30. Information Sharing

Contents

Introduction

30.1 A central theme of this Inquiry is 'seamlessness'—the idea that the laws and procedures with which victims of family violence engage should work together to protect and assist them. One of the issues identified in the course of this Inquiry was that, in some circumstances, important information was not being shared among courts and agencies, and that this was having a negative impact on victims.

30.2 This chapter considers ways to improve information flow between critical elements of the family violence system, including courts, relevant government agencies and other people and institutions involved in the family violence, family law and child protection systems. These include improving the way information is collected from parties and shared between courts—including the establishment of a national register of relevant court orders—some changes to confidentiality and privacy legislation, and the development of information sharing protocols and memorandums of understanding.

The intention is to avoid, as far as possible, victims falling into gaps between the various systems due to lack of relevant information.

30.3 Information sharing is one element of an integrated response to family violence. Integrated responses more generally, including inter-agency collaboration, are discussed further in Chapter 29.

Benefits of and impediments to information sharing

30.4 Information sharing has been identified as an ongoing challenge in ensuring the safety of victims of family violence in proceedings in federal family courts and state and territory courts. As noted in the 2009 report of the National Council to Reduce Violence against Women and their Children (*Time for Action*):

> obstacles to information-sharing by stakeholders in the family law system remain a significant impediment to ensuring that women and their children are safe. Evidence of violence is collected on a case-by-case basis via subpoenas to different organisations, but confidentiality guidelines and legislative limitations on disclosure restrict access to child-protection records, civil and criminal law records and education and medical records. With the exception of the Family Court of Australia's Magellan Case Management project, there is a 'factual vacuum' as there are few formal agreements and communication channels between organisations able to provide this evidence, and neither the Family Court of Australia nor associated socio-legal services have the power to investigate allegations of abuse.[1]

30.5 The National Council recommended that information-sharing systems and protocols should be developed and supported by all organisations in response to sexual assault and family violence. It also considered that such protocols should give primacy to the safety of women and children.[2]

30.6 In March 2010, the Queensland Department of Communities released a consultation paper on the *Domestic and Family Violence Protection Act 1989* (Qld). The Department noted that:

> Legislation generally allows information to be shared with consent. Also provisions may allow for information sharing without consent in emergency or high risk situations. The balance must be struck between protecting people's privacy and enhancing victim safety.[3]

30.7 The consultation paper noted that the benefits of information sharing include, for example: the capacity to provide a holistic approach in service provision; assisting non-government organisations to undertake their functions more effectively; and alleviating the inconvenience associated with victims having to supply the same information on a number of occasions to different service providers.

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1 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 104.

2 Ibid, Rec 6.2.1.

3 Department of Communities (Qld), *Review of the Domestic and Family Violence Protection Act 1989: Consultation Paper* (2010), 34.

30.8 The paper noted, however, that increased information sharing could result in a reluctance to report family violence due to concerns about how information would be used. It was therefore important to ensure that information was shared appropriately and stored securely. In addition, it was important to ensure that those sharing information were sensitive to any cultural issues that may arise—for example, where the information related to Indigenous people or people from culturally and linguistically diverse backgrounds.[4]

30.9 In the following sections, the Commissions consider ways to harness the benefits of information flow between the family law, family violence and child protection systems, while balancing the concerns identified by the Queensland Department of Communities.

Information flow to the family law system

30.10 As discussed in Chapter 15, the *Family Law Act 1975* (Cth) sets out detailed considerations to which a family court must have regard in deciding whether to make a particular parenting order. The 'paramount consideration' in this regard is 'the best interests of the child'.[5] Pursuant to s 60CC, the primary considerations for determining what is in a child's best interests are:

> (a) the benefit to the child of having a meaningful relationship with both of the child's parents; and
>
> (b) the need to protect the child from physical or psychological harm from being subjected to, or exposed to, abuse, neglect or family violence.[6]

30.11 Section 60CC also sets out a lengthy list of 'additional considerations'. Two of the additional considerations have particular relevance in the context of allegations of family violence:

- any family violence involving the child or a member of the child's family;[7] and
- any family violence order that applies to the child or a member of the child's family, provided the order is a final order or its making was contested.[8]

30.12 There are a number of ways that information about these matters may be brought to the attention of the court including where information is supplied by the parties, or by other professionals working with the parties. Information may also be shared between different courts or between agencies and organisations and the courts. All of these mechanisms are considered further, below.

Notification of family violence and child protection matters

30.13 One of the ways that information about these issues is channelled into the family law system is by way of application forms completed by the parties to a particular

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4 Ibid, 36.
5 *Family Law Act 1975* (Cth) ss 60CA, 65AA.
6 Ibid s 60CC(2).
7 Ibid s 60CC(3)(j).
8 Ibid s 60CC(3)(k).

matter. Section 60CF(1) of the *Family Law Act* provides that if a party to parenting proceedings is aware that a family violence protection order applies to a child, or a member of the child's family, that party must inform the court of that order. Further, a person who is not a party to the proceedings but is aware of a protection order that applies to a child or a member of the child's family, may inform the court of the order.[9]

30.14 The *Family Law Rules 2004* (Cth) specify that a party must file a copy of any family violence protection order when a case starts or as soon as practicable after the order is made.[10] This accommodates situations where parenting proceedings before the Family Court and protection order proceedings before a state or territory court are running concurrently, as well as where protection order proceedings have been finalised before Family Court proceedings begin. If a copy of the protection order is not available, the party must file a written notice containing an undertaking to file the order within a specified time, as well as details of the order.[11]

30.15 Section 67Z of the *Family Law Act* requires a party to a parenting proceeding who alleges that a child has been abused, or is at risk of being abused, to file a *Notice of Child Abuse or Family Violence* (Form 4). Once the form has been filed, the Registry Manager is required to inform the relevant child protection agency. Pursuant to s 60K of the Act, once a Form 4 has been filed, the court is required to undertake certain action, including dealing with the application promptly and considering the need for any interim or procedural orders.[12]

30.16 Form 4 includes definitions of 'abuse' in relation to a child and 'family violence'—as set out in s 4(1) of the *Family Law Act*—and provides space for a party to describe acts or omissions that are alleged to comprise the abuse or family violence.[13] However, there is no designated space on the form for a party to list any relevant family violence protection or child protection orders that have been obtained.

30.17 Part F of the initiating application for proceedings in the Family Court, Federal Magistrates Court and Family Court of Western Australia—*Initiating Application (Family Law)*—requests information about 'any ongoing cases in this or any other court' or 'any existing orders, agreements, parenting plans or undertakings to this or any other court' about 'family law, child support, family violence or child welfare issues' that involve any of the parties or children listed in the application.[14] The form is accompanied by notes to assist applicants to fill out the application, but these do not expand on what information is required in Part F.

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9 Ibid s 60CF(2).

10 *Family Law Rules 2004* (Cth) r 2.05.

11 *Federal Magistrates Court Rules 2001* (Cth) sch 3 applies r 2.05 of the *Family Law Rules* to proceedings in the Federal Magistrates Court.

12 Questions have been raised, however, about how often these forms are filed in practice: see, eg, R Chisholm, *Family Courts Violence Review* (2009), 70.

13 Family Court of Australia, *Form 4—Notice of Child Abuse or Family Violence* <www.familylawcourts.gov.au> at 9 February 2010, pts G, H.

14 Family Court of Australia, *Initiating Application (Family Law)* <www.familycourt.gov.au/> at 9 February 2010, 6.

30.18 The 2009 Family Law Council advice recommended that the federal family courts consider revising Form 4, including making it more user-friendly.[15] In addition, the Council recommended that:

> The Attorney-General propose an amendment to the [*Family Law Act*] to place a positive obligation on the parties to inform the court about any relevant orders or arrangements in place under child welfare laws.[16]

30.19 Some commentators argue, however, that the notification of involvement in other jurisdictions should not be left to the parties—parties may fail to disclose through ignorance, neglect or malice. Instead, they suggested that there should be greater communication between the courts and child protection agencies.[17]

30.20 The Chisholm Review also considered the process for identifying family violence and child abuse in the context of family law proceedings, and expressed support for a more pro-active approach that would shift the onus for providing relevant information away from the parties:

> Experience has shown that [the current] system is not working. This Report suggests that because of this, and because issues of family violence and other risk factors are so common in parenting cases brought to the courts, it would be better to have a system of risk identification and assessment that applies to all parenting cases. This approach would reflect the best available thinking about these issues, and would reinforce a lot of measures that are already being taken by the courts to identify and deal with issues of violence as early as possible.[18]

30.21 The Australian Government Attorney-General's Department has indicated that a framework for screening and assessment for family violence across the family law system is under development.[19] This issue is discussed further in Chapter 18.

30.22 In relation to application forms, the Commissions suggested in the Consultation Paper that the *Initiating Application (Family Law)* should more clearly seek information about existing protection orders obtained under state and territory family violence legislation or pending proceedings for such orders.[20] The Commissions also asked what changes to the *Initiating Application (Family Law)* would make it clear to parties that they are being asked to disclose ongoing child protection proceedings and existing child protection orders.[21] In addition, the Commissions suggested including a question on the form seeking further information about any significant safety concerns, including in relation to any children party to the proceedings.[22]

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15 Family Law Council, *Improving Responses to Family Violence in the Family Law System: An Advice on the Intersection of Family Violence and Family Law Issues* (2009), Rec 10.

16 Ibid, Rec 7.1.

17 F Kelly and B Fehlberg, 'Australia's Fragmented Family Law System: Jurisdictional Overlap in the Area of Child Protection' (2002) 16 *International Journal of Law, Policy and the Family* 38, 53–54.

18 R Chisholm, *Family Courts Violence Review* (2009), Recs 2.3, 2.4.

19 Australian Government Attorney-General's Department, *Submission FV 166,* 25 June 2010.

20 Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: Improving Legal Frameworks*, ALRC Consultation Paper 1, NSWLRC Consultation Paper 9 (2010), Proposal 8–2.

21 Ibid, Question 14–6.

22 Ibid, Proposal 14–1.

Submissions and consultations

30.23 A number of submissions expressed support for the proposal that the *Initiating Application (Family Law)* should more clearly seek information about existing family violence protection orders.[23] Others expressed the view that the *Initiating Application (Family Law)* should also seek information in relation to child protection orders.[24]

30.24 Legal Aid NSW suggested that the application form should also include questions about the nature of the violence; involvement by state and territory child protection agencies; involvement by the police; and whether the other party was, or had been, in prison, or was on remand, in relation to family violence. Legal Aid NSW was of the view that this would assist the court's assessment of risk.[25] The Aboriginal Family Violence Prevention and Legal Service (Victoria) was of the view that it would be helpful to require that orders be attached to the application, or to seek consent so that the court could obtain copies of the orders.[26]

30.25 However, a number of submissions raised concerns about using the existence of family violence protection orders as evidence of family violence in the family courts, noting that it may be more difficult to achieve orders by consent in the state and territory courts if those orders could be used for collateral purposes.[27] It was suggested that the *Initiating Application* should clearly seek information about whether the protection orders were achieved by full consent, consent without admissions or in a contested hearing.[28]

30.26 The Australian Government Attorney-General's Department noted that Part B of the Parenting Questionnaire[29]—which is completed by the parties once a matter is

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23 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212,* 28 June 2010; National Abuse Free Contact Campaign, *Submission FV 196,* 26 June 2010; Women's Legal Service Victoria, *Submission FV 189,* 25 June 2010; J Stubbs, *Submission FV 186,* 25 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Confidential, *Submission FV 183,* 25 June 2010; Women's Legal Services NSW, *Submission FV 182,* 25 June 2010; Law Council of Australia, *Submission FV 180,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010; Peninsula Community Legal Centre, *Submission FV 174,* 25 June 2010; Confidential, *Submission FV 171,* 25 June 2010; Berry Street Inc, *Submission FV 163,* 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151,* 24 June 2010; Justice for Children, *Submission FV 148,* 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144,* 24 June 2010; Confidential, *Submission FV 130,* 21 June 2010; N Ross, *Submission FV 129,* 21 June 2010; K Johnstone, *Submission FV 107,* 7 June 2010; Confidential, *Submission FV 105,* 6 June 2010; Confidential, *Submission FV 81,* 2 June 2010; A Harland, *Submission FV 80,* 2 June 2010; Confidential, *Submission FV 71,* 1 June 2010; C Pragnell, *Submission FV 70,* 2 June 2010; M Condon, *Submission FV 45,* 18 May 2010; P Easteal, *Submission FV 40,* 14 May 2010; C Humphreys, *Submission FV 04,* 23 August 2009.

24 Women's Legal Services NSW, *Submission FV 182,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.

25 Legal Aid NSW, *Submission FV 219,* 1 July 2010.

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

27 Confidential, *Submission FV 164,* 25 June 2010; P Parkinson, *Submission FV 104,* 5 June 2010.

28 Confidential, *Submission FV 164,* 25 June 2010.

29 Family Court of Australia, *Parenting Questionnaire* <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Family+Court+of+Australia+forms/FCOA_form_Questionnaire_Parenting> at 12 July 2010.

going to trial—clearly asks whether there are any past or current family violence protection orders that affect the party or the party's children.[30] The Questionnaire also asks whether the party, or any person with whom a child resides or has contact, has been involved in any child welfare proceedings.

30.27 In their submission, the Chief Justice of the Family Court of Australia and the Chief Federal Magistrate expressed the view that the inclusion of a general question in the *Initiating Application (Family Law)* asking whether an applicant had concerns for the safety of the applicant or the applicant's children may assist clients, especially unrepresented clients, to provide appropriate notification of family violence or child protection issues to the court.[31] A number of other submissions agreed with this proposal.[32] Women's Legal Services NSW noted that the same question should be included on the Response to an *Initiating Application.*[33]

30.28 The Australian Government Attorney-General's Department noted, however, that s 60Z of the *Family Law Act* requires the parties to notify the court of any concerns that a child has been abused or is at risk of abuse. The Department's view was that the use of the qualifier 'significant' in the Commissions' proposal might deter parties from notifying the court of relevant concerns.[34]

30.29 A number of submissions—while supporting clarification of the *Initiating Application*—noted that other initiatives were also necessary. Some supported, in addition to clearer application forms, the establishment of a national register of orders,[35] discussed further below, and the establishment of a risk identification and assessment system as recommended by the Chisholm Review,[36] discussed in Chapter 18.

Commissions' views

30.30 The Commissions are of the view that a range of mechanisms should be used to collect information relevant to parenting proceedings in the family courts. The

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30 Australian Government Attorney-General's Department, *Submission FV 166,* 25 June 2010.

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

32 Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212,* 28 June 2010; Solomums Australia for Family Equity, *Submission FV 200,* 28 June 2010; Women's Legal Service Victoria, *Submission FV 189,* 25 June 2010; Women's Legal Services NSW, *Submission FV 182,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151,* 24 June 2010; Confidential, *Submission FV 96,* 2 June 2010; Confidential, *Submission FV 71,* 1 June 2010; C Pragnell, *Submission FV 70,* 2 June 2010; Confidential, *Submission FV 69,* 2 June 2010; P Easteal, *Submission FV 40,* 14 May 2010.

33 Women's Legal Services NSW, *Submission FV 182,* 25 June 2010.

34 Australian Government Attorney-General's Department, *Submission FV 166,* 25 June 2010. See also: Confidential, *Submission FV 96,* 2 June 2010.

35 The Australian Association of Social Workers, *Submission FV 224,* 2 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168,* 25 June 2010.

36 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Women's Legal Service Victoria, *Submission FV 189,* 25 June 2010; Women's Legal Services NSW, *Submission FV 182,* 25 June 2010.

Commissions support, for example, the development of a risk screening and assessment process across the family court system, discussed in Chapter 18, and the establishment of a national register, discussed below.

30.31 The forms filed by parties to parenting proceedings in family courts are, however, another important source of information. The Commissions' view is that these forms—both the *Initiating Application (Family Law)* and the *Response to the Initiating Application (Family Law)*—should seek information from the parties in relation to past or present family violence protection or child protection orders, as well as past, pending or ongoing proceedings in relation to such orders. The Commissions note, for example, that the Parenting Questionnaire[37] seeks information about past or current family violence protection orders. More detailed information—such as that suggested by Legal Aid NSW and discussed above—should be collected as part of screening and risk assessment processes discussed in Chapter 18.

