Domestic Violence and Protection Orders Act 2008 (ACT) s 19(3). In Victoria, a child aged over 14 years may make an application for a family violence intervention order himself or herself provided the court grants leave: Family Violence Protection Act 2008 (Vic) s 45(d)(iii). See also Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 48(6); Intervention Orders (Prevention of Abuse) Act 2009 (SA) s 20(2)(A); Domestic and Family Violence Act 2007 (NT) s 28. In Queensland, a domestic violence order may only be made for the protection of a child in his or her own right if a spousal relationship, intimate personal relationship or informal carer relationship exists between the child and the respondent: Domestic and Family Violence Protection Act 1989 (Qld) s 12D(2).
20. Family Violence, Child Protection and the Criminal Law

person with the consent of the parent. This may include a child protection caseworker. However, in NSW, only a police officer may make an application for an apprehended violence order where the person to be protected is a child aged under 16 years. In Tasmania, a copy of an application for a family violence protection order that is brought by, or on behalf of a child, must be given to the Secretary of the government agency responsible for administering the state’s child protection legislation.

20.109 In the Northern Territory, applications for a family violence protection order for the protection of a child must be brought by the police or a child welfare officer where the health and wellbeing of a child is at risk because of domestic violence.

20.110 In NSW, a police officer investigating a family violence matter must apply for a protection order if he or she suspects that a family violence offence or a child abuse-related offence has been or is likely to be committed against the person for whose protection the order would be made. Furthermore, where the person who needs protection is a child under 16 years, only a police officer may apply for a family violence protection order, or for a variation or revocation of an existing apprehended violence order. These measures are intended to ensure that the child’s best interests are prioritised above the interests of the child’s parent or carer, by removing the potential for a defendant to put pressure on the applicant to bring an application to vary the order, where that may reduce the protection afforded to the child. In contrast, other jurisdictions permit applications to vary or revoke an order to be brought by the protected person or the respondent, and notice must be given to all parties including police applicants.

20.111 Some jurisdictions require or permit a court exercising jurisdiction under family violence legislation to make a family violence protection order against a

---

127 In most jurisdictions, police are empowered to apply for a protection order or to assist a victim to make an application. See, eg, Intervention Orders (Prevention of Abuse) Act 2009 (SA) s 20(1)(a); Family Violence Act 2004 (Tas) s 15(2)(a); Domestic Violence and Protection Orders Act 2008 (ACT) s 18(2); Domestic and Family Violence Act 2007 (NT) s 28(1)(c). See also Ch 9.

128 See, eg, Family Violence Protection Act 2008 (Vic) s 45; Intervention Orders (Prevention of Abuse) Act 2009 (SA) s 20; Domestic and Family Violence Act 2007 (NT) s 28.

129 Note, in Western Australia, the legislation expressly permits a child welfare officer to bring an application for a restraining order on behalf of a child. Restraining Orders Act 1997 (WA) s 25(2)(a). See also Intervention Orders (Prevention of Abuse) Act 2009 (SA) s 20(1)(d).

130 Crimes (Domestic and Personal Violence) Act 2007 (NSW) ss 48(3). Young people aged between 16 and 18 years can make their own applications: 48(6).

131 Family Violence Act 2004 (Tas) s 15(3).

132 Domestic and Family Violence Act 2007 (NT) s 29.

133 Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 49. A police officer must apply for a family violence protection order for a child if he or she suspects that an offence under s 227 of the Children and Young Persons (Care and Protection) Act 1998 (NSW) has recently been or is being committed, or is likely to be committed, against the child for whose protection the order would be made: s 49(1)(b).

134 Ibid s 72(3). A child is defined in s 3 as a person under 16 years.

135 See, eg, Family Violence Protection Act 2008 (Vic) s 108; Domestic Violence and Protection Orders Act 2008 (ACT) ss 59, 60; Family Violence Act 2004 (Tas) s 20.

136 Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 39. See also Ch 11.

137 See, eg, Domestic and Family Violence Protection Act 1999 (Qld) s 30; Domestic and Family Violence Act 2007 (NT) s 45(1).
defendant who pleads guilty to, or is convicted of, a domestic violence offence, even where no application has been made for one. In NSW, an interim family violence protection order must also be made before a plea of guilty or a finding of guilt, when a person is charged with a serious offence.139

20.112 Applications for family violence protection orders are generally heard in a magistrates court, except where the respondent is aged under 18 years, in which case, the application may—or, in some jurisdictions, must140—be made in the children’s court.141

**Children’s courts**

20.113 As discussed in Chapter 19, the children’s courts of all states and territories have existing powers under child welfare laws to hear a range of applications and make a variety of orders in relation to the care and protection of a child or young person.142 Some of these orders are very similar to family violence protection orders, such as orders excluding a person from a child’s residence, or limiting a person’s contact with a child.143 The Children’s Court of New South Wales, for example, may make an order under s 90A of the *Children and Young Persons (Care and Protection) Act 1998* (NSW), prohibiting a person from doing anything that a parent could do in carrying out their parental responsibility. However, unlike a family violence protection order, this order may only be made against a person who has parental responsibility for the child; and it is unenforceable.

20.114 Children’s courts in some jurisdictions may also make family violence protection orders, although the situations in which these orders may be made varies across jurisdictions. For example, in Tasmania, proceedings for a family violence protection order may be transferred to the children’s court where this is considered appropriate.144 In South Australia, the *Intervention Orders (Prevention of Abuse) Act*

---

139 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 40. A serious offence is defined to include the stalking/intimidation offence under s 13 of the Act, as well as attempted murder and ‘domestic violence offences’ (other than murder or manslaughter): s 40(5). See also Ch 11.