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

30.33 The Commissions acknowledge that some caution must be exercised in using family violence protection orders as evidence of family violence in the family court system in some circumstances, and this issue is discussed in detail in Chapter 17. However, it is important that the family court system be aware that such orders exist so as to avoid, as far as possible, the making of inconsistent parenting orders.

30.34 In addition, the Commissions are of the view that the *Initiating Application (Family Law)* and *Response* should include a more general question which targets concerns or fears the party has for their safety, or for the safety of their child. The question should focus on safety, rather than upon the notion of 'child abuse' which is the current focus of the *Notice of Child Abuse or Family Violence* (Form 4). The Commissions agree with the Australian Government Attorney-General's Department that the question should not set the threshold too high by use of the term 'significant', but should simply enquire about any safety concerns a party may have.

30.35 Form 4 does not include a designated space for parties to note existing orders. However, if a separate question seeking information about family violence protection and child protection orders is included in the *Initiating Application (Family Law)*, another question about protection orders in Form 4 would involve unnecessary duplication. The Commissions do not, therefore, propose any change to Form 4 in this respect.

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37 Family Court of Australia, *Parenting Questionnaire* <http://www.familylawcourts.gov.au/wps/wcm/connect/FLC/Home/Forms/Family+Court+of+Australia+forms/FCOA_form_Questionnaire_Parenting> at 12 July 2010.

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

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

Registration of child protection orders in family courts

30.36 One mechanism for bridging the information gap between the child protection and family law systems is s 70C of the *Family Law Act,* which enables the registration of 'state child orders'—that is, orders dealing with residence and contact.[38] Section 70D provides a similar mechanism for the registration of a child protection order made in another state. A registered order has the same force and effect as if it were an order made under the *Family Law Act*.[39] The operation of this provision with respect to orders of the NSW Children's Court has been described as follows:

> if a New South Wales Children's Court made an order that a child live with X, that order could be registered in the Family Court of Australia or the Federal Magistrates Court, in New South Wales or elsewhere, and then enforced as if it were an order of that court. The same applies to an order that a child should spend time with X (orders of the kind formerly referred to in the *Family Law Act* as 'contact' or 'access' orders).[40]

30.37 To register a relevant child protection order, a sealed copy of the order is filed in a family court registry.[41] The effect of the registration is to invoke the enforcement mechanisms of the *Family Law Act.* Chisholm considered the operation of the registration provision and suggested that 'there would be no difficulty in [a child protection agency] making an application for any of these various forms of enforcement of a Children's Court order registered in a family law court'.[42]

30.38 Section 69ZK of the *Family Law Act* provides that the family courts must not make an order under the Act in relation to a child who is under the care of a person under a child welfare law, unless the order is expressed to come into effect when the child ceases to be under care; or the order is made with the written consent of a child

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38 *Family Law Act 1975* (Cth) s 4: the definition of 'State child order' includes orders determining with whom a child under 18 years of age is to live or spend time with, or that provides for contact, access or custody.

39 Ibid s 70E.

40 R Chisholm, *The Child Protection–Family Law Interface* (2009), 31.

41 *Family Law Rules 2004* (Cth) r 23.01A.

42 R Chisholm, *The Child Protection–Family Law Interface* (2009), 34.

welfare officer. Chisholm suggested that, even where a child protection order is registered, s 69ZK means that the family courts could only make enforcement orders in relation to a child in care, if the state child welfare officer of the relevant state or territory had given written consent to the institution or continuation of the proceedings. The Review noted that, although such written consent could be given as part of the application to register the child order, the absence of a delegated power to give consent may cause difficulty.[43]

30.39 In the Consultation Paper the Commissions asked whether the registration of child protection orders under ss 70C and 70D is a useful strategy that enhances the safety of children, and whether the absence of a delegated power to provide the consent required by s 69ZK was of concern.[44]

Submissions and consultations

30.40 The Chief Justice of the Family Court and the Chief Federal Magistrate noted in their submission that there is no statistical information available on how often child protection orders are registered pursuant to ss 70C and 70D. They expressed the view, however, that the capacity to register orders is important as it minimises the need to rely on parties disclosing the orders.[45] The Magistrates' Court and the Children's Court of Victoria also noted that the registration process was useful.[46]

Commissions' views

30.41 The Commissions note that the registration of child protection orders in the family courts appears to be a useful mechanism. The Commissions' view is that, while the current registration system is useful, it would be more effective if the courts had access to the orders, without having to rely on parties or child protection agencies to register them. Accordingly, the Commissions recommend below that these orders should be included as a matter of course in the proposed national register.[47] The current proposal in relation to the national register involves the registration and inter-state recognition of family violence protection orders. In the Commissions' view, many of the arguments relating to the automatic registration and recognition of family violence orders might also be made in relation to child protection orders and it would be sensible to extend the registration and recognition arrangements to include them.

30.42 As no other major issues were identified by stakeholders in relation to the registration of child protection orders in the family courts, the Commissions make no further recommendations in relation to this matter.

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43 Ibid, 35.
44 Consultation Paper, Question 14–11.
45 D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168,* 25 June 2010.
46 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010.
47 Rec 30–18.

Non-publication provisions

30.43 Family violence legislation in every state and territory prohibits the publication of certain information about persons involved in, or associated with, protection order proceedings. However, the legislation across the jurisdictions differs as to:

- whether non-publication is the default position or is triggered by a court order;
- whether a harm threshold must be met before a court makes an order for non-publication;
- whether the non-publication provisions apply indefinitely or only until such time as a court has disposed of the proceedings; and
- the exceptions that permit publication in some circumstances.

30.44 In some states and territories, the prohibition on publication of certain aspects of protection order proceedings applies by default. Under the Queensland family violence legislation, for example, it is an offence to publish an account of proceedings that identifies, or is likely to identify the aggrieved person, a named person, the respondent, the applicant, the appellant, a witness or a child concerned in the proceedings.[48]

30.45 In comparison, under the Tasmanian family violence legislation, a prohibition on publication only applies following a court order to this effect. However, a court *must* make an order prohibiting the publication of material which may disclose the identity of a child affected by protection order proceedings.[49]

30.46 In New South Wales (NSW), a prohibition on publication also applies where there is a court order to this effect. A default prohibition applies in relation to information about children.[50] The Northern Territory family violence legislation sets out a harm threshold that must be satisfied before a court can make a non-publication order in relation to a protected person or witness in a proceeding—that is, the court must be satisfied that publication would expose the person to risk of harm.[51] There is, however a default prohibition in relation to publishing identifying information about children.[52]

Exceptions allowing communication of information

30.47 Many of the prohibitions on publication in state and territory family violence legislation include exceptions where publication is with the consent of the person to whom the information relates, or the consent of the court.[53]

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48 *Domestic and Family Violence Protection Act 1989* (Qld) s 82(1).
49 *Family Violence Act 2004* (Tas) s 32(2).
50 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45.
51 *Domestic and Family Violence Act 2007* (NT) s 26.
52 Ibid s 123.
53 See, for example, *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 45(4)(b).

30.48 The Queensland family violence legislation includes exceptions for publication with the court's or the magistrate's 'express permission', or where publication is permitted by regulation.[54] There is also an exception for the communication of transcripts of evidence or other documents to persons concerned in proceedings in a court or to the police for use in such proceedings.[55]

30.49 The Australian Capital Territory (ACT) family violence legislation includes a detailed list of exceptions, including an express exception for information provided to a federal family court under s 60CF of the *Family Law Act* ('informing the court of relevant family violence orders'), discussed above.[56] Other exceptions in the ACT legislation include: where information is communicated in accordance with an order of the Magistrates Court or the written permission of a magistrate; and the provision of information to the child protection agency to allow it to exercise its care and protection powers.[57] A court may also make an order to allow publication if it is in the public interest, will promote compliance with the protection order, or is necessary or desirable for the proper functioning of the Act.[58]

30.50 In the Consultation Paper, the Commissions asked a range of questions about the non-publication provisions in state and territory family violence legislation, including whether the provisions were unduly restricting the flow of information from state and territory courts to the federal family courts,[59] and whether state and territory courts should be required to provide details of protection orders and related proceedings to those courts.[60] The Commissions also asked whether there should be express exceptions in the non-publication provisions to allow information to be available in other court proceedings, for example, in the federal family courts.[61]

Submissions and consultations

30.51 A number of submissions stated that these provisions do not appear to be a problem in practice.[62] The Queensland Law Society commented, however, that the Queensland Police Service often referred to the provisions in response to subpoenas and expressed the view that the provisions should be reviewed to ensure that they did not restrict information flow to the police and child protection agencies where necessary.[63] One stakeholder—while expressing support for allowing information to

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54 *Domestic and Family Violence Protection Act 1989* (Qld) s 82(1)(b).
55 Ibid s 82(3).
56 *Domestic Violence and Protection Orders Act 2008* (ACT) ss 111, 112.
57 Ibid, sch 2, 2.2.
58 Ibid s 112(3).
59 Consultation Paper, Question 10–17.
60 Ibid, Question 10–19.
61 Ibid, Question 10–18.
62 Queensland Law Society, *Submission FV 178,* 25 June 2010; D Bryant, Chief Justice of the Family Court of Australia and J Pascoe, Chief Federal Magistrate of the Federal Magistrates Court of Australia, *Submission FV 168,* 25 June 2010.
63 Queensland Law Society, *Submission FV 178,* 25 June 2010. At the time of writing, the *Domestic and Family Violence Protection Act 1989* (Qld) was under review by the Queensland Government. See Department of Communities (Qld), *Review of the Domestic and Family Violence Protection Act 1989: Consultation Paper* (2010).

flow to police or others involved in court proceedings—noted that the safety of victims of violence and their children should remain a key priority.[64]

30.52 A number of stakeholders expressed the view that state and territory courts should be required to provide details of protection order proceedings to the federal family courts where there is a related family law matter.[65] The Domestic Violence Prevention Council (ACT) stated that provision of this information to the federal family courts should not be dependent upon a request from one party or the discretion of the other party. The Council noted that one solution would be for federal family courts to have regard to the proposed national register of family violence protection orders.[66]

30.53 On the other hand, the Office of the Privacy Commissioner stated in its submission that prohibitions on publication of identifying information about individuals involved in protection order proceedings are an important privacy protection. The Office did not support modifying the general prohibition on publication and expressed the view that other mechanisms that limit the disclosure of personal information to those who legitimately require it should be used to improve information sharing.[67]

Commissions' views

30.54 Limiting general publication—by, for example, the media—of identifying information relating to protection order proceedings is important to protect the privacy interests of the parties and others, in particular, children, involved in the proceedings. Stakeholders indicated that the existing non-publication provisions in state and territory family violence legislation did not appear to be unduly restricting the disclosure of information to the federal family courts.

30.55 In the Commissions' view, however, such provisions should clearly set out where disclosure to other courts and agencies that legitimately require access to the information is allowed. This provides clarity for those being asked to disclose the information, and ensures that any disclosure is consistent with the family violence legislation and with relevant privacy legislation, as the disclosure will be 'authorised by law'.[68]

30.56 The *Domestic Violence and Protection Orders Act 2008* (ACT) provides an instructive starting point. In particular, the ACT legislation makes clear that disclosure of identifying information to the federal family courts under s 60CF of the *Family Law Act* does not breach the non-publication provision. Other important exceptions in this legislation relate to disclosure:

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64 Confidential, *Submission FV 184,* 25 June 2010.

65 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124,* 18 June 2010.

66 Domestic Violence Prevention Council (ACT), *Submission FV 124,* 18 June 2010.

67 Office of the Privacy Commissioner, *Submission FV 147,* 24 June 2010.

68 Privacy legislation and the exception for disclosure that is 'required or authorised by law' is discussed further below.

- to the child protection agency, to allow the exercise of the agency's care and protection powers; and
- where a court is of the view that publication is in the public interest, will promote compliance with the protection order, or is necessary or desirable for the proper functioning of the Act.

The provision also provides a certain amount of flexibility by allowing disclosure on the basis of a court order or the written permission of the magistrate.

30.57 The Commissions are of the view that non-publication provisions in state and territory legislation should be reviewed to ensure that they expressly allow disclosure of information about protection orders and related proceedings—including identifying information—in appropriate circumstances. The exceptions to such provisions should expressly include disclosure of protection orders to the federal family courts under s 60CF of the *Family Law Act*.

30.58 The Commissions note the proposed development of a national register of state and territory family violence protection orders, which is discussed further below. State and territory family violence legislation may need to be amended to allow protection orders to be included in the national register, and this will provide an opportunity for the states and territories to consider the need for other exceptions. The Commissions' view is that the proposed national register should be designed to ensure that this information is readily available to the federal family courts and others, such as child protection agencies and the police.

Recommendation 30–3 Non-publication provisions in state and territory family violence legislation should expressly allow disclosure of information in relation to protection orders and related proceedings that contains identifying information in appropriate circumstances, including disclosure of family violence protection orders to the federal family courts under s 60CF of the *Family Law Act 1975* (Cth).

Seeking information from child protection agencies

30.59 In each state and territory, the child protection legislation contains provisions for protecting the confidentiality of information collected by child protection agencies or for precluding such information from being admissible in another proceeding.[69] The federal family courts may seek information from child protection agencies either at the request of parties by subpoena—issued under pt 15.3 of the *Family Law Rules*—or by

69 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 29; *Children, Youth and Families Act 2005* (Vic) ss 41, 129–130; *Child Protection Act 1999* (Qld) ss 186–8; *Children and Community Services Act 2004* (WA) ss 23, 124F, 141, 240–241; *Children's Protection Act 1993* (SA) ss 13, 52L; *Children, Young Persons and Their Families Act 1997* (Tas) ss 16, 103; *Children and Young People Act 2008* (ACT) ss 846, 868–71; *Care and Protection of Children Act 2007* (NT) ss 150, 195, 221.

exercising the courts' express power to seek information and documents from state and territory agencies set out in s 69ZW of the *Family Law Act*.

Subpoenas

30.60 The power of a federal family court to compel production of documents from a child protection agency under a subpoena was examined by the High Court in *Northern Territory of Australia v GPAO*.[70] The specific issue was whether under the former *Family Law Rules 1984* (Cth) O 28 r 1 the court could compel production of documents subject to s 97(3) of the *Community Welfare Act* (NT). Section 97(3) provided that:

> A person who is, or has been, an authorized person shall not, except for the purposes of the Act, be required to—
>
> (a) produce in a court a document that has come into his possession or under his control; or
>
> (b) disclose or communicate to a court any matter or thing that has come under his notice, in the performance of his duties or functions under this Act.

30.61 A majority of the court held that the provisions of the *Family Law Act* did not override s 97(3) of the *Community Welfare Act* and that the provision was binding on the Family Court by operation of s 79 of the *Judiciary Act 1903* (Cth).[71] Section 79 provides that:

> The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the *Constitution* or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable.

30.62 The High Court found that the provisions of the *Family Law Act* and the *Family Law Rules* did not 'otherwise provide' in the terms of s 79.[72] Thus, the child protection agency could not be compelled by subpoena to produce the documents to the Family Court.

30.63 By way of contrast, in Queensland s 187 of the *Child Protection Act 1999* (Qld) allows disclosure of information if the disclosure is related to a child's protection or welfare; or is otherwise required or permitted under law. This provision allows disclosure of information held by the Department of Communities to the federal family courts. Section 190 of the *Child Protection Act* specifically regulates the production of documents held by the Department where required by a party to a court proceeding. Section 190 states that any such request must include information about the people to whom the request relates; the circumstances to which it relates—these must be relevant to the court proceedings; and state the period to which it relates. Section 190(4) provides that a person must not, directly or indirectly, disclose or make use of information obtained other than for a purpose connected with the proceeding.

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70 *Northern Territory of Australia v GPAO* (1999) 196 CLR 553.
71 Ibid, 592.
72 Ibid, 589.