140 Ibid; *Restraining Orders Act 1997* (WA) s 25(3)(a). Section 20 of the *Children’s Court of Western Australia Act 1988* (WA) provides that the Court has exclusive jurisdiction to hear and determine all applications under the *Restraining Orders Act 1997* (WA) with respect to a child.

141 See, eg, *Family Violence Protection Act 2008* (Vic) s 146(2); *Domestic and Family Violence Protection Act 1989* (Qld) ss 16, 30; *Family Violence Act 2004* (Tas) s 31. In Queensland, a court cannot make a domestic violence protection order against, or in favour of, a person aged under 18 years unless the person is in a spousal or intimate relationship with the person seeking or needing protection: *Domestic and Family Violence Protection Act 1989* (Qld) s 12D(2). Children and young people under 18 cannot apply for a protection order against a parent as this is considered a child protection issue and should be dealt with under the *Child Protection Act 1999* (Qld). Nor can parents apply for domestic violence orders against their children who are under 18 years.

142 In most states and the ACT, applications for care and protection orders are made to the Children’s Court by the relevant child protection agency. In South Australia, applications are made to the Youth Court, and in the Northern Territory, they are made to the Family Matters Court.

143 See, eg, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 90A; *Children, Youth and Families Act 2005* (Vic) s 515; *Children’s Protection Act 1993* (SA) s 38(1)(e).

144 *Family Violence Act 2004* (Tas) s 31.
2009 (SA)—which has been assented to but is not yet commenced—confers jurisdiction on both the Magistrates Court and on the Youth Court.145

20.115 In Queensland and the Northern Territory, family violence law confers jurisdiction on every ‘Magistrates Court and magistrate’ or court of summary jurisdiction, and on every other court—including a children’s court—where a person before it pleads, or is found, guilty of an offence involving domestic violence orders.146

20.116 As noted above, the children’s courts of NSW and Western Australia have exclusive jurisdiction to make family violence protection orders against a child or young person.147 However, the Western Australian Children’s Court may also make a restraining order to protect a child, during care proceedings, either on its own initiative or on application by a party to proceedings, or by a parent or child welfare agency on behalf of a child.148

20.117 Similarly, the ACT Children’s Court has express jurisdiction under family violence law to make a family violence protection order for the protection of a child against a parent or other person but only where there are care proceedings before it and the court believes it is necessary to protect the child from psychological abuse arising from the child’s exposure to family violence.149 Provided these conditions are present, the court can make the order either on its own motion or on application by a party to the proceedings—which would include the child protection agency.150

20.118 By contrast, the Family Division of the Children’s Court of Victoria has broad jurisdiction to hear applications for family violence protection orders under the Family Violence Protection Act 2008 (Vic) and the Stalking Intervention Orders Act 2008 (Vic) where either party is under the age of 18 years.151 No other proceedings need to be before the court for these applications to be made.

20.119 Moreover, the Victorian Children’s Court is empowered to make a family violence intervention order for or between adults where the order relates to the same or similar circumstances as those affecting the child or young person.152

20.120 This amendment followed a recommendation of the Victorian Law Reform Commission (VLRC) in its 2006 report, Review of Family Violence Laws. The VLRC noted that it was undesirable for family violence protection applications involving a

---

146 Domestic and Family Violence Protection Act 1989 (Qld) s 38(1); Domestic and Family Violence Act 2007 (NT) ss 4, 45(1).
147 Crimes (Domestic and Personal Violence) Act 2007 (NSW) s 91(b); Restraining Orders Act 1997 (WA) s 25(3).
148 Restraining Orders Act 1997 (WA) s 63.
149 Domestic Violence and Protection Orders Act 2008 (ACT) s 17; Children and Young People Act 2008 (ACT) ss 458–460.
150 Children and Young People Act 2008 (ACT) ss 459(3), 460(2).
151 Family Violence Protection Act 2008 (Vic) ss 42, 146.
152 Ibid s 147(3). For the purposes of s 147, a ‘related application’ is defined as an application for an order on the grounds of the same or similar circumstances, and includes an application to vary, revoke or extend an order. A ‘related order’ is defined as an order made on the grounds of the same or similar circumstances.
child and an adult—for example, the child’s mother—to be ‘split’ and consequently heard in separate courts. At the time of its review, the Children’s Court of Victoria could only hear an application for protection where the respondent or the person in need of protection was under 18 years. The Children’s Court could not make an order protecting an adult from an adult respondent, even if the Court had made an order against the same respondent for the protection of the child. In these cases, adult applicants were directed to take their matter to the Magistrates’ Court, potentially leaving them without a protection order in the short term. The VLRC recommended that the Children’s Court have jurisdiction over adult–adult applications that include a child on the application. In consequence, any affected family member may now apply for a family violence protection order at the Children’s Court or the Magistrates Court in Victoria.

Relationship between family violence protection orders and child protection orders

Where families are, or have been, engaged in proceedings under both family violence legislation and under child welfare laws, there is a risk that inconsistent orders may be made, which may potentially compromise the safety of victims of family violence. Alternatively, as the Children’s Court of New South Wales submitted, a court may be prevented from making a care and protection order it considers is in the best interests of the child because of an existing, yet inconsistent family violence protection order. For example, the Court said that it had been stymied, in the past, from making an order restoring a child to his or her family because there was an existing family violence protection order against an adult family member, and it had no power to vary or revoke the family violence protection order in the absence of a police application to do so.

Although family violence protection orders generally prevail over child protection orders in Victoria and South Australia, each of those states’ children’s courts has power to vary or revoke a family violence protection order to resolve any inconsistency between the order and an order that is proposed under the relevant child protection legislation. The difference between them is that the South Australian court can only do so on application, while the Victorian court has own motion powers to vary or revoke a family violence protection order, subject to serving notice on all the parties and providing each an opportunity to be heard.

154 Ibid, Rec 76.
155 Family Violence Protection Act 2008 (Vic) ss 42, 146–147.
156 Children’s Court of New South Wales, Submission FV 237, 22 July 2010.
157 Family Violence Protection Act 2008 (Vic) s 173(1); Intervention Orders (Prevention of Abuse) Act 2009 (SA) s 16(2).
158 Family Violence Protection Act 2008 (Vic) s 173. Furthermore, if a court makes a family violence protection order that is or may be inconsistent with an order under child welfare law, it must advise the child protection agency: s 173(3). See also Intervention Orders (Prevention of Abuse) Act 2009 (SA) s 16(2).
Consultation Paper

20.123 In the Consultation Paper the Commissions sought comments on the desirability of expanding the jurisdiction of all Australian children’s courts to make family violence protection orders:

• in favour of a child who is the subject of care proceedings before it, where the court considers a protection order necessary to protect the child from harm arising from the child’s exposure to family violence;\(^{159}\)

• to protect other children or siblings of the child who is the subject of care proceedings before it, where the court is satisfied that the children are affected by the same facts as alleged;\(^ {160}\) and

• both on its own initiative and on application to the court.\(^ {161}\)

20.124 Two additional, and related, issues were raised in the course of the Commissions’ consultations, as noted above. First, whether children’s courts should also be able to make family violence protection orders for and between adults, where a related matter involving a child or young person was being heard in the children’s court, as is the case in Victoria.\(^ {162}\) Secondly, whether children’s courts should have powers to vary or revoke a family violence protection order in situations where, for example, they are prevented from making a care and protection order because of an existing, but inconsistent, family violence protection order.\(^ {163}\)

Submissions and consultations

20.125 A majority of stakeholders—including the Children’s Court of New South Wales and the Magistrates’ Court and the Children’s Court of Victoria—supported a conferral of powers on all Australian children’s courts to make family violence protection orders for the protection of a child who is the subject of care proceedings before it where the grounds for making a family violence protection order are established.\(^ {164}\)

\(^{159}\) Consultation Paper, Question 13–11.
\(^{160}\) Ibid, Question 13–12.
\(^{161}\) Ibid, Question 13–12.
\(^{162}\) Family Violence Protection Act 2008 (Vic) s 147(3).
\(^{163}\) Children’s Court of New South Wales, Submission FV 237, 22 July 2010.
\(^{164}\) Ibid; Department of Premier and Cabinet (Tas), Submission FV 236, 20 July 2010; National Legal Aid, Submission FV 232, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, Submission FV 212, 28 June 2010; Legal Aid NSW, Submission FV 219, 1 July 2010; Berry Street Inc, Submission FV 163, 25 June 2010; Confidential, Submission FV 162, 25 June 2010; Confidential, Submission FV 160, 24 June 2010; Justice for Children, Submission FV 148, 24 June 2010; N Ross, Submission FV 129, 21 June 2010; F Hardy, Submission FV 126, 16 June 2010; Northern Territory Legal Aid Commission, Submission FV 122, 16 June 2010; Confidential, Submission FV 109, 8 June 2010; Confidential, Submission FV 96, 2 June 2010; Confidential, Submission FV 81, 2 June 2010; Better Care of Children, Submission FV 72, 24 June 2010; Confidential, Submission FV 71, 1 June 2010; C Pragnell, Submission FV 70, 2 June 2010; M Condon, Submission FV 45, 18 May 2010.
20.126 One stakeholder observed that the safety and protection of children from harm and exposure to family violence should be ‘a key priority within the children’s court’ and, on this basis, gave its support. Women’s Legal Service Queensland also supported expanded jurisdiction, but stated that issues of family violence should be considered well before the matter was in the children’s court and be an integral part of any coordinated service response to the child and the family.

20.127 The Legal Aid NSW agreed that children’s courts should be empowered to make family violence protection orders on the basis that:

Protection orders can be used to maintain the child in the home but remove the perpetrator of violence. The Court will arguably be more inclined to allow a child to remain in the home if there is a criminal sanction available in the event of the breach. It also means that the onus will not be on the victim to seek out a protection order to protect themselves and the children in circumstances where they may not have the capacity or resilience to do so. Further, it makes the victim less likely to suffer recriminations for initiating a protection order and means that parallel proceedings will not have to be conducted in the Local Court and Children’s Court, which only adds further pressure to the victim.

20.128 Other stakeholders, while supportive, warned that care needed to be exercised because of the potential to use family violence protection orders against both parties where there are cross-allegations, given the criminal consequences for a breach. Stubbs submitted that the phrase ‘exposure to family violence’ may render the non-offending parent subject to a protection order for failing to protect their child from such exposure. She suggested that the intent of the power should be made clear—namely, that it is the offending party who should be the subject of any protection order—and attention needs to be given to how best to avoid orders being made against both parties, other than in exceptional circumstances.

20.129 The Queensland Government dissented, but noted that the issue was under consideration in the present review of its child protection services. The Department of Human Services (NSW) also did not support a general power being given to the children’s court to make family violence protection orders. It argued that the present power under s 90A of the Children and Young Persons (Care and Protection) Act 1998 (NSW) was adequate to restrain those with parental responsibility from doing an act that may put the child or young person at risk of harm. However, it did agree that s 90A could be expanded to ‘broaden the range of matters which can be addressed.’ While the Department did not elaborate further, the Children’s Court of New South Wales suggested that s 90A should be expanded to enable it to make a prohibition

165  Confidential, Submission FV 184, 25 June 2010.
166  Women’s Legal Service Queensland, Submission FV 185, 25 June 2010.
167  Legal Aid NSW, Submission FV 219, 1 July 2010. See also National Legal Aid, Submission FV 232, 15 July 2010.
171  Department of Human Services (NSW), Submission FV 181, 25 June 2010.
order against any person—regardless of whether or not they were exercising parental responsibility—and that the orders be made enforceable.\footnote{Children's Court of New South Wales, \textit{Submission FV} 237, 22 July 2010.}