Power to require the production of documents or information

30.64 Section 69ZW of the *Family Law Act* provides that the court may make an order in child-related proceedings requiring a prescribed state or territory agency to provide the court with the documents or information specified.[73] These must be documents recording, or information about, one or more of:

> (a) any notifications to the agency of suspected abuse of a child to whom the proceedings relate or of suspected family violence affecting the child;
>
> (b) any assessments by the agency of investigations into a notification of that kind or the findings or outcomes of those investigations;
>
> (c) any reports commissioned by the agency in the course of investigating a notification.[74]

30.65 An order under s 69ZW overrides any inconsistent state and territory law,[75] but the agency does not have to comply with the order in relation to:

> (a) documents or information not in the possession or control of the agency; or
>
> (b) documents or information that include the identity of the person who made a notification.[76]

30.66 Once information is provided in response to the order, the court must admit into evidence any such information on which it intends to rely.[77] There is qualified protection for the identity of the person who made the notification—if the person does not consent, the court can only disclose their identity if satisfied that it 'is critically important to the proceedings and that failure to make disclosure would prejudice the proper administration of justice'.[78]

Protocols relating to information sharing

30.67 Information sharing protocols are in place between child protection agencies in a number of jurisdictions—such as NSW and Queensland—and the federal family courts, dealing with a range of issues including requests for information by way of subpoena and under s 69ZW.[79] The Queensland protocol sets out the relevant law, discussed above, and the procedures that apply where a party to a family court proceeding requests the court to issue a subpoena to the Department of Child Safety (now the Department of Communities). The Protocol includes safeguards in relation to

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73 The agencies that have been prescribed in *Family Law Regulations 1984* (Cth) sch 9 are the child protection agencies and the police in each state and territory.

74 *Family Law Act 1975* (Cth) s 69ZW(2).

75 Ibid s 69ZW(4).

76 Ibid s 69ZW(3).

77 Ibid s 69ZW(5).

78 Ibid s 69ZW(6). The agency must be notified and given an opportunity to respond in such circumstances: s 69ZW(7).

79 Family Court of Australia, *Protocol between the Family Court of Australia and the NSW Department of Community Services* (2005); Federal Magistrates Court of Australia, *Protocol between the Federal Magistrates Court of Australia and the NSW Department of Community Services* (2009); Family Court of Australia, *Protocol between the Department of Child Safety Queensland, the Family Court of Australia and the Federal Magistrates Court of Australia* (2007).

subpoenaed documents, for example, that the Registry Manager of the Family Court must ensure that any file inspections are carried out under supervision and that photocopying does not occur unless ordered by the court.[80]

30.68 The Protocol also regulates the disclosure of information in response to an order made under s 69ZW and includes safeguards in relation to such documents, for example, that documents that are not admitted into evidence should be destroyed.[81]

30.69 In consultations, the Commissions heard that there were significant problems associated with information flow from state and territory child protection agencies to family courts in some jurisdictions. The Commissions understand, for example, that the decision in *Northern Territory of Australia v GPAO* has had an impact on the attitude of some jurisdictions to the exercise of the court's power under s 69ZW, although the decision itself concerned the power to require production of documents by way of subpoena.

30.70 In the Consultation Paper, the Commissions asked how best to facilitate the information flow between child protection agencies and the family courts. The Commissions proposed, as a minimum, that protocols be developed between federal family courts and state and territory child protection agencies including procedures for responding to subpoenas issued by federal family courts and for dealing with requests for documents and information under s 69ZW of the *Family Law Act*.

Submissions and consultations

Subpoenas

30.71 A number of stakeholders expressed the view that state and territory legislation should be amended to address the issues raised in *Northern Territory v GPAO* and to facilitate child protection agencies providing information to the family courts.[82] Some also suggested that the *Family Law Act* and *Rules* be amended to require that information be provided.[83]

30.72 Legal Aid NSW noted that the experience of legal practitioners in relation to the production of documents in response to subpoenas appeared to vary in different regions of NSW, noting that while some Community Service Centres (CSCs) were unresponsive, there had been better production in the last two years in a number of regions. Strategies to promote a cooperative response to the subpoena process included ensuring that subpoenas were clear about the information sought, and follow-up telephone contact between the CSC and the practitioner about what was required and what was available.[84]

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80 Family Court of Australia, *Protocol between the Department of Child Safety Queensland, the Family Court of Australia and the Federal Magistrates Court of Australia* (2007), [6.4].

81 Ibid, [6.3].

82 Law Society of New South Wales, *Submission FV 205,* 30 June 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010.

83 Confidential, *Submission FV 184,* 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144,* 24 June 2010.

84 Legal Aid NSW, *Submission FV 219,* 1 July 2010.

30.73 One stakeholder commented that resources were required to support child protection agencies to enable them to respond to requests for information.[85]

30.74 The Aboriginal Family Violence Prevention and Legal Service Victoria stated that the Department of Human Services in Victoria usually responded to subpoenas on time, but noted that child protection agencies in other jurisdictions provided more limited information.[86] The Queensland Law Society stated that the protocol between the family courts and the Queensland Department of Communities was working well, and that the Department complies appropriately with requests for information by way of subpoena as well as orders under s 69ZW.[87]

30.75 The Queensland Commission for Children and Young People and Child Guardian expressed support for the development of protocols between the federal family courts and child protection agencies, but stated that the power to compel the production of documents by way of subpoena should also be strengthened to ensure that child protection agencies are required to comply.[88]

Section 69ZW

30.76 The Chief Justice of the Family Court of Australia and the Chief Federal Magistrate stated in their submission that s 69ZW is an important mechanism to provide access to information held by state and territory child protection agencies. The submission noted that the provision generally worked well, but that 'for reasons that are unclear, section 69ZW has not yet been able to produce similar results in NSW'.[89]

30.77 The submission suggested that relationship building between courts and agencies and perhaps direct access to a contact point in child protection agencies for court staff and independent children's lawyers would assist. One way to achieve this might be to involve state and territory agencies in the Pathways networks across Australia. The submission also expressed some support for nationally consistent protocols to deal with requests for information under s 69ZW and by way of subpoena, but noted that it remained important to ensure that the enabling legislation was clear.[90]

30.78 A number of other stakeholders also expressed support for the development of protocols between federal family courts and state and territory child protection agencies that include procedures for responding to subpoenas issued by federal family courts and for dealing with requests for documents and information under s 69ZW of the *Family Law Act*.[91]

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85 C Humphreys, *Submission FV 04,* 23 August 2009.

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

87 Queensland Law Society, *Submission FV 178,* 25 June 2010.

88 Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63,* 1 June 2010.

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

90 Ibid.

91 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212,* 28 June 2010; Law Society of New South Wales, *Submission FV 205,* 30 June 2010; Women's Legal Service Victoria, *Submission FV 189,* 25 June

Commissions' views

30.79 It appears that there are a number of legislative and administrative barriers preventing the federal family courts from accessing important information held by child protection agencies in some jurisdictions. Some of these barriers stem from the High Court's decision in *Northern Territory of Australia v GPAO*.[92] In the Commissions' view, states and territories should review and amend, where necessary, their child protection legislation to ensure that the legislation is not preventing child protection agencies from disclosing relevant information to the federal family courts in appropriate circumstances.

30.80 The Commissions note that s 69ZW provides that where the federal family courts request the specified information—notifications of suspected abuse of a child or family violence affecting a child and related assessments and reports—from prescribed agencies, state or territory laws have no effect to the extent that they would hinder or prevent an agency complying with the order.[93] While it would be possible to include a similar provision in relation to requests for information by way of subpoena, in the Commissions' view a more nuanced outcome could be achieved through the amendment of state and territory legislation to allow information to flow in appropriate and controlled circumstances. The Queensland child protection legislation provides a model in this regard.

30.81 Administrative measures are also necessary to ensure that child protection agencies are aware of, and responsive to, requests for information. The Commissions recommend that federal family courts and state and territory child protection agencies in all states and territories develop protocols that include procedures for dealing with requests for documents and information under s 69ZW and for responding to subpoenas issued by federal family courts.

30.82 The Commissions note that simply putting protocols in place is not sufficient. These arrangements must be given an ongoing profile among departmental and court officers; they must form the basis of an ongoing and responsive relationship between the agencies and the courts; and they must be supported and implemented in practice. The Commissions also recommend, below, that these protocols include comprehensive information sharing arrangements.[94]

2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Women's Legal Services NSW, *Submission FV 182,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010; Justice for Children, *Submission FV 177,* 25 June 2010; Berry Street Inc, *Submission FV 163,* 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151,* 24 June 2010; Confidential, *Submission FV 130,* 21 June 2010; N Ross, *Submission FV 129,* 21 June 2010; Confidential, *Submission FV 82,* 2 June 2010; C Pragnell, *Submission FV 70,* 2 June 2010.

92 *Northern Territory of Australia v GPAO* (1999) 196 CLR 553.

93 *Family Law Act 1975* (Cth) s 69ZW(4).

94 Recs 30–16, 30–17.

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

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

(a) dealing with requests for documents and information under s 69ZW of the *Family Law Act 1975* (Cth); and

(b) responding to subpoenas issued by federal family courts.

Information flow to the family violence system

Notification of parenting orders

30.83 With the exception of the ACT, the family violence legislation in each of the states and territories includes provisions for the state and territory courts to gain access to information about parenting orders.[95] However, the legislation differs in relation to the procedure by which the information is obtained. Most commonly, the legislation imposes obligations on persons who apply for a protection order, or a variation of such an order, to inform the court of any relevant parenting order, or any pending application for a parenting order, of which the person is aware.[96] On the other hand, the Victorian family violence legislation places an obligation on a court that decides to make a family violence protection order—where one of the parties is the parent of a child—to enquire whether a parenting order or a child protection order is in force.[97]

30.84 The application forms for protection orders in most states and territories ask whether a child is the subject of a current order under the *Family Law Act*, or whether there are pending proceedings for such an order.[98] Queensland's *Protection Order Application* asks whether a court has made any other orders involving the parties, or if there are other proceedings that are yet to be decided in another court. Individual check boxes are then set out for current and non-current: children's court orders; Queensland domestic violence orders; interstate or New Zealand domestic violence orders; family

95 The *Domestic Violence and Protection Orders Act 2008* (ACT) does not directly require an applicant for a protection order or any other person to inform the court about a family law contact order. Section 31 does, however, include a requirement for courts to consider any relevant family law contact order of which they are aware.

96 *Crimes (Domestic and Personal Violence) Act 2007* (NSW) s 42; *Domestic and Family Violence Act 2007* (NT) s 90; *Domestic and Family Violence Protection Act 1989* (Qld) s 46B; *Intervention Orders (Prevention of Abuse) Act 2009* (SA)s 20; *Family Violence Act 2004* (Tas) s 15; *Restraining Orders Act 1997* (WA) s 66.

97 *Family Violence Protection Act 2008* (Vic) s 89.

98 This is the case, eg, in NSW, Victoria, Queensland, WA and Tasmania.

court orders and any other orders. The form also asks the parties to attach copies of the orders.[99]

30.85 However, some forms—for example, in the ACT—ask about pending or finalised proceedings without specifically asking whether there are existing family court orders. The application form for a protection order in the Magistrates Court of South Australia does not seek information about family court orders or pending proceedings for such orders, although this information is sought on the *Affidavit to Support an Application for a Domestic Violence Restraining Order*. In addition, few application forms for variation of protection orders request information about relevant family law orders.[100]

Consultation Paper

30.86 In the Consultation Paper, the Commissions proposed that state and territory family violence legislation should provide mechanisms for courts exercising jurisdiction under such legislation to be informed about existing parenting orders or pending proceedings for such orders. The Commissions suggested that this might be achieved by requiring parties to proceedings for a protection order to inform the court about any such parenting orders or proceedings; requiring courts making protection orders to inquire as to any such parenting orders or proceedings; or both of the above.[101]

30.87 The Commissions also proposed that application forms for protection orders in all states and territories, including applications for variation of protection orders, should clearly seek information about existing parenting orders or pending proceedings for such orders.[102]

Submissions and consultations

30.88 Submissions and consultations indicated that it was important to ensure that information about parenting orders should flow to state and territory courts and suggested a number of ways that this could be achieved. National Legal Aid, and a number of other stakeholders,[103] supported the proposal to require parties to proceedings for a protection order to inform the court about any parenting orders or

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99 Magistrates Court of Queensland, *Protection Order Application* <www.communityservices.qld.gov.au/violenceprevention/legislation/dom-violence-orders.html> at 9 February 2010, [24].

100 Exceptions include the applications for variation of protection orders in Victoria and Tasmania.

101 Consultation Paper, Proposal 8–3.

102 Ibid, Proposal 8–4.

103 Legal Aid NSW, *Submission FV 219,* 1 July 2010; Confidential, *Submission FV 183,* 25 June 2010; Confidential, *Submission FV 164,* 25 June 2010; Berry Street Inc, *Submission FV 163,* 25 June 2010; Confidential, *Submission FV 162,* 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149,* 25 June 2010; Justice for Children, *Submission FV 148,* 24 June 2010; K Johnstone, *Submission FV 107,* 7 June 2010; Confidential, *Submission FV 105,* 6 June 2010; Local Court of NSW, *Submission FV 101,* 4 June 2010; Confidential, *Submission FV 77,* 2 June 2010; Confidential, *Submission FV 71,* 1 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63,* 1 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010; C Humphreys, *Submission FV 04,* 23 August 2009.

proceedings and to require courts making protection orders to inquire as to any parenting orders or proceedings.[104] The submission noted, however, that it was not sufficient to rely on the parties to inform the courts about existing parenting orders and suggested that protocols should be put in place to allow state and territory courts to access the family courts' database containing this information.[105] Other parties suggested this information should be captured on a central national register.[106]

30.89 In their submission, the Chief Justice of the Family Court and the Chief Federal Magistrate noted that the Commonwealth Courts Portal (CCP)—an initiative of the Family Court of Australia, the Federal Court of Australia and the Federal Magistrates Court of Australia—provides secure web-based access to information about cases before these courts. The submission stated that the Family Court's Policy Advisory Committee has considered extending access to the CCP to relevant organisations including possibly state and territory police, state and territory children's courts, child protection agencies and the Child Support Agency and expressed support for a limited trial.[107] This issue is discussed further, below.

30.90 One stakeholder submitted that requiring vulnerable parties, for example those from non-English speaking backgrounds, those with intellectual disabilities, or low levels of literacy to inform the court about parenting orders—particularly where they were self-represented—would be too difficult. This stakeholder was of the view that the obligation should lie with the court.[108] A number of other stakeholders agreed.[109]

30.91 The Magistrates' Court and the Children's Court of Victoria also noted that most parties to proceedings under family violence legislation are unrepresented and may only get limited legal advice, if any, during the proceedings. The submission expressed the view that, in these circumstances, it would not be appropriate to impose a legal obligation on the parties to inform the court about parenting orders or proceedings. The Courts submitted that the best approach would be to ensure that the relevant questions are asked on application forms and to impose an obligation on courts to inquire as to any parenting orders or proceedings.

30.92 The Magistrates' Court and the Children's Court of Victoria noted, in addition, that a national register, including family law orders affecting children as well as family violence protection orders would assist. Pending the establishment of such a register,

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

105 This position was also supported by Confidential, *Submission FV 184,* 25 June 2010.

106 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144,* 24 June 2010.

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

108 Confidential, *Submission FV 81,* 2 June 2010.

109 NSW Women's Refuge Movement Working Party Inc, *Submission FV 188,* 25 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Women's Legal Services NSW, *Submission FV 182,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144,* 24 June 2010; Disability Services Commission (WA), *Submission FV 138,* 23 June 2010; A Harland, *Submission FV 80,* 2 June 2010.

the Courts suggested that it would be useful to establish protocols between the federal family courts and the state and territory courts to ensure that copies of current family court orders are provided to state and territory courts.[110]

30.93 The submission from the NSW Local Court highlighted s 42(1) of the *Crimes (Domestic and Personal Violence) Act 2007* (NSW), which provides:

> (1) A person who applies for, or for a variation of, a final apprehended violence order or interim court order must inform the court of:
>
> (a) any relevant parenting order of which the person is aware, or
>
> (b) any pending application for a relevant parenting order of which the person is aware.
>
> The court is required to inform the applicant of the obligation of the applicant under this subsection.