20.130 Submissions in this Inquiry generally agreed that, where the court found evidence to support making a family violence protection order in favour of the child before it in its care jurisdiction, the evidence may also support the making of an order to protect other children or siblings living in the home. It was agreed that where there was evidence to support the making of the order, a children’s court should be able to make a family violence protection order for the protection of a child even where the child was not a party to the care proceedings, either on application or on its own motion.\footnote{National Legal Aid, \textit{Submission FV} 232, 15 July 2010; Magistrates’ Court and the Children’s Court of Victoria, \textit{Submission FV} 220, 1 July 2010; Wirringa Baiya Aboriginal Women’s Legal Centre Inc, \textit{Submission FV} 212, 28 June 2010; J Stubbs, \textit{Submission FV} 186, 25 June 2010; Women’s Legal Service Queensland, \textit{Submission FV} 185, 25 June 2010; Confidential, \textit{Submission FV} 184, 25 June 2010; Department of Human Services (NSW), \textit{Submission FV} 181, 25 June 2010; Berry Street Inc, \textit{Submission FV} 163, 25 June 2010; Confidential, \textit{Submission FV} 162, 25 June 2010; F Hardy, \textit{Submission FV} 126, 16 June 2010; Northern Territory Legal Aid Commission, \textit{Submission FV} 122, 16 June 2010; Confidential, \textit{Submission FV} 109, 8 June 2010; Confidential, \textit{Submission FV} 81, 2 June 2010; C Pragnell, \textit{Submission FV} 70, 2 June 2010.}

20.131 The Wirringa Baiya Aboriginal Women’s Legal Centre submitted that the definition of ‘sibling’ should be refined, in view of the fact that in Aboriginal families there are often children of similar ages residing in the same household, sometimes in the care of an aunt, grandparent or other family member. We agree that if the court considers such an order necessary for the protection of a child it should have the capacity to make such an order for siblings, but this should be a discretionary power used to protect children from real risks of family and family violence, not simply a blanket policy that will apply across the board.\footnote{Wirringa Baiya Aboriginal Women’s Legal Centre Inc, \textit{Submission FV} 212, 28 June 2010.}

20.132 While the issue of expansion of the power of children’s courts to make orders between adults was not directly canvassed in the Consultation Paper, it was brought to the Commissions’ attention by the Magistrates’ Court and the Children’s Court of Victoria during consultations. The Victorian magistrates welcomed the amendment in Victoria and suggested it could be adopted in other jurisdictions to improve outcomes for children and their families all around Australia.

20.133 Several stakeholders supported giving children’s courts own motion powers to make family violence protection orders, including the Women’s Legal Service Queensland,\footnote{Women’s Legal Service Queensland, \textit{Submission FV} 185, 25 June 2010.} National Legal Aid\footnote{National Legal Aid, \textit{Submission FV} 232, 15 July 2010.} and the Magistrates’ Court and the Children’s Court of Victoria.\footnote{Magistrates’ Court and the Children’s Court of Victoria, \textit{Submission FV} 220, 1 July 2010. See also Berry Street Inc, \textit{Submission FV} 163, 25 June 2010; Confidential, \textit{Submission FV} 160, 24 June 2010; \textit{Justice for Children, Submission FV} 148, 24 June 2010; Northern Territory Legal Aid Commission, \textit{Submission FV} 122, 16 June 2010; C Pragnell, \textit{Submission FV} 70, 2 June 2010.} The reasons given in support included that it:
removes the onus on the victim of family violence to seek a protection order to protect him or herself and the children in circumstances where he or she may not have the capacity or resilience to do so; and

• makes the victim less likely to suffer recriminations for initiating an application for a protection order.

20.134 However, a small number of submissions expressed the view that family violence protection orders should only be made on application to the court, either by or on behalf of the person seeking protection, or by an advocate of the child. The Department of Human Services (NSW) submitted that giving the children’s court powers to make protection orders on its own motion would, first, compromise the court’s judicial dispute resolution functions and, secondly, give the court an inappropriate oversight function for child protection. The Department’s view was that the court should only resolve disputes before it.

20.135 There was also support for giving children’s courts the power to make an order varying or revoking a family violence protection order—for example, where the court wishes to make an order restoring a child or young person to his or her family but is prevented from doing so because of an existing family violence protection order against another member of the family. In these circumstances, the Children’s Court of New South Wales submitted that it should have power to vary or revoke an existing family violence protection order, either on application by a party or on its own motion. This would enable it to finalise both the care proceedings and the family violence protection order proceedings at the same time:

The conferral of such a power on the Children’s Court will save the family members the confusion and anxiety associated with being required to go to another court (in NSW, the Local Court) to have the AVO proceedings finalised.

20.136 Where applications for family violence protection orders for the protection of children and young people are sought in the children’s court, the Children’s Court of New South Wales argued that domestic violence support services should be available, as they are available to adult applicants in the local courts. The Court submitted that this would improve access to courts and make court processes less intimidating for children and young people.

Commissions’ views

Jurisdiction of children’s courts

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

178 Confidential, Submission FV 184, 25 June 2010; Confidential, Submission FV 81, 2 June 2010.
179 Department of Human Services (NSW), Submission FV 181, 25 June 2010.
180 Children’s Court of New South Wales, Submission FV 237, 22 July 2010.
181 Ibid.
In the Commissions’ view, all Australian children’s courts should have clear jurisdiction under family violence legislation to hear and determine applications for family violence protection orders where the person affected by the family violence, or to be protected, or against whom the order is sought, is under 18 years. However, the jurisdiction should only be enlivened where there are proceedings in the court involving the child or young person, or a member of the child’s or young person’s family. In this regard, the Commissions note that a recent review of family violence legislation in Western Australia has similarly recommended that family violence restraining orders for the protection of children should be able to be taken out in that state’s children’s court.\textsuperscript{182}

Expanding the jurisdiction of children’s courts to make family violence protection orders is consistent with the ‘one court’ principle referred to in Chapter 3. That is, the Commissions’ overarching policy objective that, to the maximum extent possible, families who enter the legal system should be able to apply for, and be granted the orders they need by the court with which they first engage to address their safety concerns. Gaps in the system create the possibility that required protection will not be obtained, or obtained expeditiously. Such orders would be a significant adjunct to the orders presently available under child protection legislation to ensure the safety of the child and the child’s non-offending parent.

Jurisdiction to make family violence protection orders also fits squarely within the expertise of children’s court magistrates. Family violence issues are part of the core work of children’s courts. Many children’s courts magistrates are also likely to have experience in exercising jurisdiction under family violence legislation in their capacity as local court magistrates. Across Australia, children’s court magistrates are generally drawn from the pool of magistrates, and are often assigned to the children’s court for long periods of time.\textsuperscript{183}

In reality, the need to exercise this jurisdiction in the care division of a children’s court may be infrequent. Family violence protection orders are likely to be sought by police in the magistrates court as soon as the police suspect that a child or young person is being harmed, or is at risk of being harmed as a result of family violence. By the time proceedings are brought in the children’s court, a number of child protection interventions are likely to have already occurred, and a family violence protection order may have already been obtained. If the Commissions’ recommendations in Chapter 32 are accepted, applications for these orders may well have been considered and dealt with in a specialist family violence court context. However, there may be times when the need for family violence protection orders arises later, in children’s court proceedings, where the court considers that family violence protection orders appropriately form part of the outcome.

\textsuperscript{182} Department of the Attorney General (WA), \textit{A Review of Part 2 Division 3A of the Restraining Orders Act 1997} (2008), 48–50, Rec 13. But note the review recommends the jurisdiction should be enlivened regardless of whether or not there are care proceedings before the court.

\textsuperscript{183} See also Ch 31 for a discussion of judicial education in relation to family violence.
20.142 The Commissions have considered carefully the concerns expressed in submissions and those raised in the Wood Inquiry in NSW, where similar issues arose. However, after Australia-wide consultations, the Commissions take the view that, as long as family violence protection orders are linked to child protection proceedings, neither the courts’ role nor the role of child protection agencies is compromised. The availability of family violence protection orders simply gives the court another—and in some jurisdictions—a more effective mechanism to protect children from harm.

20.143 The benefits of the enhanced jurisdiction are significant. It creates a more seamless system for victims of family violence—including children—to allow them to access as many orders and services as possible in the court in which the family is first involved; removes the need for the child and the family to have to navigate multiple courts; reduces the need for victims of family violence to have to repeat their stories and, consequently, reduces the likelihood that people will drop out of the system without the protections they need.

Scope of the orders

20.144 As recommended above, the Commissions consider that all state and territory children’s courts should be able to make family violence protection orders where:

- the application involves a child or young person;
- proceedings relating to the child or young person are before the court; and
- the court is satisfied that the legislative grounds for making the order are met.

20.145 Furthermore, the Commissions recommend that children’s courts should be empowered to make family violence protection orders in favour of siblings of the child or young person who is the subject of proceedings, or other children or young people within the same household, who are affected by the same or similar circumstances. ‘Siblings’ should be defined broadly to take into consideration wider concepts of kin in Indigenous cultures.

20.146 Additionally, where they have jurisdiction as recommended above, children’s courts should also have power to make a family violence protection order for the protection of an adult where the order is based on the same or similar circumstances as those affecting the child or young person. For instance, a court may be directed to make an order for the protection of a child against an adult, and in the course of proceedings, forms the view that, based on the same circumstances, a related order is justified for the protection of the protective parent, or an adult sibling.

20.147 This recommendation is modelled on s 147 of the Family Violence Protection Act 2008 (Vic), where the power has proved practical and useful. In the Commissions’ view, it is undesirable for a family to have to go to two courts to obtain protection from the same person who has committed family violence, especially when

---

making a separate application may leave a gap in protection. Protection orders in a family violence context will often be made for the protection of a parent or other carer with whom the child is living. The impact on a child of violence against a parent or other carer—in terms of that person’s capacity to be an effective parent—has been noted consistently throughout this Inquiry. A family violence protection order in favour of a protective parent will, essentially, also safeguard the protection of the child.

Revocation and variation

20.148 The Commissions further recommend that children’s courts should be empowered to make orders for the variation or revocation of an existing family violence protection order, to the extent that it is necessary to do so in order to permit the court to make an order under child protection law. A children’s court should be able to exercise this power either on application, or on its own motion. Where it exercises its own motion powers, the court should be required to serve notice on all the parties to the order and give each an opportunity to be heard. These measures will provide appropriate safeguards to ensure that family violence protection orders are not varied or revoked where doing so would compromise the safety of persons protected by the order.

Applications for orders and own motion powers

20.149 The Commissions are aware, in making these recommendations, that there will be many important procedural issues that will need to be resolved, and that the issues raised are likely to vary depending on the legislative context of each state and territory. The procedures for seeking protective orders may need to be adapted to the situation in the children’s court and may not be the same as those applying in the general courts. They should be consistent with:

- the principles underlying family violence legislation;
- the need to ensure the safety of the child or young person; and
- any special characteristics and procedures of children’s courts.

20.150 In NSW, for example, the requirement that only police can bring family violence protection order applications for the protection of a child may need to be reviewed given some concerns about the appropriateness of police appearing in care proceedings in the children’s court. In other jurisdictions, applications may be made by a parent, or another person on behalf of the child, including a child welfare officer—or on the court’s own motion. Expanding the class of people who may bring an application for a family violence protection order on behalf of a person needing protection may help close gaps for children and parents.