30.94 The provision imposes an obligation on the parties to inform the court of any parenting order or pending application, but also requires the court to bring this obligation to the parties' attention. The submission also noted that the application form for a protection order in NSW has a section for the applicant to indicate whether there are parenting orders in place.[111]

30.95 There was general support for ensuring that application forms for protection orders in all states and territories clearly seek information about existing parenting orders, or pending proceedings for such orders.[112] One submission noted that the Queensland *Protection Order Application* form, discussed above, would provide a suitable model.[113]

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

111 Local Court of NSW, *Submission FV 101,* 4 June 2010.

112 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Legal Aid NSW, *Submission FV 219,* 1 July 2010; WESNET—The Women's Services Network, *Submission FV 217,* 30 June 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212,* 28 June 2010; Women's Legal Service Victoria, *Submission FV 189,* 25 June 2010; NSW Women's Refuge Movement Working Party Inc, *Submission FV 188,* 25 June 2010; J Stubbs, *Submission FV 186,* 25 June 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Confidential, *Submission FV 183,* 25 June 2010; Women's Legal Services NSW, *Submission FV 182,* 25 June 2010; Law Council of Australia, *Submission FV 180,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010; Confidential, *Submission FV 171,* 25 June 2010; Confidential, *Submission FV 164,* 25 June 2010; Berry Street Inc, *Submission FV 163,* 25 June 2010; Confidential, *Submission FV 162,* 25 June 2010; The Central Australian Aboriginal Family Legal Unit Aboriginal Corporation, *Submission FV 149,* 25 June 2010; Justice for Children, *Submission FV 148,* 24 June 2010; Confidential, *Submission FV 130,* 21 June 2010; Confidential, *Submission FV 125,* 20 June 2010; K Johnstone, *Submission FV 107,* 7 June 2010; Confidential, *Submission FV 105,* 6 June 2010; Confidential, *Submission FV 81,* 2 June 2010; Confidential, *Submission FV 77,* 2 June 2010; Better Care of Children, *Submission FV 72,* 24 June 2010; C Pragnell, *Submission FV 70,* 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010; P Easteal, *Submission FV 40,* 14 May 2010; C Humphreys, *Submission FV 04,* 23 August 2009.

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

Commissions' views

30.96 It is clearly important that state and territory courts making protection orders are aware of existing parenting orders. This information is central to ensuring that proceedings for protection orders are conducted on an informed basis. The most common approach in state and territory family violence legislation is to impose a legal obligation on parties to inform the court about existing parenting orders. However, stakeholders have indicated that it is not helpful to impose an obligation of this kind on parties—where failure to provide the information is likely to involve a sanction of some kind—given that many will be unrepresented, and some will be more vulnerable, such as those from culturally and linguistically diverse backgrounds and persons with a disability.

30.97 Accordingly, the Commissions are not recommending placing a legal obligation on the parties to provide information about parenting orders. However, application forms for protection orders should ask—clearly and specifically—about the existence of parenting orders or pending proceedings for such orders. In the Commissions' view, including clear, specific questions on application forms is a more effective method of eliciting information from parties, than imposing a legal obligation on them. In addition, the Commissions recommend that states and territories should amend their family violence legislation to place an obligation on courts to ask for the required information.

30.98 The Commissions also recommend that parenting orders should be included on the national register and that state and territory courts exercising jurisdiction under family violence and child protection legislation should have access to the register.[114] In addition, the Commissions recommend that state and territory courts should be given access to the Commonwealth Courts Portal. This will ensure that those courts have timely access to accurate and up-to-date information about cases that are before the federal family courts, the outcomes of those cases and orders made by the courts.[115]

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

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

114 Rec 30–18.
115 Rec 30–8.

Non-publication provision

30.99 Section 121 of the *Family Law Act* makes it an offence to publish any account of any proceedings under the Act that identifies a party to the proceedings; a person who is related to, or associated with a party to the proceedings; or a witness in the proceedings.[116] The provision sets broad parameters for when information will be taken as identifying a person. These include any of the following particulars, where they are sufficient to identify a person to a member of the public, or a section of the public:

- the person's name, title, pseudonym or alias;
- the address of any premises at which the person resides or works, or the locality in which premises are situated;
- the person's physical description or style of dress;
- any employment or occupation in which the person engages;
- the person's relationship to identified relatives, friends or businesses;
- the person's recreational interests or political, philosophical or religious beliefs; and
- any real or personal property in which the person has an interest or with which the person is otherwise associated.

30.100 There are a number of exceptions to the publication offence in s 121—most relevantly, for disclosures to persons concerned in proceedings in 'any court' for use in connection with those proceedings.[117] Other exceptions include, for example, disclosures made to legal professional disciplinary boards; disclosures made to bodies providing, or considering whether to provide, legal aid; notices or reports published pursuant to a court direction; and publications intended primarily for use by members of the legal profession. Accounts of proceedings may also be published with court approval.

30.101 The impact of the publication offence in s 121 on the communication of information for the purpose of protection order proceedings under state and territory family violence legislation will depend on the interpretation of the terms an 'account of proceedings' and dissemination 'to the public or to a section of the public'. In *Hinchcliffe v Commissioner of Police of the Australian Federal Police*, Kenny J of the Federal Court gave a narrow interpretation to both of these terms.[118] Kenny J commented that an 'account of proceedings' requires a narrative, description, retelling or recitation of something about, or that has happened in, the proceedings. This is not

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116 The offence is punishable by a maximum penalty of imprisonment for one year. The *International Covenant on Civil and Political Rights* entitles all persons to a 'fair and public hearing'. However, the Covenant provides that suits of law need not be made public in proceedings concerning matrimonial disputes or the guardianship of children: *International Covenant on Civil and Political Rights*, 16 December 1966, [1980] ATS 23, (entered into force generally on 23 March 1976), art 14.

117 *Family Law Act 1975* (Cth) s 121(9)(a).

118 *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, [54].

made out merely because some allegations made in the proceedings are reiterated outside the court.

30.102 Kenny J noted with approval the ruling in *Re Edelsten; Ex Parte Donnelly,*[119] that dissemination 'to the public or to a section of the public' should be taken as a reference to a 'widespread communication with the aim of reaching a wide audience'.[120] This does not encompass communications to close personal associates or members of a group with an interest that is substantially greater than, or different from, the interest of other members of the public.

30.103 In the Consultation Paper, the Commissions asked whether the prohibition on publication set out in s 121 of the *Family Law Act* unduly restricted communication about family law proceedings to those involved in protection order proceedings, including the police.[121]

Submissions and consultations

30.104 In its submission, Legal Aid NSW noted that s 121 was designed to prevent the publication of the facts of a case in the media, rather than the use of Family Court proceedings in the state and territory courts. The submission noted, however, that where a party seeks to adduce evidence contained in family or expert reports in child abuse or assault cases brought in the state and territory courts, requests for these reports are dealt with on their merits by the family courts, the interests of children being the primary consideration. The submission noted that such reports are provided for use in other proceedings about 50% of the time.[122]

30.105 The Chief Justice of the Family Court and the Chief Federal Magistrate stated in their submission that they were not aware of any examples of the prohibition on publication in s 121 of the *Family Law Act* unduly restricting communication about family law proceedings to persons involved in protection order proceedings.[123] The Queensland Law Society suggested that s 121 could be clarified to make clear that sharing information with the police or with child protection agencies did not amount to 'publication.'[124]

30.106 The Law Council of Australia stated that, in practice, s 121 does not unduly restrict the flow of family court information to the state and territory courts. A number of other stakeholders agreed.[125] The Council noted that the exception in s 121(9)(a)—which allows the communication, to persons concerned in proceedings in any court, of

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119 *Re Edelston; Ex parte Donnelly* (1988) 18 FCR 434.

120 *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, [54].

121 Consultation Paper, Question 10–11.

122 Legal Aid NSW, *Submission FV 219,* 1 July 2010.

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

124 Queensland Law Society, *Submission FV 178,* 25 June 2010.

125 National Legal Aid, *Submission FV 232,* 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 47,* 24 May 2010.

any pleading, transcript of evidence or other document for use in connection with those proceedings—allows the use of this information in protection order proceedings.[126]

Commissions' views

30.107 The Commissions note that s 121 of the *Family Law Act* does not appear to be unduly restricting communication about family law proceedings to state and territory courts hearing protection order matters. Section 121 of the *Family Law Act* is primarily aimed at preventing widespread publication of family court proceedings that include identifying information in the media. In the Commissions' view this general prohibition is appropriate.

30.108 There are a number of ways in which information can be shared between the federal family courts, state and territory courts, the police and child protection agencies. Section 121 allows communication of information to police involved in proceedings in any court. Section 67Z of the *Family Law Act* requires the Registry Manager of the Family Court to 'as soon as practicable, notify a prescribed child welfare authority' where a *Notice of Child Abuse or Family Violence* (Form 4) is filed. In addition, those with a 'proper interest' may have access to federal family court files with the permission of the court.[127]

30.109 Finally, Justice Kenny's view that dissemination 'to the public or to a section of the public' should be taken as a reference to a 'widespread communication with the aim of reaching a wide audience',[128] means that s 121 will not apply to disclosures between courts and agencies with a legitimate interest in the matter. It is on this basis that state and territory courts, for example, might be given access to the Commonwealth Courts Portal.

30.110 In the Commissions' view, the exception to allow disclosure to persons concerned in any court proceedings for use in connection with those proceedings sufficiently enables the sharing of information for the purpose of protection order proceedings under state and territory family violence legislation. The Commissions are not, therefore, recommending that s 121 be amended.

Access to federal family court records

30.111 Information included in federal family court records may also be relevant to proceedings under state and territory family violence laws. This information is wider than the details of current or prior parenting orders and may include, for example, the reasons for making these orders—such as interviews with or assessments of parents or children, including family consultant assessments and clinicians' reports—and injunctions granted under the *Family Law Act*.

126 Law Council of Australia, *Submission FV 180,* 25 June 2010.
127 *Family Law Rules 2004* (Cth) r 24.13(1). This issue is discussed further, below.
128 *Hinchcliffe v Commissioner of Australian Federal Police* (2001) 118 FCR 308, [54].

30.112 The *Family Law Rules 2004* (Cth) specify a limited range of people who may search the court record relating to a case, or inspect or copy a document forming part of the record as follows:

> (a) the Attorney-General;
>
> (b) a party, a lawyer for a party, or an independent children's lawyer, in a case;
>
> (c) with the permission of the court, a person with a proper interest:
>
> (i) in the case; or
>
> (ii) in information obtainable from the court record in the case;
>
> (d) with the permission of the court, a person researching the court record relating to the case.[129]

30.113 In considering whether to give permission to a person seeking to obtain access to a part of the court record other than court documents, the court must consider:

> (a) the purpose for which access is sought;
>
> (b) whether the access sought is reasonable for that purpose;
>
> (c) the need for security of court personnel, parties, children and witnesses;
>
> (d) any limits or conditions that should be imposed on access to, or use of, the record.[130]

30.114 The only situation in which the *Family Law Act* expressly provides for details of injunctions or orders to be provided to other courts is where a federal family court has made an order or granted an injunction that is inconsistent with an existing protection order.[131]

30.115 The Family Law Council made a submission to the ALRC's 2008 inquiry into Australian privacy laws,[132] commenting on the challenge of information sharing in the context of family violence. It noted that:

> In many cases information held by one part of the system is not available to another part because of privacy considerations. Decisions are therefore made in the absence of a complete picture of the family circumstances. This lack of transparency often leads to misguided decisions being taken or problems being ignored. This is particularly so when decisions have to be made on an urgent basis and there is no time for the leisurely process of subpoenas or information orders to be sought.[133]

30.116 The Council advised that it was considering whether police officers should have access to the family courts' databases to ensure that they had relevant information available when dealing with situations of family violence. One of the examples that the

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129 *Family Law Rules 2004* (Cth) r 24.13(1).

130 Ibid r 24.13(3).

131 *Family Law Act 1975* (Cth) s 68P. Discussed in detail in Ch 17.

132 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008).

133 Family Law Council, *Submission to the Australian Law Reform Commission Review of Australian Privacy Law* (2007).

Council provided was where a court has ordered that a supervisor be present when a parent spends time with a child:

> Without access to information on the child related orders, police might attend a scene and remove the person responsible for supervising a parent spending time with a child without also removing the child ... At the moment, police must rely on seeing the physical orders when they attend the scene.[134]

30.117 It was noted in ALRC 108 that, pursuant to r 24.13 of the *Family Law Rules*, police officers are already able to obtain access to information held by the Family Court where the officer can demonstrate a 'proper interest' in the court record.[135] Accordingly, the ALRC did not recommend legislative change in this regard.

Submissions and consultations

30.118 The Chief Justice of the Family Court of Australia and the Chief Federal Magistrate stated in their submission that there were no known examples of individuals or agencies seeking access to records for the purpose of protection order proceedings not being provided with the requested documentation in a timely fashion. The submission stated that the existing provisions provided sufficient flexibility to enable information to be exchanged, subject to appropriate safeguards.[136]

30.119 In addition, the submission noted that access to the Commonwealth Courts Portal (CCP) is currently available to registered litigants and legal practitioners and that, as noted above, the Family Court's Policy Advisory Committee is actively considering extending access to the CCP to relevant agencies and organisations including state and territory police, state and territory children's courts, child protection agencies and the Child Support Agency.[137]

30.120 The Queensland Law Society expressed the view that the records of proceedings under the *Family Law Act* were generally accessible in a timely fashion to those involved in family violence proceedings in Queensland, noting that:

> Typically, magistrates do not want to be burdened with very long affidavits filed in family law proceedings, a great proportion of which are irrelevant to an application for a protection order. Magistrates certainly do want to be aware of existing current orders, particularly those impacting on children, provided that they are relevant. In the matters which are contested, parties ensure that these matters are property brought to the attention of magistrates.[138]

30.121 The Magistrates' Court and Children's Court of Victoria stated, however, that:

> In our experience, the process for obtaining family law orders from the federal family law courts in a timely fashion is unreliable. We believe that legislation requiring

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134 Ibid.

135 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), [35.108].

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

137 Ibid.

138 Queensland Law Society, *Submission FV 178,* 25 June 2010.

> federal family courts to provide copies of orders to state courts would assist in producing more reliable processes. We also support the development of a national database for family law, family violence and child protection orders relating to children that can be accessed by police as well as courts.[139]

30.122 A number of other stakeholders also indicated that there were problems gaining access to federal family court records[140] and suggested that there needed to be improvements in the legislation or procedures that regulate the provision of access.[141]

Commissions' views

30.123 In the Commissions' view, there is adequate flexibility in the provisions in the *Family Law Rules* to allow those with a 'proper interest' to access information for the purpose of protection order proceedings under state and territory family violence legislation. The Commissions do not, therefore, recommend that the *Rules* be amended. However, there appear to be some issues with the provision of access to family court records in practice. This could be resolved in a number of ways, for example, by developing information sharing protocols between the relevant courts, government agencies and private sector organisations. This issue is discussed further, below.

30.124 The Commissions note, however, that state and territory courts are most interested in having reliable and timely access to information about existing family court orders and proceedings for such orders. This need could effectively be addressed by providing state and territory courts with access to the CCP, which includes information about outcomes of cases and orders made. The Commissions note that the Family Court's Policy Advisory Committee is considering extending access to the CCP to relevant agencies and organisations. The Commissions' view is that state and territory courts dealing with family violence and child protection matters—and others with a 'proper interest' in such matters, including police and child protection agencies—should have access to the CCP to ensure that they can reliably confirm in a timely way whether there are existing related orders in place or pending proceedings for such orders.

30.125 The Commissions are also of the view that, in the future, this information should also be included on the proposed national register. This issue is discussed further below.[142]

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

140 Confidential, *Submission FV 184,* 25 June 2010; Justice for Children, *Submission FV 148,* 24 June 2010; C Pragnell, *Submission FV 70,* 2 June 2010.

141 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010.

142 Rec 30–18.

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

Information sharing between agencies

30.126 Information flow to the federal family courts and the state and territory courts is important to ensure that the courts are making orders based on all the relevant information, and that the potential for inconsistent orders is minimised. It is also important that information is shared appropriately among relevant government agencies and private sector organisations—for example, private sector service providers, child protection agencies and the police—to ensure the safety of victims of family violence and their children.

30.127 In the following section, the Commissions examine the legislative framework that regulates the sharing of information among government agencies and private sector organisations—that is, privacy and secrecy laws—and consider what changes are necessary to allow information to flow in appropriate circumstances. Barriers to information sharing are not, however, always legislative in nature. Often the obstacles are cultural, or arise from an excess of caution based on a lack of understanding of the relevant rules, and the Commissions also consider ways to promote a culture of appropriate and effective information sharing.