20.151 The Commissions further recommend that children’s courts should be empowered to make family violence protection orders on their own motion. This has a number of advantages, including removing the onus on the victim who may be reluctant to bring an application because they may fear retribution. The capacity of the court to make an own motion power may also be expedient in situations where the victim has not had legal advice. It may also address concerns about the appropriateness
of police or child welfare officers bringing the application in certain cases. In an
adversarial system it is a significant step to give own motion powers to a court,
allowing it to make an order in the absence of an application before it from any party to
the proceedings. Child protection presents one of the strongest cases for such a power.
Indeed, courts have long exercised *parens patriae* powers to protect vulnerable
children and, while what is proposed here is a statutory power, it arises from the same
motivation and obligation to protect.\(^{185}\) The Commissions note that several
jurisdictions already confer own motion powers on courts under family violence
legislation.

**Relationship to other courts**

20.152 In Chapter 32, the Commissions recommend the establishment (or further
development) of specialist family violence divisions in all Australian magistrates
courts. As discussed in that chapter, practical arrangements will need to be put in place
to ensure that specialist family violence courts and children’s courts work well
together. The Commissions agree with the suggestion of the Children’s Court of NSW
in its submission to the Inquiry,\(^ {186}\) that the courts should establish appropriate referral
arrangements and support mechanisms to help victims navigate between the two
courts. The role of a dedicated liaison officer appears to be desirable in this regard.

20.153 The Commissions consider below the need for regular opportunities for
ongoing family violence education and training.\(^ {187}\) The Commissions also emphasise
the importance of information sharing arrangements between the courts. In Chapter 30,
for example, the Commissions recommend that both family violence protection orders
and child protection orders are included in the national database to ensure that all
courts are aware of existing orders made in relation to a particular family.\(^ {188}\)

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

(a) the person affected by family violence, sought to be protected, or against
whom the order is sought, is a child or young person; and

(b) proceedings related to that child or young person are before the court; and

(c) the court is satisfied that the grounds for making the order are met.

---

\(^{185}\) See discussion in Ch 4.
\(^{186}\) Children’s Court of New South Wales, Submission FV 237, 22 July 2010
\(^{187}\) See Ch 31.
\(^{188}\) Rec 30–18.
Recommendation 20–4  Where a children’s court has jurisdiction to hear a family violence protection order application (see Rec 20–3), the court should also be able to make a family violence protection order in favour of siblings of the child or young person who is the subject of proceedings, or other children or young people within the same household, who are affected by the same or similar circumstances.

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

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

Child protection and juvenile justice

20.154  There is a strong correlation between juvenile participation in crime and rates of reported neglect or abuse, and, in particular, between juvenile involvement in criminal activity and neglectful parenting. Research indicates that an offending child or young person is likely to have a history of abuse or neglect, and to have been in out-of-home care. In Victoria, a study of young people sentenced to imprisonment by the children’s court over a period of eight months in 2001 found that 88% had been subject to an average of 4.6 notifications to the child protection agency. Almost one-third had been the subject of six or more notifications, and 86% had been in out-of-home care. Over half of these had had five or more care placements.

20.155  Young offenders aged between 10 and 17 years are usually dealt with by the juvenile or youth justice system, where detention is considered a last resort and the emphasis is on diversion and rehabilitation in order to break offending cycles. However, the special problems that many young people face when applying for bail tend to undermine these principles.

194  Compare Children (Criminal Proceedings) Act 1987 (NSW) ss 17–18, which excludes serious indictable offences from being determined in the Children’s Court of New South Wales.
A central issue in juvenile justice policy today is the large and increasing numbers of children and young people being held in detention on remand rather than released on bail. The Australian Institute of Criminology has found that, across all states and territories, about 50% of young people in detention (at any one point in time) were on remand awaiting trial or sentencing in 2002, and that this had increased to almost 60% in 2007.\(^{195}\)

One of the most significant factors associated with young people being remanded in custody is the lack of available and appropriate accommodation for young people.\(^{196}\) Despite its reluctance to do so, a court is often forced to remand a young person in detention rather than release him or her on bail if, because of family violence or other factors, the young person has no safe or stable home to go to, or if there is no appropriate adult guardian to provide supervision and support for the young person to meet their bail requirements. Where courts do release a young person on bail, this is often on condition that the young person ‘reside as directed by the [child protection agency]’. However, as the child protection agency is not obliged to find accommodation for the child or young person except where it has parental responsibility,\(^ {197}\) many young people fail to meet this condition, and end up in detention.

The detention of children and young people on remand, where bail would otherwise have been granted, has a disproportionate impact on homeless young people. One of the main triggers of youth homelessness is family breakdown caused, among other things, by family violence, mental health issues and neglect.\(^ {198}\)

Specialist children’s courts deal with both criminal and care matters in relation to juveniles, so that there might be thought to be few gaps in the system affecting these children. However, issues often arise where a young person appears as a defendant in the court’s criminal jurisdiction. While the personal circumstances of the young person may suggest that there are child protection concerns in relation to the young person, such as the fact that the young person is unable to go home, the court cannot compel the child protection agency to find suitable accommodation for a young person for whom it has no parental responsibility. The court has no other option but to remand the young person in detention, until trial—even where imprisonment is an unlikely outcome. The problem seems to lie in the bifurcation of administrative responsibility for child protection and juvenile justice. It was observed in the Wood Inquiry that:


Coming within the juvenile justice or criminal justice system should not exclude a young offender from long-term services from [child protection agency] and other human service agencies. Nor should a shortage of refuges or other forms of accommodation result in young people who cannot live safely with their families, being remanded in custody unnecessarily, pending trial.199