Privacy laws

30.128 The handling of personal information is regulated by privacy legislation at the federal, state and territory level. The principal piece of federal legislation regulating privacy in Australia is the *Privacy Act 1988* (Cth), which applies to Australian and ACT Government agencies and private sector organisations.[143] The Act contains a set of 11 Information Privacy Principles (IPPs) that apply to government agencies, and 10 National Privacy Principles (NPPs) that apply to private sector organisations.

30.129 Of particular relevance to this Inquiry are IPPs 10 and 11, which impose limits on the manner in which Australian Government agencies use and disclose personal information. IPP 10 provides that a 'record-keeper' in an Australian Government agency who has possession or control of personal information shall not use the information for any other purpose unless:

> the individual concerned has consented to use of the information for that other purpose;

143 Section 6 of the *Privacy Act 1988* (Cth) defines 'agency' to include 'a federal court'.

> the record-keeper believes on reasonable grounds that use of the information for that other purpose is necessary to prevent or lessen a serious and imminent threat to the life or health of the individual concerned or another person;
>
> use of the information for that other purpose is required or authorised by or under law;
>
> use of the information for that other purpose is reasonably necessary for enforcement of the criminal law or of a law imposing a pecuniary penalty, or for the protection of the public revenue; or
>
> the purpose for which the information is used is directly related to the purpose for which the information was obtained.[144]

30.130 IPP 11 governs disclosure of personal information. The exceptions in IPP 11 closely reflect those in IPP 10. Similar, but not identical, limitations on use and disclosure apply to many state and territory government agencies under state and territory privacy laws and administrative obligations.

30.131 *Time for Action* noted that privacy laws can contribute to a lack of communication and collaboration between government and non-government organisations, which impedes systems working together effectively:

> While privacy laws generally allow the sharing of information between government agencies and other specified organisations where there is a serious and imminent threat to a person's safety … many service providers report inconsistencies in the way privacy laws and principles are applied, suggesting the need for clarification of, and/or education for, relevant agencies about privacy laws and principles.[145]

30.132 It appears from some reviews of child protection systems in Australia that there is confusion among agencies about the impact of privacy rules that has created obstacles to information sharing. In a recent report, the Victorian Ombudsman noted

> a number of mistaken beliefs held by child protection staff about their responsibilities under the *Information Privacy Act*. Unfounded beliefs included that the department should not release the identity of reporters to Victoria Police when issues of physical and sexual abuse against children were alleged ...
>
> The department has not provided child protection workers with sufficient training, advice or resources to ensure an appropriate level of privacy compliance.[146]

30.133 In NSW, the privacy principles in the *Privacy and Personal Information Protection Act 1998* (NSW) and the *Health Records and Information Privacy Act 2002* (NSW) have been modified with respect to government agencies (and some private sector entities) that participate in the Domestic Violence Intervention Court Model.[147] The amending orders provide that government agencies that participate in the scheme

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144 Ibid s 14, IPP 10.

145 National Council to Reduce Violence against Women and their Children, *Time for Action: The National Council's Plan for Australia to Reduce Violence against Women and their Children, 2009–2021* (2009), 154 (citations omitted).

146 Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009), [78]–[79].

147 *Privacy Code of Practice (General) Amendment (Domestic Violence Intervention) 2010* (NSW); *Health Records and Information Privacy Code of Practice Amendment (Domestic Violence Intervention) 2010* (NSW).

are not required to comply with the Act in relation to the collection, use and disclosure of personal information about alleged perpetrators, victims and other family members. Agencies must, however, comply with codes of practice particular to the scheme.

30.134 Information sharing guidelines have been recommended as a way to clarify information sharing procedures between the relevant agencies.[148] Numerous reviews have also recommended that specific training be provided to ensure that agencies and their officers understand what information may (or must) be shared, with whom and under what circumstances.[149]

Proposed reform of the privacy principles

30.135 In its report on privacy, *For Your Information: Australian Privacy Law and Practice* (2008) (ALRC Report 108), the ALRC recommended that a uniform set of privacy principles should apply to private sector organisations and federal, state and territory government agencies.[150] The ALRC expressed the view that the use and disclosure of personal information should be permitted:

- with the consent of the individual to whom the information relates;
- for a secondary purpose that is related to the primary purpose of collection—or, if the information is sensitive personal information, *directly* related to the primary purpose of collection—where the individual to whom the information relates would reasonably expect the information to be used or disclosed in that way;
- where the agency or organisation reasonably believes that the use or disclosure is reasonably necessary to lessen or prevent a serious threat to an individual's life, health or safety; or public health or public safety;
- where the use or disclosure is required or authorised by or under law;
- where the agency or organisation reasonably believes that the use or disclosure is necessary for certain law enforcement and regulatory purposes, including 'the prevention, detection, investigation or remedying of seriously improper conduct or prescribed conduct'; and
- for research purposes.[151]

148 Community Development and Justice Standing Committee–Parliament of Western Australia, *Inquiry into the Prosecution of Assaults and Sexual Offences* (2008), 169–171; R Layton, *Review of Child Protection in South Australia* (2002), [7.9]–[7.13].

149 NSW Health, NSW Police, Department of Community Services (NSW), *NSW Joint Investigative Response Team (JIRT) Review*, unpublished (2006), 19–20; Child Safety Directors' Network—SCAN Subcommittee, *2007–2008 SCAN System Review* (2008), 2; and Northern Territory Police Territory Intelligence Division, *Strategic Intelligence Assessment Child Abuse 2009–2014* (2009), 23–24.

150 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008).

151 Ibid, Model Unified Privacy Principle 5.

30.136 Generally, personal information should be used and disclosed only for the purpose for which it was collected, that is, the primary purpose of collection or a related purpose. Where sensitive personal information is collected, it should only be used for the primary purpose of collection or a directly related purpose that the person would reasonably expect.

30.137 The information can be used for other purposes with the consent of the individual to whom the information relates. An example of information being used for another purpose with the consent of the individual is the NSW Police Yellow Card Referral Program. The Program requires police to ask victims of family violence at the time of an incident if they would like their details forwarded to a victim support agency for follow up. The Yellow Card is signed by the victim, indicating express consent for disclosure of their personal information. The Yellow Card is then forwarded to a support agency via a Domestic Violence Liaison Officer.

Serious threat to life, health or safety

30.138 In ALRC Report 108, the ALRC noted that all states and territories have laws in place that expressly allow or require disclosure of personal information in certain circumstances, for example, where a child is at risk of physical or sexual abuse. However, the ALRC also noted reports that sometimes a child was seriously injured or killed by a parent where disclosure of information about the parent's behaviour to appropriate service providers could have helped to prevent the injury or death.[152] Reviews into child deaths have also highlighted the need for increased collaboration and information sharing in order to protect children from serious harm.[153]

30.139 The ALRC was concerned that the existing exception for the use and disclosure of information where necessary to prevent or lessen a serious *and imminent* threat to the life or health of an individual, was too narrow. In the ALRC's view there were compelling policy reasons for information to be used and disclosed, for example, where a child's life, health or safety was at risk of harm in the medium to long term, not only where the threat of harm was imminent. In such circumstances, agencies and organisations should be able to take early preventative action to stop a threat from escalating to the point of materialisation.

30.140 The ALRC recommended, therefore, that the requirement that the threat be imminent should be removed,[154] noting that an analysis of whether a threat was 'serious' would involve consideration of the relative likelihood that the harm would occur, as well as the gravity of the potential outcome.

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152 Ibid, [69.103].

153 Victorian Child Death Review Committee, *Annual Report of Inquiries into the Deaths of Children Known to Child Protection, 2009*, 47; NSW Ombudsman, *The Death of Ebony: The Need for an Effective Interagency Response to Children at Risk* (2009), 53; NSW Ombudsman, *The Death of Dean Shillingsworth: Critical Challenges in the Context of Reforms to the Child Protection System* (2009), 14.

154 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), Rec 25–3.

30.141 In June 2010, in response to these recommendations, the Australian Government released exposure draft Australian Privacy Principles for comment.[155] The draft largely reflected the ALRC's recommendations, including allowing the use or disclosure of personal information where an agency or organisation reasonably believes the use or disclosure is necessary to lessen or prevent a serious threat to an individual's life, health or safety, or public health or safety. In light of stakeholder concerns about the possible breadth of the exception, the exposure draft principles stated that this exception should only apply where it is unreasonable or impracticable to obtain the individual's consent to the use or disclosure.[156]

Required or authorised by or under law

30.142 Privacy principles across Australia also generally provide exceptions for the use and disclosure of personal information where it is required or authorised by or under law.[157] The exposure draft Australian Privacy Principles provide for the use or disclosure of personal information where it is required or authorised by or under an Australian law, or an order of a court or tribunal.[158] 'Australian law' is defined to include federal, state and territory legislation.[159]

Family violence legislation

30.143 Some state and territory family violence laws include information-sharing provisions that are designed to ensure that the use and disclosure of relevant information does not contravene privacy laws on the basis that the use or disclosure is authorised by law.

30.144 Under the Tasmanian family violence legislation, for example, 'personal information custodians'—within the meaning of the *Personal Information Protection Act 2004* (Tas)—are permitted (but not required) to collect, use, disclose or otherwise deal with personal information where this is done in good faith for the purpose of furthering the objects of the *Family Violence Act 2004* (Tas).[160] Section 3 of that Act states the objects as follows: 'In the administration of this Act, the safety, psychological wellbeing and interests of people affected by family violence are the paramount considerations'.

30.145 Section 70A of the *Restraining Orders Act 1997* (WA) provides for 'interested parties' to share prescribed information if the parties agree that this is necessary to ensure the safety of a person who is the subject of a protection order or the wellbeing of a child who is affected by such an order. 'Interested parties' are defined as:

- the Commissioner of Police;

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155 Exposure Draft Australian Privacy Principles 2010 (Cth).
156 Ibid cl 7(2)(c).
157 *Privacy Act 1988* (Cth), IPPs 10.1(c) and 11.1(d) and NPP 2.1(g).
158 Exposure Draft Australian Privacy Principles 2010 (Cth) cl 7(2)(b).
159 Ibid, cl 15.
160 *Family Violence Act 2004* (Tas) s 37.

- the Chief Executive Officer of the agency assisting the Minister administering the *Restraining Orders Act*—presently the Attorney-General;
- the Chief Executive Officer of the agency assisting the Minister administering pt 8 of the *Sentence Administration Act 2003* (WA)—presently the Minister for Corrective Services; and
- the Chief Executive Officer for child welfare.[161]

30.146 'Prescribed information' includes, among other matters:

- the name, address, telephone number, age and ethnicity and other details of the victim, a child of the victim, or a person bound by a protection order;
- a description of any offence relevant to the granting of the protection order and an abridged description of the circumstances of its commission;
- any information about the grounds on which the protection order was granted; and
- the status of the investigation and prosecution of any offence relevant to the granting of the protection order by a police officer.[162]

30.147 Persons who provide information under s 70A 'in confidence and good faith' are protected from any civil or criminal liability, or breach of professional ethics or standards, in respect of the provision of the information.[163]

30.148 In the ACT, a more restricted information-sharing scheme is established under s 18 of the *Domestic Violence Agencies Act 1986* (ACT). This section enables police officers who suspect the past or future commission of a 'domestic violence offence' to disclose to approved crisis support organisations 'any information that is likely to aid the organisation in rendering assistance to the person or to any children of the person'. Crisis support organisations are approved by the Minister pursuant to disallowable legislative instruments.

30.149 In some situations, agencies are required to share information relevant to family violence proceedings. For example, the South Australian family violence legislation requires South Australian Government agencies, and persons providing services to those agencies, to make available to police officers, on request, information that 'could reasonably be expected to assist in locating a defendant to whom an intervention order is to be served'.[164]

Child protection legislation

30.150 Currently, each state and territory child protection law provides for the exchange of information between police and the child protection agency, and between

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161 *Restraining Orders Act 1997* (WA) s 70A(1).
162 *Restraining Orders Regulations 1997* (WA) reg 15.
163 *Restraining Orders Act 1997* (WA) s 70A(4).
164 *Intervention Orders (Prevention of Abuse) Act 2009* (SA) s 38.

the police and other nominated persons or agencies, although there is great diversity in how these provisions are framed.[165]

30.151 The *Children and Young People Act 2008* (ACT), for example, permits information to be shared between ACT Policing, the child protection agency and other persons where it is in the best interests of the child or young person and for the purpose of performing a function under the Act.[166] In NSW, the child protection agency is able to provide information to prescribed bodies and to request information from them where the information relates to:[167]

- the safety, welfare and wellbeing of a particular child or young person or class of children or young persons;[168]
- an unborn child who is the subject of a pre-natal report;
- the family of an unborn child the subject of a pre-natal report; or
- the expected date of birth of an unborn child that is the subject of a pre-natal report.[169]

30.152 The list of prescribed bodies is extensive and includes: NSW Police; government agencies; schools; hospitals; fostering agencies; child care services; out-of-home care services; adoption agencies; and any other organisation which is responsible for or supervises the provision of health care, welfare, education, children's services, residential services, or law enforcement, wholly or partly to children. The NSW child protection agency is also authorised to exchange information with certain Commonwealth agencies including the Family Court, the Federal Magistrates Court, Centrelink and the Department of Immigration and Citizenship.[170]

30.153 The Act makes it clear that these provisions override any provision contained in any other law, including privacy law, which prohibits or restricts the disclosure of that information.[171] A prescribed body therefore cannot refuse to release information to the child protection agency on the basis that the privacy law prohibits it from doing so.

30.154 In NSW and the Northern Territory, police and the child protection agency have a mutual obligation to share information on request where they believe that the information will assist the other in providing for the safety, welfare or wellbeing of the child to whom the information relates. The situation varies in other states and territories. The police are compelled to provide information at the request of the child protection agency in Queensland, South Australia, Tasmania and the ACT. Except for

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165 See, eg *Children and Young People Act 2008* (ACT) ch 25; *Care and Protection of Children Act 2007* (NT) ss 34, 38; *Child Protection Act 1999* (Qld) pt 4; *Children, Young Persons and Their Families Act 1997* (Tas) pt 5A.

166 *Children and Young People Act 2008* (ACT) ch 25.

167 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 248(6), *Children and Young Persons (Care and Protection) Regulation 2000* (NSW) reg 7.

168 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 248(1).

169 Ibid s 248(1A).

170 Ibid s 245I.

171 Ibid s 248(5).

NSW and the Northern Territory, the child protection agency in other jurisdictions retains discretion as to whether to supply information to the police.

30.155 A shortcoming of the NSW information sharing provisions, identified by the Wood Inquiry, was the inability of human service and justice agencies (including the police), and those agencies and non-government agencies, to share information directly without needing to use the child protection agency as a hub.[172]

30.156 This was addressed by the addition of a new Chapter 16A into the *Children and Young Persons (Care and Protection) Act 1998* (NSW) that allows prescribed bodies to share information relating to the safety, welfare or wellbeing of children and young persons.[173] The following principles apply to information sharing under this chapter:

> (a) agencies that have responsibilities relating to the safety, welfare or well-being of children or young persons should be able to provide and receive information that promotes the safety, welfare or well-being of children or young persons,
>
> (b) those agencies should work collaboratively in a way that respects each other's functions and expertise,
>
> (c) each such agency should be able to communicate with each other agency so as to facilitate the provision of services to children and young persons and their families,
>
> (d) because the safety, welfare and well-being of children and young persons are paramount:
>
> (i) the need to provide services relating to the care and protection of children and young persons, and
>
> (ii) the needs and interests of children and young persons, and of their families, in receiving those services,
>
> take precedence over the protection of confidentiality or of an individual's privacy.[174]

30.157 These provisions place a positive onus on prescribed bodies to take reasonable steps to coordinate decision making and delivery of services regarding children and young persons.[175] Information sought by an agency must relate directly to that agency's work in relation to the safety, welfare and wellbeing of a particular child or young person or class of children or young people.[176] A prescribed body will be required to comply with a request for information when it believes this will assist the requesting body in providing for the safety, welfare and wellbeing of the child and/or young person to whom the information relates.[177] Where there are inconsistencies between the Act and other legislation governing privacy, the provisions contained in

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172 J Wood, *Report of the Special Commission of Inquiry into Child Protection Services in NSW* (2008), [24.98], [24.173].