**Consultation Paper**

20.160 In the Consultation Paper, the Commissions proposed that one way to raise safety concerns about young people presenting in the youth justice system was to empower children’s courts to refer their care and protection concerns for the child or young person to the child protection agency for investigation, and to require the agency to report back to the court with the outcomes of its investigation.200

20.161 The proposal was based on provisions contained in the *Children, Youth and Families Act 2005* (Vic) which give the Children’s Court of Victoria power to refer a matter to the child protection agency for investigation when it believes that grounds exist for the making of a protection order or a therapeutic order in relation to a child or young person appearing as a defendant before it.201 Under s 350, the child protection agency is obliged to investigate any such matter referred to it by the Children’s Court, and must provide a report of its investigation of the matter to the court within 21 days of the referral.202 The report must set out the outcomes of the investigation specifying, in particular, whether the child protection agency has made an application for a protection order or a therapeutic treatment order in relation to the child or if the investigation reveals that such action is not warranted.

20.162 In the Consultation Paper, the Commissions also proposed that a similar power should be extended to children’s courts in their care jurisdiction. The suggestion was that the court should be able to refer its concerns for the safety of other children or siblings of the child who is the subject of the care proceedings to the child protection agency for investigation, and for the child protection agency to report back to the court within an agreed timeframe.203

**Submissions and consultations**

20.163 The majority of submissions that commented on these proposals were supportive.204 In relation to the first proposal, the Magistrates’ Court and the Children’s

---

201  *Children, Youth and Families Act 2005* (Vic) s 349.
202  Ibid s 350(1).
Court of Victoria stated that the Victorian provisions introduced in 2005 were particularly important for young offenders. A formal referral by the Criminal Division to the child protection agency provides an alternative pathway to direct children and young people to participate in treatment programs, where certain conditions are met, without the need to rely on a criminal prosecution.\footnote{Magistrates’ Court and the Children’s Court of Victoria, Submission FV 220, 1 July 2010.} However, during consultations some concerns were expressed about their operation in practice. It was suggested that referrals are regularly met with a response from the child protection agency saying that further investigation is not warranted.

20.164 Some stakeholders, including Legal Aid NSW, noted that, mostly due to resource constraints and funding priorities, child protection agencies were frequently unresponsive to risk of harm notifications for adolescents who came to attention as a result of offending behaviour. This leaves the children’s court in a difficult situation where it cannot release a young person on bail or a bond because there is no appropriate adult in the family to take charge of the young person.\footnote{Legal Aid NSW, Submission FV 219, 1 July 2010. See also N Ross, Submission FV 129, 21 June 2010.}

20.165 National Legal Aid submitted that a major systems failure is the ‘gap in proper remedial and support services for young people.’ It submitted that clear guidelines need to be developed between the agencies responsible for juvenile justice and child protection authorities in relation to accommodation placements and family reunification options for young people who are defendants and who require bail.\footnote{National Legal Aid, Submission FV 232, 15 July 2010.} It said that this was particularly important in cases where children have become homeless as a result of parents making applications for family violence protection orders against them.

20.166 The Children’s Court of New South Wales also strongly supported the proposals.\footnote{The Children’s Court of New South Wales has previously advocated for such a power, not only in relation to children and young people who appear before it in its criminal division, but also in respect of those who are the subject of care proceedings in its care division, or of other children or young people who are mentioned in these proceedings: see J Wood, Report of the Special Commission of Inquiry into Child Protection Services in NSW (2008), [15.76]; New South Wales Law Reform Commission, Young Offenders, Report 104 (2005), [8.140].} It noted that its criminal division often deals with young people who have no stable accommodation or who lack adequate parental supervision, and who are consequently easily led into criminal offending. It submitted that because of the lack of any power to require the child protection agency to report back to the court when the court refers these young people to the agency for investigation, the Court will not be aware of whether or not any action has been taken and may only be informed that Community Services has not intervened or taken any action when the young person again appears before the Court.\footnote{Children’s Court of New South Wales, Submission FV 237, 22 July 2010.}
20.167 Consequently, magistrates become reluctant to make reports to the agency, even when special reporting arrangements have been established with the relevant child protection agency.\(^{210}\)

20.168 In contrast, the Queensland Government did not consider legislative reform necessary as Queensland courts have ‘unfettered capacity’ to refer matters to the child protection agency when they have concerns for the safety of children, whether these concerns arise in its care or criminal divisions. In criminal proceedings, it noted that the court can liaise with the youth justice case worker who, in turn, liaises directly with the Department of Child Safety.\(^{211}\)

20.169 Similarly, the Department of Human Services (NSW) also considered that legislative reform was not strictly necessary in NSW as court officers—including judges and magistrates—are mandatory reporters under child protection legislation and should therefore be making such reports routinely. However, the Department was open to support a conferral of powers on the Criminal Division of the Children’s Court to refer certain matters to the child protection agency for investigation, subject to further consideration of a number of factors, including how the provisions were operating in Victoria, and proper funding being made available. In relation to the imposition of therapeutic orders, the Department noted that further consultation with other relevant juvenile justice and health agencies would be required.\(^{212}\)

20.170 A number of stakeholders, including the Children’s Court of New South Wales, also supported the proposal to confer a similar power on the court in its care jurisdiction to refer safety concerns for a child, who was not the subject of proceedings before the court, to the child protection agency for investigation and report back.\(^{213}\)

20.171 Opposing the proposal, both the Queensland Government and the Department of Human Services (NSW) observed that it was unlikely that a court exercising care jurisdiction would be aware of a risk to a child which came to light during care proceedings for another child, without the child protection agency also being aware. Both organisations noted that as a matter of practice, when investigating a report about a child, the child protection agency would identify any risks posed to other children including siblings, and would seek appropriate orders in respect of each child individually.\(^{214}\) The Queensland Government commented that it was important for the


\(\text{212} \) Department of Human Services (NSW), *Submission FV 181*, 25 June 2010.