173 Amended by the *Children's Legislation (Wood Inquiry Recommendations) Act 2009* (NSW).

174 *Children and Young Persons (Care and Protection) Act 1998* (NSW) s 245A(2).

175 Ibid s 245A(1).

176 Ibid s 245D(2).

177 Ibid s 245D(3).

Chapter 16A take precedence.[178] The legislation does, however, place a number of limitations on the obligation to provide information. For example, a prescribed body is not required to disclose information if the agency believes it would impact on a criminal investigation or coronial inquest, endanger a person's life or is not in the public interest.[179]

30.158 As in NSW, Tasmanian child protection legislation also makes provision for the police to share information with an extensive list of prescribed agencies other than the child protection agency.[180] In Queensland, the list is limited to the departments of health, housing and homelessness, community care services, accredited schools, persons providing services to children or families and the Mater Misericordiae Hospital.[181]

30.159 In the Northern Territory, police can request information from a list of prescribed persons, including employees of government agencies, schools, health practitioners and hospitals where they are conducting an inquiry into a child's physical, psychological or emotional wellbeing or a child protection investigation. The prescribed person must comply with the police request.[182]

30.160 Information sharing guidelines are one mechanism to explain to agencies and organisations how legislative provisions operate and to clarify information-sharing procedures between the relevant entities.[183] For example, guidelines can set down processes for requesting and providing information. As recommended in several reviews of child protection systems, they can also highlight the importance of sharing information (between police, the child protection agency and other relevant agencies) early in the investigation process.[184]

Secrecy laws

30.161 While privacy laws impose obligations on agencies with respect to the handling of personal information, secrecy laws impose obligations on individual public service officers with respect to the handling of personal and other information held by government. Frequently, secrecy laws impose criminal sanctions for the unauthorised disclosure of government information.

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178 Ibid s 245H.

179 Ibid s 245D(4).

180 *Children, Young Persons and Their Families Act 1997* (Tas) s 53B. An information sharing entity is defined broadly under s 3(1). See also Department of Health and Human Services (Tas), *Guidelines: Information Sharing for Providers of Family and Disability Support* (2010) <www.dhhs.tas.gov.au> at 14 April 2010.

181 *Child Protection Act 1999* (Qld) s 159M.

182 *Care and Protection of Children Act 2007* (NT) s 34.

183 Community Development and Justice Standing Committee–Parliament of Western Australia, *Inquiry into the Prosecution of Assaults and Sexual Offences* (2008), 169–171. See also R Layton, *Review of Child Protection in South Australia* (2002), [7.9]–[7.13].

184 NSW Health, NSW Police, Department of Community Services (NSW), *NSW Joint Investigative Response Team (JIRT) Review*, unpublished (2006), 16; Department of Child Safety (Qld), *Progress in Reforming the Queensland Child Protection System* (2006), 60.

30.162 In 2009, the ALRC conducted a review of Commonwealth secrecy laws, with a focus on the increased need to share information within and between governments and with the private sector.[185] The ALRC recommended that Australian Government agencies should review Commonwealth secrecy offences to determine whether criminal sanctions are warranted for the unauthorised disclosure of government information.[186] The ALRC also recommended that secrecy offences should generally include an exception for disclosures in the course of an officer's functions or duties.[187] This exception would ensure that where disclosures are required or authorised by or under another law—for example, state and territory family violence legislation or child protection legislation—or where an officer disclosed information in accordance with an information sharing protocol or memorandum of understanding, the officer would not breach the relevant secrecy law.

Shared databases

30.163 A number of reviews have identified the utility of shared information and data collection systems between, for example, police and child protection agencies.[188] Several models exist both in Australia, such as the Client Relationship Information System in Victoria,[189] and overseas.

30.164 A database called 'Wellnet' has been established in NSW to improve sharing of information about at-risk children between Child Wellbeing Units (CWUs), and to provide limited information about children and young people known to the child protection agency. There are CWUs in NSW Health, the NSW Police Force, the Department of Education and Training, and the Department of Human Services. Wellnet allows CWU officers to search for a child or young person to determine whether they are being case managed by the child protection agency or if other CWUs have received notification of concerns. The database also assists officers to better support vulnerable children and young people, allows cumulative risk to be recognised and reported, and records information about services required and/or provided to families, thereby assisting in the identification of service gaps.

30.165 As part of its 'Every Child Matters' program, the United Kingdom has established an online directory called ContactPoint, which contains basic information on every child in the nation and allows authorised practitioners in different services (including health, education, welfare and the police) to find out who else is working with the same child or young person. Its aim is to assist services to work together as a team and deliver more timely and coordinated support, and thus decrease service

185 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report 112 (2009).

186 Ibid, Rec 11–1.

187 Ibid, Rec 10–2.

188 NSW Health, NSW Police, Department of Community Services (NSW), *NSW Joint Investigative Response Team (JIRT) Review*, unpublished (2006), 19–20; Child Safety Directors' Network—SCAN Subcommittee, *2007–2008 SCAN System Review* (2008), 2; and Northern Territory Police Territory Intelligence Division, *Strategic Intelligence Assessment Child Abuse 2009–2014* (2009), 23–24.

189 But note the criticisms made by the Victorian Ombudsman: Ombudsman Victoria, *Own Motion Investigation into the Department of Human Services Child Protection Program* (2009), 11–12, 26–30.

delivery duplication.[190] Regulations outline what information can be held, who can (or must) provide the information, how long it can be retained, who can be granted access and how accuracy will be maintained.[191] There are also 'shielding' provisions to hide the contact details of people who are at increased risk of significant harm, such as victims of family violence.

Consultation Paper

30.166 In the Consultation Paper, the Commissions sought feedback on whether privacy or secrecy laws were unduly impeding agencies from disclosing information which may be relevant to protection order proceedings or family law proceedings.[192] The Commissions proposed that privacy principles at the federal, state and territory level should be amended, where necessary, to permit the use or disclosure of personal information where an agency reasonably believes it is necessary to lessen or prevent a serious threat to an individual's life, health or safety—rather than a serious and imminent threat[193]—as recommended by ALRC Report 108.[194]

30.167 The Commissions also proposed that:

- state and territory family violence legislation should expressly authorise agencies to use or disclose information for the purpose of ensuring the safety of a victim of family violence or the wellbeing of an affected child;[195] and
- state and territory child protection legislation should expressly authorise agencies to use or disclose information for the purpose of making accurate assessments of the needs of children and families and to ensure that appropriate programs are delivered in a timely and coordinated way.[196]

30.168 The Commissions suggested a number of parties to whom information should be able to be disclosed under information sharing provisions.[197] The Commissions also proposed the development of information sharing guidelines to assist agencies to understand their roles and responsibilities.[198] Finally, the Commissions proposed the establishment of a shared database containing basic information about a child or family that authorised agencies could access to see which other agencies were dealing with a particular child or family.[199]

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190 *Children* Act *2004* (UK) s 12; see also Department of Children, Schools and Families (UK), *Contact Point: Lessons Learned from the Early Adopter Phase* (2009).
191 *Children Act 2004 Information Database (England) Regulations 2007* (UK).
192 Consultation Paper, Question 10–20.
193 Ibid, Proposal 10–11.
194 Australian Law Reform Commission, *For Your Information: Australian Privacy Law and Practice*, Report 108 (2008), Recommendation 25–3.
195 Consultation Paper, Proposal 10–12.
196 Ibid, Proposal 13–5.
197 Ibid, Proposal 10–13.
198 Ibid, Proposal 13–5.
199 Ibid, Proposal 13–5.

Submissions and consultations

30.169 Stakeholders expressed support for amending privacy principles at federal, state and territory level to permit the use or disclosure of personal information where an agency reasonably believes it is necessary to lessen or prevent a serious threat to an individual's life, health or safety.[200]

30.170 There was general support for ensuring that family violence and child support legislation expressly allowed relevant agencies to exchange information, to keep children and families safe and to ensure timely and coordinated service provision.[201] A number of stakeholders commented that careful consideration and consultation should occur in developing these provisions to ensure that they covered all necessary and relevant parties, in particular, non-government service providers such as family violence advocacy and support services;[202] and independent children's lawyers.[203] A number of stakeholders commented that, in sharing information among government agencies and non-government service providers, it was important to ensure that the safety of victims and their families was not compromised by the inappropriate release of information.[204]

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200 National Legal Aid, *Submission FV 232,* 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Legal Aid NSW, *Submission FV 219,* 1 July 2010; J Stubbs, *Submission FV 186,* 25 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Law Council of Australia, *Submission FV 180,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010; Confidential, *Submission FV 171,* 25 June 2010; Berry Street Inc, *Submission FV 163,* 25 June 2010; Confidential, *Submission FV 162,* 25 June 2010; Justice for Children, *Submission FV 148,* 24 June 2010; Office of the Privacy Commissioner, *Submission FV 147,* 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144,* 24 June 2010; Confidential, *Submission FV 130,* 21 June 2010; N Ross, *Submission FV 129,* 21 June 2010; Confidential, *Submission FV 105,* 6 June 2010; C Pragnell, *Submission FV 70,* 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010; M Condon, *Submission FV 45,* 18 May 2010.

201 National Legal Aid, *Submission FV 232,* 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Legal Aid NSW, *Submission FV 219,* 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212,* 28 June 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Law Council of Australia, *Submission FV 180,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010; Berry Street Inc, *Submission FV 163,* 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144,* 24 June 2010; Confidential, *Submission FV 130,* 21 June 2010; N Ross, *Submission FV 129,* 21 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124,* 18 June 2010; Better Care of Children, *Submission FV 72,* 24 June 2010; C Pragnell, *Submission FV 70,* 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63,* 1 June 2010; M Condon, *Submission FV 45,* 18 May 2010.

202 Legal Aid NSW, *Submission FV 219,* 1 July 2010; Confidential, *Submission FV 184,* 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124,* 18 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010.

203 Queensland Law Society, *Submission FV 178,* 25 June 2010.

204 J Stubbs, *Submission FV 186,* 25 June 2010; Confidential, *Submission FV 184,* 25 June 2010.

30.171 The Sydney Women's Domestic Violence Court Advocacy Service (WDVCAS) agreed, noting with approval s 18 of the ACT *Domestic Violence Agencies Act*, which allows police to share information with approved crisis support organisations where the police believe on reasonable grounds that a domestic violence offence has been, or is likely to be, committed. The information is shared to allow the organisations to provide assistance to the parties. WDVCAS also noted that the NSW Police Yellow Card Referral Program was a useful initiative that could be more widely used.[205]

30.172 Guidelines were also seen as important to ensure that agencies understood their roles and responsibilities under information sharing laws.[206]

30.173 The Office of the Privacy Commissioner expressed the view, however, that if privacy principles at the federal, state and territory level were amended as suggested above, this would allow agencies to share information in appropriate circumstances and that further provisions in state and territory legislation were unnecessary. The Office stated that:

> Guidelines developed by the Office provide that a 'serious' threat must reflect significant danger, and could include a potentially life threatening situation or one that might reasonably result in other serious injury or illness. In the case of family violence involving controlling behaviour over a number of years, the degree of seriousness to allow disclosure of information may be considered to have been met where a series of incidents result in significant and demonstrable harm.
>
> It should also be noted that threats to health under the exception are not limited to physical harm but would also include threats to an individual's psychological wellbeing. The exception may therefore be relied on to disclose information where there is the threat of serious psychological harm that may be experienced as a result of ongoing domestic violence or fear for safety.[207]

30.174 There was also support for shared child protection databases,[208] although some stakeholders noted that the privacy concerns around such databases would need to be carefully managed.[209] The Tasmanian Department of Premier and Cabinet stated

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205 Sydney Women's Domestic Violence Court Advocacy Service, *Submission FV 132,* 22 June 2010.

206 National Legal Aid, *Submission FV 232,* 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212,* 28 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010; Confidential, *Submission FV 130,* 21 June 2010; N Ross, *Submission FV 129,* 21 June 2010; F Hardy, *Submission FV 126,* 16 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63,* 1 June 2010.

207 Office of the Privacy Commissioner, *Submission FV 147,* 24 June 2010.

208 National Legal Aid, *Submission FV 232,* 15 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Wirringa Baiya Aboriginal Women's Legal Centre Inc, *Submission FV 212,* 28 June 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Berry Street Inc, *Submission FV 163,* 25 June 2010; Confidential, *Submission FV 162,* 25 June 2010; Confidential, *Submission FV 130,* 21 June 2010; N Ross, *Submission FV 129,* 21 June 2010; C Pragnell, *Submission FV 70,* 2 June 2010; Queensland Commission for Children and Young People and Child Guardian, *Submission FV 63,* 1 June 2010; M Condon, *Submission FV 45,* 18 May 2010.

209 F Hardy, *Submission FV 126,* 16 June 2010.

that the development of a shared database in that jurisdiction was not a current priority.[210]

Commissions' views

30.175 As noted above, *Time for Action* identified privacy laws as one of the obstacles to an integrated and effective response to family violence. Many stakeholders consulted in this Inquiry agreed that they encounter difficulties sharing information because of actual or perceived limits imposed by privacy and secrecy laws.

30.176 Implementation of the model use and disclosure principle set out in ALRC Report 108 would address some of the issues identified. In particular, the Commissions recommend that Australian, state and territory governments ensure that the privacy principles applicable in each jurisdiction permit the use or disclosure of personal information where agencies and organisations reasonably believe it is necessary to lessen or prevent a serious threat to an individual's life, health or safety. Given the high level of involvement of private sector service providers in the areas of family violence and child protection, this exception should apply to both government agencies and private sector organisations. The threat should not have to be imminent. Agencies and organisations should be able to share information in order to intervene early in family violence and child protection situations to prevent a serious threat from manifesting.

30.177 As noted above, in *Secrecy Laws and Open Government in Australia* (ALRC Report 112) the ALRC recommended that secrecy laws should generally include an exception for disclosures in the course of an officer's functions or duties.[211] The recommendations in ALRC Report 112 were limited to Commonwealth secrecy laws, because that was the extent of the terms of reference for that Inquiry. In the Commissions' view, however, the principles underlying the ALRC's recommendation that Commonwealth secrecy laws should include an express exception for disclosure in the course of an officer's functions and duties establishes a principle of wider application.

30.178 If this approach were adopted by Australian, state and territory governments it would ensure that, where an officer disclosed information, for example, in accordance with the provisions of state and territory family violence or child protection legislation, or in accordance with an information sharing protocol or memorandum of understanding—discussed further below—the officer would not breach the relevant secrecy law. The Commissions therefore endorse the relevant recommendations in ALRC Report 112 in relation to Commonwealth secrecy laws,[212] and recommend that state and territory governments consider amending secrecy laws that regulate the disclosure of government information to include an express exception to allow the disclosure of information in the course of an officer's functions and duties.

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210 Department of Premier and Cabinet (Tas), *Submission FV 236,* 20 July 2010.

211 Australian Law Reform Commission, *Secrecy Laws and Open Government in Australia*, Report 112 (2009), Recs 7–1 and 10–2.

212 Ibid, Recs 7–1 and 10–2.

30.179 The Commissions note the views of the Office of the Privacy Commissioner that the recommended amendment to the privacy principles to remove the 'imminence' requirement will be sufficient to ensure that information can be shared appropriately in the family violence and child protection contexts. The Commissions consider, however, that it would also assist those working in these areas to have an express provision allowing information to be shared to ensure the safety of victims of family violence, children and young people. In particular, the Commissions recommend in Chapter 20 that child protection legislation should authorise the disclosure to the police of the identity of a 'reporter' under the legislation in connection with the investigation of a serious offence alleged to have been committed against a child or young person; or where necessary to safeguard or promote the safety, welfare or wellbeing of a child or young person.[213]

30.180 Where sensitive personal information is disclosed for a purpose other than the primary purpose of collection, this should generally be done on the basis of consent. As noted above, the NSW Police Yellow Card Referral Program is an example of this. It is also important for agencies and organisations to have a clear basis for sharing information in situations that do not necessarily involve a risk to safety, for example, in order to ensure timely and effective service delivery, or to ensure the wellbeing of a child, as opposed to the safety of a child.