'court and the child protection agency to maintain mutual respect and confidence’ and accordingly it should not be for the court to make a child protection order in respect of a sibling whom the agency does not consider is in need of care and protection.\(^{215}\)

20.172 In addition, the Department of Human Services (NSW) reiterated its view that a formal power of referral was, in any case, unnecessary, as court officers were mandatory reporters under NSW child protection legislation and were therefore obliged to make a report to the child protection agency where they suspected that a child was at risk of significant harm. However, the Department acknowledged that there may be value in providing a clear pathway for the court to report suspicions of abuse or neglect of children, not otherwise before it, to the child protection agency in the same way that Family Court judges and federal magistrates can. Noting the provisions of the *Family Law Act 1975*, the Department observed:

> The Family Court for example has a well established process for notifying children at risk of abuse under section 67ZA. The obligation is not limited to children who are the subject of proceedings. While it does not specifically refer to judges and magistrates, they would in NSW be covered by the provisions of section 27 of the Care Act and there may be value in specifically including judicial officers.

20.173 However, the Department did not support giving the court power to require the child protection agency to report back to it within a specified time period. It argued that this would give the children’s court an inappropriate general oversight role and would impose a costs burden on the agency with no ‘discernible benefit for the child or young person who is the subject of the report’.\(^{216}\)

20.174 According to the Department of Premier and Cabinet (Tas), the key to addressing the issues raised lies in the establishment of effective relationships between the courts and the child protection agency:

> Effective relationships between the Family Court, Children’s Court and Child Protection are essential in ensuring the safety and wellbeing of children. If in the course of hearing a matter a court forms a reasonable belief that a child has been or is at risk of harm or neglect it is appropriate for Child Protection services to be notified of that concern and to provide clear, prompt feedback on any investigation of that matter back to the court in a mutually agreeable manner. Specific timelines for the provision of such feedback should be determined regionally.\(^{217}\)

**Commissions’ views**

20.175 The Commissions acknowledge the serious community concerns for many young people who traverse the child protection and juvenile justice divide. The lack of suitable accommodation and other support services, and the consequent remand in custody of increasing numbers of young people, undermines established juvenile justice principles of diversion and rehabilitation. Of particular concern are young people who are homeless as a result of family dysfunction and violence.


\(^{216}\) Department of Human Services (NSW), *Submission FV 181*, 25 June 2010.

\(^{217}\) Department of Premier and Cabinet (Tas), *Submission FV 236*, 20 July 2010.
20.176 This is not an issue that is easily addressed by legislative reform alone. For example, giving children’s courts formal powers to refer these matters to the child protection agency for investigation, and report, may not resolve the issue if there are no specialised bail services, refuges or other forms of suitable accommodation for young people who cannot live safely with their families. Ultimately, what is required is a commitment by state and territory governments to develop and fund adequate bail support services and bail accommodation services, in both metropolitan and regional areas, to meet identified needs.\(^{218}\)

20.177 Nonetheless, the Commissions consider that some legislative reform is desirable to provide a clear pathway for referral of concerns for the welfare or safety of children from the children’s court to the relevant child protection agency.\(^{219}\)

20.178 Rather than conferring a power of referral on children’s courts as proposed in the Consultation Paper, the Commissions consider that a similar outcome can be achieved by utilising existing mandatory reporting provisions in child protection legislation. However, the Commissions note that, unlike the mandatory reporting provisions applying to Family Court judges and magistrates of the Federal Magistrates Court under the Family Law Act 1975,\(^ {219}\) current mandatory reporting provisions in state and territory child protection laws do not specifically refer to judicial officers and court staff. Rather, they apply generally to people who work in organisations that provide health, welfare, education, law enforcement, child care or residential services to children,\(^ {220}\) thus leading to some ambiguity about whether judicial officers and court staff are mandatory reporters. To resolve any doubt, the Commissions recommend that child protection legislation be amended to provide expressly that judicial officers and court personnel are mandatory reporters and therefore have a duty to report concerns for the safety and welfare of a child or young person to the relevant child protection authority.\(^ {221}\)

20.179 In addition, to address concerns by children’s courts that they are not advised about the outcome of any referrals they make to child protection agencies, the Commissions recommend that state and territory child protection legislation should be amended, to the extent that it is necessary, to require the child protection agency to provide feedback to mandatory reporters.\(^ {221}\) This should include an acknowledgement that the report was received, and providing information to the reporter about the outcome of the agency’s initial assessment of the report. The Commissions note that a

---


\(^{219}\) Family Law Act 1975 (Cth) s 67ZA.

\(^{220}\) Children and Young Persons (Care and Protection) Act 1998 (NSW) ss 23, 27; Children, Youth and Families Act 2005 (Vic) ss 162, 184; Education (General Provisions) Act 2006 (Qld) ss 365–366; Public Health Act 2005 (Qld); Child Protection Act 1999 (Qld); Public Health Act 2005 (Qld) ss 158, 191; Children and Community Services Act 2004 (WA) ss 3, 124B; Children’s Protection Act 1993 (SA) ss 6, 10–11; Children, Young Persons and Their Families Act 1997 (Tas) ss 3–4, 14; Children and Young People Act 2008 (ACT) ss 342, 356, Care and Protection of Children Act 2007 (NT) ss 13–16, 26.

\(^{221}\) See, eg, Children and Young Persons (Care and Protection) Act 1998 (NSW); Child Protection Act 1999 (Qld) s 159M.
similar recommendation, since implemented in NSW, was made by the Wood Inquiry.222

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

(a)  specify that judicial officers and court staff are mandatory reporters; and

(b)  require child protection agencies to provide timely feedback to mandatory reporters, including an acknowledgement that the report was received and information as to the outcome of the child protection agency’s initial investigation.

---