30.181 Where seeking consent is not reasonable or practicable, legislative provisions should clearly indicate those agencies with which, and the specific circumstances in which, information can be shared, for example what information can be disclosed by the police to child protection agencies. Given the high level of involvement of private sector service providers in the areas of family violence and child protection, provision should also be made in legislation to allow information to be shared with specified private sector organisations in some circumstances. The Commissions note that the approach adopted in the ACT *Domestic Violence Agencies Act*—which allows police to share information with approved crisis support organisations in some circumstances—is one possible model.

30.182 Provisions such as this mean that information can be shared without breaching privacy laws, because the information sharing is 'required or authorised by law', and without breaching secrecy laws, where those laws include an exception for disclosure in the course of an officer's functions or duties. The Commissions reiterate, however, that, as a general rule, information should only be used for the purpose it is collected or a related purpose that the individual would expect. Whenever reasonable and practicable, the person's consent should be sought if the information is to be used or disclosed for a purpose other than the one for which it was collected, where the purpose is not related to the original purpose of collection and the person would not expect the information to be used or disclosed in this way.

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213 Rec 20–1.

30.183 The Commissions do not intend to specify the exact content of the information sharing provisions. Each jurisdiction will need to consider what information sharing arrangements are necessary and appropriate and, in particular, which private sector organisations should be included in the arrangements.

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

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

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

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

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

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

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

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

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

Strategies to improve information sharing

Information sharing protocols and MOUs

30.186 The NSW Ombudsman has noted that it is:

> important to recognise that the formal arrangements being developed in relation to information exchange present only part of the challenge. Both government and non-government agencies alike need to appreciate that effective child protection practice is contingent on agencies understanding the need to be proactive in obtaining information from other agencies and in passing it on. From our review of child protection practice over a number of years we have seen an emphasis on the risks associated with the disclosure of confidential information at the expense of recognising the very significant child protection risks which can arise from the failure to pass on vital information. Therefore, while the recent legislative amendments represent an opportunity to improve practice in relation to the exchange of information, we believe this will not occur without a corresponding cultural shift that promotes information exchange as part of good child protection practice.[214]

30.187 As noted by the NSW Ombudsman, barriers to information sharing are not always legislative in character. Often the obstacles are administrative and cultural. The following section considers ways to promote a culture of effective information sharing within the legislative framework discussed above. One strategy is to put in place information sharing protocols and memorandums of understanding (MOUs) between elements in the family law, family violence and child protection systems to clarify and formalise what information can be shared, with whom, and in what circumstances.

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214 NSW Ombudsman, *The Death of Dean Shillingsworth: Critical Challenges in the Context of Reforms to the Child Protection System* (2009), 15.

30.188 A number of these arrangements exist in the child protection area, but they are less common in the family violence context. Western Australia has a number of protocols in place to assist with information sharing in matters involving family violence between the Family Court of Western Australia, the Magistrates Court (in particular, the specialist Family Violence Court), the Department of the Attorney-General, the Department of Corrective Services and Legal Aid Western Australia. The parties entered into the protocols in February 2009.[215]

30.189 The protocols acknowledge that 'as far as is practicable, and permissible under the relevant statutory provisions, the parties should share and exchange information and resources in individual cases' where to do so would assist in achieving the parties' common commitment to protecting victims of violence and providing the best possible outcomes for children.[216]

30.190 The protocols make provision for the exchange of information between courts which share common clients. In order to ascertain the existence of a common client, officers from the Magistrates Court may access information from the Family Court of Western Australia, and officers from the Family Court of Western Australia and family consultants may access information from the Magistrates Court's database.[217] Where a common client is established, the protocols permit, on written request, inspection of the relevant court records.[218] The protocols also specify processes for liaison between a family consultant in the Family Court of Western Australia and the case management coordinator in the Family Violence Court.[219]

30.191 Where a family violence service worker (employed by the Attorney-General's Department) is concerned that a child who is the subject of parenting order proceedings in the Family Court of Western Australia may be at risk, the worker may advise the family consultant that there is information or documentation available that may be relevant to the assessment of risk for the child.[220] Further, where a family violence service worker has referred a client to the Family Court of Western Australia to file applications for parenting orders, or becomes aware that such an application is likely to be filed, the worker must notify the court that the service has information that may be of use to the court. The judicial officer dealing with the file may then make appropriate inquiries with the service and request any relevant information or documentation.[221]

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215 Family Court of Western Australia and others, *Information Sharing Protocols between the Family Court of Western Australia, Magistrates Court of Western Australia, Department of the Attorney-General, Department of Corrective Services and Legal Aid Western Australia in Matters Involving Family Violence* (2009).

216 Ibid, cls 1.2.1, 1.2.2.

217 Ibid, cl 2.2.

218 Ibid, cl 2.3.

219 Ibid, cl 3.1.

220 Ibid, cl 4.1.1.

221 Ibid, cl 4.2.

30.192 In Tasmania—in response to police concerns about victim safety where protection orders operate alongside family court orders—a protocol has been negotiated between the police, the Magistrates Court of Tasmania and the Tasmanian Registry of the Family Court. Under the protocol, if a family court contact order poses a risk to the safety of a victim of family violence, the police prosecutor alerts the magistrate of this concern. The magistrate can suspend the order for a period of days and make a protection order. The Magistrates Court file with the grounds for suspension is transferred to the Family Court for review of the contact order within the period of suspension. A review of the *Family Violence Act 2004* (Tas) by Urbis recommended that the effectiveness of this protocol be evaluated over time,[222] but no such evaluation appears to have taken place.

30.193 A number of state and territory child protection agencies have protocols or MOUs with the Family Court and the Federal Magistrates Court.[223] These govern the handling of child protection matters and are designed to 'assist cooperation, clarify procedures and improve decision-making in cases that may occur in either or both Commonwealth, state and territory jurisdictions'.[224] Such documents 'represent deliberate statements of policy and agreed procedures, but do not in any way change the law'.[225] The form and content of the protocols and MOUs are different in each state and territory, largely reflecting the differences in the state and territory child protection laws.[226]

30.194 The table below sets out the MOUs and protocols in place throughout Australia to facilitate the exchange of information between child protection agencies and the family law system. At the time of writing, Families South Australia and the Family Court are believed to be finalising an MOU. The Commissions also understand that the Family Court is negotiating in similar terms with the Department of Health and Human Services in Tasmania and the Victorian Department of Human Services.

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222 Urbis, *Review of the Family Violence Act 2004* (2008), prepared for the Department of Justice (Tas), [3.5].

223 Family Court of Australia, *Protocol between the Family Court of Australia and the NSW Department of Community Services* (2005); Federal Magistrates Court of Australia, *Memorandum of Understanding between the Federal Magistrates Court of Australia and the NSW Department of Community Services* (2007); Federal Magistrates Court of Australia, *Protocol between the Federal Magistrates Court of Australia and the NSW Department of Community Services* (2009); Family Court of Australia, *Protocol between the Department of Child Safety Queensland, the Family Court of Australia and the Federal Magistrates Court of Australia* (2007); *Memorandum of Understanding between the Family Court of Western Australia, the Department for Child Protection, Legal Aid Western Australia* (2008).

224 Family Law Council, *The Best Interests of the Child? The Interaction of Public and Private Law in Australia—Discussion Paper* (2000), [3.13].

225 R Chisholm, *The Child Protection–Family Law Interface* (2009), 41.

226 See D Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (2007), prepared for the Family Court of Australia, 156.

Information sharing protocols and MOUs	
NSW	Protocol between Legal Aid NSW and DoCS [now Community Services]—dealings with independent children's lawyers in family law matters; MOU between the Family Court and DoCS; MOU between the Federal Magistrates Court (FMC) and DoCS; Protocol between the FMC and DoCS.
Victoria	Unsigned draft[227]—although the Department of Human Services is currently in discussion with the Family Court and Victoria Legal Aid regarding dealings with independent children's lawyers in family law matters.
Queensland	MOU between federal family courts and the Department of Child Safety.
Western Australia	MOU between the Family Court of Western Australia, Department of Child Protection and Legal Aid WA.
South Australia	Arrangements under negotiation.
Tasmania	Arrangements under negotiation.
ACT	MOU between Department of Disability, Housing and Community Services, Department of Education and Training, ACT Health and the Department of Justice and Community Safety.
Northern Territory	None.

30.195 The majority of the protocols and MOUs examined aim to meet the protective needs of children. The Western Australian MOU takes a more expansive approach and aims 'to provide the best possible outcomes for children'.[228]

30.196 In its report in 2002, the Family Law Council noted that the principles and procedures in the existing protocols and MOUs were at times difficult to translate into practice. While the arrangements played an important role in providing better coordination between the courts exercising jurisdiction under the *Family Law Act* and the state and territory child protection agencies, they were not a 'panacea for

227 Protocol between Victorian Department of Human Services and Family Court of Australia (unsigned, dated 19 April 1995).

228 Family Court of Western Australia and others, *Information Sharing Protocols between the Family Court of Western Australia, Magistrates Court of Western Australia, Department of the Attorney-General, Department of Corrective Services and Legal Aid Western Australia in Matters Involving Family Violence* (2009).

addressing all the problems associated with the interaction between the State and Federal systems concerned with the resolution of child protection concerns'.[229] Other commentators agree that the protocols are insufficient to develop a seamless connection between the state and territory child protection systems and federal family courts.[230] Higgins has observed that the mere fact that an MOU is in place does not necessarily lead to a more cooperative approach to the exchange of information.[231]

30.197 In the Consultation Paper, the Commissions proposed that there should be formal information sharing arrangements established between courts hearing protection orders, the federal family courts, police, relevant government agencies and private sector organisations.[232] In particular, the Commissions proposed that such arrangements should be established between federal family courts and child protection agencies.[233] The Commissions also asked for stakeholder feedback on the best way to ensure that these arrangements are well known and understood by the agencies and organisations involved.[234]

Submissions and consultations

30.198 In its submission, the Office of the Privacy Commissioner expressed the view that information sharing protocols and MOUs can assist with communication and coordination between federal, state and territory agencies and with relevant private sector organisations. The Office noted, however, that such arrangements do not stand alone but are tools to support good practice and can help agencies and organisations to understand their legal obligations. The Office suggested that such arrangements might include guidance on good privacy practice and complaint procedures.[235]

30.199 The Chief Justice of the Family Court and the Chief Federal Magistrate noted in their submission that protocols and MOUs are useful but they can be overlooked or misconstrued. If they are to be relied upon, it is important that resources are dedicated to promote their existence and to train staff in their use. They also require regular review.[236] A number of other stakeholders also emphasised the importance of training.[237]

30.200 The Magistrates' Court and Children's Court of Victoria noted that protocols and MOUs relied on relationships and goodwill in order to be effective and suggested that a national register—which included family court orders affecting children as well

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229 Family Law Council, *Family Law and Child Protection: Final Report* (2002), [2.20].

230 T Brown, R Sheehan, M Frederico and L Hewitt, *Resolving Family Violence to Children: An Evaluation of Project Magellan* (2001), 49.

231 D Higgins, *Cooperation and Coordination: An Evaluation of the Family Court of Australia's Magellan Case-Management Model* (2007), prepared for the Family Court of Australia, 137–141.

232 Consultation Paper, Proposal 10–14.

233 Ibid, Proposal 14–3.

234 Ibid, Question 14–14.

235 Office of the Privacy Commissioner, *Submission FV 147,* 24 June 2010.

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

237 Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010; C Humphreys, *Submission FV 131,* 21 June 2010.

as family violence protection orders—would be a more effective method of sharing information. The submission noted that there is a protocol in place between the Magistrates' Court of Victoria and the federal family courts to have family court orders faxed through upon request, although the protocol is not well established and has encountered difficulties, particularly when personnel change. The submission suggested that one way to improve communication would be to have liaison officers in each court, for example, federal family court officers in the Magistrates' Court and the Children's Court and vice versa.[238] A number of other stakeholders agreed that liaison officers were an important element to support such arrangements.[239]

30.201 The Aboriginal Family Violence Prevention and Legal Service expressed support for information sharing protocols and MOUs, noting that they should be publically available and that ongoing training was important. The submission also noted liaison officers could be responsible for providing training in relation to the information sharing arrangements.[240]

30.202 The Queensland Law Society expressed support for the existing protocol between the federal family courts and the Queensland child protection agency and noted that the arrangements around the protocol included regular meetings between the parties.[241] In a joint submission, Domestic Violence Victoria and others suggested that it was important that such arrangements sit within a broader model of integrated services.[242]

30.203 In its submission, the Tasmanian Department of Premier and Cabinet noted that, anecdotally, the Tasmanian protocol is not often used, suggesting that this was perhaps because family violence matters come before the courts soon after the breakdown of a relationship and before there are federal family court orders in place.[243]

30.204 National Legal Aid stated in relation to the Western Australian MOUs:

> These memoranda of understanding are working well, particularly with respect to the Family Court's access to information from [the Department of Child Protection] and the Magistrates Courts database. DCP 86 now has an officer permanently located at the Family Court of WA to facilitate the information sharing process.[244]

Commissions' views

30.205 There is some evidence from stakeholders that information-sharing protocols and MOUs between the courts and relevant agencies and organisations do have a valuable role to play in facilitating communication and information exchange between

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238 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010.
239 Queensland Law Society, *Submission FV 178,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.
240 Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010.
241 Queensland Law Society, *Submission FV 178,* 25 June 2010.
242 Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010.
243 Department of Premier and Cabinet (Tas), *Submission FV 236,* 20 July 2010.
244 National Legal Aid, *Submission FV 232,* 15 July 2010.

parties in the family law, family violence and child protection systems. However, there was also recognition that protocols and MOUs cannot stand alone and are dependent on the knowledge and involvement of officers and staff. The Commissions agree that simply putting protocols in place is not sufficient. These arrangements must be given an ongoing profile among court and agency officers; they must form the basis of an ongoing and responsive relationship between the parties and must be supported and implemented in practice. Ongoing training and liaison arrangements are also essential to ensure that the protocols and MOUs are actively and effectively implemented.

30.206 At present, there are few information-sharing protocols in the context of family violence. In the Commissions' view, there would be value in developing formal information sharing arrangements between the state and territory courts, the federal family courts, police and other agencies in relation to family violence matters. It may also be appropriate to include non-government organisations such as family violence support workers in any such arrangements. The development of information-sharing protocols in the context of family violence is consistent with the views expressed in *Time for Action*.

30.207 Above, the Commissions recommend that federal family courts and state and territory child protection agencies develop protocols that include procedures for dealing with requests for documents and information under s 69ZW and for responding to subpoenas issued by federal family courts.[245] The Commissions note that the federal family courts already have formal information sharing arrangements in place with child protection agencies in a number of jurisdictions and that negotiations are under way in several others. Stakeholders expressed a level of support for these arrangements and the Commissions are of the view that it would be of value to put protocols in place in every jurisdiction. The Commissions again emphasise that it will be necessary to ensure that the parties to the information sharing protocols receive ongoing training to ensure that the arrangements are well known and understood and that the protocol arrangements are effectively implemented.

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

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

245 Rec 30–5.

A national register

30.208 The capacity for family violence protection orders to be enforced across jurisdictions is essential to the safety of victims. The Australian Government Solicitor noted, in a background paper to *Time for Action*, that:

> This is especially so given that it is not uncommon for victims to move interstate (or to move from New Zealand to Australia or vice versa) in order to escape violent relationships. People who have obtained a protection order may also relocate for other reasons, for example, to be closer to their extended family or to seek employment.[246]

30.209 Currently, a protection order that has been obtained in one state or territory is not automatically enforceable in another state or territory. Rather, the victim of family violence or some other person must register the 'external protection order' in the second jurisdiction.[247] Registration is essentially an administrative process; however, there are some differences between jurisdictions with respect to the types of orders that are capable of registration, provisions for notification of the person against whom the order has been made, and duration for which the external protection order is in force. In some jurisdictions—including NSW, Queensland, Tasmania and the Northern Territory—a court may vary an external protection order before registration.

30.210 Family violence legislation in Victoria, Western Australia, the ACT and the Northern Territory provides that if the court registers an external protection order, the court or registrar is to provide notice of the registration to the court that made the order (the original court). In Victoria and the ACT, the court must also provide the original court with notice of any variation to the original order. The ACT is the only jurisdiction that also provides for feedback from the original court to a court which has registered a protection order made in the ACT—if an ACT court has been notified by an external court that it has registered an ACT protection order, the ACT court must notify the external court if it revokes or varies the order.[248]

30.211 Although every state and territory makes provision for the registration of external protection orders, the question of establishing a centralised national scheme has been considered on a number of occasions. In 1999, the Domestic Violence Legislation Working Group expressed the view that a national registration scheme, supported by a single register, would streamline and simplify inter-jurisdictional registration, and would enable protection orders:

> [to] attain immediate and true nationwide portability and provide needed protection to the victims of domestic violence, no matter where they live in Australia.[249]

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246 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.4.1].

247 The one exception is the Northern Territory, where a police officer can enforce a protection order if the officer 'reasonably believes a person in the Territory is a defendant named in an unregistered external order'. The police officer must, as soon as possible, make a declaration to the Commissioner of Police stating the belief and the grounds for belief: *Domestic and Family Violence Act 2007* (NT) pt 3.4.

248 *Domestic Violence and Protection Orders Act 2008* (ACT) s 109.

249 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), 169.

30.212 In 2009, the Australian Government Solicitor (AGS) commented favourably on the proposed scheme, noting that it was unclear why a scheme of this kind had not yet been implemented.[250]

30.213 One of the 'immediate actions' to which the Australian Government committed in its response to *Time for Action* was to work with the states and territories, through the Standing Committee of Attorneys-General (SCAG), to establish a national scheme for the registration and recognition of family violence protection orders. While registration involves simply putting information on a register so that it is available to those who access the register, recognition involves allowing another jurisdiction to give effect to and enforce the order that has been registered. The Australian Government noted that the proposed scheme would allow orders to be recognised and enforced across state and territory borders.[251] A SCAG working group has been established to develop options for the national scheme.[252]

30.214 The 1999 Domestic Violence Legislation Working Group proposed a central database as the repository of the relevant information. Information entered on the database would include the names of the parties, the period for which the order had effect and the prohibitions or conditions imposed by the order. Information would also include whether the order had been extended, varied, revoked or set aside on appeal. Upon the entry of an order into the register, the order would be deemed to have been registered and to be enforceable in each state and territory.[253]

30.215 The Working Group noted the potential advantages of using CrimTrac—developed for exchanging national policing information—as the supporting database, commenting that:

> CrimTrac appears to offer a vastly improved concept in national registration of orders and overcomes all of the problems associated with manual registration, such as notice to the defendant of registration, mechanical or administrative processes and costs incurred by State and Territory courts, reliability of orders and enforcement of orders.[254]

30.216 It appears that CrimTrac already includes some information about protection orders.[255] The AGS has noted that:

> Our understanding is that police in all jurisdictions provide at least some information to CrimTrac about such orders for inclusion in the database, although we understand that the amount of detail provided varies significantly between jurisdictions.[256]

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250 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.4.11].
251 Australian Government, *The National Plan to Reduce Violence against Women: Immediate Government Actions* (2009), 5.
252 Ibid, 12.
253 Domestic Violence Legislation Working Group, *Model Domestic Violence Laws* (1999), pt 3 div 1.
254 Ibid, 169.
255 CrimTrac, *Police Information* <www.crimtrac.gov.au/police_information/index.html> at 12 March 2010.
256 Australian Government Solicitor, *Domestic Violence Laws in Australia* (2009), [3.4.9].

30.217 CrimTrac includes extensive safeguards to ensure the integrity and security of information held on its systems. Access to operational data is provided on a 'need to know' basis and audit logs are maintained of access to, and disclosure of, information.[257]

Extending the scope of the register

30.218 The 1999 Working Group recommendations and, from the information presently available, the Australian Government's commitment to a national registration scheme are both limited to information about protection orders obtained under state and territory family violence legislation. A question that arises in this Inquiry is whether the register should be expanded to include other information, for example, orders and injunctions issued by the family courts and child protection orders.

30.219 In 1998, the Kearney McKenzie Report recommended that consideration should be given to establishing a central register of parenting orders made by the Family Court and protection orders made by state and territory courts. The Report recommended that this information should be accessible to judges and registrars of the Family Court, magistrates and registrars of local courts and to police.[258] A similar option for reform was set out in the Pyke Review, which suggested that a register could:

- provide ready and immediate access to orders made by the Family Court inconsistent with family violence orders; and registered pursuant to s 68P(3) of the *Family Law Act*; and
- ensure that orders made in each of the State Courts, Supreme Court, District Court, Magistrates Court and Youth Court in family violence matters and child protection proceedings are immediately available on the database of each Court and immediately available to the Police.[259]

30.220 There may also be scope for a national register to include other types of information, such as undertakings entered into by a person requesting that a child be returned to Australia under the *Convention on the Civil Aspects of International Child Abduction* (Hague Convention).[260] An overseas court can grant such a request on the condition that the person requesting the child's return enters into an undertaking of non-molestation. The Full Court of the Family Court has noted that:

> If undertakings are to be given, it is important to make sure they can be enforced … There does not appear to be any existing mechanism by which the Court that extracts the undertaking can ensure that it is complied with. There does not appear to be any legal basis upon which the Court of the State in which the child has been returned, can require compliance with an undertaking given to another court.[261]

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257 CrimTrac, *Police Information* <www.crimtrac.gov.au/police_information/index.html> at 12 March 2010.

258 Kearney McKenzie & Associates, *Review of Division 11* (1998), 29. The Kearney McKenzie Report predates the establishment of the Federal Magistrates Court, so contact orders made by this court are not listed as orders which should be included in the database.

259 M Pyke, *South Australian Domestic Violence Laws: Discussion and Options for Reform* (2007), 137.

260 The *Hague Convention* is discussed in Ch 17.

261 *Police Commissioner of South Australia v Temple [No 2]* (1993) 114 FLR 148, [35].

30.221 In the Consultation Paper, the Commissions proposed that the national register should include protection orders made under state and territory family violence legislation as well as orders and injunctions made under the *Family Law Act*. The Commissions also proposed that the information be available to federal, state and territory police officers, federal family courts, and state and territory courts that hear protection order proceedings.[262] In addition the Commissions asked whether there was any other information that should be included on the register and whether there were any other persons who should have access to the register.[263]

Submissions and consultations

30.222 The proposal for the establishment of a national register received support from a significant number of stakeholders.[264] The Domestic Violence Prevention Council (ACT) noted that the register should include interim, as well as final, orders and that the system should 'allow for the real time interrogation by courts and law enforcement to assist in decision making and policing responses'. The Council also suggested that the register should contain information on breach of orders.[265] The Magistrates' and Children's Court of Victoria also suggested that the register should include information relating to 'the contravention of intervention orders'.[266]

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262 Consultation Paper, Proposal 10–15.

263 Ibid, Question 10–21.

264 Department of Premier and Cabinet (Tas), *Submission FV 236,* 20 July 2010; National Legal Aid, *Submission FV 232,* 15 July 2010; Queensland Government, *Submission FV 229,* 14 July 2010; Women's Legal Services Australia, *Submission FV 225,* 6 July 2010; Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Legal Aid NSW, *Submission FV 219,* 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196,* 26 June 2010; Women's Legal Service Victoria, *Submission FV 189,* 25 June 2010; J Stubbs, *Submission FV 186,* 25 June 2010; Women's Legal Service Queensland, *Submission FV 185,* 25 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Law Council of Australia, *Submission FV 180,* 25 June 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179,* 25 June 2010; Queensland Law Society, *Submission FV 178,* 25 June 2010; Aboriginal Family Violence Prevention and Legal Service Victoria, *Submission FV 173,* 25 June 2010; Confidential, *Submission FV 171,* 25 June 2010; Confidential, *Submission FV 164,* 25 June 2010; Berry Street Inc, *Submission FV 163,* 25 June 2010; Confidential, *Submission FV 162,* 25 June 2010; UnitingCare Children Young People and Families, *Submission FV 151,* 24 June 2010; Justice for Children, *Submission FV 148,* 24 June 2010; Office of the Privacy Commissioner, *Submission FV 147,* 24 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144,* 24 June 2010; Confidential, *Submission FV 130,* 21 June 2010; N Ross, *Submission FV 129,* 21 June 2010; Domestic Violence Prevention Council (ACT), *Submission FV 124,* 18 June 2010; T Searle, *Submission FV 108,* 2 June 2010; Confidential, *Submission FV 105,* 6 June 2010; Local Court of NSW, *Submission FV 101,* 4 June 2010; Confidential, *Submission FV 82,* 2 June 2010; Confidential, *Submission FV 71,* 1 June 2010; C Pragnell, *Submission FV 70,* 2 June 2010; Confidential, *Submission FV 69,* 2 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010; M Condon, *Submission FV 45,* 18 May 2010; National Peak Body for Safety and Protection of Parents and Children, *Submission FV 18,* 13 January 2010.

265 Domestic Violence Prevention Council (ACT), *Submission FV 124,* 18 June 2010.

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

30.223 Similarly, the Law Council of Australia submitted:

> The database should also include pending charges and criminal convictions with respect to family violence or child abuse if possible or practicable. Otherwise this would require the information being obtained from a number of state-based criminal databases.[267]

30.224 A number of submissions suggested that child protection orders should be included in the national register.[268] The National Abuse Free Contact Campaign, for example, submitted that:

> It is our experience that in many instances, information in regard to child protection issues are not shared or made use of in determinations of the family law system. It is our view that child protection agencies and children's courts should not only have access to such a database, but that any orders made by children's court, or matters involved in child protection agencies should also be included on the national database.[269]

30.225 Other submissions argued that it is important for non-government organisations, women and children's legal and non-legal support workers, and—subject to safeguards—independent children's lawyers who have been appointed under the *Family Law Act* to be included among those parties able to utilise the register.[270] One stakeholder suggested that schools should be able to access the register in order to provide appropriate protection for pupils.[271]

30.226 However, a number of submissions expressed reservations about expanding the register to include *Family Law Act* orders and injunctions. The Victorian Aboriginal Legal Service submitted:

> There is also a question around the usefulness of the amalgamation of family violence protection orders and injunction orders made under the *Family Law Act* 1975 (Cth) in Victoria for the simple fact that injunction orders aren't used by VALS (and presumably others) because they aren't enforceable. Victoria Police do not act on Family Law matters. Therefore intervention orders are used instead.[272]

30.227 The Queensland Law Society also expressed concern about including orders made under the *Family Law Act*, noting the wide range of orders that can be made in relation to matters such as property settlement and child support.[273]

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267 Law Council of Australia, *Submission FV 180,* 25 June 2010.

268 Magistrates' Court and the Children's Court of Victoria, *Submission FV 220,* 1 July 2010; Legal Aid NSW, *Submission FV 219,* 1 July 2010; National Abuse Free Contact Campaign, *Submission FV 196,* 26 June 2010; Confidential, *Submission FV 184,* 25 June 2010; Law Council of Australia, *Submission FV 180,* 25 June 2010; Berry Street Inc, *Submission FV 163,* 25 June 2010; National Council of Single Mothers and their Children Inc, *Submission FV 144,* 24 June 2010.

269 National Abuse Free Contact Campaign, *Submission FV 196,* 26 June 2010.

270 Queensland Law Society, *Submission FV 178,* 25 June 2010; Domestic Violence Victoria, Federation of Community Legal Centres Victoria, Domestic Violence Resource Centre Victoria, Victorian Women with Disabilities Network, *Submission FV 146,* 24 June 2010; Women's Domestic Violence Court Advocacy Service Network, *Submission FV 46,* 24 May 2010.

271 Confidential, *Submission FV 69,* 2 June 2010.

272 Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179,* 25 June 2010.

273 Queensland Law Society, *Submission FV 178,* 25 June 2010.

30.228 Submissions also highlighted the need for any national register to adequately consider privacy and security concerns.[274] The Office of the Privacy Commissioner argued that any proposal to create a national register needs to be accompanied by a comprehensive privacy framework that includes: designing systems architecture and the parameters governing information collection, flows and consent mechanisms; data security measures; legislative measures in relation to who can access the register and for what purpose; and oversight mechanisms including the provisions for audit and complaint handling. The Office also encouraged the undertaking of a privacy impact assessment (PIA) as part of developing a national register of this kind.[275]

Commissions' views

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

30.230 The Commissions agree with the Domestic Violence Prevention Council (ACT) that the scheme should include interim, as well as final, orders. The Commissions are also of the view that the scheme should include police-issued orders. Interim and police orders are often issued to address acute family violence situations and it would leave a gap in the system if these critical orders were not included.

30.231 In the Commission's view, a national register of this kind also provides an opportunity for a formalised exchange of information relevant to proceedings involving family violence more broadly. While the initial proposal is to include information about family violence protection orders, in the Commissions' view there is scope to extend the ambit of the register to include, for example, child protection orders made under state and territory child protection legislation, and information about parenting orders and family violence related injunctions made under the *Family Law Act*. The Commissions agree that it will not be necessary to include all federal family court orders on the register, but only those that are relevant to family violence and child protection proceedings in the state and territory courts.

30.232 The Commissions are also of the view that the Australian Government Attorney-General's Department—as the Central Authority for the *Hague Convention*—should give future consideration to including conditions and non-molestation undertakings made in *Hague Convention* cases on the national register. While registration would not affect the enforceability of undertakings and conditions, it would

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274 Queensland Government, *Submission FV 229,* 14 July 2010; Victorian Aboriginal Legal Service Co-operative Ltd, *Submission FV 179,* 25 June 2010; Office of the Privacy Commissioner, *Submission FV 147,* 24 June 2010.

275 Office of the Privacy Commissioner, *Submission FV 147,* 24 June 2010.

ensure that police officers, state and territory courts, and federal family courts are aware that they exist, and may take them into consideration, where appropriate, in protection order or parenting proceedings.

30.233 Throughout the course of this Inquiry, the Commissions have heard about the problems that arise because of the gaps in information flow between the family law system, the family violence system and the child protection system. In this chapter the Commissions have made a number of recommendations to improve information flows including: clarifying initiating application forms;[276] amending legislation that regulates the disclosure of information in relation to parenting orders, family violence orders and child protection orders;[277] providing state and territory courts with access to the Commonwealth Courts Portal[278] and establishing information sharing protocols and MOUs between courts, agencies and organisations working in these areas.[279]

30.234 The Commissions' view is, however, that a central register including information about family violence orders, child protection orders and related federal family court orders would be a more efficient and effective mechanism to ensure that the various systems are aware of orders and proceedings relating to the same family. It would be a significant step towards closing the information gaps between the systems and improving the protection provided for victims of family violence. It will help to ensure that courts and agencies have access to the full range of orders applying in any particular case, and is likely to lead to more consistent decision making across the jurisdictions. In developing the register, further consideration could also be given to including information about criminal convictions for family violence related offences and breach of the relevant orders.

30.235 The Commissions note that the proposed national register is being established, not only to register family violence orders, but also to allow inter-jurisdictional enforcement of the orders. In the Commissions' view, many of the arguments relating to the automatic registration and recognition of family violence orders in other jurisdictions, might also be made in relation to child protection orders and it would be sensible to extend the registration and recognition arrangements to include them.

30.236 A related issue is the persons and entities that may access information on the national register. The Commissions' view is that—at a minimum—access should be available to federal family courts, state and territory courts that hear protection order and child protection order proceedings, child protection agencies and the police. The Commissions do not have sufficient information in relation to allowing private sector individuals and organisations to have access to the register and so do not make a recommendation on this point.

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276 Recs 30–1 and 30–2.
277 Recs 30–3, 30–4, 30–9, 30–10, 30–11, 30–12, 30–13.
278 Rec 30–8.
279 Recs 30–16 and 30–17.

30.237 The Commissions note that privacy and security concerns mean that access to such data should be restricted to a 'need to know' basis. Current safeguards in CrimTrac, such as audit logs, should also apply. The Commissions agree with the Office of the Privacy Commissioner that a national register of this kind needs to be accompanied by a comprehensive privacy framework and recommend that a PIA be prepared as part of developing the register.

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

(a) include interim, final and police-issued protection orders made under state and territory family violence legislation; child protection orders made under state and territory child protection legislation; and related orders and injunctions made under the *Family Law Act 1975* (Cth); and

(b) be available to federal, state and territory police, federal family courts, state and territory courts that hear matters related to family violence and child protection, and child protection agencies.

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